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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO REYES, Defendant and Appellant.	B276920 (Los Angeles County Super. Ct. No. BA147842)

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

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, a jury convicted Alejandro Reyes of possession of a firearm by a felon (Pen. Code, former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)).[1] The jury also found true allegations that Reyes previously had been convicted of two serious or violent felonies. The trial court thus sentenced Reyes as a third strike offender to 25 years to life. Reyes petitioned for a recall of his sentence and resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (§ 1170.126). The court found that Reyes was ineligible for that relief because he was armed during the commission of his third strike offense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 1997, police officers conducted a traffic stop of a vehicle after they observed that all three of its occupants were not wearing seatbelts. Reyes was sitting in the front passenger seat of the vehicle. The officers thought that Reyes appeared nervous and fidgety. They also noticed his fingers twitching over a bulge in his pants pocket. The officers conducted a pat-down search of Reyes. The search revealed that Reyes had a loaded .25 caliber semi-automatic handgun in his pocket. Reyes admitted that the gun was his.

Following a jury trial, Reyes was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 1) and being a felon in possession of a concealed firearm on a person (former § 12025, subd. (a)(2), now § 25400, subd. (a)(2); count 2). The jury also found true allegations Reyes had suffered two prior felony convictions, one

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[1] All further statutory references are to the Penal Code.

for robbery (§ 211) and the other for assault with a firearm on a peace officer or firefighter (§ 245, subd. (d)(1)). Under the three strikes law (§§ 667, subds. (b)-(i), 1170.12), the trial court sentenced Reyes to 25 years to life for possession of a firearm by a felon. The court stayed the sentence on Reyes's conviction for being a felon in possession of a concealed firearm on a person.

In November 2012, California voters enacted Proposition 36, which revised the three strikes law to preclude indeterminate life sentences unless the current offense (i.e., the potential third strike) is a serious or violent felony or is a disqualifying offense. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) It also authorized the filing of petitions for the recall of previously-imposed third strike sentences by persons who would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of their sentencing. (§ 1170.126.) The following month, Reyes filed a petition for the recall of his third strike sentence and resentencing under Proposition 36. He argued that he would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of his sentencing.

The trial court issued an order to show cause why Reyes's third strike sentence should not be recalled. In response, the People asserted that Reyes was ineligible for resentencing under Proposition 36 because "[d]uring the commission of the current offense, [he] . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

The court denied Reyes's petition. It found beyond a reasonable doubt[2] that Reyes was ineligible for Proposition 36 relief because he was armed with a firearm during the commission of his third strike offense of possession of a firearm by a felon.[3]

DISCUSSION

Proposition 36 amended sections 667 and 1170.12 and added section 1170.126. Through these statutory amendments and additions, Proposition 36 provides that where a defendant's current offense is not a serious or violent felony and the defendant is not otherwise disqualified from relief, the defendant will be sentenced as a second strike offender rather than receiving an indeterminate life sentence as a third strike offender. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.)

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[2] The trial court recognized the existence of a split in appellate authority as to whether the standard of proof for Proposition 36 ineligibility determinations is the preponderance of the evidence or proof beyond a reasonable doubt. The court stated that it applied the latter out of an abundance of caution. On appeal, Reyes does not raise the question of the proper standard of proof for determinations of ineligibility for Proposition 36 relief.

[3] In the trial court, Reyes argued that the provisions governing disqualification for Proposition 36 relief were inapplicable because the People never pleaded and proved that he was armed with a firearm in the commission of his offense. The court ruled that Proposition 36 does not require that disqualifying factors be pleaded and proved. Reyes has abandoned this issue on appeal.

Proposition 36 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." (*Id.* at p. 168; accord, *People v. Johnson* (2015) 61 Cal.4th 674, 680-681.) A defendant is ineligible for resentencing under section 1170.126 if his or her current sentence was "imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." (*Id.*, subd. (e)(2).) The referenced statutes state that defendant is not to be treated as a second strike offender if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

At issue in this appeal is the meaning of the exclusionary phrase "[d]uring the commission of the current offense . . . defendant . . . was armed with a firearm . . . ." Reyes contends that exclusion is inapplicable when being armed is an element of the current offense. According to Reyes, the exclusion applies only "if there is *another* offense to which the arming attaches." And because being armed was an element of his current offense, i.e., being a felon in possession of a firearm, that offense does not disqualify him from Proposition 36 relief. We disagree with Reyes's interpretation of the exclusion.

We are persuaded instead by the interpretation of the exclusion adopted in *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*). Like Reyes, the defendant in *Osuna* was convicted of being a felon in possession of a firearm and was sentenced as a third strike offender. Years later, the defendant petitioned for the recall of his sentence under Proposition 36. The court affirmed the denial of his petition on the ground that he was ineligible for resentencing because he was armed with a firearm during the commission of his current offense. (*Id*. at p. 1032.)

In reaching that conclusion, the court in *Osuna* noted that the phrase "'[a]rmed with a firearm' has been statutorily defined and judicially construed [in other contexts] to mean having a firearm available for use, either offensively or defensively," and either actually or constructively. (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1030.) The evidence in the defendant's case in *Osuna* established conclusively that he was "'armed with a firearm'" when he illegally possessed the firearm; indeed, he "was actually holding a handgun." (*Id*. at p. 1030.) The defendant did not dispute this. He claimed, however, as Reyes does here, that in order to be ineligible for recall of sentence under Proposition 36, "there must be an underlying felony to which the firearm possession is 'tethered' or to which it has some 'facilitative nexus.' He [argued] one cannot be armed with a firearm during the commission of possession of the same firearm." (*Ibid*.)

The court in *Osuna* rejected this argument. It said that the argument would be correct in cases involving the "imposition of an arming enhancement—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. [Citations.]" (*Osuna*, *supra,* 225 Cal.App.4th at p. 1030,

italics omitted.) An arming enhancement under section 12022, subdivision (a)(1), may be imposed where the defendant is armed "'"in the commission" of' the felony . . . ." (*Osuna*, at p. 1031.) Such an enhancement "'requires both that the "arming" take place during the underlying crime and that it have some "facilitative nexus" to that offense'" (*ibid.*, italics omitted), meaning that the defendant "must have a firearm 'available for use to further the commission of the underlying felony.' [Citation.]" (*Ibid.*, italics omitted.)

But the statutory requirements of an arming enhancement were not at issue in *Osuna*, just as they are not at issue here. The question there, as here, was whether the defendant was in possession of a firearm during the commission of the current offense. Distinguishing enhancement cases, the court in *Osuna* stated that "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no 'facilitative nexus' between the arming and the possession. However, unlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed . . . , [Proposition 36] disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '*during* the commission of' the current offense . . . . 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' (Webster's 3d New Internat. Dict. (1986) p. 703.) In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the

same. [Citation.]" (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.) In cases of constructive possession of a firearm by a felon, the temporal nexus is satisfied because the offense "is committed the instant the felon in any way has a firearm within his control," and constructive possession necessarily means that the defendant has "dominion and control" of the firearm even though it is not in the defendant's actual possession. (*Id.* at pp. 1029-1030; see *People v. Valdez* (Apr. 20, 2017, C077882) ___ Cal.App.5th ___ [2017 WL 1406809 at p *3] ["where . . . a defendant constructively possessed a weapon and simultaneously had it available for use offensively or defensively, he was armed at that point in time [for purposes of Proposition 36's firearms exclusion], and it does not matter that he was later detained in some place other than where the arming had previously taken place. He still had the weapon available for use at the earlier point in time"].)

Based on this analysis, the court in *Osuna* held the "defendant was armed with a firearm *during* his possession of the gun, but not 'in the commission' of his crime of possession [of a firearm by a felon]. There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since [Proposition 36] uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, . . . the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.)

Each appellate court to address the meaning of the firearms exclusion in Proposition 36 has construed it just as the court in *Osuna* did, holding that the exclusion applies whenever the record shows the defendant had possession of the firearm during the commission of the current offense, and thus was armed. (See *People v. White* (2016) 243 Cal.App.4th 1354, 1360-1364; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. White* (2014) 223 Cal.App.4th 512, 525.) Reyes offers no sound basis for us to depart from the reasoned analysis in this body of case law and adopt his reading of Proposition 36's firearms exclusion.

Here, the evidence showed that Reyes had a loaded handgun in his pocket when he was arrested. The firearm thus was "'in his immediate possession or control,'" "available for use, either offensively or defensively." (*People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1029.) He was therefore armed with a firearm during the commission of the offense within the meaning of Proposition 36's firearms exclusion, and this renders him ineligible for resentencing under Proposition 36. (*Id.* at p. 1030.)

DISPOSITION

The order is affirmed.

SMALL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.