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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. WALTER MORRISON, Defendant and Appellant.	B277114 (Los Angeles County Super. Ct. No. YA024145)

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 D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Walter Morrison, who in 1996 was convicted of possession of a firearm by a felon and sentenced to 25 years to life in prison, appeals from an order denying his petition to recall the sentence pursuant to Penal Code section 1170.126.[1] He contends the trial court erred in finding him ineligible for resentencing because he had been armed with a firearm during the commission of his final strike offense. We find no error and affirm.

BACKGROUND

On the evening of May 13, 1995, Los Angeles deputy sheriffs responding to a gang disturbance saw Morrison and another individual run into an apartment complex. The deputies chased the two individuals up a flight of stairs. As the individuals tried to get into an apartment, the deputies saw Morrison look back over his shoulder, reach toward his waist, and then pitch a gun down the hallway. A loaded .357 Magnum was recovered from the hallway.

At trial, Morrison was found guilty of possession of a firearm by a felon (former § 12021.1, subd. (a)(1)), and the jury found true allegations that he had four prior "strike" convictions, including two convictions for robbery, a conviction for possession of a firearm by a felon, and a conviction for possession of cocaine for sale. The trial court sentenced him under the "Three Strikes" law to 25 years to life in prison and imposed a sentence enhancement of 3 years for prior prison terms pursuant to section 667.5, subdivision (b).

In January 2013, Morrison filed a petition to recall his sentence under the Three Strikes Reform Act of 2012, added by Proposition 36 and approved by the voters on November 6, 2012,

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[1] All further statutory references will be to the Penal Code.

which permits an inmate serving an indeterminate life sentence under the Three Strikes law for a nonviolent, nonserious felony to seek a new, lesser sentence, unless resentencing would pose an unreasonable risk to public safety. (§ 1170.126, subds. (b), (e), (f).) After reviewing the record of conviction, including the trial transcript and this Court's opinion affirming Morrison's conviction (*People v. Morrison* (Aug. 20, 1997, B102553 [nonpub. opn.]), the trial court found Morrison was ineligible for resentencing because he had been armed with a firearm during the commission of his offense.

Morrison timely appealed.

DISCUSSION

Morrison contends he is eligible for resentencing. We disagree.

Section 1170.126 was added as part of the Three Strikes Reform Act. (Voter Information Guide, text of Prop. 36, § 6, pp. 109-110.) Among its stated purposes, as explained to voters, was to require "life sentences only when a defendant's current conviction is for a violent or serious crime" and to ensure "that repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence." (*Id.*, § 1, p. 105.) In accordance with these goals, section 1170.126 permits an inmate serving an indeterminate life sentence under the previous version of the Three Strikes law to petition for recall of the sentence and resentencing to a term that would have been imposed under the revised law.

But subdivision (e)(2) of section 1170.126 provides that an inmate is ineligible for resentencing if the current sentence was imposed for an offense described in subdivision (e)(2)(C) of section

667. (§ 1170.126, subd. (e)(2); *People v. Hicks* (2014) 231 Cal.App.4th 275, 282.)[2] Among the offenses described in subdivision (e)(2)(C) of section 667 is any offense during the commission of which "the defendant . . . was armed with a firearm or deadly weapon . . . ." (§ 667, subd. (e)(2)(C)(iii).)[3]

Where "the record shows that a defendant convicted of possession of a firearm was armed with the firearm during the commission of that offense, the armed with a firearm exclusion applies and the defendant is not entitled to resentencing" under Proposition 36. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 797; accord *People v. White* (2016) 243 Cal.App.4th 1354, 1363-1365; *People v. Hicks*, *supra*, 231 Cal.App.4th at pp. 283-284; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314, 1317; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030-1032; *People v. White* (2014) 223 Cal.App.4th 512, 525.) Here, Morrison was armed with a gun during the commission of his possession offense, which sufficed for the firearm exclusion to apply.

Morrison argues that having been armed during the commission of his offense (possession of a firearm by a felon) does

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[2] Subdivision (e)(2) of section 1170.126 provides in pertinent part that an inmate is eligible for resentencing if the "inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 . . . ."

[3] Subdivision (e)(2)(C)(iii) of section 667 disqualifies a defendant from relief under Proposition 36 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."

not disqualify him from resentencing under Proposition 36 because being armed is an element of the offense. He argues the armed with a firearm exclusion applies only when being armed is "tethered" to another offense and has a "facilitative nexus" to that other offense. The argument is without merit.

Contrary to Morrison's contention, being armed with a firearm is not an element of possession of a firearm by a felon. (See *People v. Brimmer*, *supra*, 230 Cal.App.4th at pp. 795, 799.) "A defendant possesses a weapon when it is under his dominion and control." (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1083.) "A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) "A firearm can be under a person's dominion and control without it being available for use. For example, suppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm." (*People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1030.) That is, whether a felon in possession of a firearm was armed with the firearm at the time of the offense depends on the specific circumstances. (See *ibid.*) Here, Morrison had a loaded .357 Magnum on his person as he was chased by deputies. Thus, at the time that he possessed the firearm, Morrison also had it readily available for use. He was therefore "armed" within the meaning of Proposition 36, which renders him ineligible for resentencing. The trial court correctly denied his recall petition.

DISPOSITION

The order dismissing Morrison's petition is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.