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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.

ANDRE GUSTAVE,

Defendant and Appellant.

B276573

(Los Angeles County  
Super. Ct. No. YA026200)

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

California Appellate Project, Jonathan B. Steiner and 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.

Defendant Andre Gustave was convicted of possession of a firearm by a felon (Pen. Code,<sup>1</sup> former § 12021, subd. (a)(1)) in 1996. After the trial court found true allegations that he had suffered three prior convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), he was sentenced to a prison term of 25 years to life plus one year for a prior prison term enhancement (§ 667.5, subd. (b)).

In February 2013, defendant filed a petition for recall of sentence under section 1170.126 (Proposition 36). The trial court denied the petition, and defendant appeals. We affirm the order.

## **BACKGROUND**

In our opinion affirming defendant's conviction for possession of a firearm by a felon, we described the facts of his offense as follows:

“Albert Ortiz testified that he is a detective with the Los Angeles County Sheriff's Department. On October 7, 1995, he was a patrol deputy with 10 years' experience. He was in possession of a ‘Ramey’ arrest warrant for [defendant], who was suspected of having committed robberies in the area. Other officers accompanied Detective Ortiz to the residence. When Ortiz was across the street from [defendant's] house, he got a radio call from Detective Decker, who was outside the residence. Decker told him he had just spoken to two women coming out of the residence, one of whom said she was [defendant's] sister-in-law, Sherril Lyn White, and that she also lived there.

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

“The women told Decker that [defendant] was inside the house. White said that the front door to the house was open, the screen door was unlocked, and they could go inside.

“Ortiz and five or six other officers, including Decker, then approached the house and entered through the open front door. Ortiz believed that one of the officers shouted, ‘Sheriff’s Department’ as they entered, although this was not noted in his police report. The officers went through the front door, into a living room. From there, they could see an open bedroom door. As they entered that bedroom, they yelled at defendant, who was lying on a bed, that they were from the sheriff’s department.

“[Defendant] appeared to be sleeping. He was ordered to raise his hands. He raised his right hand, but his left hand remained under his pillow. After repeated instructions, he raised both hands, and the officers saw the butt of a gun protruding from beneath the pillow. [Defendant] was arrested and the gun retrieved.”

At the hearing to determine defendant’s eligibility for resentencing under section 1170.126, the People submitted several documents from defendant’s case: the abstract of judgment, our unpublished opinion affirming defendant’s conviction, a summary of witness testimony, a portion of testimony from defendant’s preliminary hearing, and portions of testimony from the trial. Based upon the evidence presented, the trial court found by a preponderance of the evidence and beyond a reasonable doubt that defendant was statutorily ineligible for recall and resentencing under section 1170.126 because

during the commission of the current offense, defendant was armed with a firearm. The court therefore denied defendant's petition.

## DISCUSSION

Section 1170.126 provides that an offender serving a Three Strikes sentence may be eligible for resentencing where the current felony conviction is not a serious or violent felony. (*People v. Johnson* (2015) 61 Cal.4th 674, 681.) However, an offender is statutorily ineligible for resentencing 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.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2); *People v. Johnson, supra*, 61 Cal.4th at p. 681.)

Defendant contends on appeal that rules of statutory construction compel the conclusion that Proposition 36's exclusion from resentencing for felons who are armed during the commission of the underlying offense applies only where the arming facilitates commission of that offense or an additional offense, and not when the firearm is merely available for use. We disagree.

“‘Armed with a firearm’ has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) It is the availability of and ready access to the weapon that constitutes arming. (*People v. White* (2014) 223 Cal.App.4th 512, 524, 527 [armed-with-a-dangerous-weapon exclusion does not require that the arming be anchored or tethered to an offense that does not include simple

possession].) Obviously, the threat presented by a firearm increases in direct proportion to its accessibility; a firearm that is available for use as a weapon creates the danger that it will be used. (*People v. White* (2016) 243 Cal.App.4th 1354, 1363.)

Here, the record establishes that at the time of his arrest for possession of a firearm by a felon, defendant was armed with a firearm, because he had ready access to the weapon, which was under his pillow while he was lying on the bed. Therefore, the trial court properly found that he was ineligible for resentencing under section 1170.126. (*People v. White, supra*, 223 Cal.App.4th at p. 519 [where the record of conviction establishes that the defendant was convicted of possession of a firearm by a felon and was armed with the firearm during commission of that offense, “the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief” under section 1170.126].)

As defendant concedes, many courts of appeal have rejected his argument that the armed-with-a-firearm exclusion cannot apply to a conviction for possession of a firearm by a felon. (See, e.g., *People v. White, supra*, 243 Cal.App.4th at pp. 1360-1365; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-285; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1029-1038; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057; *People v. White, supra*, 223 Cal.App.4th at pp. 519, 523-524.) We agree with the reasoning of these

decisions, and conclude that the trial court properly denied defendant's petition to recall his sentence.

**DISPOSITION**

The order denying the petition to recall the sentence is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.