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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JUAN ANTONIO ROBLES, Defendant and Appellant.	B288482 (Los Angeles County Super. Ct. No. KA036804)

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

Jonathan B. Steiner, Executive Director, and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Noah P. Hill, and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juan Antonio Robles appeals from the trial court's order denying his petition for the recall of his indeterminate life sentence under Proposition 36. The trial court found that he was ineligible for resentencing because he was armed during the commission of his offense. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)[1] Appellant contends that his conviction for possession of a firearm by a felon does not bar him from relief under Proposition 36. We disagree and affirm.

FACTS AND PROCEEDINGS BELOW

On July 6, 1997, a Baldwin Park police officer initiated a traffic stop in response to a citizen's complaint that one of the people in the car had displayed a gun at an apartment complex. Before the automobile stopped, the officer observed appellant, who was one of the passengers in the car, throw a small black object out of the passenger-side window. The officer subsequently recovered the object—a loaded .25 caliber semiautomatic handgun—that appellant had thrown out of the car. The police also recovered two small packets of methamphetamine from appellant's pants pocket. Appellant acknowledged that the handgun belonged to him and that he possessed it at the apartment complex but he claimed he did not point it at anyone. Appellant also acknowledged throwing it out the automobile window when he saw the officer approaching.

Appellant was charged and convicted of one count of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 1)[2], and one count of possession of methamphetamine

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

[2] In 2010, the Legislature repealed section 12021 and replaced it with section 29800.

(Health & Saf. Code § 11377, subd. (a); count 2). The jury found appellant had suffered two prior strike convictions pursuant to section 667, subdivision (b), and had served one prior prison term pursuant to section 667.5, subdivision (b). The trial court sentenced appellant to two concurrent terms of 25 years to life pursuant to the "Three Strikes" law (§ 1170.12, subds. (a)-(d)).

In December 2012, appellant filed a petition to recall his sentence under the provisions of Proposition 36 (§ 1170.126).[3] The district attorney opposed the petition. After holding an eligibility hearing, the trial court denied the petition, ruling that appellant was ineligible for resentencing because he was armed with a firearm during the commission of the offense of possession of a firearm by a felon (§§ 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2)).

Appellant filed a timely notice of appeal.

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[3] On November 6, 2012, California voters passed Proposition 36, the Three Strikes Reform Act of 2012 (the Act), which amended the Three Strikes law with respect to defendants whose current conviction (the offense for which the third-strike sentence was imposed) is for a felony that is neither serious nor violent. (*People v. Johnson* (2015) 61 Cal.4th 674, 679, 680-681 (*Johnson*).) The Act amended sections 667 and 1170.12, and added section 1170.126, subdivision (b), authorizing a prisoner serving a third-strike, indeterminate life sentence to petition the trial court for recall of the sentence and for resentencing as a second-strike offender. (*Johnson, supra*, 61 Cal.4th at pp. 679-680.)

DISCUSSION

Appellant argues that his conviction for possession of a firearm by a felon is not a crime excluded from eligibility for resentencing under Proposition 36, and, thus, the court erred when it deemed him ineligible. We disagree.

Under section 1170.126, 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 . . . may file a petition for a recall of sentence." (*Id.*, subd. (b).) Subdivision (e)(2) of section 1170.126 creates an exception, providing that an inmate serving a sentence for an offense described in section 667, subdivision (e)(2)(C) is not eligible for resentencing. Among the offenses described in section 667, subdivision (e)(2)(C) are 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." (*Id.*, subd. (e)(2)(C)(iii) (subdivision (iii)).)

The trial court found appellant ineligible for resentencing under subdivision (iii) because he was armed with a firearm during the commission of the firearm offense. Appellant does not deny he possessed a firearm. He contends, however, that possession of a firearm does not preclude him from eligibility for resentencing under the Act. Appellant argues that subdivision (iii) does not apply when being "armed" is an element of the offense; he insists that the arming factor "must attach to the current offense as an addition and not just be an element of the current offense." He also asserts that when Proposition 36 uses the terms "[d]uring the commission" and "armed with a firearm" in subdivision (iii), it must be construed to require that the weapon be available for use in furtherance of the commission of the current offense that is subject

of the recall petition. According to the appellant, the Act requires that the arming factor and the current offense be "separate, but 'tethered' such that the availability of the weapon facilitates the commission of the offense." He asserts that both the grammatical analysis and intent of the voters support this interpretation, and maintains that because the Act does not disqualify inmates serving sentences for mere gun possession, a "simple violation" of former Penal Code section 12021 is not covered.

We disagree. Appellant's underlying premise—that "arming" is an element of his current offense of firearm possession—is wrong. "[P]ossessing a firearm does not necessarily constitute being armed with a firearm." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052 (*Blakely*).) A defendant can constructively possess a firearm by knowingly exercising "dominion and control" over the firearm without actually possessing it. (*People v. Osuna (*2014) 225 Cal.App.4th 1020, 1030 (*Osuna*) ["firearm can be under a person's dominion and control without it being available for use"]; see also *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314 (*Elder*), italics omitted [observing that "not every commitment offense for unlawful possession of a gun necessarily involves being armed with the gun, if the gun is not otherwise available for immediate use in connection with its possession, e.g., where it is under a defendant's dominion and control in a location not readily accessible to him at the time of its discovery"].)

Indeed, appellate courts have consistently rejected appellant's interpretation of subdivision (iii) as requiring the arming be "tethered" or have some " ' "facilitative nexus" ' " to the charged crime. (See *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798 (*Brimmer*); *Elder, supra,* 227 Cal.App.4th at pp. 1312–1314; *Osuna, supra,* 225 Cal.App.4th at pp. 1030-1032; *People v. White* (2014) 223 Cal.App.4th 512, 525 (*White*).) As the court in *Osuna*

recognized, this interpretation of subdivision (iii) draws an analogy to the case law construing the section 12022, subdivision (a)(1) sentencing *enhancement* applicable when a person " 'is armed with a firearm "in the commission" of [a] felony.' " (*Osuna, supra,* 225 Cal.App.4th at pp. 1031-1032; see *Brimmer, supra,* 230 Cal.App.4th at pp. 794-795, italics omitted [holding that the section 12022 enhancement applies only "if the gun has a facilitative nexus with the underlying offense (i.e., it serves some purpose in connection with it)"]; accord, *People v. Bland* (1995) 10 Cal.4th 991, 1001-1003 (*Bland*).)

The analogy to the section 12022 sentencing enhancement, however, does not withstand scrutiny. Proposition 36 turns on whether the defendant was armed "[*d*]*uring* the commission of the current offense" (§§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii) & 1170.126, subd. (e)(2), italics added)—not, as with the sentencing enhancement, "*in* [its] commission" (§ 12022, subd. (a)(1), italics added). " 'During' " means " 'throughout the continuance or course of' or 'at some point in the course of.' [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna,* supra, 225 Cal.App.4th at p. 1032; see also *Elder, supra,* 227 Cal.App.4th at pp. 1312–1313 [noting "illogic" of conflating enhancement provision with Proposition 36's ineligibility provision].) As the court in *Osuna* explained, this difference in language is significant. Thus, the *Osuna* court concluded that the phrase " 'armed with a firearm' " in subdivision (iii) simply "mean[s] having a firearm available for use, either offensively or defensively." (*Osuna*, *supra*, at p. 1029.)

Here, appellant both possessed a firearm and had it available for use—a police officer observed appellant throw the loaded weapon out of the front passenger window—and, thus,

appellant was in actual, not constructive, possession of the firearm. Because the weapon was available for use at any time "during the commission" of the offense, appellant was clearly "armed" during the commission of the offense for the purposes of Proposition 36 and is thus ineligible for relief. (*Bland, supra,* 10 Cal.4th at pp. 1001-1003; see also *Osuna, supra,* 225 Cal.App.4th at pp. 1031-1032.)

Appellant acknowledges that appellate courts have consistently rejected his argument that the factors listed in subdivision (iii) must be tethered to another offense, and one cannot be "armed" while committing the crime of possession of the same weapon. He contends, however, that these cases were wrongly decided and invites us to hold that "armed" within the meaning of subdivision (iii) requires both that the firearm be available and have a facilitative nexus to the crime upon which the defendant has been sentenced. We join the other California courts in rejecting appellant's contention. (See *People v. Hicks* (2014) 231 Cal.App.4th 275 [holding that the inmate was ineligible for resentencing under the Act because he was armed at the time he committed the felony of illegal possession of a firearm]; accord, *Brimmer, supra,* 230 Cal.App.4th 782; *Elder, supra,* 227 Cal.App.4th 1308; *Osuna, supra,* 225 Cal.App.4th 1020; *Blakely, supra,* 225 Cal.App.4th 1042; *White, supra,* 223 Cal.App.4th 512.)

Finally, characterizing the former section 12021 as a "low-level felony," appellant further argues that it is inconsistent with the purpose of Proposition 36 to construe subdivision (iii) to deny relief to anyone who had access to a weapon during the commission of a nonviolent crime without requiring that such access be for the purpose of furthering another criminal act. We disagree. "In interpreting a voter initiative like [the Act], we apply the same principles that govern statutory construction." (*People v.*

Rizo (2000) 22 Cal.4th 681, 685.) " ' "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law." ' " (*Johnson, supra,* 61 Cal.4th at p. 682; *Blakely, supra,* 225 Cal.App.4th at p. 1053.)

Our reading of the law comports with the voters' intent. The intent underlying of Proposition 36 is "to provide resentencing relief to low-risk, nonviolent inmates serving life sentences for petty crimes, such as shoplifting and simple drug possession. (Voter Information Guide [(Gen. Elec. (Nov. 6, 2012)] text of Prop. 36, § 1, subds. (3), (4) & (5), p. 105.)" (*White, supra,* 223 Cal.App.4th at p. 526.) "It is clear the electorate's 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. 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." (*Osuna, supra,* 225 Cal.App.4th at p. 1038, italics omitted.) Although appellant argues that having a weapon readily available for use does not render a person truly dangerous, our Supreme Court has recognized, " 'a firearm that is available for use as a weapon creates the very real danger it will be used.' " (*Bland, supra,* 10 Cal.4th at p. 997; *Brimmer, supra*, 230 Cal.App.4th at p. 799.) Because appellant was armed with a firearm during the commission of his offense, he does not fall into the category of a low-risk, nonviolent offender, and his crime cannot be deemed a petty or minor crime for purposes of resentencing under the Act.

In view of the foregoing, we conclude the superior court properly determined that appellant is ineligible for recall and resentencing under Proposition 36.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

CURREY, J.*

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