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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JACK EUGENE OROSCO, Defendant and Appellant.	2d Crim. No. B288651 (Super. Ct. No. KA051066) (Los Angeles County)

Appellant appeals the denial of a postjudgment 36 petition (Pen. Code, § 1170.126)[1] to recall his Three Strikes sentence of 25 years to life for unlawful possession of a firearm by a felon (formerly § 12021, subd. (a)(1), now § 29800, subd. (a)(1)). The trial court found that appellant was armed during the commission of the offense and statutorily ineligible for resentencing. (§ 1170.126, subd. (e)(2).) We affirm.

[1] All statutory references are to the Penal Code.

Facts and Procedural History

In 2001, appellant was sentenced to 25 years to life as a Three Strikes offender after he attempted to rob Eric Espinoza and was convicted of unlawful possession of a firearm by a felon. Appellant displayed a .22 caliber revolver in his waistband, placed his hand on the revolver several times, and demanded that Espinoza give him a silver neck chain. Espinoza saw a police car and shouted, "'That guy has a gun.'" Appellant fled on a bicycle and, during the police chase, threw the loaded revolver down on the ground.

The jury convicted appellant of possession of a firearm by a felon (formerly § 12021, subd. (a)(1)) but acquitted on the count for attempted second degree robbery. In a bifurcated proceeding, the trial court found that appellant had two prior strike convictions. We affirmed the conviction and 25-year-to-life state prison sentence in an unpublished opinion. (B150059.)

In 2012, appellant filed a Proposition 36 petition to recall his sentence. (§ 1170.126.) The prosecution opposed the petition on the ground that appellant was armed during the commission of the offense (§ 1170.126, subd. (e)(2)) and an unreasonable risk of danger to public safety (§ 1170.126, subd. (f)). Appellant had prior convictions for robbery with a weapon and first degree burglary, and was on parole when he committed the current offense. The trial court found that appellant was statutorily ineligible for resentencing.
(§ 1170.126, subd. (e)(2).)

Felon In Possession as a Disqualifying Offense

Proposition 36 provides that an inmate serving a Three Strikes sentence may be eligible for resentencing if the current felony conviction is not a serious and/or violent felony.

(§ 1170.126, subd. (e)(1); *People v. Johnson* (2015) 61 Cal.4th 674, 681 (*Johnson*).) Section 1170.126, subdivision (e)(2) refers to section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)C)(iii) which sets forth an armed-with-a-firearm exclusion. An inmate is statutorily ineligible for resentencing 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." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), herein referred to as "§1170.126, subd. (e)(2)," italics added.) The phrase "armed with a firearm" has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1035 (*Osuna*), disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8.) Proposition 36 requires "a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna*, *supra*, at p. 1032.) It is the availability of and ready access to the weapon that constitutes arming. (*People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*); *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110.) In *Osuna*, *supra*, 225 Cal.App.4th 1020, defendant, a convicted felon, was holding a handgun when apprehended by the police. "Thus, factually he was 'armed with a firearm' within the meaning of' [Proposition 36.]" (*Id.* at p. 1030.) Our courts have uniformly held that the armed-with-a-firearm exclusion applies to Third Strike sentences for unlawful possession of a firearm by a felon if the defendant possessed a firearm in a manner that made it readily available for use. (*Id*. at pp. 1030-1032; *White*, *supra*, at pp. 523-524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054-1057; *People v. Elder* (2014) 227 Cal.App.4th 1308,

1312-1313; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798-799; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-285; *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363.)

Appellant argues that all of these cases were wrongly decided and that the armed-with-a-firearm exclusion requires that the arming not only occur during the commission of the offense but also facilitate commission of the offense. That is the test for a firearm enhancement where the defendant is armed "in the commission" of an offense. (§ 12022, subd. (a)(1); *People v. Bland* (1995) 10 Cal.4th 991, 1002 [discussing "facilitative nexus"].) The Proposition 36 arming exclusion is broader because having a firearm available for use either offensively or defensively during the commission of the offense does not require that the firearm be used to facilitate the offense. (*People v. White*, *supra*, 243 Cal.App.4th at p. 1363; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1031-1032.) So too here. Appellant, a convicted felon, was in physical possession of a loaded revolver.

Appellant argues that Proposition 36 is intended to provide resentencing relief to low-risk, nonviolent prisoners serving life sentences for nonviolent or nonserious felonies. (See *Johnson*, *supra*, 61 Cal.4th at pp. 690-691.) Proposition 36's "overarching purpose" is to "retreat from the required imposition of unduly long sentences against 'repeat offenders convicted of non-violent, non-serious crimes' under the prior Three Strikes law [citation] . . . ." (*People v. Berry* (2015) 235 Cal.App.4th 1417, 1425, overruled on other grounds, *People v. Estrada* (2017) 3 Cal.5th 661, 675.) Appellant, in essence, wants to rewrite section 1170.126 to provide that the armed-with-a-firearm exclusion does not bar resentencing unless the defendant actually used a firearm in the commission of the offense. That would require

that the arming be tethered to the commission of the offense and would preclude simple possession. Our courts have rejected similar arguments because it is the availability of and ready access to the firearm that constitutes arming. (*White*, *supra*, 223 Cal.App.4th at pp. 523-524; *People v. Mendival* (1992) 2 Cal.App.4th 562, 574.) ""[A] firearm that is available for use as a weapon creates the very real danger that it will be used.". . ."" (*People v. White*, *supra*, 243 Cal.App.4th at p. 1363.)

Proposition 36 is intended to provide resentencing relief to low-risk, nonviolent prisoners serving life sentences for petty crimes, such as shoplifting and simple drug possession. (*White*, *supra*, 223 Cal.App.4th at p. 526.) But actual physical possession of a firearm by a convicted felon is not a petty or minor offense for purposes of Proposition 36. (*Ibid*.) Former section 12021 (now § 29800) "is based on the theory that a convicted felon has, by his prior conduct, demonstrated that if he comes into possession of a concealable firearm, he will use it to do evil." (*People v. Littrel* (1986) 185 Cal.App.3d 699, 703.) Although section 1170.126 is a remedial statute, we do not sit as a "super Legislature" at liberty to add to or narrow the armed-with-a-firearm exclusion. (See, e.g., *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1699.)

The judgment (order denying resentencing petition) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J. TANGEMAN, J.

William C. Ryan, Judge

Superior Court County of Los Angeles

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