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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID HAMILTON,

Defendant and Appellant.

B276323

(Los Angeles County
Super. Ct. No. BA339752)

THE COURT:*

Defendant David Hamilton appeals from an order denying his petition to be resentenced pursuant to the Three Strikes Reform Act of 2012, added by Proposition 36 (the Reform Act). (Pen. Code, § 1170.126.)¹ His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*),

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

raising no issues. Defendant was advised of his right to file a supplemental brief, and did so, reasserting his request to be resentenced and also raising a number of additional arguments.

FACTUAL AND PROCEDURAL SUMMARY

A jury convicted defendant in 2010 of mayhem (§ 203), and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), with true findings as to both counts of the special allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). In a separate proceeding the trial court determined that defendant had suffered three prior felony strikes within the meaning of section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i), had suffered three prior serious felony convictions within the meaning of section 667, subdivision (a)(1) and had served three prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to an aggregate state prison term of 46 years to life, comprised of 25 years to life for mayhem plus enhancements of 15 years (§ 667, subd. (a)(1)), 3 years (§ 12022.7, subd. (a)), and 3 years (§ 667.5, subd. (b)). A 28-years-to-life sentence imposed as to the assault conviction was stayed pursuant to section 654.

This court affirmed the judgment in a nonpublished opinion (*People v. Hamilton* (Jan. 31, 2012, B227590)), but struck two of the three one-year prior prison term enhancements and the three-year great bodily injury enhancement, thus reducing defendant's sentence by five years to 41 years to life. In June 2016, defendant filed a "Petition to Recall Sentence, Enhancements, and Reduce Sentencing." The trial court summarily denied the petition. Defendant filed a timely notice of

appeal with a request for a certificate of probable cause, which was also denied.

DISCUSSION

On November 6, 2012, voters approved the Reform Act, and it went into effect the next day. (Ballot Pamp., Gen. Elec. (Nov. 6, 2012), text of Prop. 36, p. 110.) The Reform Act amended the Three Strikes law so that an indeterminate term of 25 years to life in prison is applied only where the “third strike” conviction is a serious or violent felony, or where the prosecution pleads and proves other specific factors. (§§ 667, subd. (e)(2)(C) & 1170.12, subd. (c)(2)(C).) The Reform Act also added section 1170.126, which allows inmates sentenced under the previous version of the Three Strikes law to petition for a recall of their sentence if they would not have been sentenced to an indeterminate life sentence under the Reform Act. (§ 1170.126, subds. (a)-(b).) An inmate is eligible for resentencing if various criteria are met, including that the inmate’s commitment offense is not a serious or violent felony. (§ 1170.126, subd. (e).)

The trial court’s consideration of a petition under the Reform Act is a two-step process. First, the trial court determines whether the petitioner is eligible for resentencing. (§ 1170.126, subd. (f).) If the petitioner is eligible, the trial court proceeds to the second step, and resentsences the petitioner under the Reform Act unless the court determines that to do so would pose “an unreasonable risk of danger to public safety.” (*Ibid.*)

The trial court correctly denied defendant’s petition; defendant is ineligible for resentencing under the Reform Act because his commitment offense, mayhem, is a serious felony. (§§ 1170.126, subds. (b), (e)(1) & 1192.7, subd. (c)(2).) On the merits, there are no arguable issues.

Defendant's supplemental brief filed with this court does not affect our conclusion. Defendant appears to argue that he should not have been charged with mayhem,² he received ineffective assistance of counsel, the trial court and the prosecutor committed misconduct, and there was insufficient evidence to support the convictions.

““It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.” [Citations.]” (*People v. Mena* (2012) 54 Cal.4th 146, 152.) Appeal of the order denying relief under the Reform Act is authorized by section 1237, subdivision (b), as an order made after judgment, affecting the substantial rights of the defendant. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 601.) However, that statutorily conferred appellate jurisdiction is limited to review of the decision to deny relief under the Reform Act. To convert that limited grant of jurisdiction to effectuate appellate review of the commitment judgment would in substance allow a belated motion to vacate that judgment, thereby violating the proscription on “bypass[ing] or duplicat[ing] appeal from the judgment itself.” [Citation.]” (*People v. Totari* (2002) 28 Cal.4th 876, 882.) Defendant's challenges to the commitment judgment are not cognizable on this appeal from the order denying relief under the Reform Act. His claims should have been and for the most part were raised in his prior appeal. (*People v. Hamilton* (Jan. 31, 2012, B227590) [nonpub. opn.])

² During an argument with his ex-girlfriend, defendant punched her male friend “on the side of the head” and bit the friend’s “forearm and ear, severing the ear, which fell to the floor.” (*People v. Hamilton* (Jan. 31, 2012, B227590).)

We have reviewed the entire record pursuant to *Wende* and find no arguable issues on appeal. (*People v. Kelly* (2006) 40 Cal.4th 106.) The order denying the petition is affirmed.

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