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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT GARFEL,

Defendant and Appellant.

2d Crim. No. B292079
(Super. Ct. No. PA030663)
(Los Angeles County)

Robert Garfel appeals from an order denying his petition for the recall of his 25-year-to-life sentence and for resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012. He contends that the trial court erroneously concluded that he was ineligible for resentencing because he had been armed with a firearm during the commission of his third-strike offense: possession of a firearm by a felon. (Former Pen. Code, § 12021, subd. (a)(1), now § 29800, subd. (a)(1).)¹ We affirm.

¹All statutory references are to the Penal Code.

Facts

We quote from the statement of facts in our unpublished opinion affirming appellant's third-strike conviction (*People v. Garfel* (Dec. 26, 2000, B129735)): "The police made a traffic stop of a vehicle. Appellant and another person got out of the vehicle and began running. An officer who ran after them saw appellant throw 'a shiny metal object resembling a gun.' The officer made 'a mental note' of where the object landed. After appellant was arrested, the officer recovered the object. It was a five-shot revolver with the hammer cocked and one round in the firing chamber."

Section 1170.126

Proposition 36 added section 1170.126 to the Penal Code. "Section 1170.126 provides that an inmate serving a [T]hree [S]trikes sentence may be eligible for resentencing [as a second-strike offender] where the current felony conviction is not a serious or violent felony. [Citation.] If the statutory eligibility criteria are satisfied and no exclusion applies, the trial court then determines whether imposition of a two-strike determinate term would pose an unreasonable risk of danger to public safety, and resentsences the inmate accordingly. [Citations.] [¶] An inmate is statutorily ineligible for resentencing if '[d]uring the commission of the current offense, the defendant . . . was armed with a firearm' (§ 1170.12, subd. (c)(2)(C)(iii).) "[A]rmed with a firearm" . . . has been statutorily defined and judicially construed to mean having a firearm . . . available for use, either offensively or defensively. [Citations.]' [Citation.] It is the availability of and ready access to the weapon that constitutes arming. [Citations.] In ruling on a petition for resentencing, the trial court may consider the entire record of conviction

including . . . the appellate opinion affirming the judgment of conviction. [Citations.]” (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110 (*Cruz*).)

*Appellant Is Ineligible for Resentencing Because
He Was Armed with a Firearm during the Commission
of the Third Strike Offense*

Appellant argues: “[W]hen Proposition 36 uses the terms ‘during the commission’ and ‘armed with a [firearm]’ in subdivision [(c)(2)(C)](iii) [of section 1170.12], it must be construed to require that the [firearm] be available for use in furtherance of the commission of the [third-strike] offense that is the subject of the recall petition. [Citation.] This in turn requires that the arming and the offense be separate, but ‘tethered,’ such that the availability of the [firearm] facilitates the commission of the offense.” (Italics omitted.) Thus, Proposition 36 “should be read to require that, for arming with a [firearm] to disqualify a defendant from resentencing under . . . section 1170.126, the arming must have a facilitative nexus to the crime during which it occurs. The crime of felon in possession of a firearm is not furthered by the fact that the weapon is on the defendant’s person and available to him.” The trial court therefore “erred in finding appellant ineligible for a sentence reduction.”

Appellate courts have consistently rejected appellant’s argument. (*Cruz, supra*, 15 Cal.App.5th at pp. 1111-1112; *People v. Frutoz* (2017) 8 Cal.App.5th 171, 175-178; *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030-1032, disapproved on another ground in

People v. Frierson (2017) 4 Cal.5th 225, 240, fn. 8.) Appellant offers no persuasive reason for us to depart from this settled line of authority. We recently explained in *Cruz*, *supra*, 15 Cal.App.5th at pp. 1111-1112: “Proposition 36 turns on whether the defendant was armed ‘*during the commission*’ of the current offense’ (§ 1170.12, subd. (c)(2)(C)(iii), italics added), which is different than a sentence enhancement for use of a weapon ‘*in the commission*’ of the offense (§ 12022, subd. (b)(1), italics added). “‘During’ is variously defined as “throughout the continuance or course of” or “at some point in the course of.” [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one.’ [Citations.]”

Cruz is consistent with *People v. Estrada* (2017) 3 Cal.5th 661. There, our Supreme Court observed: “[S]ection 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement . . . : the excluding conduct must occur ‘*[d]uring the commission*’ of the offense. [Citation.] The term ‘during’ suggests temporal overlap: something that occurs throughout the duration of an event or at some point in its course. [Citation.] The term implies, at a minimum, a need for a temporal connection between the excluding conduct and the inmate’s offense of conviction.” (*Id.* at p. 670.) The court noted that Proposition 36 “could certainly have imposed an even stricter requirement for triggering the exception,” such as “a “‘facilitative nexus’” requirement,” but it “does not do so.” (*Ibid.*)

Disposition

The order denying appellant's petition for the recall of his sentence and for resentencing pursuant to Proposition 36 is affirmed.

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YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

William C. Ryan, Judge

Superior Court County of Los Angeles

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