

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LORENZO FOREMAN,

Defendant and Appellant.

B270022

(Los Angeles County
Super. Ct. No. TA035868)

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

California Appellate Project, Jonathan B. Steiner, Executive Director, and 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, Assistant Attorney General, Noah P. Hill, and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lorenzo Foreman challenges the trial court's denial of his petition for recall of his indeterminate life sentence pursuant to Proposition 36. The trial court found that he was ineligible for resentencing because he was armed during the commission of his offense. (See Penal Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)¹ Foreman argues that his conviction for possession of a firearm by a felon does not bar him from relief under Proposition 36. We disagree and affirm.

FACTS AND PROCEEDINGS BELOW

On the evening of May 23, 1996, approximately one dozen Los Angeles police officers went to an apartment to serve a search warrant, where they expected to find cocaine, drug paraphernalia, money and weapons. Two officers, Jerry Moya and Wilson Wong, stood at the front windows and observed Foreman sitting on a chair and counting money. Another officer announced their presence at the front door and ordered the occupants to open the door. There being no compliance, several officers broke down the front door and entered the apartment. Upon entering, Officer Moya ordered Foreman to lie on the ground, but Foreman refused to comply and instead jumped over the table and ran upstairs. A nine-millimeter semi-automatic handgun was lying on the chair that Foreman had vacated. The handgun was loaded with 12 rounds, with one bullet in the chamber ready to fire.

On October 10, 1996, a jury convicted Foreman of possession of a firearm by a felon, in violation of former section 12021, subdivision (a)(1).² The jury also found that Foreman had four prior robbery convictions within the meaning of the "Three Strikes" law, as

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

² In 2010, the Legislature repealed section 12021 and replaced it with section 29800.

defined in section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d), and that he had served one prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Foreman under the Three Strikes law to an indeterminate term of 25 years to life and dismissed the one-year prior prison enhancement.

In 2012, the people of California voted to enact Proposition 36, which provides for relief from indeterminate life sentences under the Three Strikes law for defendants currently serving sentences for nonviolent, nonserious felonies. (§ 1170.126.) In 2013, Foreman filed a petition for recall of his sentence in the superior court pursuant to this provision.

The district attorney opposed Foreman's petition on the ground that he was ineligible for relief because he was armed during the commission of his offense (see § 1170.126, subd. (e)(2)), and filed six exhibits, including portions of the reporter's transcripts of Foreman's 1996 trial along with a copy of this court's 1998 unpublished opinion affirming Foreman's conviction.

Foreman filed a reply to the opposition asserting that he was eligible for resentencing under Proposition 36 because he was not armed with a handgun.

On January 25, 2016, the trial court, after considering the materials both sides had submitted, determined that Foreman was ineligible for relief under Proposition 36 because he was armed during the commission of his most recent offense.

Foreman filed a notice of appeal.

DISCUSSION

Under section 1170.126, an inmate serving an indeterminate life sentence under the Three Strikes law “upon conviction . . . of a felony or felonies that are not defined as serious and/or violent felonies . . . may file a petition for a recall of sentence.” (*Id.*, subd. (b).) Subdivision (e)(2) of section 1170.126 creates an exception, such that inmates serving a sentence for an offense described in section 667, subdivision (e)(2)(C) are not eligible for resentencing. Among the offenses described in section 667, subdivision (e)(2)(C) are 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 bodily injury to another person.” (*Id.*, subd. (e)(2)(C)(iii) (subdivision (iii).))

The trial court found Foreman ineligible for resentencing under subdivision (iii) because he was armed with a firearm during the commission of his most recent offense. Foreman contends, however, that possession of a firearm does not preclude him from eligibility for resentencing under Proposition 36 because subdivision (iii) does not apply when “arming” is an element of the offense. He insists that the arming factor “must attach to the current offense as an addition and not just be an element of the current offense.” In addition, Foreman asserts that “when Proposition 36 uses the terms ‘during the commission’ and ‘armed with a firearm’ in subdivision (iii), it must be construed to require that the weapon be available for use *in furtherance of the commission of the [current] offense* that is the subject of the recall petition.” According to Foreman, this requires that the arming factor and the current offense be “separate, but ‘tethered,’ such that the availability of the weapon facilitates the commission of the offense.”

Foreman’s arguments lack merit. “ ‘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, 1029 (*Osuna*); accord *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793 (*Brimmer*); *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).) At the time Foreman was convicted, section 12021, subdivision (a)(1) provided that “[a]ny person who has been convicted of a felony under the laws of . . . the State of California . . . who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.”

Section 12021 did not include as an element a requirement that the defendant be armed. Indeed, a defendant may be guilty of illegal possession of a firearm through constructive possession, or in other words “‘knowingly exercis[ing] a right to control the prohibited item, either directly or through another person.’” (*Brimmer, supra*, 230 Cal.App.4th at p. 795.) A parolee might be guilty of illegal possession of a firearm if police find a weapon in his home during a search, but he would not have been armed with the weapon if it was not readily available for him to use. (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) Thus, being armed was not an element of the offense for which Foreman was convicted.

It is consistent with the voters’ intent in enacting Proposition 36 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 its proposers made on its behalf, the court in *Osuna, supra*, 225 Cal.App.4th at p. 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.

‘[T]he threat presented by a firearm increases in direct proportion to its accessibility. Obviously, a firearm that is available for use as a weapon creates the very real danger it will be used.’ ”

For these reasons, we reach the same conclusion as all published cases that have considered this issue: A defendant is ineligible for resentencing under Proposition 36 if he was armed at the time he committed a felony for illegal possession of a firearm. (See *Brimmer*, *supra*, 230 Cal.App.4th 782; *Osuna*, *supra*, 225 Cal.App.4th 1020; *White*, *supra*, 223 Cal.App.4th 512; *People v. Blakely* (2014) 225 Cal.App.4th 1042; *People v. Elder* (2014) 227 Cal.App.4th 1308; *People v. Hicks* (2014) 231 Cal.App.4th 275.) Consequently, the trial court did not err in denying Foreman’s petition for recall of his sentence.

DISPOSITION

The order of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.