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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIUS BROWN,

Defendant and Appellant.

B261554

(Los Angeles County Super. Ct.  
No. MA016719)

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

SIAS | CARR, Jason O. Sias, Na'Shaun Neal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant and appellant Darius Brown was convicted by jury in 1999 of possession of cocaine base for the purpose of sale (Health & Saf. Code, § 11351.5), with a special finding pursuant to Penal Code section 12022<sup>1</sup> that he was personally armed with a firearm in the commission of the offense. Brown was sentenced to state prison for 29 years to life pursuant to the three strikes law. This court affirmed the judgment on appeal, specifically holding that substantial evidence supported both the conviction and firearm allegation. (*People v. Brown* (May 11, 2000, B130672) [nonpub. opn.]<sup>2</sup>)

On December 4, 2013, counsel for Brown filed a petition for resentencing under the provisions of Proposition 36 (§ 1170.126) which ameliorate sentences under the three strikes law in specified circumstances. The trial court denied the petition on December 18, 2013, reasoning that the finding that Brown was personally armed with a firearm “is a disqualifying offense pursuant to Penal Code section 667(e)(2)(C)(iii)” and Brown was “ineligible for resentencing pursuant to Penal Code section 1170.126(e)(2).”

Counsel for Brown did not file a notice of appeal from the order denying the petition for resentencing. This court granted Brown leave to file a late notice of appeal from the order denying the petition for resentencing. Counsel was appointed to represent Brown on appeal, but Brown later secured retained counsel.

Having perfected his appeal, Brown raises three issues. First, he argues the finding that he was armed with a firearm in his 1999 prosecution must be reversed due to insufficiency of the evidence. Second, he contends he received ineffective assistance of counsel in connection with the petition for resentencing because counsel failed to file a timely notice of appeal. Third, Brown argues the trial court should resentence him “according to the newly enacted Proposition 47.” We affirm.

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<sup>1</sup> Statutory references are to the Penal Code except where otherwise stated.

<sup>2</sup> We take judicial notice of the record and appellate opinion in case No. B130672. (Evid. Code, §§ 452, subd. (d) & 459, subd. (a).)

## DISCUSSION

### *The Finding that Brown was Armed with a Firearm*

Brown reasons that there was insufficient evidence to support the section 12022 finding that he was personally armed with a firearm in connection with his 1999 conviction for possession of cocaine base for the purpose of sale. From this premise, Brown argues the firearm finding must be reversed, and he is accordingly eligible for resentencing under Proposition 36. This contention has no merit.

Section 1170.126, subdivision (e)(1), permits an inmate serving an indeterminate term of imprisonment under the three strikes law to seek resentencing if the current offense is not a serious or violent felony. Possession of cocaine base for the purpose of sale is not a serious or violent felony. However, subdivision (e)(2) of section 1170.126 disqualifies an inmate from resentencing eligibility where “[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . .” as set forth in section 667, subdivision (e)(2)(C)(iii). The trial court found that Brown was disqualified due to the armed allegation in his current offense.

In Brown’s appeal from his 1999 conviction, this court rejected defendant’s express argument that the evidence was insufficient to support the finding he was personally armed with a firearm in the commission of the offense of possession of cocaine base for the purpose of sale. Under the law of the case doctrine, the trial court ruling on Brown’s petition for resentencing under Proposition 36 had no authority to revisit the issue, which has already been presented and determined on the merits by this Court on Appeal. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441-442; *People v. Gray* (2005) 37 Cal.4th 168, 197.)

We note that this is not a case in which the trial court is presented with a petition for resentencing that involves a factual issue as to whether a defendant was personally armed with a firearm. This case involves an express jury finding in 1999 that Brown was armed with a firearm, a finding affirmed by this Court on Appeal. Nothing in section

1170.126 empowers the trial court, or this court, to reopen the factual findings in a case that has been final for 15 years.

### ***Competency of Counsel in Failing to File a Notice of Appeal***

Brown contends he received constitutionally inadequate assistance of counsel when his attorney failed to file a notice of appeal from the order denying the petition for resentencing. This court remedied any error by granting Brown leave to file a late notice of appeal, and in this appeal, we address the merits of Brown's claim that he is entitled to resentencing under section 1170.126, rendering moot the claim of ineffective assistance of counsel. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 [issue is moot where no practical relief can be awarded]; *Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178 [as a rule appellate courts will not render opinions on moot questions].)

The claim of inadequate assistance of counsel having been cured, Brown is entitled to no further relief on this issue. We have already determined that the trial court properly found Brown ineligible for resentencing as a matter of law. Brown was not prejudiced by his counsel's failure to file a notice of appeal. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 119 [*Strickland v. Washington* (1984) 466 U.S. 668, 694 requires a defendant claiming ineffective assistance of counsel to demonstrate deficient performance and resulting prejudice "sufficient to undermine confidence in the outcome"]].)

### ***Application of Proposition 47***

Finally, Brown argues he is entitled to be resentenced under Proposition 47 ("The Safe Neighborhoods and Schools Act"), an act distinct from Proposition 36. Brown concedes he has not filed the required "petition for a recall of sentence before the trial court." (§ 1170.18, subd. (a).) Brown is free to seek whatever relief he might be entitled

to in the trial court upon filing a proper petition under section Proposition 47, but he is not entitled to relief on an appeal from an order denying a petition to recall a sentence under Proposition 36. (*People v. Shabazz* (2015) 237 Cal.App.4th 303, 307.)

### **DISPOSITION**

The order is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

BAKER, J.