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

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL THOMAS TATE,

Defendant and Appellant.

F070836

(Super. Ct. No. BF101761A)

OPINION

THE COURT*

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

Sylvia Whatley 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, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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

INTRODUCTION

In *People v. Tate* (Aug. 5, 2004, F043819), an unpublished opinion, this court affirmed the felony conviction of defendant Earl Thomas Tate for being an ex-felon in possession of a firearm (Pen. Code, former § 12021, subd. (a)(1))¹ and his misdemeanor conviction for possession of narcotics paraphernalia (Health & Saf. Code, § 11364).² Defendant had two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and was sentenced to a term of 25 years to life. On December 19, 2014, pursuant to the resentencing provisions of the Three Strikes Reform Act of 2012 (Proposition 36), the trial court heard and denied defendant's petition, finding defendant ineligible. We affirm the trial court's ruling.

FACTS AND PROCEEDINGS

Defendant was seen by Kern County Sheriff's Deputies Lance Grimes and Arthur Gonzales walking near the entrance of a trailer park. When defendant turned around and saw the deputies in their marked patrol car, he walked at a faster pace, repeatedly turning around to look at the patrol car. The deputies followed defendant into the trailer park where it was too dark to see defendant's hands. Defendant walked behind a parked vehicle and a wall, temporarily obstructing the deputies' view of him. Although the deputies could see defendant from the shoulders up, his hands were not visible. Defendant walked toward trailer space No. 2. Grimes turned on the patrol car spotlight and trained it on defendant.

Defendant then turned around and approached the patrol car. The deputies exited their car and asked defendant what was going on and if he would talk to them. Defendant agreed. When asked, defendant told the deputies he was not doing anything illegal and

¹Unless otherwise indicated, all statutory references are to the Penal Code.

²On April 1, 2015, this court granted defendant's request to take judicial notice of this court's opinion in *People v. Tate, supra*, F043819. The day after we took judicial notice of our previous opinion, the People filed their reply brief also requesting we grant defendant's request for judicial notice.

was not carrying contraband. Defendant agreed to a search. Gonzales found a glass smoking pipe in defendant's fanny pack and a hypodermic syringe in his jacket pocket. Defendant was arrested and placed in handcuffs. Defendant repeatedly asked to be given a citation instead of going to jail. Defendant asked if they could "work something out," which, based on Grimes's experience, meant defendant was willing to provide information to avoid going to jail. Grimes told defendant they might be able to work something out if defendant could provide information about clandestine drug activities, especially methamphetamine laboratories.

Defendant said he did not know about drug sales or labs, but added, "I do know where a gun is." Grimes asked where it was. Defendant said it was close by, within 20 feet of where they were standing. Grimes asked defendant if the gun was stolen. Defendant said, "[T]hey told me it wasn't, but I don't believe them." Defendant retraced the path he had previously taken behind trailer Nos. 1 and 2 and the wall. Defendant walked a straight line, motioned his head toward a blue bandana on the ground, and said, "there it is." Grimes picked up the bandana and found a .22-caliber revolver wrapped inside it. Grimes testified the gun was "along the same path of where he [defendant] had walked up to trailer number two" when they previously directed the spotlight on defendant.

Grimes told defendant he was the one who had dropped the gun there. Defendant initially denied doing so. Grimes again accused defendant of dropping the gun to avoid getting caught with it. Then defendant told Grimes he was holding the gun for someone else and mentioned Sergeant Bonsness who worked at the Taft substation. Defendant said he was holding the gun and was supposed to take it to Bonsness. Grimes contacted Bonsness that evening. Bonsness said he was very familiar with defendant but told Grimes it was not true that defendant was holding a gun for him. After being advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, defendant again told

Grimes he was holding the gun for Bonsness and planned to give the gun to him. Defendant also said he received the gun from a woman, but he refused to give her name.

Bonsness testified, corroborating Grimes's testimony. Bonsness further explained that he did not tell defendant to take possession of the gun because he knew defendant was an ex-felon and informants were not supposed to have guns.

Defendant testified and admitted having felony convictions in 1985 and 1992. Defendant said Bonsness had arrested defendant's girlfriend in February 2003 and told defendant that if defendant came up with information about guns, Bonsness would not come back to defendant's residence with a warrant and arrest him for narcotics. Defendant admitted that although Bonsness wanted information about a gun, he never told defendant to bring him a gun. According to defendant, Bonsness gave him five to seven days to produce information or he would arrest defendant.

On February 28, 2003, Venus Sutton visited defendant's residence at space No. 8 in the trailer park and offered to sell defendant the gun for \$50. Defendant wanted to get Bonsness "off [his] back." Defendant did not have any money, but called Sutton later and told her he had money for the gun. She replied the gun was no longer available. Defendant waited a few hours, called Sutton back, and she told him he could pick up the gun at a certain location. Defendant said he was walking back to his trailer when the deputies saw him. Defendant denied walking faster when he saw them. Defendant asserted the deputies stopped him before he picked up the gun or paid for it. The jury convicted him of being an ex-felon in possession of a firearm.

DISCUSSION

Defendant contends the trial court's exclusion of him from resentencing based on defendant personally handling the firearm "is based upon speculation rather than reasonable inferences drawn from the circumstantial and direct evidence." Defendant argues there was only substantial evidence that he was in constructive possession of the gun, not in actual personal possession of the gun. Defendant argues this court's

resolution of his corpus delicti contention in *People v. Tate, supra*, F043819 does not constitute the law of his case. We reject these contentions.

On November 6, 2012, the voters approved Proposition 36, which amended sections 667 and 1170.12 and added section 1170.126. Proposition 36 changed the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law, a recidivist with two or more prior strikes who was convicted of any new felony was subject to an indeterminate life sentence. Proposition 36 restricted the three strikes law by reserving the life sentence for cases where the current offense is a serious or violent felony, or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist is sentenced as a second strike offender. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

In addition to reforming three strikes sentencing for defendants convicted after the effective date of Proposition 36, the initiative also added section 1170.126 to provide for retroactive reform of existing three strikes sentences imposed before the effective date of the initiative. Section 1170.126 “provides a means whereby, under three specified eligibility criteria and subject to certain disqualifying exceptions or exclusions, a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious or violent felony conviction.” (*People v. White* (2014) 223 Cal.App.4th 512, 517 (*White*), review den. Apr. 30, 2014, S217030.)

In *White, supra*, 223 Cal.App.4th 512, the court rejected an argument similar to defendant’s. It held the defendant there was ineligible for resentencing under section 1170.126 because “the record of conviction,” which consisted of the trial evidence and appellate record, established he had a firearm in his possession and was personally armed in the commission of the underlying offenses, even though he was not charged with an

arming enhancement. (*White*, at pp. 525–526.) *White* further held the prosecution was not required to plead and prove charges and/or enhancements that would support facts to disqualify him from resentencing under Proposition 36. (*White*, at pp. 526–527.)

A series of cases have reached the same conclusion as *White* and hold that the superior court may review the documents contained in the entire record of the qualifying conviction, including prior appellate opinions, to determine if the defendant is ineligible for resentencing, and the prosecution is not required to plead and prove any of the disqualifying factors set forth in section 1170.126. (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 740, 747; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798–800; *People v. Guilford* (2014) 228 Cal.App.4th 651, 660; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314–1317; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030-1032, 1038-1039.)

The court in *White* further noted that the California Supreme Court has explained in *People v. Bland* (1995) 10 Cal.4th 991, 997, that arming is established by the availability and ready access of the weapon. (*White, supra*, 223 Cal.App.4th at p. 524.)

Defendant asserts that in this court’s original opinion we stated the prosecution proved slight or minimal evidence to establish the corpus delicti rule that defendant was an ex-felon in possession of a firearm. Defendant argues slight or minimal evidence stands in stark contrast to the beyond a reasonable doubt standard of proof. In evaluating whether there was evidence independent of defendant’s admissions, we made the following observations.

“Deputies Grimes and Gonzales observed [defendant] walking at night toward the trailer park. [Defendant] turned around and realized the deputies were watching him, and walked at a faster pace. He continued to walk quickly as he entered the trailer park. While the deputies could see his entire body, they only saw his back and could not see if he had anything in his hands. [Defendant] walked behind a parked vehicle and a wall, and the deputies could only see his shoulders. As he walked past trailer No. 2, the deputies activated their spotlight and [defendant] approached their patrol car and spoke with them. The deputies later retraced [defendant]’s path between trailer Nos. 1 and 2 and found the handgun in the area where he

had just walked. The gun was wrapped in a bandana, but it was placed on the ground, in an area with sparse grass and dirt. The circumstantial evidence strongly suggested that [defendant] increased his walking pace when he realized the deputies were following him, and disposed of the gun when he walked behind the vehicle and the wall, and between the two trailers. Such circumstantial evidence was sufficient to satisfy the corpus delicti requirement for possession of the gun.”

We concluded there was sufficient evidence of defendant’s constructive possession of the gun without his statements to the deputies. In our first opinion, however, we were analyzing the theory of constructive possession because under the corpus delicti rule, we were reviewing the evidence in the absence of defendant’s statements. We are not so constrained now. Defendant’s comments to the deputies constituted substantial evidence he was in physical possession of the gun and an admission he had immediate access and availability of the weapon. Defendant told the deputies he knew where the gun was and brought them to the very spot he had been standing when they trained the patrol car spotlight on him. As noted above, there was strong circumstantial evidence defendant was carrying the gun and dropped it on the ground prior to encountering the deputies. Relying on the totality of the evidence, there was substantial evidence defendant had actual physical possession of the gun rather than mere constructive possession.

As we read the facts, defendant had immediate access and availability to the firearm within the meaning of *People v. Bland, supra*, 10 Cal.4th 991, 997, and its progeny. The trial court did not err in denying defendant’s motion for resentencing based on the disqualifying fact that he personally had possession of a firearm.

DISPOSITION

The trial court’s denial of defendant’s petition for resentencing pursuant to Proposition 36 is affirmed.