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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. MONROE ROBERT ROSS, Defendant and Appellant.	B277187 (Los Angeles County Super. Ct. No. YA020903)

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

Jonathan B. Steiner, Executive Director, Richard B. Lennon, Staff Attorney, California Appellate Project, 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 Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Monroe Robert Ross argues the trial court erred by denying his petition for recall of his indeterminate life sentence pursuant to Proposition 36, the Three Strikes Reform Act of 2012. The trial court determined defendant was ineligible for recall and resentencing because he was armed with a firearm during the commission of the subject offense. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 6, 1994, police officers responded to a call reporting shots fired at a bar. Defendant and another man emerged from a crowd that had assembled near the scene. Defendant was ordered by an officer to approach and kneel. Instead, defendant, who was holding a gun, walked to the front of a nearby car and made a downward motion with his hand. He started to approach the officer, but then fled and was apprehended. A loaded .38-caliber revolver was found in the gutter next to the car.

Defendant was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1))[2] and the trial court found he had suffered two prior "strikes" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced under the Three Strikes law to a term of 25 years to life. We affirmed the judgment of conviction in *People v. Ross* (Jun. 30, 1997, B104360) (nonpub. opn.) but remanded the matter to the superior court so that it could exercise its discretion whether to strike the prior "strike" conviction allegations in

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[1] Unless otherwise noted, all further statutory references are to the Penal Code.

[2] Former section 12021, subdivision (a)(1) was repealed as of January 1, 2012, and reenacted without substantive change as section 29800, subdivision (a)(1). (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2.) For convenience and brevity, because defendant was convicted under the repealed statute, we refer to former section 12021 in this opinion as section 12021.

light of *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. Following remand, the trial court determined that defendant's prior "strikes" should not be stricken. Defendant appealed again, and we affirmed. (*People v. Ross* (Oct. 6, 1999, B124142) [nonpub. opn.].)

In January 2013, defendant filed a petition for recall and resentencing. The trial court denied the petition in August 2016. Defendant timely appealed from the trial court's order.

DISCUSSION

Under section 1170.126, subdivision (b), 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 . . . ." Subdivision (e)(2) of section 1170.126 limits those inmates eligible for resentencing to those whose "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 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." The referenced offenses for which resentencing is not available include 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." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii) (hereinafter referred to collectively as "subdivision (iii)").)

The trial court here found defendant ineligible for recall and resentencing under section 1170.126 on the ground that during the commission of the offense at issue (possession of a firearm by a felon) defendant was armed with a firearm.

Defendant argues that the trial court erred because the factors listed in subdivision (iii) "must attach to the current offense as an addition and not just be an element of the offense." He notes that other offenses which render an inmate ineligible for resentencing are referred to with the phrase "[t]he current offense is" (see §§ 667, subd. (e)(2)(C)(i) [specific controlled substance offenses], (ii) [specific sex offenses], 1170.12, subd. (c)(2)(C)(i), (ii)), while subdivision (iii) begins "[d]uring the commission of the current offense." Based on this distinction, defendant contends that if the statute were intended to exclude the offense of possession of a firearm by a felon, the offense would have been specifically enumerated.

We disagree. First, defendant is incorrect that being "armed with a firearm," as stated in subdivision (iii), is an element of the subject crime. When defendant 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 that a defendant be "armed." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029-1030 (*Osuna*).) "'Armed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively." (*Id.* at p. 1029.) In contrast, a felon could be in possession of a firearm if the firearm was in the felon's home when he was not there, but he would not be armed. (*Id.* at p. 1030.) Here, defendant was armed (and did not merely possess a firearm) because he had a gun in his hand, making it available for offensive or defensive use. Thus, based on the text of subdivision (iii), defendant was not eligible for resentencing.

Second, the history of Proposition 36 does not support defendant's contention. The phrase "during the commission of the current offense" in subdivision (iii) indicates that being armed must accompany an offense other than being a felon in possession of a firearm. In Proposition 36, "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. Significantly, however, those categories, while broad, are not unlimited. Voters easily could have expressly disqualified any defendant who committed a gun-related felony or who possessed a firearm, had they wanted to do so. This is not what voters did, however." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1055 (*Blakely*).) The *Blakely* court examined Proposition 36 ballot materials and explained how the "materials expressly distinguished between dangerous criminals who were deserving of life sentences, and petty criminals (such as shoplifters and those convicted of simple drug possession) who posed little or no risk to the public and did not deserve life sentences." (*Id.* at pp. 1056-1057.) Since 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," he is the type of dangerous criminal deemed ineligible for resentencing under Proposition 36. (*Blakely,* at p. 1057.)

Consistent with this analysis, courts have roundly rejected defendant's argument that being armed must be "tethered" to or have a "facilitative nexus" with an offense. (See *Osuna, supra,* 225 Cal.App.4th 1020, 1029-1032;

People v. White (2014) 223 Cal.App.4th 512, 524-527; *Blakely, supra,* 225 Cal.App.4th 1042, 1051-1057; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793-799; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363.) As explained in *Osuna*, the phrase "during the commission of the current offense" requires no more than a "temporal nexus between the arming and the underlying felony, not a facilitative one." (225 Cal.App.4th at p. 1032.)

Further, defendant's argument that a "facilitative nexus" is required by the holdings in *People v. Bland* (1995) 10 Cal.4th 991 and *People v. Pitto* (2008) 43 Cal.4th 228 misconstrues these opinions. Neither *Bland* nor *Pitto* examined subdivision (iii). Instead, both analyzed how a sentence enhancement under section 12022 for being "armed" "in the commission of" a specified offense applied in the context of a possessory drug offense. (*Bland,* at p. 1002; *Pitto,* at pp. 239-240.) As explained in *Pitto*, the section 12022 enhancement applies when "(1) a defendant, while perpetrating a drug offense, knows of the presence and location of a firearm near the drugs, (2) the proximity of the gun to the drugs is not the result of mere accident or happenstance, and (3) the defendant is in a position to use the gun offensively or defensively to aid in the commission of the offense." (*Pitto*, at p. 240.)

This holding—relating to the proximity of a gun to drugs for purposes of a sentence enhancement—has no relevance here. Instead, the issue in this matter is whether defendant was armed with a firearm during the commission of the section 12021 offense. Because as explained above, defendant not only possessed a firearm, but was armed with a firearm during the commission of the offense, the trial court properly determined defendant was ineligible for recall and resentencing under section 1170.126.

DISPOSITION

The order denying the petition for recall and resentencing is affirmed.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.