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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JACK JACKSON, Defendant and Appellant.	B275830 (Los Angeles County Super. Ct. No. GA031819)

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

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Appellant Jack Jackson was convicted in 1997 of two counts of possessing a firearm as a felon. (Pen. Code, § 29800, subd. (a)(1) [formerly Pen. Code, § 12021, subd. (a)(1)].)[1] Because he had prior convictions that qualified as "strikes," he was sentenced as a "third strike" offender to an indeterminate term of 25 years to life on each count (running concurrently). In the underlying action, the trial court denied appellant's petition to be resentenced pursuant to the Three Strikes Reform Act of 2012 (the Reform Act or the Act), because during the commission of the offense he was armed with a firearm. In his appeal, appellant contends the court erred in concluding his offense was ineligible for resentencing under the Reform Act. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, two sheriff's deputies testified that on March 19, 1997, they were on patrol in a marked vehicle. They saw a parked car containing three men: appellant in the front passenger seat, appellant's co-defendant Richard Barry driving, and Harold Favors riding in the back seat. When one of the deputies approached the car, it sped off. During the ensuing chase, the deputies saw the front passenger -- appellant -- throw two weapons out the window. The weapons were recovered and identified as two loaded .380 handguns. Appellant was found guilty of two counts of being a felon in possession of a firearm. In *People v. Jackson* (Oct.

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[1] Undesignated statutory references are to the Penal Code.

21, 1998, B115634) (nonpub. opn.), this court modified the judgment to include certain mandatory fines and otherwise affirmed.

In December 2012, appellant petitioned for recall of his sentence pursuant to section 1170.126. The People opposed, arguing he was ineligible for resentencing due to section 1170.12, subdivision (c)(2)(C)(iii) which disqualifies a third strike petitioner from resentencing as a "two-striker" 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." (Italics omitted.) The trial court agreed and denied the petition, finding that based on the record of conviction, appellant had been armed with a firearm during the commission of the offenses for which he sought resentencing. This appeal followed.

DISCUSSION

The Reform Act was enacted in 2012 when voters approved Proposition 36. The Act amended sections 667 and 1170.12, the "Three Strikes" law. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1026 (*Osuna*); *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168 (*Yearwood*).) Under the original version of the Three Strikes law, a recidivist with two or more prior strikes was subject to an indeterminate life sentence if convicted of any new felony. (*Yearwood, supra,* at pp. 167-168.) The Reform Act "'change[d] the requirements for sentencing a third strike offender . . . by

reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. [Citation.]'" (*Osuna, supra*, at p. 1026, italics omitted, quoting *Yearwood, supra*, at pp. 167-168.)

The Reform Act also added section 1170.126 to the Penal Code, creating a post-conviction proceeding whereby an incarcerated third strike offender such as appellant may petition to have his or her sentence recalled and be resentenced as a second strike offender. (See *Osuna, supra*, 225 Cal.App.4th at p. 1026; *Yearwood, supra,* 213 Cal.App.4th at p. 168.) With certain exceptions, an inmate is eligible for resentencing if he or she is "serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7." (§ 1170.126 (e)(1).) One such exception is found in section 1170.126, subdivision (e)(2) and provides that the inmate is not eligible for resentencing if his or her current sentence was imposed for "any of the offenses appearing in clauses (i) to (iii), inclusive, of [section 1170.12, subdivision (c)(2)(C)]." Section 1170.12, subdivision (c)(2)(C)(iii) provides in pertinent part that an inmate is not eligible for more lenient sentencing if the prosecutor pled and proved that "[d]uring the

commission of the current offense, the defendant . . . was armed with a firearm . . . ."

There is no dispute that appellant was "armed with a firearm" when he committed the 1997 offenses. (See *Osuna*, *supra*, 225 Cal.App.4th at p. 1029 ["'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively"].) Here, both deputies testified that appellant had the guns in his hand prior to dropping them out the window of the car. Appellant contends, however, that for the section 1170.12, subdivision (c)(2)(C)(iii) exception to apply, the defendant must have been armed to further or facilitate the commis-sion of another offense.

The contention that "disqualification for resentencing under Proposition 36 requires an underlying offense or enhancement to have been pled and proved, and that a conviction for possession of a firearm cannot constitute being 'armed' with a firearm for [resentencing] eligibility purposes" has been rejected by numerous Courts of Appeal. (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1030-1038; accord, *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1364; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1012-1018; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057; *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 989-995; *People v. White* (2014) 223

Cal.App.4th 512, 522-527.) Appellant has raised no new arguments not considered and rejected by existing authority.

Appellant contends that the language of the provision -- requiring the arming to have occurred "during" the commission of the offense -- "only makes sense if there is *another* offense to which arming attaches." He points to *People v. Bland* (1995) 10 Cal.4th 991 and *People v. Pitto* (2008) 43 Cal.4th 228, in which the Supreme Court explained that the section 12022 enhancement, which applies to those persons armed with a firearm "'in the commission of a felony or attempted felony,'" is imposed where having a firearm available for use furthers a separate felony. (*People v. Bland, supra*, at p. 1001; *People v. Pitto, supra*, at pp. 236-239.) The courts have distinguished section 12022, explaining that the language of section 1170.12, subdivision (c)(2)(C)(iii) demands only a temporal nexus, not a facilitative one. As explained in *Osuna*: "[U]nlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '*during* the commission of' the current offense (italics added). '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.] [¶] . . . [¶] [D]efendant was armed with a firearm during his possession of the gun, but not 'in the commission' of his crime of possession. 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 the Act uses the phrase '[d]uring the commission of the current offense,' and not 'in the commission of the current offense' [citations], and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of the Act 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, italics omitted; accord, *People v. Hicks*, *supra*, 231 Cal.App.4th at p. 284; *People v. Brimmer*, *supra*, 230 Cal.App.4th at pp. 798-799.)

Appellant further contends that the structure of section 1170.12, subdivision (c)(2)(C)(iii) supports his contention that the factors in clause (iii) "must attach to the current offense as an *addition* and not just be a part of the current offense." He points out that clauses (i) and (ii) begin with "[t]he current offense is" and go on to list specific statutory offenses rendering a defendant ineligible for resentencing, whereas clause (iii) begins with "'[d]uring the commission of the current offense'" and goes on to say "'the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person'" without referring to any statute or specific

offense. Appellant argues that "[w]here the statute is meant to exclude specific offenses themselves, it so states, but where it is meant to exclude an offense only if something beyond its mere commission occurs, it states 'during the commission of' the offense something else happens." Appellant asserts the "'during the commission of the current offense'" language would be rendered surplusage unless "something beyond [the] . . . commission [of being a felon in possession of a firearm] occurs."

Although subdivision (c)(2)(C)(iii) of section 1170.12 specifies circumstances rendering the current offense ineligible for resentencing instead of listing specific offenses, nothing in it suggests that those circumstances must attach to a crime other than the current offense. As explained in *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332-1333 interpreting this subdivision as covering "conduct that occurs during the commission of an offense" that is "not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted" avoids rendering its language surplusage. The court in *People v. Blakely* similarly observed that by enacting the disqualifying factors of subdivision (c)(2)(C)(iii), "the electorate signaled its . . . intent that disqualifying conduct not be limited to what is specifically proven or punishable in the form of an offense or enhancement. Apparently recognizing the maxim *expressio unius est exclusio alterius* -- the expression of some things in a statute necessarily means the exclusion of other things not expressed [citation] -- voters rendered ineligible

for resentencing not only narrowly drawn categories of third strike offenders who committed particular, specified offenses or types of offenses, but also broadly inclusive categories of offenders who, during commission of their crimes -- and regardless of those crimes' basic statutory elements -- used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (*People v. Blakely, supra,* 225 Cal.App.4th at p. 1055.)

Appellant also contends that construing subdivision (c)(2)(C)(iii) of section 1170.12 as encompassing the offense of being a felon in possession of a firearm when the manner in which that crime was committed involved being armed would frustrate the goals of Proposition 36, which he describes as "giv[ing] lesser sentences to the less dangerous felons while making sure that the truly dangerous felons were kept behind bars." Characterizing his crime as a "minor" offense and a "low-level felony," he contends that "[h]aving a weapon readily available for use generally does not render a person truly dangerous. " As the court in *People v. Elder*, observed, "a *felon's* possession of a gun is not a crime that is merely *malum prohibitum*. . . . '[P]ublic policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them.' [Citation.] Therefore, even if the great majority of commit-ments for unlawful gun possession come within our interpretation of this eligibility criterion, it would not run afoul of the voters' intent." (*People v. Elder, supra,* 227 Cal.App.4th at p. 1314; see also *People v. Blakely*,

supra, 225 Cal.App.4th at p. 1057 ["[T]he electorate's intent was not to throw open the prison doors for all third strike offenders whose current convictions were not for serious or violent felonies, but only for those who were perceived as nondan-gerous or posing little or no risk to the public. A felon who has been convicted of two or more serious and/or violent felonies in the past, and most recently had a firearm readily available for use, simply does not pose little or no risk to the public" (italics omitted)].) We find persuasive the reasoning of the courts that have overwhelmingly rejected the contention that an armed felon poses little or no risk to the public. Accordingly, we conclude the trial court did not err in denying appellant's petition for recall of his sentence and resentencing.

DISPOSITION

The trial court's order is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.