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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EVERETT YOUNG, Defendant and Appellant.	B277221 (Los Angeles County Super. Ct. No. BA210069)

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

Jonathan B. Steiner, Executive Director, Richard B. Lennon, Staff Attorney, California Appellate Project, 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 Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Everett Young appeals from the trial court's denial of his petition for recall and resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] The trial court determined defendant was ineligible for recall and resentencing because he was armed with a firearm during the commission of the subject offense. (§§ 1170.126 subd. (e)(2), 667, subd. (e)(2)(C)(iii).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 1999, police officers saw defendant riding a bicycle on the sidewalk and ordered him to stop. Defendant pedaled faster and rode the bicycle southbound in northbound lanes of traffic. A car almost struck defendant, and he fell off the bicycle. Defendant ran from the police. As he was running, defendant pulled a loaded revolver from his waistband. A police officer pointed a gun at defendant, again ordering him to stop. Continuing to run from the police, defendant cocked his arm backwards and threw the loaded revolver. He then stopped running. The gun struck a concrete wall about 40 feet from defendant, and the cylinder popped open.[2]

On April 18, 2001, a jury convicted defendant of possession of a firearm by a felon. (Former § 12021, subd. (a)(1).)[3] The trial court found defendant

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

[2] The factual background and part of the procedural background are taken from this court's opinion in defendant's prior appeal, *People v. Young* (Feb. 26, 2002, B151411) (nonpub. opn.) (*Young I*). We take judicial notice of this opinion. (Evid. Code, §§ 452, subd. (d)(1), 459.)

[3] Former section 12021, subdivision (a)(1) was repealed operative January 1, 2012, but its provisions were reenacted without substantive change as section 29800, subdivision (a)(1). (See *People v. Sanders* (2002) 55

had suffered two prior convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) and that he served a prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to a prison term of 25 years to life. We affirmed the judgment of conviction in *Young I*.

On February 15, 2013, defendant filed his petition for recall and resentencing. On August 25, 2016, the trial court denied the petition. That same date, defendant timely appealed the trial court's order.

DISCUSSION

Section 1170.126 was enacted as part of Proposition 36, which became effective on November 7, 2012. (*People v. Johnson* (2015) 61 Cal.4th 674, 685.) Proposition 36 "provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) 'An inmate is eligible for resentencing if . . . [¶] . . . [t]he inmate is serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent . . . .' (§ 1170.126, subd. (e)(1).) Like a defendant who is being sentenced under the new provisions, an inmate is disqualified from resentencing if any of the exceptions set forth in section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C) are present. (§ 1170.126, subd. (e).)" (*Johnson,* at p. 682.) The referenced offenses for which resentencing is not available include 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

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Cal.4th 731, 743, fn. 12.) For convenience and brevity, we refer to former section 12021 throughout this opinion as section 12021.

bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii) (hereinafter referred to collectively as subdivision (iii)).)

The trial court here found defendant statutorily ineligible for recall and resentencing because defendant was armed with a firearm during the commission of the underlying offense of being a felon in possession of a firearm.

Defendant argues the trial court erred because "the factors listed in subdivision (iii) must attach to the current offense as an addition and not just be an element of the current offense." He notes that other offenses which render an inmate ineligible for resentencing are referred to with the phrase "[t]he current offense is" while subdivision (iii) begins with the phrase "[d]uring the commission of the current offense." Based on this distinction, defendant contends that if the statute were intended to exclude the offense of possession of a firearm by a felon, the offense would have been specifically enumerated.

Defendant further argues the phrase "[d]uring the commission of the current offense" only makes sense if it "requires that the arming and the offense be separate, but 'tethered,' such that the availability of the weapon facilitates the commission of the offense." (*People v. Pitto* (2008) 43 Cal.4th 228, 239-240 (*Pitto*); *People v. Bland* (1995) 10 Cal.4th 991,1001-1003 (*Bland*).) Thus, with respect to the crime of possession of a gun, defendant contends that one cannot be found to be "armed with a firearm" because "it is the very act of having the gun available which *is* the crime." (Original

italics.) Defendant recognizes that numerous appellate courts have rejected his arguments,[4] but argues such cases were wrongly decided. We disagree.

First, defendant incorrectly asserts that being armed with a firearm is an element of the offense of being a felon in possession of a firearm. Section 12021, subdivision (a)(1) "makes it a felony for a person previously convicted of a felony to own, purchase, receive, or have in his or her possession or under his or her custody or control, any firearm." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1029.) "'[A]rmed with a firearm'" has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. (*Ibid.*) Thus, "possessing a firearm does not necessarily constitute being armed with a firearm." (*Id.* at p. 1030.) For example, a felon is in possession of a firearm if the firearm is found at his residence, but if he is not home at the time, he is not armed because the firearm is not readily available to him. (*Ibid.*) Here, the record shows defendant was observed pulling a handgun from his waistband, making it available for offensive or defensive use. Thus, defendant was "armed with a firearm" within the meaning of subdivision (iii) and is ineligible for resentencing.

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[4] See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030 (*Osuna*) (when pulled over by police, defendant who was holding a handgun when he got out of the car was found to be armed with a firearm and ineligible for resentencing); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 796-797 (defendant who was holding a shotgun while arguing with his girlfriend was found to be armed with a firearm and ineligible for resentencing); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317 (after police searched defendant's bedroom and found a gun on a shelf and another gun in a safe, defendant was found to be armed with a firearm and not eligible for resentencing); *People v. White* (2014) 223 Cal.App.4th 512, 524-526 (when approached by police, defendant tossed a handgun and was held to be armed with a firearm and not eligible for resentencing).

Second, the history of Proposition 36 does not support defendant's contentions. In Proposition 36, "voters rendered ineligible for resentencing not only narrowly drawn categories of third strike offenders who committed particular, specified offenses or types of offenses, but also broadly inclusive categories of offenders who, during commission of their crimes—and regardless of those crimes' basic statutory elements—used a firearm, were armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person. Significantly, however, those categories, while broad, are not unlimited. Voters easily could have expressly disqualified any defendant who committed a gun-related felony or who possessed a firearm, had they wanted to do so. This is not what voters did, however." (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1055 (*Blakely*).) The *Blakely* court examined Proposition 36 ballot materials and explained how the "materials expressly distinguished between dangerous criminals who were deserving of life sentences, and petty criminals (such as shoplifters and those convicted of simple drug possession) who posed little or no risk to the public and did not deserve life sentences." (*Id.* at pp. 1056-1057.) Since "[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," defendant is the type of dangerous criminal deemed ineligible for resentencing under Proposition 36. (*Blakely,* at p. 1057.)

Consistent with this analysis, courts have rejected the argument that the arming must be "tethered" to or have a "facilitative nexus" with a separate offense. (See *Osuna*, *supra*, 225 Cal.App.4th at p. 1032; see also *People v. White* (2016) 243 Cal.App.4th 1354, 1362-1363; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284; *People v. Brimmer*, *supra*, 230 Cal.App.4th at pp. 798-799; *People v. Elder*, *supra*, 227 Cal.App.4th at pp.

1312-1314; *Blakely*, *supra*, 225 Cal.App.4th at pp. 1051-1057; *People v. White*, *supra*, 223 Cal.App.4th at pp. 524-527.) As explained in *Osuna*, the phrase "during the commission of the current offense" requires "a temporal nexus between the arming and the underlying felony, not a facilitative one" because "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon." (225 Cal.App.4th at p.1032.)

Defendant's reliance on *Pitto* and *Bland* in support of his argument that a "facilitative nexus" is required is misplaced. Neither *Pitto* nor *Bland* examined subdivision (iii). Rather, both cases analyzed the sentence enhancement under section 12022, which imposed an additional prison term for one who was "armed with a firearm in the commission of" a felony. (*Pitto*, *supra*, 43 Cal.4th at pp. 239-240; *Bland*, *supra*, 10 Cal.4th at pp. 1001-1002.) As explained in *Bland*, "by specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission' of the felony offense, section 12022 implicitly requires both that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus*' to that offense." (*Bland*, at p. 1002, original italics.) This holding has no relevance here. As noted above, "section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022." (*Osuna*, *supra*, 225 Cal.App.4th at p. 1032.) Thus, because defendant was "armed with a firearm" within the meaning of subdivision (iii), the trial court properly determined that defendant was ineligible for recall and resentencing under Proposition 36.

DISPOSITION

The order denying the petition for recall and resentencing is affirmed.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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