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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MARTINEZ,

Defendant and Appellant.

E064834

(Super.Ct.No. FSB036237)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Scott C. Taylor and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Martinez (defendant) is currently serving a three strikes sentence of 25 years to life for unlawful possession of a firearm. He filed a petition for resentencing pursuant to Proposition 36. The trial court denied the petition; it found that he was armed during the commission of the underlying offense and therefore ineligible for relief.

In this appeal, defendant contends that, because arming was not pleaded or proved in the underlying criminal proceeding, the trial court was forbidden to rely on it in determining his eligibility. This contention flies in the face of a massive and unanimous line of case law. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, after a jury trial, defendant was found guilty of unlawful possession of a firearm. (Pen. Code, former § 12021, subd. (a)(1); see now Pen. Code, § 29800, subd. (a)(1).) Two “strike” prior conviction allegations were found true. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) Accordingly, defendant was sentenced to 25 years to life in prison.

On November 7, 2012, Proposition 36 — also known as the Three Strikes Reform Act of 2012 — went into effect. (See generally *People v. Johnson* (2015) 61 Cal.4th 674, 682-683.)

In 2014, defendant filed a petition for resentencing pursuant to Proposition 36. In 2015, the trial court held a hearing on the petition. The prosecutor asked the trial court to take judicial notice of the contents of its case file, specifically including the probation report. Based on the probation report, the trial court found that defendant had been

armed with a firearm during the commission of the underlying offense. It therefore ruled that he was ineligible for resentencing.

II

PROPOSITION 36 DOES NOT REQUIRE THAT A DISQUALIFYING FACTOR HAVE BEEN PLEADED AND PROVED IN THE UNDERLYING CRIMINAL PROCEEDING

Defendant contends that the trial court erred in finding that he was ineligible for resentencing under Proposition 36, because the fact that he was armed had not been pleaded and proved in the underlying criminal proceeding.

Under the three strikes law as originally enacted, a defendant who had two or more serious or violent prior felony convictions (a “third-striker”) was subject to an indeterminate sentence of 25 years to life for any new felony conviction, regardless of whether it was serious or violent. A defendant with only one serious or violent prior felony conviction (a “second-striker”) was subject to a sentence for any new felony conviction of double the term otherwise provided.

Proposition 36 amended the three strikes law in two respects that are relevant here.

First, in most cases, a third-striker who is convicted of a nonserious, nonviolent felony is subject to the same sentence as a second-striker — i.e., double the term otherwise provided. (Pen. Code, §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) However, there are some exceptions, under which a third-striker still must be sentenced to 25 years to life, including if “[d]uring the commission of the current offense, the

defendant . . . was armed with a firearm” (Pen. Code, §§ 667, subds. (e)(2)(A), (e)(2)(C)(iii), 1170.12, subds. (c)(2)(A), (c)(2)(C)(iii).)

Second, in most cases, a third-striker who was sentenced to 25 years to life for a nonserious, nonviolent felony before Proposition 36 went into effect can petition for resentencing. (Pen. Code, § 1170.126.) Again, however, this is subject to exceptions, including if “[d]uring the commission of the current offense, the defendant . . . was armed with a firearm” (Pen. Code, §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), as cited in Pen. Code, § 1170.126, subd. (e)(2).)

“A defendant’s ‘mere possession’ of a firearm or deadly weapon does not establish that the defendant was armed with the firearm or deadly weapon. [Citation.] Rather, the defendant was armed, and thus ineligible for resentencing, if he or she had the firearm or deadly weapon ‘available for offensive or defensive use.’ [Citation.] ‘[A] person convicted of being a felon in possession of a firearm is not automatically disqualified from resentencing by virtue of that conviction; such a person is disqualified only if he or she had the firearm available for offensive or defensive use.’ [Citation.]” (*People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.)

Contrary to defendant’s contention, Proposition 36 does not require that any disqualifying factor must have been pleaded and proved in the underlying criminal proceeding. (*People v. Newman* (2016) 2 Cal.App.5th 718, 723-727, petn. for review filed Sept. 28, 2016; *People v. Chubbuck* (2014) 231 Cal.App.4th 737, 745-748; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 801-805; *People v. Guilford* (2014) 228 Cal.App.4th 651, 656-659; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332-1334;

People v. Elder (2014) 227 Cal.App.4th 1308, 1314-1316; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1059; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033-1038; *People v. White* (2014) 223 Cal.App.4th 512, 526-527.) “In determining eligibility for Proposition 36 relief, a court is empowered to consider the record of conviction and to make factual findings . . . , even if those findings were not made by the jury or the trial court in convicting a defendant of the current offense.” (*People v. Newman, supra*, 2 Cal.App.5th at p. 721.)

Defendant asks us not to follow these cases, but he does not really explain why he thinks they are wrong. Moreover, he claims to be relying on the statutory language, but he does not really point to any that would support his contention.

Defendant does note that, after the trial court determines that a defendant is eligible for resentencing, the statute expressly gives it discretion to determine whether the defendant poses an unreasonable risk of danger to public safety. His point seems to be that, by negative implication, the trial court has no discretion in the preliminary step of determining eligibility. However, simply making a factual finding is not normally viewed as an exercise of discretion. It is something that juries may do, in appropriate circumstances, as well as trial courts. It is reviewed under the substantial evidence standard, not the abuse of discretion standard. The statutory language in no way implies that the trial court cannot make factual findings regarding eligibility.

Defendant also argues that, in determining the unreasonable risk of danger issue, the trial court may consider “extraneous sources such as probation reports, trial transcripts, and victim impact statements” Again, his point seems to be that

implicitly, the trial court *cannot* consider these sources in determining eligibility, and therefore it is limited to considering only matters that have been pleaded and proved.

It is well-established that, in determining eligibility, the trial court can consider the record of conviction. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford, supra*, 227 Cal.App.4th at pp. 1336-1340; *People v. Blakely, supra*, 225 Cal.App.4th at p. 1063.) “A probation report ‘ordinarily is not part of the record of conviction.’ [Citation.]” (*People v. Burnes, supra*, 242 Cal.App.4th at p. 1458; accord, *People v. Trujillo* (2006) 40 Cal.4th 165, 180-181.) However, the record of conviction *does* include a trial transcript. (*People v. Brimmer, supra*, 230 Cal.App.4th at pp. 800-801.) Contrary to defendant’s reasoning, this suggests that the trial court *can* make factual findings.

In this case, the trial court did err by considering the probation report. However, defendant does not raise this as a claim of error in his brief. If only out of an excess of caution, then, we note that the error was harmless. Unlike a probation report, a preliminary hearing transcript is part of the record of conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Here, at the preliminary hearing, a police officer testified that he personally saw defendant with a gun in his hand. He then saw defendant tuck the gun into his waistband. When he forcibly arrested defendant, the gun fell out of defendant’s waistband. Arming does not require that the firearm be operable. (*People v. Bland* (1995) 10 Cal.4th 991, 1005.)

Thus, the preliminary hearing transcript established that defendant was armed. The record of conviction, to the extent that it is before us, contains no evidence to the

contrary. If we were to reverse and remand with directions to determine defendant's eligibility without reference to the probation report, the trial court would undoubtedly find, once again, that defendant was armed and therefore ineligible for resentencing.

In sum, then, defendant was ineligible for resentencing under Proposition 36, and he has not shown that the trial court committed any prejudicial error in finding him ineligible.

III

DISPOSITION

The order appealed from is affirmed.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

MILLER

J.