

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

ANTHONY JOEL WILLIAMS,

Defendant and Appellant.

B277376

(Los Angeles County  
Super. Ct. No. YA022695)

APPEAL from a judgment 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.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Assistant Attorney  
General, Noah P. Hill and Lindsay Boyd, Deputy Attorneys  
General, for Plaintiff and Respondent.

Appellant Anthony Joel Williams challenges, pursuant to Proposition 36, the trial court's denial of his petition for recall of his indeterminate life sentence. The trial court found that he was ineligible for resentencing because he was armed during the commission of his crimes. (See Pen. Code §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)<sup>1</sup> He contends that his conviction for possession of a firearm by a felon does not bar him from relief under Proposition 36. We disagree and affirm.

### **FACTS AND PROCEEDINGS BELOW**

In 1995, a jury found Williams guilty of possession of a firearm by a felon, in violation of former section 12021, subdivision (a).<sup>2</sup> The jury also found that Williams had two prior convictions for offenses defined as strikes in sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d). Accordingly, the court sentenced him under the "Three Strikes" law to an indeterminate term of 25 years-to-life.

In 2012, the people of California voted to enact Proposition 36, which provides for relief from indeterminate life sentences under the Three Strikes law for defendants currently serving sentences for nonviolent, nonserious felonies. (§ 1170.126.) On November 26, 2012, Williams filed a petition for recall of his sentence pursuant to this provision.

The district attorney opposed Williams's petition on the ground that Williams was ineligible for relief because he was armed during the commission of his offense. (See § 1170.126, subd. (e)(2).) Williams filed a reply brief and attached transcripts of his 1995

---

<sup>1</sup> Unless otherwise specified, all further statutory references are to the Penal Code.

<sup>2</sup> In 2010, the Legislature repealed section 12021 and replaced it without substantive change with section 29800.

trial, along with a copy of our unpublished opinion affirming his conviction.

In our opinion, we described the facts of the case as follows: “On January 16, 1995, the police were summoned to the Hawthorne apartment where [Williams] was staying after receiving complaints of a domestic dispute. Inside, the police found a loaded sawed-off shotgun.” The transcripts show that during the trial, a police officer testified that he observed Williams seated in a chair in the living room of the apartment, and later observed a sawed-off shotgun lying on the floor immediately adjacent to the chair. A woman who lived at the apartment testified that the gun was located underneath the chair, rather than beside it. A second police officer testified that he questioned Williams after his arrest. According to this officer, Williams said that a friend had left the gun at the apartment two months earlier. When the friend was arrested and did not come back to reclaim the gun, Williams elected to keep it for protection.

The trial court, after considering the materials both sides submitted, determined that Williams was ineligible for relief under Proposition 36 because he was armed during the commission of his most recent offense.

## **DISCUSSION**

Under section 1170.126, an inmate serving an indeterminate life sentence under the Three Strikes law “upon 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, may file a petition for a recall of sentence.” (*Id.*, subd. (b).) Subdivision (e)(2) of section 1170.126 creates an exception, such that inmates serving a sentence for an offense described in section 667, subdivision (e)(2)(C) are not eligible for resentencing. Among the offenses described in section 667,

subdivision (e)(2)(C) are those in which “[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.” (*Id.*, subd. (e)(2)(C)(iii) (subdivision (iii))).

The offense for which Williams is currently imprisoned, possession of a firearm by a felon, is not defined as a serious or violent felony. (See §§ 667.5, subd. (c), 1192.7, subd. (c).) Nevertheless, the trial court found Williams ineligible for resentencing under section 1170.126 on the ground that he was armed with a firearm during the commission of the offense.

A person is “armed with a firearm” if he has “a firearm available for use, either offensively or defensively.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); accord *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793 (*Brimmer*); *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).) The record demonstrates unequivocally that Williams was armed, in that he had a gun within reach either beside or below his chair at the time the police officer first entered the apartment.<sup>3</sup>

Williams contends that this does not preclude him from eligibility for resentencing. He argues that the “language of the statute suggests that the factors listed in subdivision (iii) must attach to the current offense as an addition and not just be an element of the current offense.” Williams notes that subdivision (iii) is worded differently from the two preceding subdivisions. In section 667, subdivision (e)(2)(C)(i), the voters barred relief for defendants whose “current offense is a controlled

---

<sup>3</sup> In determining whether a defendant was ineligible for Proposition 36 relief because of the circumstances of his offense, a court may consider the record of the case, including the facts as stated in the appellate decision. (*Brimmer, supra*, 230 Cal.App.4th at pp. 800-801.)

substance charge” involving large quantities of certain drugs. In section 667, subdivision (e)(2)(C)(ii), they barred relief for defendants whose “current offense is a felony sex offense, . . . or any felony offense that results in mandatory registration as a sex offender.” According to Williams, by using the language “[d]uring the commission of the current offense” in subdivision (iii) in place of “[t]he current offense is,” as in the two preceding subdivisions, the voters signaled an intent to forbid relief not on the basis of the elements of the current offense, but rather on additional factors separate from the elements of the offense themselves.

Even if we accept for the sake of argument that Williams’s analysis is correct, it does not follow that he was therefore eligible for relief under Proposition 36. At the time Williams was convicted, section 12021, subdivision (a)(1) provided that “[a]ny person who has been convicted of a felony under the laws of . . . the State of California . . . who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.”

This statute did not include as an element a requirement that the defendant be armed. Indeed, a defendant may be guilty of illegal possession of a firearm through constructive possession, or in other words “ ‘knowingly exercis[ing] a right to control the prohibited item, either directly or through another person.’ ” (*Brimmer, supra*, 230 Cal.App.4th at p. 795.) A parolee might be guilty of illegal possession of a firearm if police find a weapon in his home during a search, but he would not have been armed with the weapon if it was not readily available for him to use. (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) Thus, being armed was not an element of the offenses for which Williams was convicted.

Williams argues that subdivision (iii) requires that there be a facilitative connection between the defendant’s arming and the commission of the current offense. In other words, he argues that, for purposes of the statute, a defendant was not armed “[d]uring

the commission of the current offense” (subdivision (iii)) unless being armed aided him in committing the current offense. We are not persuaded. As the court reasoned in *Osuna*, the language of subdivision (iii) requires only that the defendant be armed at the time of the current offense, not that the arming facilitated the offense. (*Osuna, supra*, 225 Cal.App.4th at p. 1032.)

It is consistent with the voters’ intent in enacting Proposition 36 to draw a distinction between the illegal constructive possession of a firearm and actual possession in which the defendant has a weapon readily available for use. After reviewing the text of Proposition 36 and the arguments its proposers made on its behalf, the court in *Osuna, supra*, 225 Cal.App.4th at p. 1038, concluded, “[i]t is clear the electorate’s intent was not to throw open the prison doors to *all* third strike offenders whose current convictions were not for serious or violent felonies, but only to those who were perceived as nondangerous 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. ‘[T]he threat presented by a firearm increases in direct proportion to its accessibility. Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.’ ”

For these reasons, we reach the same conclusion as all published cases that have considered this issue: A defendant is ineligible for resentencing under Proposition 36 if he was armed at the time he committed a felony for illegal possession of a firearm. (See *Brimmer, supra*, 230 Cal.App.4th 782; *Osuna, supra*, 225 Cal.App.4th 1020; *White, supra*, 223 Cal.App.4th 512; *People v. Blakely* (2014) 225 Cal.App.4th 1042; *People v. Elder* (2014) 227 Cal.App.4th 1308; *People v. Hicks* (2014) 231 Cal.App.4th 275.)

Consequently, the trial court did not err in denying Williams's petition for recall of his sentence.

**DISPOSITION**

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.