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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. WILLIE LAVIOR GARDNER, Defendant and Appellant.	B275348 (Los Angeles County Super. Ct. No. MA020373)

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

Jonathan B. Steiner and Richard B. Lennon for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Alene M.

Games, Deputy Attorneys General, for Plaintiff and Respondent.

Willie Lavior Gardner (Gardner) appeals the trial court's denial of his petition for recall and resentencing under Proposition 36, the Three Strikes Reform Act of 2012. Gardner contends that felons who were armed during the commission of the underlying offense should be denied relief under Proposition 36 only if the arming facilitated commission of that offense or an additional offense, and not when the firearm was merely available for use. We disagree, and affirm the denial of the petition.

BACKGROUND[1]

Gardner was in a Lancaster convenience store when an unnamed person struck him in the right eye. With a gun in his car (a Suburban), Gardner drove to James Ashley's house, believing this was where he would find the man who had hit him. Dana French was in Ashley's home (along with other adults and children). Gardner stood on Ashley's front porch and demanded, " 'Bring the person out that hit me in my eye. . . . If you don't send that person down to the park, I'll be back and I'll shoot your house up. I don't care who's in there.' " Gardner then left in the Suburban.

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[1] We affirmed Gardner's underlying conviction on June 25, 2002. (*People v. Gardner* (June 25, 2002, B151930) [nonpub. opn.].) The following facts have been taken from our opinion in that case.

French believed that Gardner had a handgun in his immediate possession and that Gardner's threats were directed at him. He called 911, reported Gardner's statements, and described the Suburban. French then walked to a nearby park to see if Gardner was there. When the police arrived at the park, French repeated his description to a deputy. As he was talking, French saw the Suburban drive by and pointed it out to the deputy. As the deputy headed toward Ashley's house, he saw the Suburban parked on the street and saw Gardner with a group of men standing in Ashley's yard. When Gardner saw the deputy, he went to the Suburban and got in, then got out and walked toward the deputy. Gardner was detained and questioned. He said the Suburban belonged to his wife. When the deputy opened the driver's door, he saw the handle of a handgun underneath the driver's seat. The gun (a " 'double action' " Baretta semi-automatic) was loaded with " 'hollow point' " and " 'full metal jacket bullets, with a round chambered and the hammer cocked. The deputy arrested Gardner.

Gardner was charged with possession of a firearm by a felon and making terrorist threats, with allegations that he had suffered two prior strikes and served five prior prison terms. A jury convicted Gardner on the firearm count and admitted the priors. Gardner's prior convictions qualified as "strike" convictions. (Pen. Code, §§ 667, 1170.12.)[2] The trial

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

court therefore sentenced Gardner to an indeterminate term of 25 years to life plus an additional four years for prior prison enhancements (§ 667.5, subd. (b)) for a total term of 29 years to life. On direct appeal, Gardner contended that the trial court should have granted his motion to strike his strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and challenged the three strikes law generally and as applied to him. We rejected his claims of error and affirmed the judgment.

After the enactment of Proposition 36, Gardner filed a petition for recall of his third strike sentence.[3] The trial court issued an order to show cause regarding Gardner's eligibility for recall. The People filed an opposition, as well a supplemental opposition and partial trial transcript, contending that Gardner was ineligible for recall and resentencing because he was armed with a firearm during the commission of the offense.[4]

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[3] Proposition 36 amended the "Three Strikes" law to reduce the penalty for some third strike offenders when the third strike is not a serious or violent felony. It also enacted section 1170.126, which created a postconviction procedure whereby a prison inmate "presently serving" a third strike sentence for a crime that was not a serious or violent felony may petition to recall his or her sentence and be resentenced as a second strike offender. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.)

[4] A defendant is ineligible for resentencing if the defendant used a firearm or was armed with a firearm during the commission of the current offense. (§§ 667,

The trial court held that Gardner is ineligible for recall and resentencing. The court first agreed with Gardner that possession of a firearm by a felon did not automatically disqualify him from relief. Indeed, the court observed, it is well settled that a defendant's mere possession of a firearm does not establish that the defendant was armed with a firearm when determining eligibility under Proposition 36. Instead, a defendant is " 'armed with a firearm' only if the firearm was readily available for offensive or defensive use." "Contrary to [Gardner's] position, the record of conviction establishes the pistol was readily available for offense or defensive use during the commitment offense of unlawful possession," the court held. "Indeed, there was no evidence to the contrary." Gardner expressly threatened to shoot up Ashley's home. Gardner drove the Suburban—where a loaded and cocked pistol was stored underneath the driver's seat—immediately before the deputy contacted him. Gardner was the only person in the Suburban. He walked back to the vehicle and entered it briefly while the deputy observed him. Thus, the court determined that, under California law, Gardner was armed with the firearm—even

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subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e).) " '[A]rmed with a firearm' " has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (See, e.g., § 1203.06, subd. (b)(3); Health & Saf. Code, § 11370.1, subd. (a); *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*).)

though he did not carry it on his person—because it was in a place readily accessible to him.

This timely appeal followed.

DISCUSSION

Gardner's appeal turns on our interpretation of the list of offenses which render a defendant ineligible for recall and resentencing under Proposition 36. A defendant is eligible for such relief unless the prosecution pleads and proves the following: (i) the current offense is a controlled substance charge; (ii) the current offense is a felony sex offense or any felony offense that results in mandatory registration as a sex offender; or (iii) during the commission of the current offense, the defendant was armed with a firearm or deadly weapon. (§§ 667, subd. (e)(2)(C)(i-iii); 1170.12, subd. (c)(2)(C)(iii).)[5]

As noted above, a defendant will be considered armed with a firearm or deadly weapon if the weapon was available for use, either offensively or defensively. In other words, the defendant is armed if the weapon was under his or her immediate dominion and control. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).) The threat presented by

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[5] Subdivision (e)(2)(C) of section 667 also precludes relief when a defendant has been convicted of a serious and/or violent felony and provides a list of those qualifying felonies. (§ 667, subd. (e)(2)(C)(iv)(I-VIII).) It is undisputed that Gardner's felon in possession conviction does not fall under this category.

a firearm increases in direct proportion to its accessibility; a firearm that is available for use as a weapon creates the danger that it will be used. (*People v. White* (2016) 243 Cal.App.4th 1354, 1363.) Thus, '[i]t is the availability—the ready access—of the weapon that constitutes arming.' " (*Bland*, *supra*, 10 Cal.4th at p. 997.) As a result of these principles, "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." (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1313–1314.)[6]

Numerous cases have held that a defendant who was armed with a deadly weapon while committing the third strike offense of unlawfully possessing that weapon is ineligible for recall and resentencing under Proposition 36. (*Osuna*, *supra*, 225 Cal.App.4th at pp. 1032–1040; *White*,

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[6] A firearm can be under a person's dominion and control without it being available for use—i.e. when he has constructive possession. "For example, suppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1030, fn. omitted.)

supra, 223 Cal.App.4th at p. 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 (*Blakely*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 284 (*Hicks*).) Gardner concedes that he is ineligible for relief if we follow *Osuna*, *White*, *Blakely*, *Brimmer* and *Hicks*. Consequently, he urges us to overrule this established precedent, arguing that these cases were wrongly decided because they misinterpreted the controlling statutes.[7] Thus, the sole issue on appeal becomes one of statutory interpretation.

When interpreting a voter initiative such as a proposition, "we apply the same principles that govern the construction of a statute." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) Statutory language is generally the best indicator of legislative intent, and so we begin by examining the language of the statute itself, giving the words their ordinary and usual meaning. (*Hassan v. Mercy American*

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[7] We note that every division of our court has addressed this issue and refused to overrule this precedent. (See, e.g., *People v. Foreman* (Oct. 28, 2016, B270022) [nonpub. opn.] [Division One]; *People v. Ramos* (Mar. 29, 2016, B265180) [nonpub. opn.] [Division Two]; *People v. Bates* (Apr. 28, 2017, B270760) [nonpub. opn.] [Division Three]; *People v. Gustave* (Mar. 21, 2017, B26573) [nonpub. opn.] [Division Four]; *People v. Gaither* (Oct. 17, 2016, B267029) [nonpub. opn.] [Division Five]; *People v. Wilson* (June 20, 2016, B267916) [nonpub. opn.] [Division Six]; *People v. Robles* (Dec. 9, 2015, B263387) [nonpub. opn.] [Division Seven].)

River Hospital (2003) 31 Cal.4th 709, 715.) We avoid any interpretation that renders part of the statute " 'meaningless or inoperative.' " (*Id.* at pp. 715–716.) When the language is clear, we apply the language without further inquiry. (*Ibid.*) "In determining legislative intent, courts look first to the words of the statute itself: if those words have a well-established meaning, . . . there is no need for construction and courts should not indulge in it." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 24.)

Gardner contends that the phrase "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm" (§ 667, subd. (e)(2)(C)(iii)) is not implicated unless the weapon facilitated the current offense. In other words, the weapon must be available for use in furtherance of the commission of the offense that is the subject of the recall petition. This argument was rejected in *Osuna*, *supra*, 225 Cal.App.4th 110, which noted that the statute requires "a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Id.* at p. 1032.) This is because " '[d]uring' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' " (*Ibid.*) This interpretation comports with the plain language of the statutes, and we adopt it once again.[8]

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[8] Nevertheless, Gardner contends, there is no meaningful difference between "during the commission" in subdivision (e)(2)(C)(iii) and "in the commission"—a phrase which has been interpreted to require a facilitative nexus as

Gardner notes that the applicable subdivision in this case—section 667, subdivision (e)(2)(C)(iii)—reads differently than subdivisions (e)(2)(C)(i) and (ii). Subdivisions (e)(2)(C)(i) and (ii) specify a current offense that will preclude relief under Proposition 36, while subdivision (e)(2)(C)(iii) precludes relief only if something beyond the current offense occurs. Although subdivision (e)(2)(C)(iii) specifies circumstances which render the current offense ineligible for resentencing, nothing in the statutory language suggests that those circumstances must attach to a crime other than the current offense. The subdivision, on its face, refers to "facts attendant to commission of the actual offense," that is, the offense for which the defendant seeks resentencing. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332.) The subdivision thus encompasses the offense of being a felon in possession of a firearm when the manner in which that crime was committed involved arming.

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well as a temporal relationship. Gardner cites *People v. Poroj* (2010) 190 Cal.App.4th 165, 172–176, *People v. Valdez* (2010) 189 Cal.App.4th 82, 90, and *Bland*, *supra*, 10 Cal.4th at pages 1001–1003, for this proposition. We reject Gardner's claim. The word "during" ordinarily has a purely temporal meaning. (Merriam–Webster's Collegiate Dict. (1995) p. 360 [defining "during" to mean "throughout the duration of"].) The fact that the word "in" sometimes has a temporal meaning does not mean that the word "during," as found in subdivision (e)(2)(C)(iii), expresses a facilitative relationship in addition to a temporal one.

Lastly, Gardner contends, the voters' intent behind Proposition 36 mandates that subdivision (e)(2)(C)(iii) be read to require a facilitative nexus. We disagree. It is consistent with the voters' intent to draw a distinction between the illegal constructive possession of a firearm and actual possession in which the defendant has a weapon readily available for use. After reviewing the text of Proposition 36 and the arguments made on its behalf, the court in *Osuna*, *supra*, 225 Cal.App.4th at page 1038, concluded, "[i]t 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."

Consequently, we reach the same conclusion as all the published cases that have considered this issue and hold that defendant is ineligible for resentencing under Proposition 36 if he was armed at the time he committed the felony of illegal possession of a firearm.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.