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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY SIMONIAN,

Defendant and Appellant.

B270689

(Los Angeles County  
Super. Ct. No. GA037369)

APPEAL from an order of the Superior Court of Los Angeles County, Darrell S. Mavis, Judge. Reversed and remanded with directions.

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, Senior Assistant Attorney General, Noah P. Hill and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Danny Simonian appeals from an order denying his petition seeking to recall his sentence for false imprisonment and resentence him under the Three Strikes Reform Act of 2012, enacted by the voters as Proposition 36. The trial court summarily found Simonian ineligible for resentencing without stating any reason for its decision. Because Simonian sought resentencing for a qualified three-strike sentence and his petition listed only nondisqualifying prior offenses, we reverse and remand for the trial court to reconsider Simonian's petition.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1999 a jury convicted Simonian of false imprisonment (Pen. Code, § 236),<sup>1</sup> attempted carjacking (§§ 215, subd. (a), 664), attempted second degree robbery (§§ 211, 664), and providing false information to police (§ 148.9, subd. (a)). The trial court vacated the conviction for attempted second degree robbery as a lesser included offense of attempted carjacking.

Simonian had prior convictions in 1990 and 1992 for robbery, which is a serious felony under section 667, subdivision (a)(1). Therefore, both convictions qualified as strikes. The trial court sentenced Simonian as a third strike offender and imposed concurrent sentences of 25 years to life on his convictions for false imprisonment and attempted carjacking. The court stayed the sentence for attempted carjacking under section 654. The court imposed a suspended sentence for the misdemeanor of providing

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<sup>1</sup> Statutory references are to the Penal Code.

false information to the police. The court also imposed two consecutive terms of five years for each prior serious felony conviction for a total prison term of 35 years to life. We affirmed Simonian’s conviction and sentence with directions to correct the abstract of judgment. (See *People v. Simonian* (May 9, 2000, B133320) [nonpub. opn.].)

On January 21, 2016, over three years after the voters enacted Proposition 36, Simonian filed a petition for writ of habeas corpus in the trial court. Simonian’s petition asked the court to exercise its discretion under section 1385 to strike his prior convictions and to recall his sentence for false imprisonment and resentence him under Proposition 36. The trial court summarily denied the petition. With respect to Simonian’s request for recall of his sentence under Proposition 36, the court’s order states that Simonian is not “eligible for resentencing pursuant to Proposition 36” but provides no reason for this conclusion. Simonian timely appealed from the trial court’s order denying relief under Proposition 36.<sup>2</sup>

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<sup>2</sup> Ordinarily the denial of a petition for writ of habeas corpus is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; *Cox v. Superior Court of Amador County* (2016) 1 Cal.App.5th 855, 858.) Simonian’s petition, however, included a request for relief under Proposition 36. As the People acknowledge, Simonian “appeals only from the court’s order concluding [he] was ineligible for resentencing under Proposition 36,” and “an order denying a petition for recall of sentence pursuant to section 1170.126 is appealable.” (See *Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.)

## DISCUSSION

### A. *Proposition 36*

The voters approved Proposition 36 on November 6, 2012. (See *Teal v. Superior Court* (2014) 60 Cal.4th 595, 596.) Prior to the enactment of Proposition 36, the three strikes law (§§ 667, subds. (b)-(i), 1170.12) provided that an offender convicted of two prior serious or violent felonies was subject to an indeterminate life sentence upon conviction of a third felony. (*Teal*, at p. 596.) After the enactment of Proposition 36, such an offender is subject to an indeterminate life sentence only if the third felony is a serious or violent felony or where the offender is not eligible for a determinate sentence based on certain disqualifying factors. (*Teal*, at p. 597; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1137.) If the third felony is not a serious or violent felony, the court sentences the offender as though he or she has only one prior serious or violent felony conviction; i.e., as a second strike offender. (*Manning*, at pp. 1137-1138; see *People v. Conley* (2016) 63 Cal.4th 646, 653 [under Proposition 36's "revised penalty provisions, many third strike defendants are excepted from the provision imposing an indeterminate life sentence . . . and are instead sentenced in the same way as second strike defendants . . . : that is, they receive a term equal to 'twice the term otherwise provided as punishment for the current felony conviction'"].)

Proposition 36 also enacted section 1170.126, which establishes a procedure for an inmate serving an indeterminate life sentence for a third strike conviction that is not a serious or violent felony to file a petition to recall that sentence and to request resentencing. (*Teal, supra*, 60 Cal.4th at p. 597.) Section

1170.126, subdivision (b), provides that such inmates may file a petition within two years after the effective date of Proposition 36 or at a later date upon a showing of good cause. If the petitioner is eligible for resentencing and the trial court determines that resentencing the petitioner would not pose an unreasonable risk of danger to public safety, the court must resentence the petitioner as if he or she had only one prior serious or violent felony conviction. (§ 1170.126, subd. (f); *Manning, supra*, 226 Cal.App.4th at p. 1138; see *Conley, supra*, 63 Cal.4th at p. 653.)

An inmate is eligible for resentencing under section 1170.126, subdivision (e), if:

(1) the inmate is serving an indeterminate term of life imprisonment imposed under the three strikes law for a conviction of a felony or felonies that are not defined as serious or violent felonies by section 667.5, subdivision (c), or section 1192.7, subdivision (c);

(2) the inmate's current sentence was not imposed for any of the offenses listed in section 667, subdivision (e)(2)(C)(i)-(iii), or section 1170.12, subdivision (c)(2)(C)(i)-(iii); and

(3) the inmate has no prior convictions for any of the offenses appearing in section 667, subdivision (e)(2)(C)(iv), or section 1170.12, subdivision (c)(2)(C)(iv), the so-called "super strike" offenses (*People v. Spiller* (2016) 2 Cal.App.5th 1014, 1018).

The determination of a petitioner's eligibility for resentencing under Proposition 36 is "not a discretionary determination by the trial court, in contrast to the ultimate determination of whether an otherwise eligible petitioner should be resentenced." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336.) We therefore review de novo whether a petitioner

satisfies the initial eligibility requirements for resentencing under section 1170.126, subdivision (e). (See *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7 [whether the facts in the record of a conviction establish eligibility under Proposition 36 is a question of law].)

B. *Simonian's Petition Satisfied the Eligibility Requirements for Relief Under Proposition 36*

Simonian's petition sought the recall of his sentence and resentencing for false imprisonment. The petition met the first requirement for eligibility under section 1170.126, subdivision (e), because false imprisonment is neither a serious nor violent felony under section 667.5, subdivision (c), or section 1192.7, subdivision (c). Although Simonian's conviction for attempted carjacking is a serious felony under section 1192.7, subdivisions (c)(27) and (c)(39), the Supreme Court in *People v. Johnson* (2015) 61 Cal.4th 674 held that "the presence of a current offense that is serious or violent does not disqualify an inmate from resentencing with respect to a current offense that is neither serious nor violent." (*Id.* at p. 680.) Thus, under *Johnson*, Simonian satisfied the first eligibility requirement for resentencing on his false imprisonment conviction.

The People attempt to avoid the holding of *Johnson* by arguing that remanding this case for resentencing "would be an idle act" because, even if Simonian is resentenced as a second-strike offender for false imprisonment, the trial court ultimately could impose the same sentence he is now serving on the count for attempted carjacking. The Supreme Court rejected this argument in *Johnson*. (See *Johnson, supra*, 61 Cal.4th at p. 688 ["an inmate may obtain resentencing with respect to a three-

strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third-strike sentence of 25 years to life”]; *id.* at pp. 690-691 [“by reducing the sentence imposed for a count that is neither serious nor violent, [Proposition 36] allow[s] an inmate who is also serving an indeterminate life term to be released on parole earlier if the Board of Parole Hearings concludes he or she is not a threat to the public safety”].)

With regard to the second eligibility requirement, Simonian’s current sentence for false imprisonment was not imposed for any of the offenses listed in section 667, subdivisions (e)(2)(C)(i)-(iii), or section 1170.12, subdivisions (c)(2)(C)(i)-(iii). The offenses identified in section 667, subdivisions (e)(2)(C)(i)-(iii), which are identical to those identified in section 1170.12, subdivisions (c)(2)(C)(i)-(iii), include certain controlled substance charges, felony sex offenses, and offenses where 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).) The information charging Simonian with the current offenses and alleging sentencing enhancements does not include any allegation that Simonian was armed with a firearm or other deadly weapon, nor does it allege that Simonian intended to cause the victim great bodily injury.<sup>3</sup>

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<sup>3</sup> Neither party addresses whether Simonian is ineligible for relief under the statutory exclusion in section 667, subdivision (e)(2)(C)(iii), for being armed with a deadly weapon or intending to cause great bodily injury while committing the offense of false imprisonment. Our opinion in *People v. Simonian*, *supra*, states that police officers found a steak knife under a tire of the car driven by the victim. (*Id.* at p. 2.) In an affidavit filed with his

Finally, the record reveals no prior convictions for any of the “super strike” offenses listed in section 667, subdivision (e)(2)(C)(iv), or section 1170.12, subdivision (c)(2)(C)(iv). These offenses include certain sex offenses, homicide and attempted homicide, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, and any serious and/or violent felony offense punishable in California by life imprisonment or death.

Thus, on its face, Simonian’s petition demonstrates eligibility for recalling his sentence and resentencing him on his conviction for false imprisonment. We therefore remand this matter to the trial court to reconsider Simonian’s petition. If the trial court determines Simonian is not eligible for relief under Proposition 36, we direct the trial court to provide a “precise reason . . . for finding [Simonian] ineligible for resentencing” and to identify the records it relied on in making its determination. (*Manning, supra*, 226 Cal.App.4th at p. 1144.)

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petition, however, Simonian states that the victim told police that Simonian did not “brandish” a weapon. On remand, the parties may present evidence and argument regarding, and the trial court may consider whether, the record of conviction shows that Simonian used a deadly weapon or intended to cause great bodily injury. (See *Bradford, supra*, 227 Cal.App.4th at pp. 1338-1339.) If the trial court concludes that Simonian is initially qualified for relief, the People will have an opportunity at a qualification hearing “to highlight facts in the record they assert establish ineligibility.” (*People v. Oehmigen, supra*, 232 Cal.App.4th at p. 8; see *Bradford*, at p. 1341.)



Because the trial court did not specify any basis for its decision denying Simonian’s petition, we do not consider the People’s argument that Simonian is ineligible for relief under Proposition 36 on the ground he filed his petition more than two years after the effective date of Proposition 36 and showed no “good cause” for his delay. On remand the trial court may consider, among other issues, whether the two letters Simonian attached to his petition from the public defender’s office advising him he was not eligible for relief under Proposition 36 (one of which is dated just two months before the expiration of the two-year time period) constitute good cause under section 1170.126, subdivision (b).

### **DISPOSITION**

The trial court’s order denying Simonian’s petition for recall and resentencing under Proposition 36 is reversed and remanded with directions to determine whether Simonian is eligible for recall and resentencing.

SEGAL, J.

We concur:

PERLUSS, P. J.

SMALL, J.\*

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