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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS TURNER JACKSON,

Defendant and Appellant.

F070477

(Super. Ct. No. SC066959A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J. and Smith, J.

INTRODUCTION

In 1996, appellant Louis Turner Jackson was convicted of violating Penal Code¹ section 4502 (possession of a weapon or sharp instrument while confined in a penal institution) and was sentenced to a term of 25 years to life as a third strike defendant. This court affirmed the judgment in case No. F027303 in 1999. In 2013, Jackson filed a petition for recall of sentence pursuant to section 1170.126, which was denied. Jackson appeals the denial of the petition. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

At Jackson's trial for violating section 4502, Correctional Officer Francisco Flores testified that on March 17, 1996, he was conducting cell inspections looking for dangerous contraband or altered personal or state property. Flores directed Jackson and his cellmate to exit their cell. Jackson was the first out. He turned around and asked his cellmate to hand him his glasses so he could get a good look at the television set. His cellmate retrieved the glasses from a table in the cell and handed them to Jackson.

During the usual course of such inspections, the cellmates would be directed to a day room area to sit on benches facing a television set. Flores became suspicious because the television set was not on and inmates had no access to the television controls.

Flores told Jackson to turn over the glasses and he noticed through the magnified lenses that the ear pieces of the frame appeared to be severed. He ordered Jackson to hand over the glasses. Flores noticed, upon closer inspection, the glasses had been altered so the plastic covering the ends of the ear pieces could be removed to expose approximately three-quarters of an inch of metal machined by the manufacturer to a fine point. Flores had seen glasses altered in this fashion before.

¹ All statutory references are to the Penal Code, unless otherwise noted.

Jackson challenged his conviction for violating section 4502, in part on the grounds the altered eyeglasses were not a weapon. In our opinion upholding the conviction in case No. F027303, we concluded a jury could reasonably find Jackson was in possession of eyeglasses that had been modified for use as a weapon. From inspection of the eyeglasses, it is obvious the plastic encasing the ear pieces was severed or cut through to the metal in a manner permitting the plastic to be removed, revealing a sharp metal point. This alteration, done before they were seized, made it possible to remove the plastic and use the sharp ends of the ear pieces to inflict injury. The otherwise innocuous eyeglasses were rendered a weapon or sharp instrument within the meaning of section 4502 by the alteration. Whenever the plastic was first removed, since they were in this altered state when Flores seized them, the jury could reasonably conclude they were in this altered state while in Jackson's possession.

Jackson filed a petition on October 9, 2013, asserting he was eligible for resentencing pursuant to the provisions of section 1170.126. In his petition, Jackson asserts he was convicted in 1996 of a violation of section 4502, subdivision (a) and is eligible for resentencing. He was sentenced to a third strike sentence of 25 years to life. The district attorney opposed the petition. The trial court found Jackson was ineligible for resentencing because the conviction for which he was seeking to be resentenced, a violation of section 4502, involved a deadly weapon.

DISCUSSION

The trial court concluded Jackson was ineligible for resentencing because he was serving a sentence for a crime where he was armed with a deadly weapon. The parties agree the superior court concluded Jackson was armed with a deadly weapon when he was arrested for violating section 4502, subdivision (a). Jackson asserts that a violation of section 4502 is not necessarily a disqualifying offense; a procedure that allows fact-finding from the record of conviction is unconstitutional; and the trial court erred in concluding Jackson was armed with a deadly weapon.

For the purpose of this appeal, we will assume that a conviction for violating section 4502, subdivision (a) does not *automatically* disqualify an inmate from resentencing pursuant to section 1170.126. However, the converse of this statement is also true; an inmate who is serving a third strike sentence for violating section 4502, subdivision (a) is not *automatically* eligible for resentencing pursuant to section 1170.126.

Instead, the question in this case, and all such cases, is whether the record contains substantial evidence that the actual item found in Jackson's possession and which formed the basis for his conviction was a deadly weapon within the meaning of section 667, subdivision (e)(2)(C)(iii). The answer in this case is yes.

Standard of Review and Applicable Law

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended [Penal Code] sections 667 and 1170.12 and added [Penal Code] section 1170.126 (hereafter the Act) The Act ... created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1026 (*Osuna*).

To qualify for resentencing, a petitioner must satisfy three criteria. (§ 1170.126, subd. (e)(1)–(3).) Pertinent to this appeal, the petitioner's current sentence must not be imposed “for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.” (§ 1170.126, subd. (e)(2).) As applied to the Act, clause (iii) of subparagraph (C) of paragraph (2) of subdivision (e) of section 667 requires considering whether the petitioner “was armed

with a firearm or deadly weapon” during the commission of the relevant offense. (§ 667, subd. (e)(2)(C)(iii).)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.126, subd. (f).) “[A] trial court need only find the existence of a disqualifying factor by a preponderance of the evidence.” (*Osuna, supra*, 225 Cal.App.4th at p. 1040.)² As the trial court’s eligibility determination is factual in nature, we review that determination for substantial evidence. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331 (*Bradford*).)

Substantial Evidence Shows Appellant was Armed with a Deadly Weapon

Jackson argues the trial court erred in concluding that he was armed with a deadly weapon. We disagree.

The item in Jackson’s possession were eyeglasses that had been altered so that the ear pieces were essentially “five-inch stabbing instruments.” Jackson had them in his possession in prison and the People maintained in their opposition to the petition for resentencing that the eyeglasses could be used as a weapon to cause great bodily injury or death.

Section 667, subdivision (e)(2)(C)(iii) does not define the term deadly weapon, therefore we accord to the phrase the definition that has evolved through case law. Under this definition, a deadly weapon is either an instrument designed to cause death or great bodily injury (such as a firearm), or an instrument used in such a fashion as to be capable

² As noted, our prior holding in *Osuna* sets the burden of proof at a preponderance of the evidence. We are aware of the recent opinion in *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852, concluding the burden must be “beyond a reasonable doubt.” However, like the court in *People v. Berry* (2015) 235 Cal.App.4th 1417, 1428, we are not convinced by the arguments for a higher burden at this time. The concerns underlying the rationale for a higher burden can be cured through proper application of settled principles of review.

of causing death or great bodily injury. (*People v. Brookins* (1989) 215 Cal.App.3d 1297, 1307; see *People v. Pruett* (1997) 57 Cal.App.4th 77, 81-86.)

As for Jackson's claim that relying on the record of conviction is unconstitutional and he is entitled to a jury trial on his resentencing petition, this court has previously considered and rejected this contention. (*People v. Johnson* (2016) 244 Cal.App.4th 384, 390, fn. 6.)

The superior court may look to the entire record of conviction to determine whether a petitioner is eligible for relief under section 1170.126. (*Bradford, supra*, 227 Cal.App.4th at p. 1338.) At the initial hearing on the petition on October 22, 2014, the superior court noted that it had the petition, opposition to the petition filed by the People, and additional exhibits that had been submitted. The superior court heard argument on the petition at the initial hearing. The superior court allowed the parties to submit further evidence and exhibits and continued the hearing to November 6, 2014.

At the continued hearing on November 6, 2014, the superior court indicated that it had reviewed this court's opinion upholding the conviction for violating section 4502. The appellate opinion constitutes a part of the record of conviction and may be considered by a superior court at a section 1170.126 resentencing hearing. (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) After reviewing the appellate opinion, the superior court found that Jackson had been armed with a deadly weapon and concluded Jackson was ineligible for resentencing.

In case No. F027303, Jackson had challenged his conviction for violating section 4502 in part on the basis that the altered eyeglasses did not constitute a weapon or sharp instrument. Our opinion in F027303 upholding the conviction stated that the evidence in the case supported the conclusion that "[t]he otherwise innocuous eyeglasses were rendered a weapon or sharp instrument within the meaning of section 4502 by the alteration."

We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact, in this case, the superior court. Accordingly, we find substantial evidence supports the conclusion that the altered eyeglasses were a deadly weapon.

DISPOSITION

The November 6, 2014 order denying Jackson's petition for resentencing pursuant to section 1170.126 is affirmed.