

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EVERETTE YVVECK LYNN,

Defendant and Appellant.

B260407

(Los Angeles County
Super. Ct. No. YA028632)

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

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Carl N. Henry,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Everette Yvveck Lynn appeals from an order denying his motion for recall and resentencing pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Act). He contends that the trial court erred by finding him ineligible for resentencing on one of his two current convictions. In light of *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, a jury convicted Lynn of second degree robbery (Pen. Code, § 211)¹ and attempted grand theft person (§§ 664, 487, subd. (c)). The trial court found Lynn had suffered four “strike” convictions for serious or violent felonies (§ 667, subds. (b)-(i)) and two prior serious felonies (§ 667, subd. (a)(1)), and had served four prior prison terms (§ 667.5, subd. (b)). The trial court sentenced Lynn to a term of 35 years to life pursuant to the Three Strikes law, comprised of concurrent terms of 25 years to life on each count, plus two 5-year prior serious felony enhancements. We affirmed the judgment. (*People v. Lynn* (Apr. 17, 2000, B126489) [nonpub. opn.]²)

On November 6, 2012, California voters approved the Act, which amended the Three Strikes law effective November 7, 2012. (*Johnson, supra*, 61 Cal.4th at p. 679; *People v. Jernigan* (2014) 227 Cal.App.4th 1198, 1203.) 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. (*Johnson*, at p. 680; *People v. Jernigan*, at p. 1203; *People v. Superior Court (Kaulick)* (2013)

¹ All further undesignated statutory references are to the Penal Code.

² The trial court initially imposed consecutive sentences, resulting in a term of 60 years to life. In Lynn’s original appeal, we affirmed his convictions but vacated his sentence and remanded the matter to allow the trial court to determine whether to exercise its discretion to impose concurrent, rather than consecutive, sentences. (*People v. Lynn* (Oct. 16, 1997, B106367).) On remand, the trial court imposed concurrent terms, resulting in the 35 years to life sentence at issue here. (*People v. Lynn, supra*, B126489.) We take judicial notice of our unpublished opinions in Lynn’s direct appeals. (Evid. Code, § 452, subd. (d).)

215 Cal.App.4th 1279, 1285 (*Kaulick*.) 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. (§§ 1170.12, subd. (c)(2)(C), 667, subd. (e)(2)(C); *Johnson*, at p. 681; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168; *Kaulick*, at p. 1286.) Absent such exceptions, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony. (*Johnson*, at p. 681.)

The Act also added section 1170.126,³ which created a resentencing procedure for prisoners serving indeterminate terms under the former version of the Three Strikes law,

³ 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

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); *Johnson*, at p. 682; *Kaulick, supra*, 215 Cal.App.4th at p. 1286.) Resentencing of eligible inmates may nonetheless be refused if the trial court, in its discretion, determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f); *Johnson*, at p. 682; *Kaulick*, at p. 1286.)

On August 1, 2014, Lynn petitioned for recall of his sentence pursuant to section 1170.126. The trial court appointed counsel for Lynn. On October 24, 2014, the trial court denied the recall petition with prejudice, on the ground that one of Lynn’s current convictions was for robbery, a serious felony, and therefore he was statutorily ineligible for resentencing on either of his two current offenses.

Lynn appeals. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 597.)

DISCUSSION

After the parties completed initial briefing, the California Supreme Court 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. (*Johnson*, at pp. 690-691, 694.) Moreover, evaluating resentencing eligibility on a count-by-count basis promotes sentencing that fits the crime, effectuates the voters’ intent of making

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.”

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.)⁴

Here, Lynn’s current crimes are second degree robbery (§ 211) and attempted grand theft from the person (§§ 664, 487, subd. (c).) Robbery is a serious and violent felony. (§§ 667.5, subd. (c)(9), 1192.7, subd. (c)(19).) Attempted grand theft is neither, absent additional circumstances, such as, for example, the use of a firearm or the infliction of great bodily injury in commission of the felony. (See §§ 1192.7, subds. (c)(8), (26), 667.5, subd. (c)(8).) Under *Johnson*, the fact Lynn was convicted of robbery does not make him ineligible as a matter of law for recall of sentence and resentencing on the attempted grand theft conviction, absent a showing the attempted grand theft itself qualified as a serious or violent felony. Accordingly, we reverse the trial court’s order and remand for a new hearing at which the court should determine Lynn’s eligibility for recall and resentencing on the attempted grand theft count in accordance with section 1170.126, subdivisions (e) and (f).⁵ (See *People v. Jernigan, supra*, 227 Cal.App.4th at p. 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”].)

⁴ We invited the parties to submit supplemental briefing in light of *Johnson*. We have considered the letter brief submitted by Lynn. The People declined to submit additional briefing.

⁵ Lynn states in passing that he “might qualify for recall of his felony sentence” on the attempted grand theft count “pursuant to Proposition 47.” This issue is not properly before us and we do not understand Lynn to assert it as an additional and distinct claim.

DISPOSITION

The trial court's order denying Lynn'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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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.