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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GLEN ROBERT TUFUGA, Defendant and Appellant.	B277190 (Los Angeles County Super. Ct. No. NA036865)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler and Lance E. Winters, Assistant Attorneys General, Noah P. Hill and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

Glen Robert Tufuga appeals from an order denying his petition to recall his sentence under the Three Strikes Reform Act of 2012, added by Proposition 36. (Pen. Code, § 1170.126.)[1] The argument he advances—that being armed with a firearm during the commission of the commitment offense does not render him ineligible for resentencing because that offense is felony possession of a firearm—has been consistently rejected by the courts. We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

A loaded firearm was found in appellant's waistband during a search of a home in Long Beach in 1998. After a jury trial, appellant was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1); now § 29800, subd. (a)(1)). He was sentenced to 25 years to life in prison as a third striker, with four additional years imposed for prison priors. (§§ 667, 667.5, 1170.12.) The judgment was affirmed as modified on appeal with respect to fines. (*People v. Tufuga* (Oct. 6, 1999, No. B127301 [nonpub. opn.].)

In 2013, appellant filed a petition to recall his sentence under section 1170.126. The petition was denied in 2016 on the ground that appellant was ineligible for resentencing under section 1170.126, subdivision (e)(2) because he was armed with a firearm during the commission of the current offense. This appeal followed.

DISCUSSION

An inmate is eligible for resentencing if he or she is serving an indeterminate term of life imprisonment under the Three

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[1] Statutory references are to the Penal Code.

Strikes law for a felony that is neither serious nor violent. (§ 1170.126, subd. (e)(1).) However, a commitment offense renders an inmate ineligible for resentencing if "[d]uring [its] commission . . . the defendant . . . was armed with a firearm . . . ." (§§ 1170.126, subd. (e)(2); 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).)

Appellant does not dispute he was armed with a firearm, but he argues this factor does not apply when the commitment offense is possession of a firearm because the arming must be in furtherance of some other offense. He contends the cases that have consistently held to the contrary were incorrectly decided. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029–1032; *People v. White* (2014) 223 Cal.App.4th 512, 524–527; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051–1057; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312–1314; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793–799; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283–284; *People v. White* (2016) 243 Cal.App.4th 1354, 1362–1363.) We disagree.

Application of Proposition 36 on undisputed facts presents an issue of statutory interpretation that we review de novo. (*People v. Harbison* (2014) 230 Cal.App.4th 975, 980.) When interpreting a voter initiative, "we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

Being "armed" with a firearm has been construed to mean having a firearm "available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) *Bland* dealt with the sentencing enhancement in former section 12022, which applied to arming "in the commission" of the underlying crime. The court construed the phrase "in the commission of" to mean "both that the 'arming' take place during" the underlying crime and that it have "some 'facilitative nexus' to" that crime, i.e. that it occur "*during and in furtherance of*" the underlying crime. (*Bland*, at pp. 1001–1002.)

In contrast, a defendant is ineligible for resentencing under Proposition 36 if he or she was armed "during the commission of" the commitment offense. The phrase "during the commission of" has been construed as requiring a temporal, but not a facilitative, nexus between the arming and the firearm possession offense. Hence, a defendant who was armed during the commission of the firearm possession offense is ineligible for resentencing under Proposition 36, but the arming need not have been in furtherance of that, or any other, offense. (See *People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1032; *People v. Hicks*, *supra*, 231 Cal.App.4th at pp. 283–284; accord *People v. White*, *supra*, 243 Cal.App.4th at pp. 1362–1363; *People v. Brimmer*, *supra*, 230 Cal.App.4th at pp. 798–799.)

Appellant argues there is no meaningful distinction between "during" and "in" because the words are used interchangeably to denote a temporal relationship. That does not mean, however, that they both signal a facilitative relationship. Appellant offers no authority for the proposition that "during" means "in furtherance of." Nor can *People v. Bland*, *supra*, 10 Cal.4th 991 be read to support such a proposition. The court in that case used

the word "during" to refer only to a temporal nexus; it used a separate phrase, "in furtherance of," to refer to the facilitative nexus required by former section 12022. (*Bland*, at pp. 1001–1002.)

Appellant also argues the electorate did not include firearm possession offenses in the list of crimes that render a defendant ineligible for resentencing because it did not intend to exclude those offenses from Proposition 36. This argument is based on the flawed assumption that being armed with a firearm is indistinguishable from firearm possession.

It is well established that having a firearm readily available for use is not an element of a firearm possession offense, since such an offense may be based on constructive possession. (See, e.g., *People v. Osuna*, *supra*, 225 Cal.App.4th at pp. 1029–1030, citing *People v. Peña* (1999) 74 Cal.App.4th 1078, 1083–1084 [constructive possession requires dominion and control, but not actual possession]; accord *People v. Blakely*, *supra*, 225 Cal.App.4th at p. 1052.) Thus, "while the act of being armed with a firearm . . . necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it." (*People v. White*, *supra*, 223 Cal.App.4th at p. 524.)

Consequently, a felon whose commitment offense was constructive possession of a firearm may be eligible for resentencing if the firearm was not readily available for use—for instance, when a firearm is found during a search of a felon's home in the felon's absence. (*Osuna*, at p. 1030.)

Appellant argues that felony firearm possession is a "low level" offense that does not render an individual "truly dangerous" in order to bar relief under Proposition 36. Yet, it is reasonable to

assume that a felon who walks around with a loaded gun in his waistband is more dangerous than a felon who goes out unarmed and leaves his gun at home. That is because the former is more likely to misuse the firearm than the latter. (See *People v. Elder*, *supra*, 227 Cal.App.4th at p. 1314.) Proposition 36 was directed at reducing the sentence of "felons perceived as nondangerous or posing little or no risk to the public. A felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not pose little or no risk to the public." (*People v. Blakely*, *supra*, 225 Cal.App.4th at p. 1057.)

We see no reason to disagree with the many cases holding that third strikers convicted of firearm possession by a felon are ineligible for resentencing under Proposition 36, where the facts show they not only possessed the firearms but also were armed with them. Since appellant had a firearm readily available for use during his commitment offense, he is ineligible for resentencing.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J. COLLINS, J.