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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD LYDELL BOWDRY,

Defendant and Appellant.

B288111

(Los Angeles County
Super. Ct. No. NA051139)

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, Susan Sullivan Pithey and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Reginald Lydell Bowdry appeals from an order denying his petition for recall of sentence and resentencing under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).¹ He contends the trial court erred in finding he was ineligible for resentencing based on a factual finding that he was armed during the commission of his third strike offense. We affirm.

BACKGROUND

In November 2001, Long Beach police officers executed a search warrant at Bowdry's apartment. They found a handgun and a magazine for the handgun containing live ammunition underneath the mattress in his bedroom. They found a box containing additional rounds of ammunition on a shelf in the bedroom. Bowdry told them that a friend had put the gun and ammunition in a lockbox in the carport. The friend called to say he was coming to get the gun, so Bowdry took the gun upstairs and put it under the mattress.

A jury convicted Bowdry of being a felon in possession of a firearm (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)) and ammunition (former § 12316, subd. (b)(1), now § 30305, subd. (a)(1)). The trial court found true the allegations Bowdry previously suffered strike convictions of assault with a deadly weapon (§ 245, subd. (a)(1)) and attempted first degree residential burglary (§§ 459, 664). It imposed a third strike sentence of 25 years to life (§§ 667, subds. (b)-(i), 1170.12).

¹ All statutory references are to the Penal Code.

On December 14, 2012, Bowdry filed a petition for recall of sentence and resentencing under Proposition 36. He claimed possession of a firearm by a felon was no longer a serious or violent felony within the meaning of the three strikes law (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1)), and neither of his prior serious or violent felony convictions was one which disqualified him from having his sentence recalled (§ 1170.126, subd. (e)(3); see §§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)). The trial court issued an order to show cause why his sentence should not be recalled. The People filed opposition to the petition, arguing Bowdry was ineligible for recall of sentence and resentencing because he was armed during the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e)(2)).

On February 5, 2018, the trial court denied Bowdry's petition, finding beyond a reasonable doubt that he was ineligible based on his being armed during the commission of the current offense. Bowdry timely appealed.

DISCUSSION

A defendant is eligible for recall of sentence and resentencing under Proposition 36 if (1) the current offense is not one defined as a serious or violent felony and is not specified in the three strikes law as a disqualifying conviction, and (2) the defendant has no prior disqualifying convictions. (§ 1170.126, subd. (e).) Disqualifying convictions include those in which, “[d]uring the commission of the . . . 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); see § 1170.126, subd. (e)(2).)

Bowdry argues that the armed exclusion from eligibility for resentencing does not apply to possession of a firearm by a felon. Rather, it applies only where the arming is “tethered” to another offense, such that the weapon facilitates the commission of that separate offense, and there is a facilitative nexus between the arming and the other offense.

In making this argument, Bowdry acknowledges that the Courts of Appeal have consistently held that the arming need not be tethered to another offense, and the armed exclusion requires only a temporal nexus, not a facilitative one. (See *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1111-1112; *People v. Valdez* (2017) 10 Cal.App.5th 1338, 1356; *People v. Frutoz* (2017) 8 Cal.App.5th 171, 175-176, 177-178; *People v. White* (2016) 243 Cal.App.4th 1354, 1363; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1032; *People v. White* (2014) 223 Cal.App.4th 512, 525; see also *People v. Piper* (2018) 25 Cal.App.5th 1007, 1015-1016.)

Moreover, the Supreme Court in *People v. Estrada* (2017) 3 Cal.5th 661 rejected the argument that there must be a “facilitative nexus” between the arming and the underlying offense for a defendant to be ineligible for resentencing under Proposition 36. The court pointed out that “section 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement between these general descriptive terms and the inmate’s prior offense: 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. (See, e.g., Merriam-Webster's Collegiate Dict. (11th ed. 2003) p. 388 [defining 'during' as 'throughout the duration of' or 'at a point in the course of'].) The term implies, at a minimum, a need for a temporal connection between the excluding conduct and the inmate's offense of conviction. Although the need to establish such a nexus imposes certain limits on the applicability of the firearm-related exception, [Proposition 36] could certainly have imposed an even stricter requirement for triggering the exception. (See *People v. Bland* (1995) 10 Cal.4th 991, 1002 . . . [interpreting the phrase "in the commission" to impose a "facilitative nexus" requirement].) Because [Proposition 36] does not do so, we may infer some kind of temporal limitation on the retroactive application of section 1170.12, subdivision (c)(2)(C)(iii)." (*Estrada, supra*, at p. 670, fn. omitted.)

Bowdry does not challenge the finding that he was armed with a firearm during the commission of the current offense, to the extent of a temporal nexus, not a facilitative one. (See *People v. Osuna, supra*, 225 Cal.App.4th at p. 1029 ["[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively"].) He requests that we "part ways with earlier decisions holding otherwise" and "hold that, with respect to the crimes of possessing or carrying, a gun, the defendant is not also armed with it in the commission of those offenses within the meaning of Proposition 36." We decline to do so.

DISPOSITION

The order is affirmed.

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JOHNSON, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

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