

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD OJEDA,

Defendant and Appellant.

B277228

(Los Angeles County
Super. Ct. No. TA101093)

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.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Ojeda, who in 1999 was convicted of possession of a firearm by a felon and other possession offenses and was sentenced to 25 years to life in prison, appeals from an order denying his petition to recall the sentence pursuant to Penal Code section 1170.126.¹ He contends the trial court erred in finding him ineligible for resentencing because he had been armed with a firearm during the commission of his third-strike offenses. We find no error and affirm.

BACKGROUND

On March 29, 1999, two Los Angeles police officers in a patrol car observed Ojeda standing on a street corner, drinking beer. When the officers pulled over to talk to Ojeda, he fled. They pursued him through a store, down an alley, and into the rear entrance of an automobile repair shop, momentarily losing sight of him as he entered the shop, but ultimately apprehending him inside. After the police officers detained Ojeda in their patrol car, they searched the path of pursuit and found a .32 caliber handgun under a car near where Ojeda had entered the repair shop. The handgun had a live round in the chamber. When the officers returned to the patrol car with the handgun, Ojeda saw the gun and said, “I thought I left that gun in my friend’s car.” The officers also searched Ojeda, finding 10 live rounds of ammunition that fit the handgun, methamphetamine, and a glass pipe. The owner of the automobile repair shop testified that the handgun belonged to neither him nor his son, the only two people working in the shop at the time of the incident. The gun had not been under the car before Ojeda

¹ All undesignated statutory references are to the Penal Code.

entered the repair shop, and he observed one of the officers find the gun.

At trial, Ojeda was found guilty of the felonies of possession of a firearm by a felon (former § 12021.1, subd. (a)(1)), possession of ammunition by a felon (former § 12316, subd. (b)(1)), and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), and of misdemeanor possession of a smoking device (Health & Saf. Code, § 11364). The jury found true allegations that he had two prior “strike” convictions, for robbery and voluntary manslaughter. The trial court sentenced Ojeda under the “Three Strikes” law to 25 years to life in prison, ordered him to pay a restitution fine, and imposed and stayed a parole restitution fine.

In April 2013, Ojeda filed a petition to recall his sentence under the Three Strikes Reform Act of 2012, added by Proposition 36 and approved by the voters on November 6, 2012, which permits an inmate serving an indeterminate life sentence under the Three Strikes law for a nonviolent, nonserious felony to seek a new, lesser sentence, unless resentencing would pose an unreasonable risk to public safety. (§ 1170.126, subds. (b), (e), (f).) After considering the parties’ papers and exhibits and hearing argument, the trial court found Ojeda was ineligible for resentencing because he had been armed with a firearm during the commission of his offenses.

Ojeda timely appealed.

DISCUSSION

Ojeda contends he is eligible for resentencing. We disagree.

Section 1170.126 was added as part of the Three Strikes Reform Act. (Voter Information Guide, text of Prop. 36, § 6, pp. 109-110.) Among its stated purposes, as explained to voters, was

to require “life sentences only when a defendant’s current conviction is for a violent or serious crime” and to ensure “that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence.” (*Id.*, § 1, p. 105.) In accordance with these goals, section 1170.126 permits an inmate serving an indeterminate life sentence under the previous version of the Three Strikes law to petition for recall of the sentence and resentencing to a term that would have been imposed under the revised law.

But subdivision (e)(2) of section 1170.126 provides that an inmate is ineligible for resentencing if the current sentence was imposed for an offense described in subdivision (e)(2)(C) of section 667. (§ 1170.126, subd. (e)(2); *People v. Hicks* (2014) 231 Cal.App.4th 275, 282.)² Among the offenses described in subdivision (e)(2)(C) of section 667 is any offense during the commission of which “the defendant . . . was armed with a firearm or deadly weapon” (§ 667, subd. (e)(2)(C)(iii).)³

² Subdivision (e)(2) of section 1170.126 provides in pertinent part that an inmate is eligible for resentencing if the “inmate’s current sentence was not 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”

³ Subdivision (e)(2)(C)(iii) of section 667 disqualifies a defendant from relief under Proposition 36 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.”

Where “the record shows that a defendant convicted of possession of a firearm was armed with the firearm during the commission of that offense, the armed with a firearm exclusion applies and the defendant is not entitled to resentencing” under Proposition 36. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 797; accord *People v. White* (2016) 243 Cal.App.4th 1354, 1363-1365; *People v. Hicks, supra*, 231 Cal.App.4th at pp. 283-284; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314, 1317; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030-1032; *People v. White* (2014) 223 Cal.App.4th 512, 525.) Here, Ojeda was armed with a gun during the commission of the offenses of possession of a firearm by a felon, which sufficed for the firearm exclusion to apply.

Ojeda argues that having been armed during the commission of possession of a firearm by a felon does not disqualify him from resentencing under Proposition 36 because being armed is an element of the offense.⁴ He argues the armed with a firearm exclusion applies only when being armed is “tethered” to another offense and has a “facilitative nexus” to that other offense. The argument is without merit.

Contrary to Ojeda’s contention, being armed with a firearm is not an element of possession of a firearm by a felon. (See *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 795, 799.) “A defendant possesses a weapon when it is under his dominion and control.” (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083.) “A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively.” (*People v. Bland* (1995) 10 Cal.4th 991, 997.) “A firearm can be under a

⁴ Ojeda raises no arguments regarding the other offenses for which he was convicted.

person's dominion and control without it being available for use. For example, suppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm." (*People v. Osuna, supra*, 225 Cal.App.4th at p. 1030.) Whether a felon in possession of a firearm was armed with the firearm at the time of the offense depends on the specific circumstances. (See *ibid.*) Here, Ojeda had a loaded handgun on his person as he was chased by police officers. Thus, at the time that he possessed the firearm, Ojeda also had it readily available for use. He was therefore "armed" within the meaning of Proposition 36, which renders him ineligible for resentencing. The trial court correctly denied his recall petition.

DISPOSITION

The order dismissing Ojeda's petition is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.