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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SERGIO PEREZ DESANTIAGO, Defendant and Appellant.	B268337 (Los Angeles County Super. Ct. No. LA055007)

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

Richard B. Lennon and Suzan E. Hier, 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, Esther P. Kim and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Sergio Perez DeSantiago was convicted in 2008 of being a felon in possession of a firearm. Based on his prior convictions, he was sentenced to a term of 25 years to life in prison as a third strike offender. Following the passage of Proposition 36, the Three Strikes Reform Act of 2012 (the Act), appellant filed a petition requesting recall of his sentence pursuant to Penal Code section 1170.126.[1] The trial court denied the petition, finding appellant ineligible for resentencing because he was "armed with a firearm" during the commission of the felon-in-possession offense. We reject appellant's challenge to that ruling and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

In *People v. DeSantiago* (Feb. 11, 2010, B212783 [nonpub. opn.] (*DeSantiago*)), we affirmed appellant's current conviction and described the underlying facts as follows:

"On February 26, 2007, Los Angeles Police Officer Rigoberto Vasquez was the passenger in a patrol vehicle responding to a call of a shooting in the 14200 block of Tiara Street in Van Nuys. En route to the location, Officer Vasquez observed appellant walking toward the patrol car. Immediately upon making eye contact with the officer, appellant turned his face away. Appellant matched the description of a wanted no-bail parole suspect and the officer believed appellant was the suspect. Officer Vasquez's partner negotiated a U-turn and began traveling back to investigate. When Officer Vasquez exited his vehicle and ordered appellant to stop, appellant immediately began to run. Appellant scaled a six-foot wall and Officer

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Vasquez and his partner chased him. As appellant ran, he clutched his waistband, causing Officer Vasquez to believe appellant might be arming himself. Officer Vasquez then observed appellant toss a dark object and continue to run, crossing the street. Appellant then surrendered. After appellant was taken into custody, Officer Vasquez walked back to the area where he had seen appellant toss the object and located an unloaded handgun. A forensic examination revealed the weapon was operable. Gunshot residue was found on appellant's hands." (*DeSantiago*, *supra*, B212783, at p. 1.)

In September 2008, a jury convicted DeSantiago of being a felon in possession of a firearm (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). He admitted prior convictions for residential burglary (§ 459) and criminal threats (§ 422), 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 sentenced him to an indeterminate term of 25 years to life imprisonment. We affirmed the judgment on direct appeal. (*DeSantiago*, *supra*, B212783, at p. 9.)

In November 2012, voters adopted the Act, which prospectively limited the imposition of indeterminate life sentences under the Three Strikes law by amending sections 667 and 1170.12. Prior to the Act, 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.) The Act now reserves "the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor." (*Ibid.*) The Act 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.)" (*Id.* at p. 168.)

In January 2013, DeSantiago filed a petition requesting recall of his sentence pursuant to section 1170.126. In September 2015, the trial court denied the petition on the ground that DeSantiago was ineligible for resentencing under the disqualifying provisions of the Act because he was "armed with a firearm" "'[d]uring the commission of the . . . offense'" of being a felon in possession of a firearm. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), both cross-referenced in § 1170.126, subd. (e).) The court relied on several recent decisions in concluding that the armed-with-a-firearm exclusion applies to current convictions for being a felon in possession of a firearm. (See *People v. White* (2014) 223 Cal.App.4th 512 (*White*); *People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*); *People v. Elder* (2014) 227 Cal.App.4th 1308 (*Elder*).)

This timely appeal followed.

DISCUSSION

On appeal, DeSantiago argues the trial erred in finding him ineligible for resentencing under Proposition 36. At issue is the proper interpretation of the exclusion precluding resentencing if "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) We review de novo

issues of statutory interpretation. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) When interpreting a voter initiative, "we apply the same principles that govern statutory construction. [Citation.] Thus, 'we turn first to the language of the statute, giving the words their ordinary meaning.' [Citation.] The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme. [Citation.] When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo* (2000) 22 Cal.4th 681, 685.)

Appellant argues that the circumstance of being "armed with a firearm" under this exclusion "must attach to the current offense as an addition and not just be an element of the current offense." In other words, he maintains that one cannot be "armed with a firearm" during the commission of the current offense if the current offense is simple possession of a firearm. He acknowledges that appellate courts consistently have rejected this argument and held that the armed-with-a-firearm exclusion applies to the offense of being a felon in possession of a firearm. (See *Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1032; *White*, *supra*, 223 Cal.App.4th at pp. 524-527; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057 (*Blakely*); *Elder*, *supra*, 227 Cal.App.4th at pp. 1312-1314; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793-799 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 (*Hicks*); *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363 (*White*).) He argues these cases were wrongly decided. We disagree with his analysis for the reasons explained below.

I

"'[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm 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 firearm'" to have this meaning under Proposition 36. (*Osuna*, 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 to a conviction for being a felon in possession of a firearm whenever the record indicates the defendant was in actual physical possession of the weapon.[2] (See, e.g., *Osuna*, at p. 1030 [record showed fleeing defendant was observed holding handgun that was discovered during subsequent search of nearby house from which he emerged]; *White*, *supra*, 223 Cal.App.4th at p. 524 [record showed defendant was observed tossing away pair of rolled-up sweatpants

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[2] Because section 1170.126 does not require facts related to an inmate's eligibility for resentencing to be resolved by the verdicts or special findings rendered at trial, the trial court may independently examine the record of conviction to make determinations regarding those facts. (See *White*, *supra*, 223 Cal.App.4th at pp. 526-527; *Osuna*, *supra*, 225 Cal.App.4th at p. 1020; *Elder*, *supra*, 227 Cal.App.4th at pp. 1314-1316; *Brimmer*, *supra*, 230 Cal.App.4th at pp. 799-801; *Hicks*, *supra*, 231 Cal.App.4th at p. 286.)

containing handgun during police pursuit]; *Brimmer*, *supra,* 230 Cal.App.4th at p. 796 [record showed defendant was personally armed with unloaded shotgun while arguing with his girlfriend].)

The facts of this case are not distinguishable. The record shows appellant was observed tossing a dark object as he was running from a police officer. (*DeSantiago*, *supra*, B212783, at p. 1.) The officer discovered an unloaded handgun shortly thereafter in the location where he had seen appellant toss the object. (*Ibid.*) In addition to the officer's observation and subsequent discovery, the evidence also indicated that appellant had actually used the handgun because the weapon was operable and he had gunpowder residue on his hands. (*Ibid.*) Based on this record, it is clear that appellant had a firearm "available for use, either offensively or defensively" and was therefore "armed with a firearm" within the meaning of section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii). (See *Osuna*, *supra*, 225 Cal.App.4th at pp. 1029-1032.)

Appellant does not dispute that the record shows he had a "firearm available for use, either offensively or defensively." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029.) Rather, he maintains *Osuna* incorrectly interpreted the armed-with-a-firearm exclusion. Based on the "plain language of the statute" and "basic principles of grammar," he argues the exclusion "must attach to the current offense as an addition and not just be an element of the current offense." Relying on *Bland*, *supra*, 10 Cal.4th at page 997, he maintains 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 other than, or in addition to, the offense of possessing a firearm as a felon. We disagree.

As a preliminary matter, appellant incorrectly asserts that being armed with a firearm is an element of the offense of being a felon in possession of a firearm. (See *Blakely*, *supra*, 225 Cal.App.4th at p. 1052 [the elements of the offense are "conviction of a felony and ownership or knowing possession, custody, or control of a firearm . . . . [¶] A firearm can be under a person's dominion and control without it being available for use"]; *White*, *supra*, 223 Cal.App.4th at p. 524 ["while the act of being armed with a firearm . . . necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it"].) Thus, there are circumstances under which a third strike offender is eligible for resentencing even though he or she was not "armed with a firearm" during the commission of the felon-in-possession offense. (See *Blakely*, at p. 1052; *Osuna*, *supra*, 225 Cal.App.4th at p. 1030; *Elder*, *supra*, 227 Cal.App.4th at pp. 1313-1314.) This undermines appellant's assumption that the arming must attach to a separate offense and not just be an element of the current offense.

Courts consistently have rejected the argument that the arming must be "tethered" to or have a "'facilitative nexus'" with a separate offense. (See *Osuna, supra,* 225 Cal.App.4th at p. 1032; accord *Brimmer*, *supra*, 230 Cal.App.4th at pp. 798-799; *Hicks*, *supra*, 231 Cal.App.4th at pp. 283-284; *White*, *supra*, 243 Cal.App.4th at pp. 1362-1363.) As appellant notes, the *Osuna* court borrowed the judicial construction of "armed with a firearm" from *Bland*, *supra*, 10 Cal.4th at page 997. That case 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).) As discussed in *Osuna*, at p. 1030, the *Bland* court interpreted the phrase

"armed with a firearm" in section 12022 to mean that "the defendant has the specified weapon available for use, either offensively or defensively. [Citations.]" (*Bland*, at p. 997.) The court went on to note that "contemporaneous possession of illegal drugs and a firearm will satisfy the statutory requirement of being 'armed with a firearm in the commission' of felony drug possession only if the evidence shows a nexus or link between the firearm and the drugs." (*Id.* at p. 1002.) Based on this interpretation, appellant concludes that "when Proposition 36 uses the terms 'during the commission' and 'armed with a firearm' . . . it must be construed to require that the weapon be available for use in *furtherance of the commission of the offense* that is the subject of the recall petition."

The *Osuna* court rejected this argument, explaining that 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.) As the court explained "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon [former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)]. Thus, a defendant convicted of violating . . . section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no 'facilitative nexus' between the arming and the possession." (*Id.* at p. 1032.) 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,* at p. 1032.)

Defendant argues the *Osuna* court's analysis does not withstand scrutiny because there is no meaningful distinction between the use of the words "during" and "in" to support the conclusion that the armed-with-a-firearm exclusion only requires a temporal nexus between the arming and the possession offense. Although we agree that the two words often are used synonymously, courts applying the section 12022 sentencing enhancement have articulated a distinction. (See *In re Pritchett* (1994) 26 Cal.App.4th 1754, 1757 [rejecting an enhancement because "[a]lthough [defendant] used the shotgun as a club *during* his possession of it, he did not use it 'in the commission' of his crime of possession. . . . [U]sing it as a club in no way furthered the crime of possession."].) Further, we disagree with the contention that by borrowing a judicial construction of "armed with a firearm" from *Bland*, we are bound to that court's comprehensive interpretation of a sentencing enhancement statute. Here, our task is to determine the proper scope of an eligibility exclusion under Proposition 36. The issue is "not whether a defendant could or should be punished more harshly for a particular aspect of his or her offense, but whether, having already been found to warrant an indeterminate life sentence as

a third strike offender, he or she should now be eligible for a lesser term." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1054.)

II

Appellant also argues the plain language and structure of the Act's disqualifying provisions support his proposed interpretation of the exclusion. Section 1170.126, subdivision (e)(2) provides that an inmate is ineligible for relief if his or her sentence was imposed for any offense listed in clauses (i) to (iii) of section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C). Both clauses (i) and (ii) enumerate and cross-reference specific controlled substance and sex offenses using the language "the current offense is . . . ." (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) Clause (iii), the exclusion at issue here, does not enumerate specific offenses but states in full: "During 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).) Based on this distinction, appellant reasons that if the statute were intended to exclude the offense of felon in possession of a firearm, this offense would have been specifically enumerated. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 [the expression of some things in a statute necessarily means the exclusion of other things not expressed].) Instead, he maintains, the use of the phrase "during the commission" in clause (iii) indicates that there must be some other offense to which the arming is tethered.

We interpret this linguistic and structural distinction between the exclusions differently. Clause (iii) effectively functions as a catch-all provision to exclude violent or dangerous

third strike offenders from resentencing eligibility. (See §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) As the *Blakely* court explained, "[a]pparently recognizing the maxim *expressio unius est exclusio* alterius . . . 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." (*Blakely*, *supra*, 225 Cal.App.4th at p. 1055.)

Support for this interpretation is found in the ballot materials related to Proposition 36. The "OFFICIAL TITLE AND SUMMARY" stated that the initiative "[c]ontinues to impose life sentence penalty if third strike conviction was for certain nonserious, non-violent sex or drug offenses *or involved firearm possession.*" (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) official title and summary, p. 48, italics added.) The measure's proponents stated: "Prop. 36 requires that murderers, rapists, child molesters, *and other dangerous criminals* serve their full sentences. [¶] . . . [¶] Today, dangerous criminals are being released early from prison because jails are overcrowded with *nonviolent offenders who pose no risk to the public.* Prop. 36 prevents dangerous criminals from being released early. *People convicted of shoplifting a pair of socks, stealing bread or baby formula don't deserve life sentences.*" (Voter Information Guide, Gen. Elec., *supra*, rebuttal to argument against Prop. 36, p. 53, italics added & omitted.) Section 1 of the initiative measure provides the Act will "[m]aintain 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." (Voter Information Guide, Gen. Elec., *supra*, text of proposed laws, § 1, p. 105, italics added.)

These "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." (*Blakely*, *supra*, 225 Cal.App.4th at pp. 1056-1057.) The materials clearly indicate that the voters' 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." (*Id.* at p. 1057, italics omitted.) Despite appellant's argument that being a felon in possession of a firearm is a "relatively minor" offense and having a weapon readily available for use generally does not make a person truly dangerous, we believe the record shows he is the kind of third strike offender that Proposition 36 seeks to exclude from resentencing. "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." (*Ibid.*)

DISPOSITION

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

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.