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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIJAH EDMUND GILMORE,

Defendant and Appellant.

E059229

(Super.Ct.No. RIF083648)

**OPINION**

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## I

### INTRODUCTION

On December 3, 2013, defendant and appellant Elijah Edmund Gilmore directed a letter to the trial court requesting resentencing under Proposition 36. After the court appointed a public defender to represent defendant, a request for Proposition 36 resentencing was filed. The People filed an opposition.

On July 16, 2013, following the court's recall of sentence conference, the court denied defendant's request because his criminal history made him ineligible for resentencing.

On July 24, 2013, defendant filed a timely notice of appeal.

## II

### STATEMENT OF FACTS

#### A. *Underlying Facts*<sup>1</sup>

“On November 28, 1998, about 6 p.m., Troy Nielsen saw someone inside his parents' GMC Suburban, which was parked in their driveway, and told his mother, Katherine Nielsen. She told her son, David, to call 911. Katherine, her husband Doug Nielsen, and their other sons, Scott and Michael, ran outside and saw defendant sitting in the GMC, trying to start it. Defendant drove the GMC across the street, into a neighbor's driveway.

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<sup>1</sup> Because this appeal is from the court's denial of defendant's request for resentencing under Penal Code section 1170.126, the underlying facts have been derived from our opinion, Case No. E027649, filed July 3, 2001, the original appeal in this matter.

“Scott threw a football at the GMC’s windshield. As Katherine and Scott stood behind a palm tree in front of their house, defendant suddenly drove toward them. Defendant ran into the palm tree, knocking it over.

“Defendant revved up the GMC, which was stuck on the fallen palm tree. The GMC jerked forward and then backward, as defendant drove the GMC off the tree. Katherine and Scott approached the GMC. Defendant put the truck into drive and drove around the tree, toward Katherine and Scott. Katherine screamed, ““Oh, my God, he’s coming at us. [¶] . . . [¶] [H]e’s going to run us over and go through our house.””

“Defendant drove the GMC up the Nielsens’ lawn, across a row of shrubs, over to a neighbor’s driveway, and back onto the street. The truck stalled in the street. Doug and Scott approached the GMC. Defendant restarted the truck. Scott chased it on foot as defendant drove it away while Doug retrieved his shotgun from the house.

“As defendant headed for the 91 freeway, the Neilsens’ neighbors picked up Scott and Doug in their truck and pursued the GMC. They pulled up next to the GMC on the 91 freeway. Scott threw a bat at one of the GMC doors. According to Doug’s trial testimony, he aimed his shotgun at the GMC’s front tire but lost his balance and shot the GMC driver’s window. Defendant stopped the GMC on the side of the freeway. The Neilsens pulled off the freeway at the next off-ramp and waited for defendant to get out of the GMC. The GMC suddenly headed directly toward the Neilsens, veered off the side of the off-ramp, headed down a slope, went back onto the 91 freeway, and drove away.

“Later that evening, the police noticed defendant at a pay telephone, acting in a suspicious manner. Defendant told the officers he had just been jumped by several Mexicans, who had shot him in the arm. Defendant identified himself falsely by giving his brother’s name and birth date. The officers ultimately arrested defendant and took his statement, during which he admitted he stole the GMC by starting it with a screwdriver, but denied that he intentionally drove it toward the Niensens. Rather, he claimed he initially could not control the GMC because the steering wheel temporarily locked.

“Later that same evening, a police officer located the GMC abandoned near the 91 freeway, and confiscated it. A few days later, it was returned to the Niensens.”

A jury found defendant guilty of assault with a deadly weapon, a vehicle, under Penal Code section 245, subdivision (a)(1) (counts 1 and 3); vehicle theft with a prior theft conviction under Vehicle Code section 10851 and Penal Code section 666.5 (count 5); receiving stolen property under Penal Code section 496 (count 6); false impersonation under Penal Code section 529, subdivision (3) (count 7); failure to appear under Penal Code section 1320.5 (count 8); and false representation of identity to a peace officer under Penal Code section 148.9, subdivision (a) (count 9). The trial court further found true allegations that defendant suffered three prior prison terms and two prior convictions for robberies in 1992 and 1994, but struck the 1992 prior conviction.

#### *B. Resentencing Proceedings*

In the petition for recall of sentence, defense counsel argued that a violation of Penal Code section 245, subdivision (a)(1), assault with a deadly weapon, is not necessarily a “strike.” In support of his argument, defense counsel relied on *People v.*

*Williams* (1990) 222 Cal.App.3d 911. In that case, the court determined that when a violation of section 245, subdivision (a)(1) is based on assault “by any means of force likely to produce great bodily injury,” it does not come within section 1192.7, subdivision (c)(23).<sup>2</sup> (*Id.* at p. 914.) Defense counsel argued that since the jury in this case was given the option of finding defendant guilty under that section of either an assault with a deadly weapon or by means or force likely to produce great bodily injury, it must be determined that defendant was convicted of the least adjudicated offense, a non-serious felony.

On that basis, defense counsel argued that defendant met the eligibility criteria for Proposition 36 second strike resentencing, and requested his presence at a full qualification hearing. A similar argument was made by defense counsel at the recall of sentence conference.

Prior to its ruling, the trial court noted that the amended information, filed January 20, 1999, stated as to count 1, that “defendant committed a violation of Penal Code section 245, subdivision (a), subsection (1), a felony, in that on or about November 29th, 1998, in the county of Riverside, state of California, he did willfully and unlawfully commit an assault upon Catherine Nielsen with a deadly weapon other than a firearm, to wit: a vehicle, and by means of force likely to produce great bodily injury.” The court also indicated that the same language, e.g., “to wit: a vehicle” was contained in our opinion in the underlying case.

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<sup>2</sup> Penal Code section 1192.7, subdivision (c)(23) classifies as a “serious” felony, “any felony in which the defendant personally used a dangerous or deadly weapon.”

After discussing eligibility and suitability, the trial court ruled that defendant was not eligible for resentencing “based on the fact he was convicted of a crime, 245 (a)(1), to wit, a vehicle, which is under California law a strike offense, and strike offenses are excluded from eligibility under 1170.126.”

### **III**

#### **ANALYSIS**

Defendant appealed and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

**IV**  
**DISPOSITION**

The judgment is affirmed.

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RICHLI  
J.

We concur:

RAMIREZ  
P. J.

CODRINGTON  
J.