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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT SHOULDERS,

Defendant and Appellant.

B277048

(Los Angeles County  
Super. Ct. No. TA043117)

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

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Suzan E. Hier, 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, Assistant Attorney General, Noah P. Hill and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

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Robert Shoulders appeals from a post-conviction order denying his petition to recall his sentence and to resentence him under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126), commonly referred to as Proposition 36.<sup>1</sup> We affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

Shoulders was convicted of robbery in 1979 and residential burglary in 1986. On a morning in August 1995, a Los Angeles County Sheriff's deputy saw Shoulders jaywalking on Long Beach Boulevard. The deputy asked Shoulders to approach his patrol vehicle, but Shoulders continued walking until he reached a post office. He took a gun from his pocket and threw it onto the post office steps. Shoulders then walked back toward the deputy, who detained him. The deputy recovered a gun containing four live rounds from the post office steps.

In 1996, a jury convicted Shoulders of being a felon in possession of a firearm (former § 12021, subd. (a)(1))<sup>2</sup> and found true allegations that he had been convicted of the 1979 robbery and the 1986 burglary, each a serious or violent felony for purposes of the "Three Strikes" law. The court sentenced Shoulders to 25 years to life in prison. We affirmed the conviction in *People v. Shoulders* (Oct. 28, 1997, B105468) [nonpub. opn.].

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<sup>1</sup> Unless otherwise specified, subsequent statutory references are to the Penal Code.

<sup>2</sup> At the time Shoulders committed his offense, section 12021, subdivision (a)(1), provided: "Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country . . . , who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." (Former Pen. Code, § 12021, subd. (a)(1).)

In November 2012, Shoulders filed a petition under Proposition 36 to recall his sentence and resentence him (the petition). The court found that Shoulders had made a prima facie showing of eligibility for resentencing and issued an order to show cause why the petition should not be granted. The People opposed the petition on the ground that Shoulders was statutorily ineligible for sentencing because he was armed with a firearm during the commission of the current offense, i.e., being a felon in possession of a firearm. After a hearing, the court agreed with the People and denied the petition. Shoulders timely appealed. We affirm.

### DISCUSSION

Prior to the enactment of Proposition 36, “the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third-strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 680 (*Johnson*).) Proposition 36 “prospectively changed the Three Strikes law by reserving indeterminate life sentences for cases where the new offense is also a *serious or violent felony*, unless the prosecution pleads and proves an enumerated disqualifying factor. In all other cases, a recidivist defendant will be sentenced as a second strike offender, rather than a third strike offender.” (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 740-741.)

Proposition 36 also created a post-conviction procedure whereby a prison inmate who is 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. (§ 1170.126, subds. (a)-(f); *Johnson, supra*, 61 Cal.4th at p. 682.) An inmate who is otherwise eligible for relief under Proposition 36 may be disqualified if he or she “used a firearm, was armed with a

firearm or deadly weapon, or intended to cause great bodily injury to another person” “[d]uring the commission of the current offense.” (§§ 667, subds. (e)(2)(C)(iii); 1170.12, subds. (c)(2)(C)(iii); 1170.126, subds. (e)(2).)

One is “armed with a firearm” within the meaning of Proposition 36 when he or she has “a firearm available for offensive or defensive use.” (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052 (*Blakely*).) Here, there is no dispute that, based on the record of conviction, Shoulders, who had a gun in his pocket just before throwing it onto the post office steps, had a firearm available for offensive or defensive use. He was, therefore, armed with a firearm for purposes of Proposition 36.

The “armed with a firearm” disqualification applies if the inmate was armed “[d]uring the commission of the current offense.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Here, Shoulders was a felon when he crossed Long Beach Boulevard and walked to the post office steps with a firearm in his pocket. Under a straightforward application of the statutory language to the facts, Shoulders was armed with a firearm *during* his commission of being a felon in possession of a firearm.<sup>3</sup>

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<sup>3</sup> Although a person armed with a firearm necessarily possesses it, one can, for purposes of being a felon in possession of a firearm, *possess* a firearm without be *armed* with a firearm. (*Blakely, supra*, 225 Cal.App.4th at p. 1052; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1313 (*Elder*).) Thus, “a person convicted of being a felon in possession of a firearm is not automatically disqualified from resentencing by virtue of that conviction; such a person is disqualified only if he or she had the firearm available for offensive or defensive use.” (*Blakely*, at p. 1048; accord *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.)

Shoulders argues, however, that we should construe the armed with a firearm disqualification to apply only when the defendant possessed the firearm to aid or further some other crime—i.e., when there is a “facilitative nexus” between the arming and an offense other than being a felon in possession of a firearm. Shoulders relies on decisions interpreting a firearm enhancement statute, section 12022, which mandates additional prison time when the defendant was armed with a firearm “in the commission” of a crime. (See, e.g., *People v. Bland* (1995) 10 Cal.4th 991, 1001-1002; *People v. Pitto* (2008) 43 Cal.4th 228, 239-240.)

As Shoulders acknowledges, courts have consistently rejected similar arguments and analogies to firearm enhancement statutes. (See *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363; *People v. Hicks* (2014) 231 Cal.App.4th 275, 284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797-799; *Elder, supra*, 227 Cal.App.4th at pp. 1312-1314; *Blakely, supra*, 225 Cal.App.4th at p. 1054; *Osuna, supra*, 225 Cal.App.4th at pp. 1030-1032; *People v. White* (2014) 223 Cal.App.4th 512, 524.) He contends, however, that we “should part ways” with these cases.

*Osuna, supra*, 225 Cal.App.4th 1020, is illustrative and on point. In that case, the defendant was serving a Three Strikes sentence for his “current offense” of being a felon in possession of a firearm. (*Id.* at p. 1027.) The trial court denied his Proposition 36 petition on the ground that he was ineligible because he was armed with a firearm. (*Id.* at p. 1028.) On appeal, the defendant argued that “one cannot be armed with a firearm during the commission of possession of the same firearm.” (*Id.* at p. 1030.) The Court of Appeal explained that the defendant “would be correct if we were concerned with 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.” (*Ibid.*) Unlike the firearm

enhancement statute, however, “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.” (*Osuna, supra*, 225 Cal.App.4th at p. 1032.) The court concluded that, because Proposition 36 “uses the phrase ‘[d]uring the commission of the current offense,’ and not in the commission of the current offense [citation], and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, . . . the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*Ibid.*)

We agree with *Osuna*. Shoulders offers no contrary apposite authority and no persuasive argument for rejecting it or the other cases cited above. Because Shoulders was armed with a firearm during the commission of his current offense—being a felon in possession of a firearm—the court did not err in finding him ineligible for relief under Proposition 36.

## **DISPOSITION**

The order denying Shoulder's petition to recall his sentence is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.