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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC CURTIS,

Defendant and Appellant.

C077452

(Super. Ct. No. 94F06354)

Defendant Eric Curtis appeals from the denial of his petition for recall and resentencing pursuant to the Three Strikes Reform Act of 2012. (Pen. Code, § 1170.126.)<sup>1</sup> The trial court denied his petition, finding him ineligible for resentencing because defendant was armed with a firearm during the commission of the offense. We affirm.

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

## BACKGROUND

We take the facts of defendant's current crimes from our prior opinion<sup>2</sup> affirming his conviction (*People v. Curtis* (Aug. 15, 1997, C021885) [nonpub. opn.]; see *People v. Guilford* (2014) 228 Cal.App.4th 651, 660-661 [prior appellate opinion admissible to prove ineligibility in section 1170.126 proceeding].)

An eyewitness observed two men leaving a Sacramento convenience store--one carrying a shotgun. The men briefly hid behind dumpsters, then ran to a nearby parking lot where a tan Subaru station wagon waited. The men entered the Subaru's front and rear passenger doors on the right side; the car started to drive away before the men were completely inside the car. The eyewitness, after dialing 911 and giving a description of the getaway car, followed the Subaru to a nearby bowling alley. He did not see anyone enter or leave the Subaru, but lost sight of it when it left the bowling alley parking lot.

A California Highway Patrol (CHP) officer saw the Subaru pass and gave chase, leading to a high-speed pursuit. Five times, the Subaru drove into the oncoming traffic lane, in an apparent attempt to force traffic to swerve around and collide with the CHP vehicle. The Subaru also ran a red light, nearly causing several cars to collide. At one point, a shotgun was thrown from the right side of the vehicle. When the Subaru finally stopped, three men got out; defendant from the driver's door.

At trial, defendant testified to spending the day of the robbery with his good friend of four years, Kevin Price, and an acquaintance, Oscar Foster (Price and Foster were the two passengers in the Subaru). In the afternoon, defendant borrowed his girlfriend's car,

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<sup>2</sup> Although we granted respondent's request for judicial notice of the record filed in case No. C021885 (treating it as a request to incorporate by reference), because the documents were not in front of the trial court, we decline to consider them in support of defendant's substantive argument. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [although reviewing court takes judicial notice it may choose not to rely on documents].)

a yellow Subaru station wagon. He claimed the three drove to a bowling alley, where the two friends left defendant and returned 40 minutes later. Defendant denied knowing anything unusual had happened until a number of police vehicles began following the Subaru as he drove. Defendant also denied knowing of the shotgun until Foster pointed the shotgun at him, telling him to evade the police.

Defendant was convicted of possession of a firearm by a felon (§ 12021) and felony evasion of a peace officer (Veh. Code, § 2800.2). The jury acquitted him of robbery. Finding two prior strikes, the trial court sentenced defendant to two 25-years-to-life terms, under California's Three Strikes law.<sup>3</sup>

Years later, defendant petitioned to recall his sentence, pursuant to section 1170.126. The trial court denied his petition, finding him ineligible because he was armed with a shotgun during the commission of the third strike offense. Defendant timely appealed.

## **DISCUSSION**

Section 1170.126 permits a three strikes inmate serving a life term for felonies neither serious nor violent to petition for resentencing. (§ 1170.126, subds. (b), (e)(1).) But an inmate is not eligible for resentencing if, inter alia, during the commission of the third strike offense, the defendant "was armed with a firearm or deadly weapon." (§ 667, subd. (e)(2)(C)(iii).) "[A]rmed with a firearm" has been construed to mean having a firearm readily available for offensive or defensive use. (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1052.)

Defendant challenges the denial of his resentencing petition, arguing the evidence was insufficient to show the weapon was available for his use because the weapon was in the physical possession of someone else. We disagree.

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<sup>3</sup> The passengers received sentences of 12 and five years for their role in the robbery.

We review a trial court's finding that a defendant was armed for purposes of resentencing eligibility for substantial evidence. (See *People v. Hicks* (2014) 231 Cal.App.4th 275, 286.) A trial court need only find the existence of a disqualifying factor by a preponderance of the evidence. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040.)

Here, substantial evidence supports the finding that defendant was armed with a firearm during his third strike offense. The trial court relied on the shotgun's proximity and the defendant's knowledge of the shotgun: "The shotgun was within his reach. It was nearby. He had ready access to it. It was available for offensive and defensive purposes, although the defendant claimed he did not know there was a shotgun in the car until it was pointed at him. That defies credulity. It's a shotgun not a handgun or a revolver that is easily concealed." The court also noted that defendant was driving his girlfriend's car; that he was friends with the passengers; and that he was behind the wheel of the get-away car as the two perpetrators fled the scene, armed with the shotgun.

Those facts constitute substantial evidence that defendant knew of the shotgun and that it was available to him during the commission of the offenses. (See *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 984-85 [defendant "armed" when he did not carry the firearm on his person]; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1011 [defendant "armed" when handgun was found in adjacent bedroom, in a purse belonging to his wife]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1317 [defendant "armed" when gun was on shelf of entertainment center, and another gun was in an unlocked safe in a bedroom].)

Moreover, the jury's verdict on the charge defendant was a felon in possession necessarily entailed a finding that defendant--at a minimum--exercised control over the shotgun. During deliberation, the jury sent a note: "On page 31a, it says that constructive possession requires that 'a person knowingly exercise control or the right to control a thing . . . .' [¶] Does this mean that constructive possession requires that 'a

person knowingly exercise control or exercise the right to control a thing . . . .’ [¶] In other words, if we believe he had the right to control the weapon, must he have exercised that right to be found guilty?” The court responded: “The answer is the defendant either exercised control or had the right to exercise control. [¶] The question that you have written, ‘or exercise the right to control,’ is not an interpretation under the instruction.”<sup>4</sup> Thus, in convicting on the possession count, the jury necessarily at least found that defendant had the right to exercise control over the shotgun.

We similarly find unavailing defendant’s argument that the trial court overly relied on elements concerned with constructive possession and failed to determine factors specifically directed to arming. While it is possible to possess a firearm without being armed, that is not the case before us. (See *People v. Blakely*, *supra*, 225 Cal.App.4th at pp. 1048, 1052 [if a parolee has a gun next to his bed while he is not home, he is in possession of the firearm because it is under his dominion and control, but he is not armed with the firearm because it is not readily available to him for offensive or defensive use].) Here nothing suggests that defendant might have possessed the shotgun without being armed; rather, the record amply supports the finding that the shotgun was available to him in the small confines of the Subaru.

Finally, defendant’s argument that he could not have been armed because the shotgun did not further the underlying crimes is unavailing. To determine that an inmate was armed for purposes of resentencing does not require a finding that the firearm furthered the underlying felony. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 798-99.) Unlike section 12022, which requires that a defendant be armed “in the commission of” a felony to impose additional punishment, the Three Strikes Resentencing Act disqualifies an inmate if he was armed with a firearm “during the commission of” the

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<sup>4</sup> We held that instruction was not error. (*People v. Curtis*, *supra*, C021885, at p. 8.)

