Filed 11/15/16 P. v. Bloodsaw CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

THE PEOPLE, Plaintiff and Respondent, v. DEANDRE BLOODSAW, Defendant and Appellant.	B263336 (Los Angeles County Super. Ct. No. BA199916)

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

Jonathan B. Steiner and Suzan E. Hier, 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, and Noah Hill and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Deandre Bloodsaw appeals the trial court's order denying his petition for recall and resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (hereinafter the Act or Proposition 36). The trial court concluded Bloodsaw was ineligible for resentencing because he was armed with a firearm during commission of his current offense, possession of a firearm by a felon. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2001, a jury convicted Bloodsaw of three counts of misdemeanor drawing or exhibiting a firearm (Pen. Code, § 417, subd. (a)(2))[1] and three counts of possession of a firearm by a felon (former § 12021, subd. (a)(1)).[2] The jury additionally found Bloodsaw had served a prior prison term within the meaning of section 667.5, subdivision (b) and had been convicted of or had sustained juvenile petitions for two prior "strike" offenses.[3] The trial court sentenced Bloodsaw to a term of 25 years to life on count 6, one of the felon-in-possession of a firearm offenses, pursuant to the Three Strikes law (§§ 667, subds. (b)-(i),

---

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

[2] Effective January 1, 2012, former section 12021, subdivision (a) was repealed and reenacted without substantive change as section 29800, subdivision (a). (See *People v. White* (2014) 223 Cal.App.4th 512, 518, fn. 2.) All further references to section 12021 are to the former version of the law.

[3] The jury found Bloodsaw had suffered one conviction for shooting at an inhabited dwelling (§ 246); a sustained juvenile petition for attempted robbery (§§ 664, 211); and two sustained juvenile petitions for assault with a firearm (§ 245, subd. (a)(2)).

1170.12, subds. (a)-(d)). Sentence on the other five convictions was stayed pursuant to section 654. We affirmed the judgment in an unpublished opinion. (*People v. Bloodsaw* (Mar. 28, 2003, B153468) [nonpub. opn.].)[4]

As summarized in our unpublished opinion, the evidence at trial was sufficient to establish the following. Bloodsaw was a member of the Hoover Five-Deuce Crip criminal street gang. Eric Netterville was also a member of the gang. Tashiaka Canson lived near West 53rd Street in Los Angeles. Netterville and Bloodsaw often "hung out" nearby. In October 1999, Canson overheard Netterville threaten to kill her cousin, Talley Robinson. Within a few weeks, Robinson was killed. Thereafter, on repeated occasions when Canson left her house, Bloodsaw and Netterville were outside staring at her in an intimidating fashion.

On the afternoon of January 27, 2000, Canson observed Netterville standing outside her house. He said, "Shut up, bitch. I'll kill you." Approximately an hour and a half later, Bloodsaw walked to Canson's house, lifted his jacket, and exposed a chrome handgun with black grips that was tucked in his waistband. He said nothing to Canson. On the afternoon of January 29, 2000,

---

[4] As the People request, we take judicial notice of the record in case No. B153468, including our unpublished opinion. (Evid. Code, §§ 459, subd. (a), 452, subd. (d); see *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800 [appellate court's unpublished opinion in defendant's prior underlying appeal is sufficient evidence of the record of conviction]; *People v. Hicks* (2014) 231 Cal.App.4th 275, 285-286 [appellate opinion is part of the record of conviction which the trial court properly used in determining defendant's Proposition 36 eligibility].)

when Canson and her two sisters returned home from shopping, Bloodsaw was standing in front of a nearby house. He walked over to the women and exposed the same gun, again without saying anything. Later that afternoon Bloodsaw exposed the gun a third time when Canson and her sisters walked outside their home. Canson perceived Bloodsaw's actions as a threat. Canson's mother, Jennifer Rivers, reported to a police detective in February 2000 that Bloodsaw had been looking at her "crazy" and harassing her. Once between January 31, 2000 and February 4, 2000, Bloodsaw "jumped out on" Rivers and, with a threatening expression, exposed a gun.

On November 6, 2012, the electorate passed Proposition 36. (*People v. Brimmer, supra,* 230 Cal.App.4th at p. 788.) As discussed more fully *post,* Proposition 36 enacted section 1170.126, which provides that persons currently serving an indeterminate life term under the Three Strikes law may file a petition in the sentencing court seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subds. (f), (g); *People v. Brimmer, supra,* at p. 788.)

On January 22, 2013, Bloodsaw, who was represented by counsel, petitioned for resentencing pursuant to section 1170.126. He argued that he was eligible and resentencing would not pose an unreasonable risk of danger to public safety.[5] The People opposed the motion, arguing, inter alia, that Bloodsaw was

---

[5] Bloodsaw requested that he be resentenced to the high term of three years on the felon-in-possession conviction in count 4, doubled to six years pursuant to the Three Strikes law, plus a section 667.5 prior prison term enhancement, with sentence on the remaining convictions stayed pursuant to section 654, for a total term of seven years.

ineligible because he had been armed with a firearm during commission of the offenses,[6] and in any event resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).) On April 2, 2015, the trial court denied the petition. It concluded Bloodsaw was "legally ineligible for relief. He was armed with a firearm within the meaning of [section] 667(e)(2)(C)(iii) and 1170.126 (e)(2)."

Bloodsaw filed a timely notice of appeal challenging the trial court's denial of his petition. (*Teal v. Superior Court* (2014) 60 Cal.4th 595.)

DISCUSSION

1. *The Act*

"Prior to its amendment by the Act, the Three Strikes law required that a defendant who had two or more prior convictions of violent or serious felonies receive a third strike sentence of a minimum of 25 years to life for any current felony conviction, even if the current offense was neither serious nor violent. [Citations.] The Act amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony. [Citations.]" (*People v. Johnson* (2015) 61 Cal.4th 674, 680-681, fn. omitted; *People v. Conley* (2016) 63 Cal.4th 646, 651.)

---

6 The People also argued that Bloodsaw was ineligible because he had intended to cause great bodily injury. The trial court did not rule on this contention and it is not before us.

The Act also enacted section 1170.126, which created a procedure by which eligible prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules.[7] (*People v. Johnson, supra,* 61 Cal.4th at

---

[7] Section 1170.126, subdivision (b) provides: "(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section."

Subdivision (e) provides in pertinent part: "An inmate is eligible for resentencing if: [¶] (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. [¶] (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12."

p. 682; *People v. Conley, supra,* 63 Cal.4th at p. 653; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048.) An inmate is eligible for resentencing if he or she 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); *People v. Johnson, supra,* at p. 682.) 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." (*People v. Johnson, supra,* at p. 682.) One such disqualifying exception applies when the defendant, " '[d]uring the commission of the current offense . . . used a firearm, [or] was armed with a firearm.' " (*People v. Brimmer, supra,* 230 Cal.App.4th at p. 788; §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312.) The trial court may decline to resentence an eligible defendant if, in its discretion, it determines resentencing would pose an unreasonable danger to public safety. (§ 1170.126, subd. (f).)

To determine whether a defendant meets the statutory eligibility requirements of the Act, a trial court examines the entire record of conviction. (See, e.g., *People v. Arevalo* (2016) 244 Cal.App.4th 836, 848; *People v. Hicks*, *supra*, 231 Cal.App.4th at p. 286; *People v. Brimmer, supra,* 230 Cal.App.4th at pp. 800-801; *People v. Guerrero* (1988) 44 Cal.3d 343, 355.) Ineligibility must be proven beyond a reasonable doubt. (*People v. Arevalo, supra,* at p. 853.)

2. *The record supports the trial court's finding that Bloodsaw is ineligible for resentencing because he was armed during commission of the offense*

Bloodsaw's current convictions for being a felon in possession of a firearm are not serious or violent felonies for purposes of the Three Strikes law. (*People v. Brimmer, supra,* 230 Cal.App.4th at p. 792.) The sole disqualifying criterion at issue here is the armed with a firearm exclusion contained in section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii).[8] Under those subdivisions, an inmate is ineligible for Proposition 36 resentencing if "[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."

Application of Proposition 36 on the facts presented here is a pure question of law that we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Camp* (2015) 233 Cal.App.4th 461, 467.) When interpreting a voter initiative, our task is to ascertain and effectuate the voters' intent. (*People v. Park* (2013) 56 Cal.4th 782, 796.) We apply the same principles that govern interpretation of a statute enacted by the Legislature. Thus, we look first to the language of the statute, giving the words their ordinary meaning. (*Ibid.*; *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) If not ambiguous, the plain meaning of the statutory language controls. (*People v. Birkett* (1999)

---

[8] The relevant language in section 667, subdivision (e)(2)(C)(iii) and section 1170.12, subdivision (c)(2)(C)(iii) is identical. For ease of reference we hereinafter refer only to section 667.

21 Cal.4th 226, 231; *People v. Bush* (2016) 245 Cal.App.4th 992, 1003.) The statutory language must be construed in the context of the statute as a whole and the overall statutory scheme. (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1509; *People v. Bush, supra,* at p. 1003.) When the statutory language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet. (*People v. Superior Court (Pearson), supra,* at p. 571; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313.)

The phrase " '[a]rmed with a firearm' has been statutorily defined and judicially construed to mean having a firearm available for use, either offensively or defensively." (*People v. Blakely, supra,* 225 Cal.App.4th at p. 1051; *People v. Brimmer, supra,* 230 Cal.App.4th at p. 795; see *People v. Pitto* (2008) 43 Cal.4th 228, 236 ["A defendant is armed under section 12022 as long as the gun is 'available for use, either offensively or defensively"]; *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*).) Our Supreme Court has explained that it is " 'the availability—the ready access—of the weapon that constitutes arming.' " (*Bland, supra,* at p. 997.) The enacting body, including the electorate, is deemed to be aware of existing laws and judicial constructions in effect when legislation is enacted. (*People v. Blakely, supra,* at p. 1052; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029.) Where a statute uses terms that have been judicially construed, we presume the terms have been used " ' " 'in the precise and technical sense which had been placed upon them by the courts.' " ' " (*People v. Osuna, supra,* at p. 1029; *People v. Blakely, supra,* at p. 1052.) Accordingly, "the electorate intended 'armed with a firearm,' as that phrase is used in the Act, to mean having a firearm available for offensive or

defensive use." (*People v. Blakely, supra,* at p. 1052; *People v. Osuna, supra,* at p. 1029.)

The elements of former section 12021, felon in possession of a firearm, are "conviction of a felony and ownership or knowing possession, custody, or control of a firearm. [Citations.]" (*People v. Osuna, supra,* 225 Cal.App.4th at p. 1029; *People v. White*, *supra*, 223 Cal.App.4th at p. 524.) " '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.' " (*People v. Osuna, supra,* at p. 1029; *People v. Blakely, supra,* 225 Cal.App.4th at p. 1052.) The crime " 'is committed the instant the felon in any way has a firearm within his control.' [Citation.]" (*People v. Blakely, supra,* at p. 1052.) Thus, the crime of possession of a firearm by a felon may involve the act of personally carrying or being in actual physical possession of a firearm. However, physical possession is not an essential element because a conviction may also be based on a defendant's constructive possession of the firearm. (*People v. White, supra,* at p. 524; *People v. Osuna, supra,* at p. 1030.) "[W]hile the act of being armed with a firearm—that is, having ready access to a firearm [citation]—necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it. For example, a convicted felon may be found to be a felon in possession of a firearm if he or she knowingly kept a firearm in a locked offsite storage unit even though he or she had no ready access to the firearm and, thus, was not armed with it." (*People v. White, supra,* at p. 524.)

Applying these principles in the Proposition 36 resentencing context, courts have repeatedly concluded that a conviction for being a felon in possession of a firearm disqualifies an inmate from resentencing if the nature of that possession amounted to arming as defined in *Bland,* that is, if the inmate had the firearm available for offensive or defensive use during commission of the crime. (See *People v. White* (2016) 243 Cal.App.4th 1354, 1362; *People v. Hicks, supra,* 231 Cal.App.4th at pp. 283-284; *People v. Brimmer, supra,* 230 Cal.App.4th at p. 796; *People v. Elder, supra,* 227 Cal.App.4th at pp. 1311-1312; *People v. Osuna, supra,* 225 Cal.App.4th at pp. 1026-1027; *People v. Blakely, supra,* 225 Cal.App.4th at p. 1048; *People v. White, supra,* 223 Cal.App.4th at p. 525; cf. *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.) However, because a defendant's mere possession of a firearm does not *necessarily* establish that he was armed with it, a current felon-in-possession conviction does not automatically disqualify an inmate from resentencing. (*People v. Elder, supra,* at pp. 1313-1314 ["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"]; *People v. Burnes, supra,* at p. 1458; *People v. Blakely, supra,* at p. 1048.)

Here the record demonstrates beyond a reasonable doubt that Bloodsaw was armed with the firearm, and therefore the trial court correctly concluded he was ineligible for Proposition 36 resentencing. (See *People v. Elder, supra,* 227 Cal.App.4th at p. 1317.) Underlying each of the three felon-in-possession counts was Bloodsaw's conduct of carrying a handgun in his waistband and raising his shirt to display it to Canson, her sisters, or her

mother. He not only had a firearm in his possession but was "personally armed with the firearm on that date because he was carrying it and using it in a menacing manner to threaten" the victims, demonstrating he had ready access to the firearm. (*People v. Brimmer, supra,* 230 Cal.App.4th at p. 796.) The evidence thus established Bloodsaw had the weapon available for offensive use and was armed within the meaning of section 667, subdivision (e)(2)(C)(iii). (See *People v. Blakely, supra,* 225 Cal.App.4th at p. 1052; *Bland, supra,* 10 Cal.4th at p. 997.)

Bloodsaw argues that *White, Osuna, Hicks, Brimmer, Blakely,* and *Elder* were wrongly decided. In his view, the section 667, subdivision (e)(2)(C)(iii) arming exclusion does not apply when the current offense is possession of a firearm. Instead, he insists the exclusion applies only when the defendant was armed during the commission of a *separate* felony, not when the arming was part of the "commission of the felony itself." Put differently, he urges that there must be a facilitative nexus between the arming and an underlying felony to which the arming is tethered. Such a facilitative nexus cannot exist in the case of a possessory firearm offense, he posits, because being armed with a firearm does not facilitate the felony of possessing it.

Bloodsaw bases his argument on *Bland* and *People v. Pitto,* both of which concerned imposition of an arming enhancement pursuant to section 12022. In *Bland,* our Supreme Court concluded a defendant convicted of a possessory drug offense was subject to a section 12022 arming enhancement when he possessed both drugs and a gun in the same location, but was not present when the police seized them. (*Bland, supra,* 10 Cal.4th at p. 995.) The court concluded the term "armed" in section 12022 "means simply that the defendant had the prohibited

weapon available for offensive or defensive use." (*Bland, supra,* at p. 1001.) The statutory language " 'in the commission of a felony' meant *any time during and in furtherance of the felony*. Therefore, by its terms, [section 12022's] three-year sentence enhancement for being 'armed' with an assault weapon applies whenever during the commission of the underlying felony the defendant had an assault weapon available for use in the *furtherance of* that felony. [Citation.]" (*Bland, supra,* at p. 1001, second italics added.) "Of course, contemporaneous possession of illegal drugs and a firearm will satisfy the statutory requirement of being 'armed with a firearm in the commission' of felony drug possession only if the evidence shows a nexus or link between the firearm and the drugs," a requirement sometimes described as a " 'facilitative nexus.' " (*Id.* at p. 1002.) "[B]y 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." (*Ibid.*) Such a facilitative nexus may exist if, for example, the drugs and the firearm are kept in close proximity. (*Ibid.*)

People v. Pitto observed that *Bland* "appears to have adopted a 'facilitative nexus' test and embraced a 'purpose and effect' standard," but clarified that there was no intent requirement. (*People v. Pitto, supra,* 43 Cal.4th at pp. 239-240.) "In other words, a defendant is armed if the gun has a facilitative nexus with the underlying offense (i.e., it *serves* some purpose in connection with it); however, this requires only that the defendant is aware during the commission of the offense of the nearby presence of a gun available for use offensively or

defensively, the presence of which is not a matter of happenstance. This does not require any intent to use the gun for this purpose." (*People v. Brimmer, supra,* 230 Cal.App.4th at pp. 794-795.)

Bloodsaw argues that because the relevant language setting forth the arming exclusion in section 667, subdivision (e)(2)(C)(iii) is essentially the same as that construed in *Bland* and *Pitto,* the two provisions must be interpreted the same way. (See *People v. Blakely, supra,* 225 Cal.App.4th at p. 1052; *People v. Osuna, supra,* 225 Cal.App.4th at p. 1029; *People v. Brimmer, supra,* 230 Cal.App.4th at pp. 795-796; *People v. Weidert* (1985) 39 Cal.3d 836, 844.) Thus, he avers that without a facilitative nexus to an underlying, or "tethering" offense, the arming exclusion in subdivision (e)(2)(C)(iii) does not apply.

We disagree. When an arming *enhancement* is imposed under section 12022, the enhancement must be based on (or "tethered to") an underlying felony, and must have a facilitative nexus to that crime. (See *People v. Osuna, supra,* 225 Cal.App.4th at p. 1030; *People v. Hicks, supra*, 231 Cal.App.4th at p. 283.) "Having a gun available does not further or aid in the commission of the crime of possession of a firearm by a felon. Thus, a defendant convicted of violating former section 12021 does not, regardless of the facts of the offense, risk imposition of additional punishment pursuant to section 12022, because there is no 'facilitative nexus' between the arming and the possession." (*People v. Hicks, supra,* at p. 283.) This simply reflects the "unremarkable point that an enhancement of necessity does not have any independent existence and must as a result be tied to an underlying offense . . . ." (*People v. Elder, supra,* 227 Cal.App.4th at p. 1312.) But we "are not concerned here with

an enhancement but with a criterion for mitigation of sentence." (*Id.* at p. 1315.) The conclusion that ineligibility under section 667, subdivision (e)(2)(C)(iii) must, like an enhancement, require a second offense in addition to the possession offense does not follow. "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)." (*People v. Elder*, *supra*, at pp. 1312-1313.)

"[U]nlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '[*d*]*uring* the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' [Citation.] Thus, there must be a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same." (*People v. Hicks, supra,* 231 Cal.App.4th at pp. 283-284; *People v. Osuna, supra,* 225 Cal.App.4th at pp. 1030-1032; *People v. White, supra,* 243 Cal.App.4th at pp. 1362-1363; *People v. Brimmer, supra,* 230 Cal.App.4th at pp. 798-799.) "Following this reasoning, defendant was armed with a firearm *during* his possession of the gun, but not 'in the commission' of his crime of possession. There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since the Act uses the phrase '[d]uring the commission of the current offense,' and not in the commission of

the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, . . . the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*People v. Osuna, supra,* at p. 1032.)

Bloodsaw insists that the distinction between "during" and "in" relied upon by the foregoing authorities is not meaningful. He argues that "during" and "in" are sometimes used interchangeably, both as a matter of common parlance and by our Supreme Court in *Bland.* (See, e.g., *Bland, supra,* 10 Cal.4th at pp. 1001-1003 ["armed," for purposes of section 12022, means any time during and in furtherance of the felony].) We do not view *Bland*'s use of the word "during" as problematic. For arming to have a facilitative nexus to an underlying crime for purposes of a section 12022 enhancement, there must be a temporal link; a weapon can hardly be said to be available for use if the defendant does not possess it *during* the offense. "[I]n the commission of a felony," the language used in section 12022, means "the arming not only must occur *during* the commission of the felony, but must *also* facilitate it," whereas " '[*d*]*uring* the commission of the current offense' " (§ 667, subd. (e)(2)(C)(iii)) "specifically requires only that the arming occur *during* the commission." (*People v. White, supra,* 243 Cal.App.4th at p. 1363.)

Bloodsaw avers that the distinction between the words "during" and "in" relied upon by the foregoing authorities is unpersuasive because these words have not been consistently applied. He argues that cases have held that the language "in the commission of a felony" in section 12022.7, providing for a

great bodily injury enhancement, requires only a temporal relationship between the great bodily injury inflicted and the felony, rather than a facilitative nexus. However, the cases he cites do not support this proposition.[9] Nor are we persuaded by his contention that the electorate would not have chosen the word "during" had it intended to exclude from Proposition 36's sweep "anyone with a possession offense when it would have been much easier to make such an exclusion clear by including the possession crimes in the list of crimes for which resentencing is prohibited." There are good reasons for the electorate's choice to omit firearm possession offenses from the "list" of ineligible crimes. For one thing, as we have seen, not all convictions for

---

[9] *People v. Poroj* (2010) 190 Cal.App.4th 165 did not expressly consider the question, and does not stand for the proposition that there need be no facilitative nexus between the crime and the great bodily injury. The question in *Poroj* was whether a section 12022.7 great bodily injury enhancement required a showing of intent to inflict great bodily injury separate or apart from the intent required to commit the underlying felony. *People v. Valdez* (2010) 189 Cal.App.4th 82 does not assist Bloodsaw either. There the defendant's crime was fleeing the scene of an accident in violation of Vehicle Code section 20001. The court concluded that a section 12022.7 enhancement could not be imposed where the defendant's failure to stop and render aid was not the cause of the victim's injuries. (*People v. Valdez, supra,* at pp. 84-85.) "As the defendant . . . was not committing or attempting to commit a felony at the time of the accident, the injury suffered during the accident was not inflicted in the course of the commission of a felony or attempted felony within the meaning of Penal Code section 12022.7." (*Id.* at p. 85.) *Valdez* does not hold only a temporal nexus is required for imposition of a section 12022.7 enhancement, as Bloodsaw appears to suggest.

being a felon in possession of a firearm make a defendant ineligible for resentencing. (See *People v. White, supra,* 243 Cal.App.4th at p. 1364.) For another, the electorate apparently wished ineligibility to turn on whether the defendant used or was armed with a firearm or weapon, not whether he or she was convicted of a firearm possession crime or a firearm enhancement was found true. Section 667, subdivision (e)(2)(C)(iii) facilitates this goal, whereas simply listing statutory sections would not. We also disagree that the phrase "during the commission of the current offense" is meaningless unless the current offense is "something to which the arming attaches," as Bloodsaw suggests. The armed-during-the-commission language in section 667, subdivision (e)(2)(C)(iii) makes clear that mere possession of a firearm without arming is not a disqualifying crime. (See *People v. White, supra,* at p. 1364.)

Bloodsaw further contends that a comparison of the language in section 667, subdivisions (e)(2)(C)(i), (ii), and (iii) indicates the electorate intended to exclude firearm possession offenses from subdivision (iii). He points out that subdivisions (i) and (ii) begin by stating, "[t]he current offense is," whereas subdivision (iii) begins with the phrase, "[d]uring the commission of the current offense." He urges this "change in structure is telling" because where the electorate intended to exclude specific offenses the statute so states, but where the intent was to "exclude an offense only if something beyond its mere commission occurs, it states 'during the commission of' the offense something else happens." We do not find this significant. First, the statutory language is clear and unambiguous. Under these circumstances there is no need for construction. (*People v. Blakely, supra,* 225 Cal.App.4th at p. 1053.) Even if we agreed

that the language was ambiguous, the differences between the subdivisions do not, in our view, support the conclusion Bloodsaw seeks. Section 667, subdivision (e)(2)(C)(i) makes an inmate ineligible for resentencing when the current offense is a controlled substance charge in which a quantity enhancement was admitted or found true. Subdivision (C)(ii) makes an inmate ineligible if his or her current offense is a felony sex offense; specific ineligible offenses are defined by reference to other statutes. Subdivision (C)(iii), as we have discussed, makes an inmate ineligible if he used or was armed with a firearm or deadly weapon or intended to cause great bodily injury. We do not discern in these three subdivisions a particular pattern suggesting subdivision (iii) was intended to be inapplicable to firearm possession offenses.

Finally, Bloodsaw contends construing section 667, subdivision (e)(2)(C)(iii)'s arming exclusion as he suggests comports with the electorate's intent to shorten sentences for less dangerous felons while ensuring the "truly dangerous felons [are] kept behind bars." (See *People v. Brimmer, supra,* 230 Cal.App.4th at p. 793 [discussion of electorate's intent].) He urges that the crime of being a felon in possession of a firearm is not categorized as a serious or violent offense; possession of a weapon is, by itself, lawful and does not present a public danger; section 1170.126, subdivision (f) suffices to protect public safety, in that it allows a trial court to deny resentencing to an eligible inmate if resentencing poses an unreasonable risk of danger; and an interpretation of section 667, subdivision (e)(2)(C)(iii) that excludes fewer inmates would further the electorate's goal of saving incarceration costs.

Again, we disagree. The electorate was told in the relevant ballot materials that if the offender had committed gun-related felonies, or his or her current offense involved firearm possession, he or she would still be subject to a life sentence under the Three Strikes law. (See *People v. Blakely, supra,* 225 Cal.App.4th at p. 1055 [discussing Proposition 36 ballot materials].) Given these representations in the ballot materials, we think voters would be surprised to learn that the offense of being a felon in possession of a firearm could never exclude an inmate from eligibility.

Nor can we agree that an inmate who has suffered a conviction for being a felon in possession is merely a petty criminal, or that the electorate's goal of saving on incarceration costs overrides its goal of protecting public safety. "It is clear the electorate's intent was not to throw open the prison doors for *all* third strike offenders whose current convictions were not for serious or violent felonies, but only for 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." (*People v. Blakely, supra,* 225 Cal.App.4th at p. 1057; *People v. Osuna, supra,* 225 Cal.App.4th at p. 1038; *People v. White, supra,* 223 Cal.App.4th at p. 526.) "While, as defendant asserts, 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.' " (*People v. Elder, supra,* 227 Cal.App.4th at p. 1314.) As to whether section 1170.126, subdivision (f) suffices to protect public safety, "the electorate was

entitled to draw a line decreeing that any third strike felon who was actually armed with a prohibited firearm—no matter how benign the circumstances—was categorically ineligible for resentencing relief. It is not this court's role to second-guess that determination." (*People v. White, supra,* 243 Cal.App.4th at pp. 1364-1365.)

In sum, because the record of conviction establishes that Bloodsaw does not meet Proposition 36's resentencing eligibility criterion, he is ineligible for resentencing and the trial court correctly denied his petition.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.