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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

B276742

Plaintiff and Respondent,

(Los Angeles County Super. Ct. No. VA031965)

v.

LEMOND L. MCCORD,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, John R. Stanton, Judge. Affirmed.

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, Senior Assistant Attorney General, Noah P. Hill and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent. This appeal is taken from a superior court order denying a Proposition 36 petition for a reduction in sentence filed by defendant and appellant Lemond Lamar McCord. We hold, because defendant was armed with a firearm when he committed his offense, the trial court properly ruled he was not eligible for relief.

Background

The record on appeal corresponding to defendant's conviction is scant. It consists only of portions of the reporter's transcript from the trial. But, because the appellate issue does not turn on the details of defendant's trial, the complete record of the proceedings is unnecessary. Simply put, defendant was outside the window of his neighbor's home yelling, "I'm going to kick your ass. Come outside." Then, with a .380 caliber automatic gun in his hand, defendant stated, "I'm going to kill your fucking ass"

Based on these facts, in 1996, a jury found defendant guilty of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). The trial court found true the allegations that defendant had two prior felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had served one prior prison term within the meaning of section 667.5, subdivision (b). Pursuant to the Three Strikes law, defendant was sentenced to 25 years to life in prison.² In 1997,

¹ All further statutory references are to the Penal Code.

² In addition, one year was imposed and stayed for serving a prior prison term (§ 667.5 subd. b).

we affirmed the judgment on appeal but remanded the case for a recalculation of sentencing credits.

In November 2012, California voters approved Proposition 36, which amended the Three Strikes law so that a defendant who has two prior serious or violent felony convictions is exposed to an indeterminate term only if the current third felony is also serious or violent. (*People v. Conley* (2016) 63 Cal.4th 646, 651; § 1170.126, subd. (b).) Proposition 36 also provided a vehicle for prisoners serving indeterminate terms for a third felony that was neither serious nor violent to petition the trial court and request a reduction in sentence commensurate with the amended version of the Three Strikes law. (§ 1170.126, subd. (a).)

Following the passage of Proposition 36, defendant filed a petition in superior court requesting his sentence be recalled pursuant to section 1170.126. The superior court denied the petition on the ground that defendant was armed with a firearm during the commission of the offense—a fact that disqualified defendant from resentencing under Proposition 36. As stated, defendant has appealed that order.

Defendant Is Not Eligible for Proposition 36 Relief

An inmate is excluded from Proposition 36 resentencing if he was armed during the commission of the current offense. (§§ 1170.126, subd. (e)(2); 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii).) "[A]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively. [Citations.]" (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) "The California Supreme Court has explained that "[i]t is the availability—the ready access—of the weapon that constitutes

arming." (People v. Bland (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391] (Bland), quoting People v. Mendival (1992) 2 Cal.App.4th 562, 574 [3 Cal.Rptr.2d 566].)" (People v. White (2014) 223 Cal.App.4th 512, 524.) Where "the record establishes that a defendant convicted under the pre-Proposition 36 version of the Three Strikes law as a third strike offender of possession of a firearm by a felon was armed with the firearm during the commission of that offense, the armed-with-a-firearm exclusion applies and the defendant is not entitled to resentencing relief under [Proposition 36]." (Id. at p. 519.)

Defendant's position is the arming exclusion in Proposition 36 is inapplicable if the only offense committed by the petitioning inmate was possession of a firearm by a felon. He claims, for the exclusion to apply, the arming must be "tethered" to a different underlying offense and must facilitate the commission of that offense.

This is an argument that has been repeatedly rejected by a multitude of appellate panels. (See, e.g., *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 ["[d]uring the commission of" provision in Proposition 36 requires a "temporal nexus between the arming and the underlying felony, not a facilitative one"]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799 [concluding the "defendant was armed with a firearm during the commission of his commitment offenses for possession of a firearm by a felon and possession of a short-barreled shotgun"]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312-1314; *People v. Osuna, supra*, 225 Cal.App.4th at pp. 1030-1032; *People v. Blakely, supra*, 225 Cal.App.4th at pp. 1058-1059; *People v. White, supra*, 223 Cal.App.4th at p. 519.)

Defendant criticizes these cases, for two central reasons. First, he maintains there is no "meaningful difference" between the words "during" and "in" and, because "in the commission" has been interpreted to require a facilitative nexus with a crime the same must be true for the phrase "during the commission." Second, he asserts the intent of the electorate was to shorten the sentences of "the less dangerous felons" and, in order to facilitate that intent, the exclusion from Proposition 36 eligibility for those who were convicted of being a felon in possession of a firearm should only apply if the felon was armed to facilitate the commission of a different offense.

We agree with above-cited cases that "during the commission" does not require a defendant to be armed with a firearm to facilitate the commission of a separate crime. It is true, as defendant points out, the terms "in" and "during" have been used interchangeably in certain enhancement circumstances. (See, e.g., People v. Bland, supra, 10 Cal.4th at p. 997 ["in the commission" means both the arming must take place during the commission of the crime and have a facilitative nexus to that offense in order to be subject to a section 12022 enhancement for being armed "in the commission" of a felony].) But that is of no moment because Proposition 36 is not an enhancement and there is no language in it that suggests a defendant, who is convicted of being a felon in possession of a firearm, is subject to its "arming" disqualification only if he or she was armed to facilitate the commission of a separate/different offense. (See People v. Frutoz (Feb. 6, 2017, F069140) __Cal.App.5th__ [2017 D.A.R. 1093, 1094-1096] [a defendant convicted of possession of a firearm by a felon, with a jury finding that he was "armed" with a firearm during the commission of

that offense, is considered "armed with a firearm" within the meaning of the Three Strikes Reform Act even though he was not armed to facilitate a separate offense].)

We also reject defendant's position that the goals of Proposition 36 would be frustrated should the enactment not be interpreted to avail him of relief. The ballot materials for Proposition 36 indicate it is not intended to reduce sentences for those convicted of "gun-related" felonies, or whose third-strike conviction involved "firearm possession." (People v. Cervantes (2014) 225 Cal.App.4th 1016, 1016-1017.) Furthermore, because of obvious societal dangers, the public may rationally be opposed to reducing the sentence of a felon who, after being convicted, elects to both illegally possess a firearm and arm himself or herself with it. (People v. Elder, supra, 227 Cal.App.4th at pp. 1313-1314 [recognizing legislative finding that convicted felons are more likely to misuse guns, even when possessed momentarily].) Even if an armed felon is not armed to facilitate a separate crime, the objectives of Proposition 36 are not foiled by the exclusion of that felon from its reach.

We follow the long line of published authority and hold the trial court properly determined defendant was armed with a firearm during the commission of the offense and therefore ineligible for Proposition 36 relief.

DISPOSITION

The order denying the petition for resentencing is affirmed. NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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We concur:

KRIEGLER, P. J.

BAKER, J.

^{*}Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.