

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL DURAN ORTIZ,

Defendant and Appellant.

E062295

(Super.Ct.No. INF057587)

OPINION

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

Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Daniel Duran Ortiz appeals the trial court's order denying his petition for recall and resentencing as a second strike offender under the Three Strikes Reform Act of 2012, added by Proposition 36 (the Act). (Pen. Code¹ § 1170.126.)

The trial court denied defendant's petition, because it found that defendant was armed with a firearm during the commission of his relevant conviction offense: being a felon in possession of a firearm. (Former § 12021, subd. (a)(1).) Based on that finding, the trial court concluded defendant was ineligible for relief under the Act.

Defendant appeals, arguing that he was not armed with a firearm during the commission of this offense. We disagree and affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

On March 1, 2007, an Indio police officer noticed defendant sitting in his truck in the driveway of a residence where suspicious activity had been reported the prior day. Defendant looked out of his side view mirror and then slumped down in his seat. The officer parked his car and started walking toward defendant's truck. Defendant got out of his truck and walked around it. The officer briefly spoke with defendant, discovered that defendant had an outstanding warrant, and arrested defendant. The officer then walked up to the passenger side of the truck and looked inside. On the passenger seat in plain view was a loaded .32-caliber revolver within arm's reach of the driver's seat.

¹ All further statutory references are to the Penal Code, unless otherwise noted.

On October 18, 2007, a jury convicted defendant, in relevant part, of being a felon in possession of a firearm under former section 12021, subdivision (a)(1). Defendant was found to suffer two prior strikes.

On January 23, 2008, the trial court imposed a third strike sentence of 25 years to life.

On October 17, 2014, defendant petitioned the trial court to recall his third strike sentence and to resentence him as a second strike offender under section 1170.126. The trial court denied the petition. According to the relevant portion of the minute order, the trial court found that defendant was ineligible for relief, because he was convicted of being a felon in possession of a firearm and had a loaded revolver on the passenger seat of the truck. The trial court therefore concluded defendant was armed with a firearm during his commission of the offense of being a felon in possession of a firearm, and thus ineligible for relief under the Act. Defendant appealed.

DISCUSSION

On appeal, defendant argues that, under the facts of the current offense, he was not armed with a firearm during the commission of being a felon in possession. We disagree.

Defendant asks us to determine whether he is eligible for relief under the Act based upon interpretation of the Act's statutory language. This presents a question of law that we review de novo. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1181.)

The Act lists several disqualifying factors that bar recall and resentencing relief if any one of them applies to the offense for which a defendant seeks such relief.

(§ 1170.126, subd. (e)(2).) One of the disqualifying factors is whether the defendant was “armed with a firearm during the commission” of the offense; this has been termed the armed with a firearm exclusion. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 792, citing §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The armed with a firearm exclusion applies if the defendant had “ ‘a firearm available for offensive or defensive use’ ” during the commission of the offense for which the defendant seeks relief. (*Brimmer*, at p. 796.)

Here, the record reveals that defendant had a firearm available for offensive or defensive use during the commission of his offense of being a felon in possession of a firearm. An officer observed defendant sitting in the driver’s seat of a truck belonging to him. The officer then observed defendant sliding down in the driver’s seat when the officer parked his patrol car. After defendant got out of the truck and was arrested, the arresting officer found a loaded revolver in the passenger seat. Given that the revolver was loaded and within defendant’s reach as he sat in the driver’s seat of the truck, the revolver was available for his offensive or defensive use as he committed the offense of being a felon in possession of a firearm. The trial court thus properly determined defendant was ineligible for relief under the Act pursuant to the armed with a firearm exclusion.

I. *Defendant’s Contentions*

Defendant makes the following contentions as to why the armed with a firearm exclusion either did not or could not apply to him: (1) he was not armed within the

meaning of the exclusion's statutory language; (2) section 1170.126 required the People to plead and prove the fact of his arming; and (3) the Sixth Amendment to the United States Constitution required a jury trial on the fact of his arming.

Defendant also contends, in any event, that insufficient evidence in the record supports the trial court's finding that he was armed. The opening brief raises this argument in conclusory fashion, and we do not address it. (See, e.g., *People v. Dixon* (2007) 153 Cal.App.4th 985, 996 [appellate court may consider contentions forfeited if not supported by sufficient argument or authority].)

We address each of defendant's enumerated contentions, and we disagree with all of them on the basis of this court's opinion in *People v. Brimmer, supra*, 230 Cal.App.4th 782.

1. The Meaning of the Exclusion's Statutory Language is Unambiguous

Defendant first contends the statutory language of the armed with a firearm exclusion is ambiguous, because it could require *either* that he was armed with a firearm during the commission of a separate, tethering offense; *or* that he was armed with a firearm during the commission of the nonseparate offense of merely being a felon in possession. In light of this ambiguity, defendant presses, we should apply the former, more lenient interpretation to him and find that he was not armed, because he was not committing an offense apart from merely possessing a firearm as a felon. We disagree.

This court squarely addressed this very same contention in *Brimmer*. As we explained in *Brimmer*, the statutory language of the armed with a firearm exclusion is

unambiguous, because the language in it *already* had been statutorily defined and judicially construed and, by that process, had accrued the precise meaning discussed *ante*. (*Brimmer, supra*, 230 Cal.App.4th at pp. 795-797, 799.) The exclusion’s prepositional phrase “during the commission of” requires *only* that a defendant’s arming occur *at the same time* as the underlying felony. This means in turn that the defendant does *not* have to commit a separate, tethering felony offense *apart* from merely being a felon in possession before the exclusion may apply. (*Id.* at pp. 797-799.) Defendant does not offer any persuasive reasons as to why we should revisit this conclusion we reached in *Brimmer*.

Defendant claims that the prepositional phrase “during the commission of” a felony is semantically identical to the prepositional phrase “in the commission of” a felony, which, we noted in *Brimmer*, *does* require a separate, tethering offense. (*Brimmer, supra*, 230 Cal.App.4th at pp. 798-799.) Even if the two phrases are *semantically* identical, they are not *contextually* identical; as we also noted in *Brimmer*, “in the commission” of a felony is used in a *sentencing enhancement* statute, which necessarily requires a separate offense to enhance. Defendant also claims that liberally construing the exclusion language should likewise result in relief to him, but even a liberal construction must be tied to the unambiguous language used in the statute. (E.g., *People v. Cruz* (1974) 12 Cal.3d 562, 566 [noting that the command to liberally construe statutory language “does not license either enlargement or restriction of its evident meaning.”].)

In sum, the statutory language of the Act's armed with a firearm exclusion unambiguously permits the exclusion to apply where a defendant, as here, had a firearm available for offensive or defensive use while committing the nonseparate offense of being a felon in possession of a firearm.

2. *Whether the Act's Statutory Provisions Require the People to Plead and Prove the Fact of Defendant's Arming*

Next, defendant contends that the People had the burden to prove his ineligibility for relief by pleading and proving the fact of his arming beyond a reasonable doubt. Section 1170.126 does not address the issue of burden or standard of proof, and the People seek the benefit of the exclusion. This means, defendant continues, that the People had to plead and prove the fact of his arming beyond a reasonable doubt. We disagree.

Again, we rejected this same argument in *Brimmer*. *Brimmer* explained that the Act operates *prospectively* in the cases of people yet to be convicted and sentenced; *and retrospectively* in the cases of people, like defendant, who have *already* been sentenced and are required to petition for relief pursuant to section 1170.126. (*Brimmer, supra*, 230 Cal.App.4th at p. 802.) The retrospective part of the Act under section 1170.126 lacks pleading and proof language, and requires only that *the trial court* determine whether a defendant has committed an eligible commitment offense. (*Id.* at p. 803.) Thus, the People need not plead or prove anything; “the burden falls on the trial court to make the

determination whether a defendant meets the prima facie criteria for recall of sentence” after a defendant submits his or her petition. (*Ibid.*)

The three cases defendant cites to support this contention—*Addington v. Texas* (1979) 441 U.S. 418, *Conservatorship of Roulet* (1979) 23 Cal.3d 219, and *People v. Thomas* (1977) 19 Cal.3d 630—do not apply, because they are factually and contextually distinguishable. All three cases addressed the possibility of involuntary, indefinite civil commitment, which operate as a *prospective deprivation* of liberty. (*Addington*, at pp. 419-420; *Roulet*, at p. 221; *Thomas*, at pp. 632-633.) In contrast, section 1170.126, by affording sentencing relief to eligible defendants, operates as a potential *retrospective restoration* of liberty.

In sum, the absence of plead and proof language in section 1170.126, coupled with the statute’s directive for the trial court to determine whether the defendant has met the prima facie criteria for eligibility, means that section 1170.126 does not require the People to plead and prove the fact of a defendant’s arming beyond a reasonable doubt.

3. *Whether the Sixth Amendment Requires a Jury Trial on the Fact of Defendant’s Arming*

Finally, defendant contends the trial court violated his Sixth Amendment right to a jury trial. Specifically, defendant contends that the rule from *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)² entitled him to a jury trial and pleading and proof

² “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.)

beyond a reasonable doubt to determine whether he was armed within the meaning of the exclusion.

Once again, we rejected this same argument in *Brimmer*. The *Apprendi* rule does not apply to defendant's case, because the rule applies only where a finding of fact may *increase* a punishment beyond a statutorily prescribed maximum sentence. In contrast, section 1170.126 presents an opportunity for a defendant to petition a court to *decrease* a punishment that was *already* imposed pursuant to a statutorily prescribed maximum under the three strikes law. (*Brimmer, supra*, 230 Cal.App.4th at pp. 804-805.)

Defendant claims this conclusion is mistaken, because resentencing in accordance with the Act is actually a "plenary resentencing proceeding" to which the *Apprendi* rule applies, rather than a downward "sentence modification proceeding" to which the *Apprendi* rule does *not* apply. Defendant points to *Pepper v. United States* (2011) 562 U.S. 476 as clarifying this distinction, which the high court originally drew in *Dillon v. United States* (2010) 560 U.S. 817. We disagree with defendant's claim. *Pepper* only remarked that a sentencing court, *on remand*, must impose a *new* sentence that comports with the *Apprendi* rule as it applies in the context of advisory federal sentencing guidelines. (*Pepper*, at p. 490.) In that context, the sentencing court *has yet to impose* a sentence at a statutorily prescribed maximum; the sentencing court is *not*, as here, seeking to potentially decrease a sentence *already imposed* at a statutorily prescribed maximum.

In sum, the Sixth Amendment to the United States Constitution as embodied in the *Apprendi* rule does not require that the fact of defendant’s arming be pled and proved to a jury beyond a reasonable doubt. The *Apprendi* rule does not apply to downward sentence modifications like those contemplated by the Act.

Because defendant’s contentions did not persuade us to abandon *Brimmer*, we do not separately address defendant’s claims that we should not follow as wrongly-decided the cases of *People v. Blakely* (2014) 225 Cal.App.4th 1042, *People v. Elder* (2014) 227 Cal.App.4th 1308, *People v. Osuna* (2014) 225 Cal.App.4th 1020, and *People v. White* (2014) 223 Cal.App.4th 512, which reached the same conclusions this court reached in *Brimmer*.

DISPOSITION

The trial court’s order denying defendant’s petition for recall and resentencing pursuant to section 1170.126 is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.