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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ISADOR ALEXANDER PIPER,

Defendant and Appellant.

H040118

(Monterey County  
Super. Ct. No. SC940466)

Defendant Isador Alexander Piper challenges the superior court’s denial of his petition for resentencing under Penal Code section 1170.126.<sup>1</sup> Defendant is currently serving a sentence of 25 years to life for possession of a firearm by a felon (former § 12021, subd. (a)). The superior court found that defendant’s current conviction made him ineligible for resentencing because he had been “armed with a firearm” during its commission. A defendant is ineligible for resentencing under section 1170.126 where, “[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.” (§§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

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<sup>1</sup> Subsequent statutory references are to the Penal Code unless otherwise specified.

On appeal, defendant claims that the superior court erred in finding him ineligible because (1) the arming factor was not pleaded and proved at the time of his conviction, (2) there was no “tethering” offense to which the arming factor applied, and (3) the record does not demonstrate that he was armed because the firearm was not shown to have been readily accessible for offensive or defensive use. We reject his contentions and affirm the superior court’s order.

### **I. Background**

In March 1994, defendant drove his car at a high rate of speed up to another car on the freeway. His initial attempt to pass the other car was unsuccessful. Defendant then pulled his car up to the right of the other car and exchanged angry gestures with the passenger in the other car. After saying “‘you want some of this mother fucker,’” defendant exhibited a BB gun and pointed it at the other car. The other car’s driver took down defendant’s license plate number and reported the incident.

Sheriff’s deputies went to defendant’s home and found his car parked on the street. Defendant came out of his home and identified himself as the owner of the car. He consented to a search of the car, and the deputies found a loaded handgun in the pocket of an army jacket in the middle of the trunk. The BB gun was also in the trunk, near the army jacket. Defendant admitted that the army jacket belonged to him.

Defendant was convicted by a jury of felony possession of a firearm by a felon, misdemeanor exhibition of an imitation firearm in a threatening manner (§ 417.4), and misdemeanor reckless driving (Veh. Code, § 23103). The court found true allegations that he had suffered prior strike convictions for manslaughter and arson, and it committed defendant to state prison for a term of 25 years to life.

In March 2013, defendant filed a petition for resentencing under section 1170.126. The superior court recognized that “a conviction under [former] section 12021 does not necessarily mean that a person is ‘armed’ with a firearm. . . . [A] person’s conviction for

this crime could have arisen under a variety of fact patterns. [¶] It is the specific conduct of being ‘armed’ that must be established to make a defendant ineligible for resentencing under section 1170.126, subdivision (e)(2). Whether a defendant was convicted due to the actual, constructive, or vicarious possession of a weapon, the determinative question is whether he had a weapon available for offensive or defensive use.”<sup>2</sup> “The question here is whether petitioner’s current conviction for being a felon in possession of a firearm (§ 12021) falls within this exclusionary provision based on the facts and circumstances of the offense.” “[I]t is clear that petitioner was armed with a firearm because the handgun was readily available for offensive or defensive use. The fact that the gun was in petitioner’s trunk is not determinative for the purposes of deciding whether he was armed. It is the reasonable ability to quickly retrieve the weapon for offensive or defensive use that is key. . . . [P]etitioner could have easily stopped his car to retrieve the handgun to use offensively or defensively.”

The superior court found defendant ineligible for resentencing and denied his petition. Defendant timely filed a notice of appeal from the court’s order denying his petition.

## **II. Discussion**

### **A. No Pleading and Proof Requirement**

Defendant contends that the “plain language” of the applicable statutes does not permit a defendant to be found ineligible for resentencing due to the fact that, “[d]uring the commission of the current offense,” he or she “was armed with a firearm” unless that

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<sup>2</sup> The court construed the statutory language: “The most logical definition for the term ‘armed’ - as used in the statute - is ‘being equipped with a weapon.’ It is distinguishable from the ‘use’ of a weapon and logically connotes the availability of a weapon.”

fact was pleaded and proved when the defendant was convicted of the current offense. (§§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

“Several published cases have held that the Reform Act does not contain a pleading and proof requirement with respect to factors that disqualify defendants from resentencing, including *People v. White* (2014) 223 Cal.App.4th 512 [167 Cal.Rptr.3d 328] (*White*) (Ct. App., Fourth Dist., Div. One), *People v. Osuna* (2014) 225 Cal.App.4th 1020 [171 Cal.Rptr.3d 55] (*Osuna*) (Ct. App., Fifth Dist.), *People v. Blakely* (2014) 225 Cal.App.4th 1042 [171 Cal.Rptr.3d 70] (Ct. App., Fifth Dist.), *People v. Elder* (2014) 227 Cal.App.4th 1308 [174 Cal.Rptr.3d 795] (Ct. App., Third Dist.), and *People v. Brimmer* (2014) 230 Cal.App.4th 782 [178 Cal.Rptr.3d 857] (Ct. App., Fourth Dist., Div. Two). We agree with the analysis in these cases.” (*People v. Chubbuck* (2014) 231 Cal.App.4th 737, 745 (*Chubbuck*)). We agree with this court’s analysis in *Chubbuck* and the analysis in the other cases and therefore reject defendant’s claim.

### **B. No Tethering Requirement**

Defendant claims that a defendant cannot be found ineligible for resentencing due to the fact that, “[d]uring the commission of the current offense,” he or she “was armed with a firearm” unless “there is a separate, ‘tethering’ felony in which the defendant is armed with a firearm.” This contention has been rejected by our colleagues in the Fifth District (*People v. Osuna* (2014) 225 Cal.App.4th 1020 (*Osuna*)) and the Fourth District (*People v. Brimmer* (2014) 230 Cal.App.4th 782 (*Brimmer*)).

“In *Osuna, supra*, 225 Cal.App.4th 1020, the defendant argued he was not ineligible for resentencing under section 1170.126, subdivision (e)(2), because a finding of being armed with a firearm had to be tethered to an underlying conviction or there had to be a “‘facilitative nexus”’ between the arming and the possession. (*Osuna*, at p. 1030.) The appellate court agreed tethering and a “‘facilitative nexus”’ are required when imposing an “‘armed with a firearm”’ sentence enhancement under section 12022.

(*Osuna*, at pp. 1030–1031.) ‘However, unlike 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 “*during 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.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]’ (*Id.* at p. 1032.) ‘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, we conclude 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.’ (*Ibid.*)” (*Brimmer, supra*, 230 Cal.App.4th at pp. 798-799.)

Since we agree with the analysis in *Osuna* and *Brimmer*, we reject defendant’s contention that a “tethering” offense was required.

### **C. Substantial Evidence**

Defendant claims that there was not substantial evidence to support the superior court’s finding that he was armed with a firearm during the commission of the possession of a firearm offense because “the firearm located in appellant’s trunk was not readily accessible for offensive or defensive use during the road rage incident . . . .”

“A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively” “at any time during the commission” of the offense. (*People v. Bland* (1995) 10 Cal.4th 991, 997, 999 (*Bland*)). The weapon need not be carried by the defendant at any time. (*Ibid.*) Indeed, as the California Supreme Court noted with approval in *Bland*, “a drug dealer who sold cocaine from his car was deemed

to be ‘armed’ when he kept a loaded .357 Ruger in an unlocked compartment in the back of his car.” (*Bland*, at p. 998.) Where the offense is a continuing one, the question is whether “‘*at any time* during the commission’” of the offense, the defendant had ready access to the firearm. (*Bland*, at p. 999, italics added.)

Defendant misperceives the issue in this case. His possession of the firearm in his trunk was a continuing offense. (See *People v. Warren* (1940) 16 Cal.2d 103, 112; *People v. Crawford* (1982) 131 Cal.App.3d 591, 597.) The evidence supported a finding that, at least at one point during his continuous possession of the firearm, defendant had ready access to the firearm. That point was when defendant placed the BB gun in the trunk near the firearm. The BB gun was found in the trunk near the firearm *after* defendant displayed the BB gun and before the firearm was found by the deputies in the trunk of defendant’s car. At some time between the “road rage incident,” and the search of defendant’s car, defendant had ready access to the firearm because he opened the trunk and placed the BB gun near it. Thus, substantial evidence supports the superior court’s finding that defendant was “armed with a firearm” in the commission of the possession offense.

### **III. Disposition**

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Elia, J.