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## Digest: People v. Pitto

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*Digest: People v. Pitto*

*Benjamin Price*

Opinion by Baxter, J., with George, C. J., Werdegar, J., Chin, J., Moreno, J., and Corrigan, J. Dissenting Opinion by Kennard, J.

Issue

Is a sentence enhancement pursuant to California Penal Code section 12022 proper for those who are armed with a firearm in the commission of specified offenses, although the defendant's purpose for having the weapon was unrelated to the offense?

Facts

On May 23, 2003, police officers detained defendant Michael Pitto in an area commonly used for methamphetamine sales.<sup>1</sup> The officers, searching defendant's van, found a bag containing a small quantity of methamphetamine under a floorboard and an unloaded handgun stored in a cardboard box behind the driver's seat.<sup>2</sup> The prosecution's witnesses testified that the gun was likely for purposes of protecting the drugs possessed for sale, because the gun was "within arm's reach of defendant" and could be quickly loaded.<sup>3</sup> Defendant admitted that he intentionally placed the drugs and the gun there, but argued that the drugs were for his own personal consumption and that he bought the gun because he planned to commit suicide.<sup>4</sup>

Defendant was convicted of possessing for sale and transporting methamphetamine in violation of Health and Safety Code sections 11377(a) and 11379(a).<sup>5</sup> The jury sustained the charges under Penal Code section 12022 that he was "armed" with a firearm in the commission of the related offenses and therefore subject to a sentence enhancement.<sup>6</sup> He was sentenced to eighteen years in prison.<sup>7</sup>

The court of appeal found that the trial court's jury instruction concerning the meaning of "armed" in Section 12022 failed to adequately

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1 *People v. Pitto*, 180 P.3d 338, 340 (Cal. 2008).

2 *Id.*

3 *Id.* at 338, 340.

4 *Id.* at 341.

5 *Id.* (citing CAL. HEALTH & SAF. CODE §§ 11377(a), 11379(a)).

6 *Id.* (citing CAL. PEN. CODE § 12022(a)(1), (c)).

7 *Id.* at 342.

explain the link between the firearm and the drug crime.<sup>8</sup> The court, finding that this instructional error was a constitutional violation not harmless beyond a reasonable doubt, reversed the conviction to the extent that defendant was found to be armed in the commission of the crimes.<sup>9</sup> The Supreme Court of California granted review and reversed the judgment of the Court of Appeal.<sup>10</sup>

### Analysis

The Court observed that, under *People v. Bland*, Section 12022 does not require that the defendant use or even carry a firearm for the sentence enhancement to apply.<sup>11</sup> A defendant is "armed" under Section 12022 as long as the gun is "available for use, either offensively or defensively."<sup>12</sup> *Bland* expressed that, because "the mere presence and potential for use of a firearm at a crime scene increases the risk of injury and death," Section 12022 is meant to "deter and punish persons who create such dangerous situations in the course of committing crimes."<sup>13</sup>

The Court articulated the principle in *Bland* that, "[w]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession."<sup>14</sup>

Applying these principles, the Court said that this was a "classic case for finding that the defendant was armed while possessing and transporting a controlled substance."<sup>15</sup> The Court looked to the proximity of the gun to the drugs, defendant's intent of placing them there, and the ease with which the gun could be reached and loaded.<sup>16</sup> Thus, the Court said, "a rational jury could have concluded beyond a reasonable doubt that the gun was available 'to protect the defendant during a drug sale, to guard against theft of the drugs, or to ward off police.'"<sup>17</sup>

Defendant argued that the trial court should have given a special instruction allowing the jury to find that there was no "facilitative nexus"

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 342-43.

<sup>10</sup> *Id.* at 343, 345.

<sup>11</sup> *Id.* at 343 (citing *People v. Bland*, 898 P.2d 391 (Cal. 1995)).

<sup>12</sup> *Id.* (quoting *Bland*, 898 P.2d 391).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 238 (quoting *Bland*, 898 P.2d 391) (internal citations omitted).

<sup>15</sup> *Id.* at 344.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (internal citations omitted).

between the gun and the drugs because he possessed the gun for a reason unrelated to the drug crimes.<sup>18</sup> He argued that, under *Bland*, a different purpose would show that the proximity of the gun was accidental or coincidental.<sup>19</sup> The Court rejected this argument because *Bland* does not impose an intent requirement.<sup>20</sup> Regardless of his motive, the Court said, “the opportunity and incentive to later resort to using the gun in perpetrating the crime is the same.”<sup>21</sup>

### Holding

The Court held that defendant was not entitled to a special jury instruction on whether he intended to use the gun for a purpose unrelated to drug possession in determining whether he was “armed” with a firearm in the commission of the specified drug offenses within the meaning of Section 12022.<sup>22</sup>

### Dissent

Justice Kennard agreed with the Court of Appeal’s conclusion that the trial court erred by refusing to instruct the jury on *Bland*’s nexus requirement.<sup>23</sup> He reasoned that *Bland* interpreted the phrase, “armed . . . in the commission” of a felony as requiring a “facilitative nexus” or link between the firearm and the drug offense.<sup>24</sup> He also said that, under *Bland*, a jury’s inference that the firearm’s proximity to the drugs was not “accidental or coincidental” may be “refuted by defense evidence” to the contrary, which he said occurred in this case.<sup>25</sup> He argued that the trial court’s instruction to the jury precluded it from considering the defense’s theory that the gun’s presence was unrelated to the drugs.<sup>26</sup>

### Legal Significance

This case effectively eradicates the facilitative nexus defense to a sentence enhancement under Section 12022 when a defendant knows of the nearby presence of a firearm while perpetrating a drug offense. The sentence enhancement may be applied regardless of whether the firearm’s presence near the drugs was for the intended purpose of facilitating the offense. Rather, the defendant may be found to be armed in the commission of the drug offense as long as he knows of its presence, that its presence was not accidental or coincidental, and that the firearm was available for use.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 345.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 346.

<sup>24</sup> *Id.* at 348 (quoting CAL. PEN. CODE § 12022(a)(1); *People v. Bland*, 898 P.2d 391 (Cal. 1995)).

<sup>25</sup> *Id.* at 349 (quoting *Bland*, 898 P.2d 391).

<sup>26</sup> *Id.* at 350.