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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. ERNEST PADILLA, Defendant and Appellant.	B277241 (Los Angeles County Super. Ct. No. KA049485)

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

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

In 2001, appellant was sentenced to a term of 25 years to life as a "three strike" offender after being convicted of possession of a firearm by a felon. In the underlying action, the trial court denied appellant's motion under Penal Code section 1170.126 to be resentenced pursuant to the Three Strikes Reform Act of 2012 (Reform Act).[1] We reject his challenges to that ruling and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. *Conviction*

In September 2000, appellant was charged with being a felon in possession of a firearm (former § 12021, subd. (a)(1)) and causing a concealed firearm to be carried in a vehicle (former § 12025, subd. (a)(3)).[2] Accompanying the charges were allegations that appellant had suffered prior convictions constituting strikes under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

At trial, the prosecution presented evidence that on August 9, 2000, Los Angeles County Sheriff's Department Deputy Sheriffs Murray Simpkins and Daniel Spitulski were on routine patrol when they saw a car drive past them containing three persons, including appellant, who was in the right front passenger seat. The car had no front license

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1 All further statutory citations are to the Penal Code.

2 Those offenses are now codified in section 29800, subdivision (a)(1), and section 25400, subdivision (a)(3).

plate, and appellant was not wearing a seat belt. When the deputy sheriffs directed the car to stop, they saw appellant make a "stuffing motion" near the car's center. After the car came to a halt, the deputy sheriffs ordered the car's occupants to leave it. Simpkins looked inside the car and saw a gun wedged between the driver's seat and the front passenger seat. Without removing the gun or referring to it, Simpkins asked appellant, "'What else is in the car?'" Appellant replied, "'There's nothing else in there but the gun.'" Later, appellant told Simpkins that the gun belonged to Richard Marquez, the car's driver. Appellant further asserted that when Marquez tossed the gun to him, he hid it between the seats.

The prosecution also presented testimony from Marquez, who stated that he neither brought the gun into the car nor had any knowledge of it. According to Marquez, when the deputy sheriffs directed him to pull over, he paid no attention to what appellant was doing.

After a jury found appellant guilty of being a felon in possession of a firearm and causing a concealed firearm to be carried in a vehicle, the trial court found true the allegations that appellant had suffered two prior convictions for assault with a deadly weapon, a prior conviction for shooting into an occupied vehicle, and a prior conviction for assault and battery by force likely to produce great bodily injury. The court imposed a term of 25 years to life under the Three Strikes law on appellant's conviction for being a felon in possession of a firearm, and stayed punishment regarding

his conviction for causing a concealed firearm to be carried in a vehicle (§ 654). In a partially published opinion, this court affirmed the judgment. (*People v. Padilla* (2002) 98 Cal.App.4th 127.)

B. *Petition for Recall of Sentence*

In 2012, the electorate enacted the Reform Act by approving Proposition 36. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-170.) The Reform Act amended the Three Strikes law to provide that absent specified exceptions, an offender with two or more prior strikes is to be sentenced as a two-strike offender unless the new offense also is a strike, that is, a serious or violent felony.[3] (See *ibid.*) The Reform Act also added section 1170.126, which creates a post-conviction resentencing proceeding for specified inmates sentenced under the prior version of the Three Strikes law. (*People v. Yearwood, supra,* at pp. 167-170.) Under that statute, a defendant sentenced as a three-strike offender may petition for recall of the sentence and for resentencing, but is subject to certain eligibility criteria. (§ 1170.126, subd. (e).) As our Supreme Court has explained, the ballot history of Proposition 36 reflects that its goals were "making the punishment fit the crime, making room in

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[3] Generally, an offense is a "'strike'" if it is either a "'violent felony'" under section 667.5, subdivision (c), or a "'serious felony'" under section 1192.7, subdivision (c). (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525.)

prison for dangerous felons, and saving taxpayer money." (*People v. Johnson* (2015) 61 Cal.4th 674, 691)

In March 2013, appellant filed a petition for resentencing pursuant to section 1170.126. On August 23, 2016, the trial court denied the petition with prejudice, concluding that appellant was ineligible for resentencing because he was armed with a firearm during his commission of the offenses of being a felon in possession of a firearm and causing a concealed firearm to be carried in a vehicle (§§ 1170.126 (e)(2), 667 (e)(2)(C)(iii). This appeal followed.

DISCUSSION

Appellant contends the trial court erred in finding him ineligible for resentencing under an exclusion that applies if "[d]uring the commission of the current offense, [that is, the offense which the resentencing petition targets] the defendant . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2); see *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1327 (*Bradford*).) Appellant argues that under that exception, being armed with a weapon disqualifies a defendant from resentencing only when the arming is "in addition to another felony and not . . . based on the commission of the felony itself," that is, being a felon in possession of a firearm. As explained below, we reject his contention.[4]

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[4] To the extent appellant presents an issue of statutory
(*Fn. continues on the next page.*)

The key issue before us concerns the circumstances under which the offense of being a felon in possession of a firearm is subject to the eligibility exclusion relating to "'armed'" offenders. Generally, courts interpreting the term "'armed'" in the exclusion have sought guidance from *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), which examined a sentencing enhancement set forth in section 12022, subdivision (a), applicable to defendants "'armed with a firearm in the commission or attempted commission of a felony.'" (*Bland, supra,* at p. 998.) Our Supreme Court concluded that under the enhancement, the term "armed" means that the defendant had the firearm "available for

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interpretation, our inquiry applies established principles. "'In interpreting a voter initiative like [the Reform Act], we apply the same principles that govern statutory construction. [Citation.]' [Citation.]" "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]'" [Citation.] 'In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]' [Citation.] We also "'refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." [Citation.]' [Citation.]" (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1014 (*Cervantes*).)

offensive or defensive use." (*Id.* at p. 1001.) So understood, the term "armed" encompasses unloaded and inoperable firearms, as such weapons "create[] a risk of harm because [their] passive display 'may stimulate resistance.'" (*Id.* at pp. 1004-1005, quoting *People v. Nelums* (1982) 31 Cal.3d 355, 360.) The court further concluded that the enhancement also demands the satisfaction of certain requirements beyond the mere existence of arming, stating: "[B]y specifying that the added penalty applies only if the defendant is armed with a firearm 'in the commission of' the felony offense, [the enhancement] . . . implicitly requires that the 'arming' take place *during* the underlying crime and that it have some '*facilitative nexus*' to that offense." (*Bland*, *supra*, 10 Cal.4th at p. 1002.)

In construing the eligibility exclusion relating to "armed" offenders, our focus is on the crime of being a felon in possession of a firearm. "The elements of this offense are conviction of a felony and ownership or knowing possession, custody, or control of a firearm. [Citations]. 'A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]' [Citation.] 'Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.' [Citation.]" (*People v. Osuna* (2014) 225 Cal.App.4th 1020,

1029-1030 (*Osuna*).) As explained in *Osuna*, because one may possess a gun without it being available for one's use, a defendant may commit the offense of being a felon in possession of a firearm without having satisfied the definition of "armed" set forth in *Bland*. (*Id.* at p. 1030.)

Numerous courts have determined that under the Reform Act, the offense of being a felon in possession of a firearm falls under the pertinent eligibility exclusion when the possession in question amounted to arming, as specified in *Bland*. (E.g., *People v. White* (2014) 223 Cal.App.4th 512, 524-525; *Cervantes*, *supra*, 225 Cal.App.4th at pp. 1012-1018; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1028-1038; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051-1057; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314 & fn. 7 (*Elder*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 793-799; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 (*Hicks*).) Instructive discussions of the exclusion are found in *Osuna*, *Elder*, and *Hicks*.

In *Osuna*, the defendant drove his car at an excessive speed and refused to yield to a police officer who tried to pull him over. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1027.) The defendant eventually stopped, left his car while holding a gun, and fled into a house. (*Ibid.*) After arresting the defendant, officers found an unloaded nine-millimeter gun hidden in the house and nine-millimeter ammunition in the car. (*Ibid.*) The defendant was convicted of being a felon in possession of a firearm and obstructing a police officer, and was sentenced as a three strike offender. (*Id.* at pp. 1026-

1027.)

When the defendant sought resentencing, the trial court determined that he was ineligible for relief because he was armed with a firearm during the commission of his "current offense," that is, being a felon in possession of a firearm. (*Osuna*, *supra*, 225 Cal.App.4th at p. 1028.) In affirming that ruling, the appellate court concluded that the offense did not, by itself, render the defendant ineligible absent a showing that he was armed, as defined in *Bland*, viz., that the firearm was available to him for offensive or defensive use. (*Id*. at p. 1030.) The court recognized that "[h]aving a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon," but concluded that the exclusion mandates no showing that the arming promoted the "current offense." (*Id*. at p. 1032.) The court determined that the exclusion demands only a temporal nexus -- but no facilitative nexus -- between the arming and the offense of being a felon in possession of a firearm, as the exclusion merely requires that the arming occur "during" the commission of the offense, unlike the enhancement construed in *Bland*, which requires that the arming occur "in" the commission of the offense. (*Id*. at pp. 1032-1033.)

In *Elder*, police officers executing a search warrant for an apartment found the defendant standing outside the apartment. (*Elder*, *supra*, 227 Cal.App.4th at p. 1317.) The defendant admitted that he lived there. (*Ibid*.) Inside the apartment, the officers discovered two guns and a photo of

the defendant holding one of them. (*Ibid.*) Following his conviction for being a felon in possession of a firearm, he was sentenced as a three strike offender. (*Id.* at p. 1311.) Following the denial of his petition for resentencing, he contended on appeal that under the exclusion, "ineligibility for resentencing for being 'armed' . . . require[s] something beyond the substantive offense of possession itself," relying on decisions interpreting the enhancement discussed in *Bland*. (*Id.* at p. 1312.) In affirming the denial of the petition, the appellate court rejected that contention, stating: "The illogic of this line of reasoning rests on its conflating the *criterial definition* of an ineligible *offense* (being armed during the commission of such offense) with the derivative nature of the armed *enhancement* (which requires being armed *in* the commission of an offense)." (*Id.* at pp. 1312-1313.)

In *Hicks*, police officers frisked the defendant after he appeared to throw away a bag containing drugs, and found he had several .380 caliber bullets. (*Hicks*, *supra*, 231 Cal.App.4th at pp. 280-281.) When the officers searched a nearby apartment, they found a backpack containing a loaded .380 caliber gun. (*Ibid.*) A witness told the officers that the defendant had carried the backpack into the apartment. (*Ibid.*) The defendant was convicted of possession of a firearm as a felon and sentenced as a three strike offender on the basis of that offense. (*Ibid.*) Later, the trial court rejected the defendant's petition for resentencing, concluding that he was armed with a firearm when he

committed the offense of possessing a firearm as a felon. (*Id.* at pp. 279-280, 284.) The appellate court affirmed that ruling, applying an interpretation of the exclusion identical to that set forth in *Osuna*. (*Id.* at pp. 283-284.) In construing the exclusion, the court rejected the defendant's contention that it required the existence of an "underlying felony to which the arming is 'tethered.'" (*Id.* at p. 283.) The court explained that although the contention would be correct if directed at the arming enhancement discussed in *Bland*, it failed in light of the plain language of the exclusion, which concerns eligibility for reduced punishment. (*Ibid.*) As the court noted, the exclusion requires no facilitative nexus between the arming and any offense. (*Ibid.*)

Here, the record establishes that appellant was armed with a firearm -- that is, had a gun available to him for offensive or defensive use -- during his possession of the firearm as a felon.[5] The evidence submitted in connection

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[5] As the resentencing provisions of section 1170.126 do not require that the eligibility facts have been resolved by the verdicts or special findings rendered at trial, many decisions have concluded that the trial court may independently examine the record of conviction in order to make determinations regarding those facts. (E.g., *White*, *supra*, 223 Cal.App.4th at pp. 526-527; *Osuna*, *supra*, 225 Cal.App.4th at p. 1020; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1139-1144; *Elder*, *supra*, 227 Cal.App.4th at pp. 1314-1336; *Bradford*, *supra*, 227 Cal.App.4th at pp. 1338-1340; *Brimmer*, *supra*, 230 Cal.App.4th at pp. 799-801; *Hicks, supra*, 231 Cal.App.4th at p. 275.) This court reached
(*Fn. continues on the next page.*)

with appellant's petition was sufficient to show that he personally concealed the gun the deputy sheriffs found wedged between the car's front seats. (See *Cervantes*, *supra*, 225 Cal.App.4th at pp. 1011-1018 [defendant's offense of being a felon in possession of a firearm rendered him ineligible for resentencing under the Reform Act when the evidence showed that at the time of appellant's arrest, his gun was eight feet from him in his wife's purse].)

Appellant contends the pertinent exclusion, viewed in the context of the Reform Act, must be interpreted to require a facilitative nexus between arming and an offense independent of the crime of being a felon in possession of a firearm. Under the Reform Act, subdivision (e)(2) of section 1170.126 provides that a defendant is not eligible for resentencing if his or her current sentence was imposed for an offense appearing in three provisions stated in materially identical terms in both sections 667 and 1170.12 (§§ 667, subd. (e)(2)(C)(i) - (iii), 1170.12, subd. (c)(2)(C)(i)-(iii)). Of those three provisions, two enumerate particular offenses rendering a defendant ineligible for resentencing. (§§ 667, subd. (e)(2)(C)(i) - (ii), 1170.12, subd. (c)(2)(C)(i)-(ii).) The remaining provision, which incorporates the exclusion at issue here, states that the defendant is ineligible if: "During the commission of the current offense, the defendant used a

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the same conclusion in a recent decision (*People v. Frierson* (2016) 1 Cal.App.5th 788, 791-793, review granted Oct. 19, 2016, S236728).

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).)

Appellant maintains that the structure of the three provisions establishes that the pertinent exclusion applies only when the arming is related to, or promotes, an offense other than being a felon in possession of a firearm. He argues: "'Where the statute is meant to exclude specific offenses entirely, it so states, but where it is meant to exclude an offense only if something beyond its mere commission occurs, it states "during the commission of" the offense something else happens.'" He further asserts that the factors identified in the third provision "must attach to the current offense as an addition and not just be an element of the current offense," and that the phrase "'during the commission of the current offense'" makes sense only if "there is *another* offense to which the arming attaches." We disagree.

Although the third provision specifies circumstances rendering the current offense ineligible for resentencing, nothing in it suggests that those circumstances must attach to a crime other than the current offense. As noted in *Bradford*, the provision, on its face, refers to "facts attendant to commission of the actual offense," that is, the offense for which the defendant seeks resentencing. (*Bradford*, *supra*, 227 Cal.App.4th at p. 1332.) The provision thus encompasses the offense of being a felon in possession of a firearm when the manner in which *that* crime was committed

involved arming.

Appellant also contends the word "during" in the eligibility exclusion must be construed as having the same meaning as the word "'in,'" as used in the enhancement construed in *Bland*. To support that contention, appellant notes that courts have sometimes interpreted the word "in" to express a purely temporal relationship. He directs our attention to *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 and *People v. Valdez* (2010) 189 Cal.App.4th 82, 90, which examined an enhancement in section 12022.7, subdivision (a), applicable to defendants who personally inflict great bodily injury "in the commission of a felony or attempted felony." In each case, appellant argues, the court interpreted the word "in" to convey a temporal relationship between the criminal conduct and the injury. (*Poroj*, *supra*, at pp. 172-176; *Valdez*, *supra*, at p. 90.)

Appellant's contention fails, as nothing within the eligibility exclusion suggests that the word "during" there has the complex meaning attributed to the word "in" in *Bland*, which viewed "in" as conveying both a temporal and a facilitative relationship. 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 purely temporal meaning does not show that the word "during," as found in the eligibility exclusion, expresses a facilitative relationship in addition to a temporal one.

Appellant also contends that so construing the eligibility exclusion would frustrate the goals of Proposition 36. He asserts that in approving Proposition 36, the electorate did not intend to deny relief to offenders convicted of possessing a firearm as a felon, which he characterizes as a "low-level felony." He argues: "Proposition 36 was meant to give lesser sentences to the less dangerous felons while making sure that the truly dangerous felons were kept behind bars. . . . [¶] Having a weapon readily available for use generally does not render a person truly dangerous; it is a right protected by the federal constitution. It only becomes dangerous when it might facilitate a crime, when it might be used for violence."

Appellant's contention fails in light of the election materials relating to Proposition 36, which state that it was not intended to afford relief to offenders who committed "gun-related felonies" or whose third strike "'involved firearm possession.'" (*Cervantes*, *supra*, 225 Cal.App.4th at p. 1016, italics omitted.) As explained in *Elder*, although "possession of a gun of itself is not criminal, a *felon's* possession of a gun is not a crime that is merely *malum prohibitum*. . . . '[P]ublic policy generally abhors even momentary possession of guns by convicted felons who, the Legislature has found, are more likely to misuse them.' [Citation.] Therefore, even if the great majority of commitments for unlawful gun possession come within our interpretation of this eligibility criterion, it would not run afoul of the voters' intent." (*Elder*, *supra*, 227 Cal.App.4th at

p. 1314, quoting *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037-1038.) In sum, the trial court did not err in denying appellant's petition for recall of his sentence and resentencing.[6]

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[6] In a related contention, appellant suggests that the occurrence of the word "during" in the exclusion undercuts the interpretation placed on the exclusion by *Osuna* and the other pertinent decisions. He argues that those decisions "fail to explain why the electorate," in approving Proposition 36, "would have used the word 'during' as a means of excluding anyone who had access to a weapon instead of making such an exclusion clear by including the weapon possession crimes in the list of crimes for which resentencing is prohibited . . . ." He also argues that the choice of the word "during" is inapt for the purpose of "excluding anyone who had access to a weapon" because it has been construed judicially to convey a facilitative nexus.

For the reasons discussed above, we reject both arguments. Because Proposition 36 reflects an intent to deny relief for offenders convicted of "gun-related felonies," the exclusion is reasonably construed as a "catch all" provision that characterizes "gun-related felonies" in temporal terms, that is, by means of the word "during." Furthermore, the term "in," not the term "during," has been construed judicially to convey a facilitative nexus.

DISPOSITION

The order of the trial court is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.