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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SYLVESTER FLOYD, Defendant and Appellant.	B286819 (Los Angeles County Super. Ct. No. YA051229)

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

Richard B. Lennon, 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 Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

In March 2002, a Los Angeles County deputy sheriff stopped Sylvester Floyd (Floyd) in a weeded area near a sidewalk and conducted a patdown search. The deputy sheriff uncovered a loaded handgun inside the breast pocket of Floyd's jacket. Floyd was subsequently convicted of one count of possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1)).[1] As he had suffered two prior serious or violent convictions within the meaning of the "Three Strikes" law (§§ 1170.12, subd. (a)-(d), 667, subds. (b)-(i)), the court sentenced Floyd to 25 years to life in state prison.

In 2012, the people of California voted to enact Proposition 36, which provides an opportunity for inmates serving indeterminate life sentences for nonviolent, nonserious felonies to petition the court for resentencing. On December 12, 2012, Floyd filed a petition for a recall of his sentence and new sentencing hearing pursuant to Proposition 36. The court issued an order to show cause on February 19, 2013. After receiving briefing from the parties and hearing oral argument, the court found Floyd ineligible for resentencing under Proposition 36 because he was armed during the commission of his commitment offense.

DISCUSSION

Although an inmate serving a sentence for possession of a firearm by a felon is not by law disqualified from Proposition 36 relief, those who were armed with a firearm "[d]uring the commission of the current offense" are legally ineligible for

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[1] All further statutory references are to the Penal Code.

resentencing. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Floyd argues, however, that: (1) this exclusion does not apply when "arming is an element of the offense;" (2) in order for the exclusion to apply, the arming must be "tethered" to another offense, such that the weapon facilitates the commission of that separate offense; and (3) the arming exclusion must be read to require a facilitative nexus to another offense in order to comport with the electorate's intent to provide relief to those serving unduly long sentences for nonserious, nonviolent crimes.

Floyd's first argument rests on a faulty premise. Arming is decidedly *not* an element of the offense for which Floyd was convicted. In 2002, when Floyd committed his offense, section 12021, subdivision (a)(1)[2] read as follows: "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." Thus, a person can be found guilty of possession of a firearm by a felon by merely owning a firearm. Arming, however, requires that the weapon be "available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) Here, Floyd had a loaded handgun in the breast pocket of his jacket when he was stopped by law enforcement. Thus, he did not just own or possess the gun, he had it readily available for use, which is the distinguishing factor rendering him ineligible for Proposition 36 relief.

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[2] In 2010, the Legislature repealed section 12021 and replaced it with section 29800, which contains the same operative language.

Second, as Floyd acknowledges, the weight of authority is against his position that the arming exclusion must be tethered to a separate offense. Every appellate court to decide the issue has concluded that a defendant is ineligible whenever the record shows the defendant was in actual physical possession of the firearm, and therefore not only possessed the firearm but was armed with it. (*People v. Frutoz* (2017) 8 Cal.App.5th 171; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283–284; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312–1314, 1317; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030 (*Osuna*); *People v. White* (2014) 223 Cal.App.4th 512, 525.) In other words, the arming exclusion requires "a temporal nexus between the arming and the underlying felony, not a facilitative one." (*Osuna,* at p. 1032.)

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. The threat presented by 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 actually 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.' " (*People v. 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, supra,* 227 Cal.App.4th at pp. 1313–1314.) "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.) That is not the case here, as Floyd was carrying the firearm that he possessed in the pocket of his jacket when he was arrested.

Finally, it is entirely 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. The purpose of Proposition 36 was to provide relief to inmates serving life sentences for nonserious, nonviolent felonies who pose very little risk to the public. (*Osuna, supra,* 225 Cal.App.4th at p. 1038.) "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." (*Ibid.*)

Consequently, we reach the same conclusion as all the published cases that have considered this issue and hold that Floyd is ineligible for resentencing under Proposition 36 because 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:

ROTHSCHILD, P. J.

BENDIX, J.