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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS BYRON BROWN,

Defendant and Appellant.

G050211

(Super. Ct. No. 95CF1300)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, John Conley, Judge. Affirmed.

John L. Dodd, 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, Assistant Attorney General, Barry Carlton, Warren Williams and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Dennis Byron Brown appeals from the denial of his petition for recall of his indeterminate life sentence under Penal Code section 1170.126 (unless otherwise identified, all further statutory references are to this code), which was enacted by voter initiative in 2012, as part of the Three Strikes Reform Act. (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 6, pp. 109-110 (hereafter Voter Information Guide).) Defendant contends the order must be reversed because the trial court erroneously concluded he was ineligible for resentencing relief based on a factual circumstance (i.e., that he was “armed” during the commission of his offense) that was neither pleaded nor proved in the underlying case. The contention is unpersuasive.

We agree with the other courts that have examined this issue and concluded that factual circumstances rendering a defendant ineligible for resentencing relief on an underlying conviction need not have been pleaded and proved.

FACTS

In 1996, defendant was convicted of possession of a firearm by a felon (§ 12021, subd. (a), repealed by Stats. 2010, Ch. 711, § 4, now § 29800, subd. (a)(1)). He was also found to have been previously convicted of seven serious felonies and to have served five prior prison terms within the meaning of section 667.5, subdivision (b). He was sentenced to a term of 25 years to life in prison.

The circumstances of defendant’s offense were that in May 1995, he was walking on Main Street in Santa Ana. He was approached by a police officer who asked to speak with him. In response, defendant ran away, jumped a fence and ran to a parking lot. The officer observed him squat down next to a van in the parking lot, toss an item under it, and run again. Another police officer searched under the van and retrieved a loaded semiautomatic handgun. After defendant was detained, a search of his pockets revealed additional ammunition of the same type and caliber found in the gun.

In February 2013, defendant filed a petition under section 1170.126, asking the court to recall his indeterminate life sentence and resentence him to a lesser term of years. The district attorney moved to dismiss the petition, arguing that because defendant was armed during the commission of the crime for which he received the indeterminate life term, he was ineligible for resentencing under subdivision (e)(2) of section 1170.126. Although the trial court denied that motion, the district attorney subsequently filed another motion requesting the court to make an eligibility determination based on the trial transcript of defendant's underlying case. In connection with that motion, the trial court directed the parties to address a newly decided case, *People v. White* (2014) 223 Cal.App.4th 512 (*White*), in which the appellate court rejected the argument that a disqualifying factor, such as whether the defendant was armed during the commission of the relevant offense, was required to have been pleaded and proved in the underlying case. Moreover, the court in *White* also concluded (1) a defendant whose underlying conviction was for being a felon in possession of firearm could be deemed "armed" during the commission of that possession for purposes of section 1170.126, subdivision (e)(2), rendering that defendant ineligible for resentencing relief; and (2) the circumstances of the defendant's possession of the firearm, as reflected in his record of conviction, demonstrated his possession amounted to an arming.

At the hearing, defendant's counsel attempted to distinguish *White* on the basis that the defendant in that case had actual possession of the firearm, whereas in this case it was "less likely" defendant actually possessed the firearm. He otherwise conceded that under *White*, his client "doesn't even get to first base." The trial court concluded it was required by *White*, as well as by two newer cases, *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007 and *People v. Osuna* (2014) 225 Cal.App.4th 1020, to view defendant as having been armed during the commission of his offense of being a felon in possession of a firearm, and to deem him ineligible for resentencing relief on that basis.

DISCUSSION

1. The Resentencing law

Under the original version of the Three Strikes law, codified in sections 667 and 1170.12, a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. However, in November 2012, the Three Strike Reform Act was enacted by voter initiative. (Voter Information Guide, *supra*, text of Prop. 36, § 6, p. 109.) Among the stated purposes of the initiative, as explained to voters, was to “[r]estore the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime” and to “[m]aintain that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.” (*Id.* § 1, p. 105.)

Thus, the Three Strikes Reform Act “diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citations.] The Act also 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.” (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

In accordance with these goals, the resentencing provision, contained in section 1170.126, states that it is intended to apply only to those “persons presently serving an indeterminate term of imprisonment . . . whose sentence under this act would not have been an indeterminate life sentence.” (§ 1170.126, subd. (a).) And subdivision

(b) specifies that the relief to be obtained through a successful petition is “resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.” (§ 1170.126, subd. (b).)

Consequently, the initial inquiry under section 1170.126 is whether an inmate who is already serving an indeterminate life sentence under the Three Strikes law is *eligible* for resentencing relief, meaning he or she would not have been sentenced to that same indeterminate life term under the revised sentencing provisions of the Three Strikes Reform Act. Thus, the petition to recall an indeterminate life sentence is required to specify the exact basis for its imposition: “The petition . . . shall specify all of the currently charged felonies, which resulted in the sentence under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12.” (§ 1170.126, subd. (d).)

Subdivision (e) of section 1170.126 then details which inmates are eligible, based upon the offense for which the inmate received the indeterminate life term, and his or her prior record. The first requirement is that “[t]he inmate is serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (§ 1170.126, subd. (e)(1).)

The second requirement is that “[t]he inmate’s current sentence was not imposed for any of the offenses appearing in [section 667, subdivision (e)(2)(C)(i - iii) or section 1172.12, subdivision (c)(2)(C)(i - iii)].” (§ 1170.126, subd. (e)(2).) These cross-referenced offenses, imported from the revised Three Strikes sentencing statutes, include certain controlled substance charges and felony sex offenses, as well as other offenses committed in circumstances where the defendant used a firearm, was armed with a

firearm or deadly weapon, or intended to cause serious bodily injury. Under both sections 667 and 1172.12, these factual circumstances are required to be pleaded and proved in cases brought after the effective date of the Three Strikes Reform Act or they cannot be relied upon to disqualify a defendant from receiving a reduced sentence.

And the third eligibility requirement for resentencing relates to prior convictions, specifying that the eligible inmate “has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” (§ 1170.126, subd. (e)(3).)

The resentencing statute specifies that “the court shall determine whether the petitioner satisfies the [eligibility] criteria of subdivision (e).” (§ 1170.126, subd. (f).) If the petitioner does satisfy those eligibility requirements, he or she must be resentenced in accordance with section 667, subdivision (e)(1) and section 1170.12, subdivision (c)(1) – i.e., to twice the term otherwise provided as punishment for the current felony – “unless the court, *in its discretion*, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f), italics added.) In making that discretionary determination, the court can consider “[a]ny . . . evidence the court, within its discretion, determines to be relevant.” (§ 1170.126, subd. (g)(3).) Thus, whether an *eligible* inmate actually *obtains* resentencing relief will depend upon the court’s discretionary assessment of all relevant evidence bearing upon the inmate’s dangerousness.

2. Defendant’s “Arming” Need not be Tethered to an Offense Other Than Possession of the Firearm.

Defendant initially argues that his conviction for being a felon in possession of a firearm cannot support a finding he was armed during the commission of that offense. He contends the plain language of sections 667, subdivision (e)(2)(C)(iii)

and 1170.12, subdivision (c)(2)(C) (iii), which are incorporated by reference into the eligibility provisions of section 1170.126, require that a defendant's arming be tethered to some offense other than a mere possessory one.

We disagree. Defendant's argument is based largely on our Supreme Court's opinion in *People v. Bland* (1995) 10 Cal.4th 991, 1002, which explains why the statutory sentence enhancement is applicable when a defendant is found to be armed "*in the commission*" of an offense (§ 12022, subd. (a)(1), italics added) requires not only that the arming have occurred *during* commission of the relevant offense, but also that it have a "facilitative nexus" to that offense. As defendant points out, this rule would preclude a finding that he was armed in the commission of his possession of a firearm because being armed with a firearm does not facilitate the felony of merely possessing it. (See *In re Pritchett* (1994) 26 Cal.App.4th 1754, 1757 [rejecting an arming enhancement on the basis that defendant's possessory use of a shotgun – as a club – did not further his offense of possessing it].)

However, as other courts have pointed out (see, e.g., *People v. Osuna*, *supra*, (2014) 225 Cal.App.4th at pp. 1031-1032 (*Osuna*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798-799), the language used to limit eligibility for relief under section 1170.126, subdivision (e)(2), is different from the language used in the arming enhancement statute. Whereas the arming enhancement statute requires the defendant be "armed with a firearm *in the commission of a felony*" (§ 12022, subd. (a)(1), italics added) – which is the phrase *Bland* concluded implied both a temporal and a facilitative nexus – section 1170.126 incorporates language requiring merely that the defendant be armed with a firearm "[*d*uring the commission of the current offense." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C) (iii).) The use of "during" implies *only* a temporal nexus. "During" is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.'" (*Osuna*, at p. 1032) Thus, any defendant whose arming is *temporally* related to his offense can qualify as "armed" for purposes of assessing

eligibility for resentencing under section 1170.126, subd. (e)(2), with no requirement that the arming have also facilitated the commission of the relevant offense.

And of course, a defendant can be armed “during” his possession of a firearm. Possession of a firearm can be either actual or constructive (*White, supra*, 223 Cal.App.4th at p. 524.) And because “[a] defendant is armed if the defendant has the specified weapon available for use, either offensively or defensively,” (*Bland, supra*, 10 Cal.4th at p. 997), some felons who only constructively possess a firearm (e.g., by storing the firearm in locked box in an inaccessible location) would not qualify as being armed during their possession of the weapon.

Moreover, drawing a distinction between felons who merely possess a firearm, and those who are actually armed, makes sense for purposes of the Three Strikes sentencing revisions effectuated with the passage of the Three Strikes Reform Act. The overall goal of the revisions is to draw distinctions between those repeat offenders who have committed serious or violent crimes, and those who have not. (Voter Information Guide, *supra*, text of Prop. 36, § 6, p. 105.) And as pointed out in *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1057 “[t]he threat presented by a firearm increases in direct proportion to its accessibility. Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.” [Citation.] The same cannot necessarily be said about a firearm that is merely under the dominion and control of a person previously convicted of a felony. For instance, a firearm passed down through family members and currently kept in a safe deposit box by a convicted felon would be under his or her dominion and control, but would present little or no real danger.” Thus, a felon who found to be armed with a firearm can generally be assumed to pose a more serious risk to the public than one who merely possessed the firearm without being in a position to actually use it.

As section 1170.126, subdivision (e)(2) requires only a temporal nexus between a defendant’s being “armed” and his commission of the offense for which he

received his indeterminate life term, we conclude it does not exclude mere possessory offenses as the basis for a finding that the defendant is ineligible for resentencing relief because he was armed during the commission of his offense. Thus, we reject defendant's assertion he cannot, as a matter of law, be deemed ineligible for resentencing relief on the basis he was armed during the commission of his offense of being a felon in possession of a firearm.

3. Circumstances Disqualifying a Defendant From Resentencing Relief Need not be Pleaded and Proved in the Underlying Case.

Defendant's main contention on appeal is that he cannot be deemed ineligible for resentencing relief on the basis of a factual circumstance that was neither pleaded nor proved in the underlying case – in this case, the circumstance being that he was “armed” during his commission of the offense of being a felon in possession of a firearm. As defendant points out, this arming disqualification is incorporated into the resentencing statute by reference to the list of disqualifying factors set forth in sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C), all of which are explicitly required by *those statutes* to be pleaded and proved before they can be relied upon to justify imposing an indeterminate life term for an offense that would otherwise not qualify as “serious or violent” under sections 667.5, subdivision (c) and 1170.12, subdivision (b).

Thus, for offenses occurring after the effective date of the Three Strikes Reform Act, a defendant could not be sentenced to an indeterminate life term under sections 667 and 1170.12 on the basis he was armed during the commission of an otherwise nonserious, nonviolent felony unless the fact of his arming was both pleaded and proved at trial. Defendant believes this same requirement should pertain to petitions for resentencing.

However, several courts have already rejected this contention, including *White, Osuna, Brimmer, Blakely*, and *People v. Guilford* (2014) 228 Cal.App.4th 651. These courts have generally relied on the fact that while *the list* of factors is incorporated into section 1170.126, the requirement they be pleaded and proved is not. As explained in *Blakely*, the language incorporating the disqualifying factors from sections 667 and 1170.12 “refers specifically to the disqualifying factors, and does not incorporate the pleading and proof requirements contained in other portions of sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C).” (*Blakely, supra*, 225 Cal.App.4th at p. 1058.)

Moreover, as *Osuna* points out, importing into section 1170.126’s eligibility determination, a requirement that disqualifying factors have been pleaded and proved in the underlying case would seemingly nullify at least one of the specified factors; i.e., that the relevant offense was committed with the *intent to* “inflict great bodily injury.” (§ 1170.126. subd. (e)(2), incorporating language from § 667, subd. (e)(2)(C), § 1170.12, subd. (c)(2) (C).) The defendant’s *intent* to inflict great bodily injury – as opposed to the abstract assessment that he or she engaged in force likely to result in it (see § 245) – was not an element of any crime existing when the Three Strikes Reform Act was voted into law. (*Osuna, supra*, 1020 Cal.App.4th at p. 1034 [“We are aware of no provision criminalizing, or permitting imposition of an additional sentence for, the mere intent to cause great bodily injury to another person”].) Thus, before the passage of the new law, there would have been no occasion for a prosecutor to have pleaded or proved that particular disqualifying factor in any case where resentencing relief might later have been sought.

A similar problem exists with respect to the arming factor. As we have already explained, the Three Strikes Reform Act incorporates language creating a broader scope of circumstances in which a defendant could qualify as being “armed” in connection with an offence than had previously existed under the arming enhancement

statute. (§ 12022, subd. (a)(1).) Thus, if the resentencing law were construed as requiring the fact of arming to have already been pleaded and proved in an underlying case, the only cases which would qualify would be those where the prosecution could have successfully pleaded and proved arming under the narrower rule set forth in the arming enhancement statute. Hence, that construction would effectively nullify the expanded scope of arming that has been incorporated into the resentencing statute.

It is well-settled that a statutory “interpretation that renders related provisions nugatory must be avoided.” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) And because inferring a pleading and proof requirement into subdivision (e)(2) of section 1170.126 would do just that with respect to two of the factors it identifies as disqualifying a defendant from eligibility for resentencing, we join the other courts that have rejected that inferred requirement.

4. Defendant’s Record of Conviction Establishes he was Ineligible for Resentencing.

Here, as in *White*, defendant’s “record of conviction establishes” he was actually armed during his possession of the firearm. (*White, supra*, 223 Cal.App.4th at p. 524.) His conviction was for possession of a firearm, so there was no basis to dispute that point. And although the judgment itself includes no finding defendant was “armed” with that gun, the record of conviction provided to the trial court reflected no realistic probability that he was not. While it is true that a conviction for gun possession can be based on either actual or constructive possession (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1313), defendant’s underlying conviction was based on undisputed evidence he was seen crouching next to a van and tossing something – later revealed to be the gun – underneath it as he was running away from a police officer. That evidence demonstrates defendant’s actual possession of the gun. There was no evidence of any *other* gun in the case that defendant might have possessed only constructively. Thus,

when the jury concluded he was in possession of a gun, as charged, its verdict necessarily established that the gun he possessed was the one he was seen tossing under the van.

Further, even if there were any room to dispute whether defendant was the person who placed the gun under the van – and we are aware of none – the jury’s conclusion he possessed that gun is sufficient to establish he was aware it was there. (*People v. Snyder* (1982) 32 Cal.3d. 590, 592 [defendant’s knowledge of the gun is an element of the crime of being a felon in possession].) Given that knowledge, defendant’s act of crouching next to the van where the gun was hidden, during his flight from the police, establishes arming.

As our Supreme Court has explained, “[i]t is the availability – the ready access – of the weapon that constitutes arming.” (*Bland, supra*, 10 Cal.4th at p. 997.) And it is well settled that a defendant is armed with a weapon even though it is not carried on his person, when he is aware it is hidden in a place readily accessible to him. (*People v. Elder, supra*, 227 Cal.App.4th at p. 1317 [the defendant was encountered outside of his residence, and the gun was found inside on a shelf]; *People v. Vang* (2010) 184 Cal.App.4th 912, 914 [the defendant was encountered on the driveway of his residence, and the gun was found in his locked bedroom]; *People v. Searle* (1989) 213 Cal.App.3d 1091, 1095 [the defendant was encountered selling drugs from his car, and the gun was found in an unlocked compartment in the back of the car].)

Thus, the accessibility of the gun to defendant when he crouched next to the van established he was armed during the commission of his possession of that gun. On this record, there was no realistic probability that defendant was not armed during the commission of that offense and the trial court could properly reach that conclusion without resolving any additional disputed facts. Consequently, the trial court did not err by concluding he was ineligible for resentencing relief and dismissing his petition for resentencing on that basis.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.