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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. NATHANIEL D. SMITH, Defendant and Appellant.	B277237 (Los Angeles County Super. Ct. No. GA023598)

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.

Kamala Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah Hill and Iliana Hersovitz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Nathaniel Smith was convicted in 1995 of possession of a firearm by a felon. Based on his prior convictions, he was sentenced to 25 years to life in prison as a third strike offender. He now appeals from the postjudgment order denying his petition for resentencing under Penal Code section 1170.126,[1] enacted by Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36). The trial court found defendant was "armed" during the commission of his underlying crime and therefore was ineligible for resentencing under Proposition 36. We reject his challenge to that ruling and affirm the order.

FACTUAL AND PROCEDURAL HISTORY

In *People v. Smith* (February 26, 1997, B098829 [nonpub. opn.]), we affirmed defendant's current conviction and described the following underlying facts: On April 1, 1995, police made a traffic stop of a car driven by defendant. As they prepared to conduct a pat-down search of defendant, he spun away, causing a gun in his possession to fall to the ground.

On November 14, 1995, a jury convicted defendant of possession of a firearm by a felon in violation of former section 12021, subdivision (a)(1).[2] Defendant admitted two prior convictions for robbery (§ 211), which qualified as serious or violent felonies under the Three Strikes law. (See §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) Consequently, the trial court

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[1] All further code citations are to the Penal Code unless otherwise indicated.

[2] Effective January 1, 2012, former section 12021, subdivision (a) was repealed and reenacted without substantive change as section 29800, subdivision (a). (Stats. 2010, ch. 711, § 4.) All further references to section 12021 are to the former version.

sentenced defendant to an indeterminate prison term of 25 years to life. (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2).)

We affirmed defendant's conviction in December 1995.

In November 2012, voters adopted Proposition 36, which prospectively limited the imposition of indeterminate life sentences under the Three Strikes law by amending sections 667 and 1170.12. Prior to Proposition 36, a defendant with two or more prior convictions for serious or violent felonies (see §§ 667.5, 1192.7) who also was convicted of any new felony was subject to an indeterminate life sentence. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Pursuant to Proposition 36, life sentences are reserved "for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Ibid*.)

Proposition 36 also established a postconviction relief process "whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood*, *supra*, 213 Cal.App.4th at p. 168.) Pursuant to section 1170.126, subdivision (e)(2), an inmate is ineligible for resentencing if, "during the commission" of the underlying 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), 1170.126, subd. (e)(2).)

In March 2013, defendant filed a petition requesting recall of his sentence pursuant to section 1170.126. In August 2016,

the trial court denied the petition, finding defendant ineligible for resentencing under Proposition 36 because he was "armed with a firearm" "[d]uring the commission of the current offense." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e).) Specifically, the court found that "a loaded firearm fell from defendant's waistband as he fled from the police on foot."

Defendant timely appealed from the order denying his petition for resentencing.

DISCUSSION

Defendant asserts the trial court erred in concluding that he was "armed" during the commission of his underlying offense, arguing that one cannot be armed with a firearm during the commission of the crime of possession of the same firearm. We follow the majority of decisions in rejecting this argument.

Defendant asserts that the arming requirement must be "separate" from, but "tethered" to, the underlying offense, such that the weapon has a "'facilitative nexus' to the commission of the crime." Consequently, he argues, a finding that he was armed cannot be based on an underlying conviction for being a felon in possession of a firearm, because the "arming is an element of the offense." He acknowledges that appellate courts consistently have rejected this argument under the same circumstances. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029-1032 (*Osuna*) [conviction for possession of a firearm can constitute being "armed" with a firearm for Proposition 36 eligibility purposes]; *People v. White* (2014) 223 Cal.App.4th 512, 524–527 (*White*) [same]; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051–1057 [same]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312–1314 [same]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793–799 [same]; *People v. Hicks* (2014) 231

Cal.App.4th 275, 283–284 [same]; *People v. White* (2016) 243 Cal.App.4th 1354, 1362–1363 [same].) He argues these cases were wrongly decided. We disagree.

"Armed" with a firearm or other deadly weapon "has been statutorily defined and judicially construed to mean having a [weapon] available for use, either offensively or defensively." (*Osuna, supra*, 225 Cal.App.4th at p. 1029, citing § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) [construing arming enhancement in § 12022].) We presume the electorate intended "armed" with a deadly weapon to have this meaning under Proposition 36. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029, citing *People v. Weidert* (1985) 39 Cal.3d 836, 844 [""The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted' . . . [and] [t]his principle applies to legislation enacted by initiative."].) Following this construction, courts uniformly have held that the armed-with-a-firearm exclusion applies where there is a "temporal nexus between the arming and the underlying felony, not a facilitative one," in other words, where the record indicates the defendant was in actual physical possession of the weapon. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032 [record showed fleeing defendant was observed holding handgun that was discovered during subsequent search of nearby house from which he emerged]; see also *White, supra*, 223 Cal.App.4th at p. 524 [record showed defendant was observed tossing away pair of rolled-up sweatpants containing handgun during police pursuit]; *People v. Brimmer, supra*, 230 Cal.App.4th at p. 796 [record showed defendant was personally armed with unloaded shotgun while arguing with his girlfriend].)

Here, defendant does not challenge the trial court's factual finding that he had a firearm available for use at the time he committed the underlying offense. Rather, he maintains something more is required to establish the "armed" exclusion. Relying on *Bland, supra*, 10 Cal.4th at p. 997, he argues the exclusion should be interpreted to disqualify an inmate from resentencing only if the arming is "tethered" to or has some "'facilitative nexus'" with a current offense. This cannot occur where the underlying crime is a possessory offense, as having a gun available does not facilitate the commission of the crime of possession of a firearm by a felon.

Bland involved a sentencing enhancement that applies where a defendant was "armed with a firearm in the commission" of a felony drug possession offense. (§ 12022, subd. (c).) The *Bland* court interpreted the phrase "armed with a firearm in the commission" of felony drug possession as requiring evidence of a "nexus or link between the firearm and the drugs." (*Bland, supra*, 10 Cal.4th at p. 1002.) Appellate courts have routinely refused to apply this interpretation to the "armed" requirement under Proposition 36. As the *Osuna* court explained, the construction of section 12022 requiring a "facilitative nexus" between the arming and an underlying felony is specific to the "imposition of an arming enhancement—an additional term of imprisonment added to the base term, for which a defendant cannot be punished until and unless convicted of a related substantive offense. [Citations.]" (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) The court also reasoned that "unlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), [Proposition 36] 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.]" (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032; accord *People v. Brimmer, supra*, 230 Cal.App.4th at pp. 798-799; *People v. Hicks, supra*, 231 Cal.App.4th at pp. 283-284; *People v. White, supra*, 243 Cal.App.4th at pp. 1362-1363.)

We agree with the reasoning of the *Osuna* line of cases. We further reject defendant's suggestion that this outcome is inconsistent with the intent of the electorate in passing Proposition 36 to reduce sentences for "relatively minor" offenses such as firearm possession. "It is clear the 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 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.' [Citation.]" (*People v. Blakely, supra*, 225 Cal.App.4th at p. 1057.)

Thus, we conclude that the trial court did not err in finding that defendant was armed with a firearm when he committed the

felon-in-possession offense, and for that reason was ineligible for resentencing.

DISPOSITION

Affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.