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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS RUDOLF HESSE,

Defendant and Appellant.

B260384

(Los Angeles County  
Super. Ct. No. BA201551)

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

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and  
Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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Thomas Hesse appeals from an order denying his petition for recall and resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Act). He contends the trial court erred in concluding he was ineligible for resentencing on his convictions for unlawful taking or driving a vehicle and evading a police officer. In light of *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), we reverse and remand.

***FACTUAL AND PROCEDURAL BACKGROUND***

In 2000, a jury convicted Hesse of first degree burglary (Pen. Code, § 459),<sup>1</sup> unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), and evading a police officer (Veh. Code, § 2800.2, subd. (a)). Based on the additional finding that Hesse had suffered two prior “strike” convictions for serious felonies, he was sentenced to a term of 88 years to life pursuant to the Three Strikes law, comprised of three consecutive terms of 25 years to life on each count, plus two five-year prior serious felony conviction enhancements (§ 667, subd. (a)(1)) and three one-year prior prison term enhancements (§ 667.5, subd. (b)).

On November 6, 2012, California voters approved Proposition 36, the Act, which amended the Three Strikes law effective November 7, 2012. (*Johnson, supra*, 61 Cal.4th at p. 679.) Prior to passage of the Act, a defendant convicted of two prior serious or violent felonies was subject to a 25 years to life sentence upon his or her conviction of *any* additional felony. (*Id.* at p. 680.) Under amended sections 667 and 1170.12, a defendant who has been convicted of two prior strikes is subject to such a sentence only if the current, third felony is itself serious or violent or if certain enumerated exceptions apply. (*Id.* at p. 681; §§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) Absent such exceptions, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony. (*Johnson, supra*, 61 Cal.4th at p. 681.)

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

The Act also added section 1170.126,<sup>2</sup> which created a resentencing procedure for prisoners serving indeterminate terms under the former version of the Three Strikes law, who would not have been sentenced to such terms under the Act. (*Johnson, supra*, 61 Cal.4th at p. 682.) An eligible prisoner may file a petition to recall his or her sentence in the trial court and seek resentencing as a second strike offender. (§ 1170.126, subds. (b), (e).) Resentencing of eligible inmates may nonetheless be refused if the trial court in

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<sup>2</sup> Section 1170.126 provides in pertinent part: “(a) The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence. [¶] (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. [¶] . . . [¶] (e) 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. [¶] (f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.”

its discretion determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

On November 6, 2014, Hesse filed a petition for recall of sentence seeking resentencing under the Act as to his convictions for unlawful taking or driving a vehicle and evading a police officer. The trial court denied the petition, finding that Hesse was ineligible for resentencing under section 1170.126, subdivision (e)(2) because one of his current convictions was for first degree burglary, a serious felony. Hesse timely appealed.

### ***DISCUSSION***

After the parties completed initial briefing, the California Supreme Court, resolving an issue that had divided the Courts of Appeal, held in *Johnson* that an inmate is eligible for resentencing under section 1170.126 on a current conviction that is neither serious nor violent, even though he or she has another current conviction that is serious or violent. (*Johnson, supra*, 61 Cal.4th at pp. 679-680.) The court reasoned that historically, sentencing under the Three Strikes law has focused on the sentence to be imposed with respect to each individual count. (*Id.* at pp. 688-689.) The Proposition 36 ballot materials did not suggest that the electorate intended to apply a different approach in the context of resentencing under section 1170.126. (*Id.* at pp. 691, 694.) Moreover, evaluating resentencing eligibility on a count-by-count basis promotes sentencing that fits the crime, effectuates the voters' intent of making room in prison for dangerous criminals while protecting public safety, and prevents a distinction in punishment based on whether the counts were tried in the same prosecution. (*Id.* at p. 694.) Accordingly, *Johnson* concluded that the Act "requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, an inmate may obtain resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life." (*Id.* at p. 688.)

Here, Hesse's current convictions are for first degree burglary (§ 459), unlawful taking or driving a vehicle (Veh. Code, § 10851, subd. (a)), and evading a police officer

(Veh. Code, § 2800.2, subd. (a)). First degree burglary is a serious felony. (§§ 667.5, subd. (c)(21), 1192.7, subd. (c)(18).) Unlawful taking or driving a vehicle and evading a police officer are not serious or violent felonies absent additional circumstances, such as, for example, the use of a firearm or the infliction of great bodily injury in the commission of the felony. (§§ 667.5, subd. (c), 1192.7, subd. (c).) Under *Johnson*, the fact Hesse was convicted of first degree burglary does not make him ineligible as a matter of law for recall of sentence and resentencing on the convictions for unlawful taking or driving a vehicle or evading a police officer.<sup>3</sup> Accordingly, we reverse the trial court’s order and remand for a new hearing at which the court should determine Hesse’s eligibility for recall and resentencing on the unlawful taking or driving a vehicle and evading a police officer convictions in accordance with section 1170.126, subdivisions (e) and (f). (See *People v. Jernigan* (2014) 227 Cal.App.4th 1198, 1204 [“First, the trial court must determine whether an inmate is eligible for resentencing. And second, the trial court must evaluate whether resentencing an eligible inmate would pose an unreasonable risk of danger to the public.”].)

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<sup>3</sup> We invited the parties to submit supplemental briefing in light of *Johnson*. Hesse agrees and the People concede that, under *Johnson*, Hesse may be eligible for resentencing on his convictions for unlawful taking or driving a vehicle and evading a police officer.

***DISPOSITION***

The trial court's order denying Hesse's petition for recall of sentence is reversed and the matter is remanded for further proceedings consistent with the opinions expressed herein.

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EDMON, P. J.

WE CONCUR:

ALDRICH, J.

JONES, J.\*

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