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

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMUNDO FRIAS SANDOVAL,

Defendant and Appellant.

F070489

(Super. Ct. No. SC081238A)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Kern County. Michael G. Bush, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Michael A. Canzoneri, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Franson, J.

Appellant Raymundo Frias Sandoval appeals the denial of his petition for recall of sentence pursuant to Penal Code section 1170.126.¹ Appellant is currently serving a sentence of 25 years to life, plus one year for a prior prison term enhancement, for possession of tar heroin while confined in a penal institution (§ 4573.6), possession of controlled substance paraphernalia while confined in a penal institution (§ 4573.6), obstruction of a peace officer by force or violence (§ 69), and possession of a sharp instrument while confined in a penal institution (§ 4502, subd. (a)). (*People v. Sandoval* (Nov. 26, 2001, F037280) [nonpub. opn.] (*Sandoval*)).² The trial court concluded appellant was not eligible for resentencing because appellant was armed with a deadly weapon when committing the crimes underlying his current conviction. This appeal timely followed. For the reasons set forth below, we affirm.

FACTS REGARDING PRIOR CONVICTION

Both appellant and the People rely exclusively on the facts recounted in our unpublished opinion from 2001, upholding appellant's current convictions. In total, that factual recitation reads:

“At 8:30 p.m. on April 3, 2000, Correctional Officer Timothy Crouch was walking down the dormitory of the California Correctional Institution at Tehachapi when he heard an inmate say, ‘man walking.’ Crouch proceeded toward the voice when he saw Sandoval make a quick movement with his hands toward an open locker, close the door to the locker, and try to appear nonchalant.

“Crouch opened the locker and seized pieces of what appeared to be black tar heroin. A criminalist later identified the substance as 2.69 grams of heroin, a usable amount. As Crouch turned to face Sandoval, Sandoval arose from his bed and placed

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

² On appellant's unopposed motion, we have taken judicial notice of our prior opinion in *Sandoval, supra*, F037280. This opinion was submitted to the trial court as part of the opposition to appellant's petition.

himself within inches of Crouch. Crouch noticed Sandoval dropping objects onto his bed. Sandoval was constantly moving around. Crouch told Sandoval to ‘knock it off’ but Sandoval kept moving about. Sandoval grabbed a razor blade and a ziplock bag.

“Crouch held Sandoval’s wrists and used his body to pin Sandoval against his bunk. Another correctional officer came to Crouch’s aid and Sandoval was handcuffed. An inmate-manufactured syringe was found in a laundry bag assigned to Sandoval.”
(*Sandoval, supra*, F037280.)

DISCUSSION

Appellant contends the trial court erred in finding his possession of a razor blade precluded resentencing. This argument takes two forms. First, that a razor blade is not a deadly weapon. Second, that appellant was not armed with the razor blade.

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.)³

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*).)

Appellant, relying on *People v. Oehmigen* (2014) 232 Cal.App.4th 1 (*Oehmigen*), asserts the “armed with a deadly weapon” eligibility question is a legal issue subject to de novo review. We disagree. *Oehmigen* overstates the legal nature of our review. Indeed, its conclusion that the eligibility determination is a matter of law relies on a citation to *Bradford* which states the analysis of which evidence to consider is factual, (*Oehmigen, supra*, 232 Cal.App.4th at p. 7 [citing *Bradford, supra*, 227 Cal.App.4th at pages 1337, 1339]) while ignoring that *Bradford* itself treated the eligibility analysis as factual. (*Bradford, supra*, at pp. 1331, 1334.) Thus, our review is limited to whether substantial evidence supports the trial court’s conclusion that appellant was not eligible for resentencing.

³ Citing *People v. Bradford* (2014) 227 Cal.App.4th 1322, appellant baldly states that the trial court did not identify the burden of proof it was applying. As noted, our prior holding in *Osuna* sets the burden of proof at a preponderance of the evidence. We have not been asked to reconsider this holding. We are aware of both the concurrence in *Bradford* suggesting the burden should be clear and convincing evidence (*id.* at pp. 1344-1345), and 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.

Substantial Evidence Shows Appellant was Armed with a Deadly Weapon

Appellant argues the trial court erred in concluding that a razor blade is a deadly weapon because the context surrounding appellant's possession of the razor blade does not provide substantial evidence that the razor blade was a deadly weapon under the circumstances. We disagree.

When an object is not considered a deadly weapon as a matter of law, the fact finder must determine whether the object was possessed or used in such a manner that it should be considered a deadly weapon under the circumstances. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-29.) "In making this determination it may be necessary to consider 'the attendant circumstances, the time, place, destination of the possessor,' any alteration of the object, and other relevant facts indicating 'the possessor [would] use it as a weapon should the circumstances require.'" (*Bradford, supra*, 227 Cal.App.4th at p. 1342.)

In this case, appellant grabbed a razor blade while in close proximity with a correctional officer and while ignoring instructions to stop moving. A razor blade is obviously not an item that an inmate should possess in such circumstances. Indeed, our Supreme Court has affirmed that a razor blade in the possession of an inmate is a deadly weapon, explaining that even "without a handle, a razor blade could be used to slice a victim's throat, wrist, or other vital spot, and thus a detached razor blade has a reasonable potential of causing great bodily injury or death." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1178.)

Relying on *Bradford, supra*, 227 Cal.App.4th at pages 1342-1343, appellant argues the razor blade was not a deadly weapon because he possessed the blade only for use in his drug activities and there was no evidence it was actually used as a weapon. We are not persuaded. *Bradford* does not stand for the proposition that an object must be used as a weapon in order to be considered a deadly weapon. In *Bradford*, wire cutters found in the defendant's possession upon arrest were not found to be a deadly weapon

because every one of the relevant indicators considered by the court were missing: the wire cutters were not being carried “in a manner that suggests potential use as a weapon[,]” the wire cutters were not “modified for use as a weapon[,]” and the wire cutters “were discovered after the fact of the crimes.” (*Ibid.*)

In contrast, here these same indicators support finding the razor blade is a deadly weapon. The razor blade was possessed by an inmate, suggesting it could be used for a weapon, was modified such that it could be used as a weapon, and was discovered in part because appellant grabbed the razor blade during a confrontation with Officer Crouch. Appellant’s argument that his explanation for possessing the razor blade is the most credible (i.e., in support of his drug activities) impermissibly asks us to reweigh the facts of this matter. (*People v. Baker* (2005) 126 Cal.App.4th 463, 469 [“ ‘If the circumstances reasonably justify the [trial court’s] findings,’ the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] 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.”].) Accordingly, we find substantial evidence supports the conclusion that the razor blade was a deadly weapon.

Appellant’s argument in reply that he was not armed with the razor blade also fails. Contrary to appellant’s position, having the razor blade in his hand is dispositive of this issue. One is “armed” in the context of the Act if the deadly weapon is “available for offensive or defensive use.” (*Osuna, supra*, 225 Cal.App.4th at p. 1029.) In this case, appellant grabbed the razor blade during his confrontation with Officer Crouch. This is substantial evidence that appellant was “armed” within the meaning of the Act, regardless of the intended use of the razor blade.

DISPOSITION

The order is affirmed.