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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

OTIS FITZGERALD ERVIN,

Defendant and Appellant.

B277538

(Los Angeles County  
Super. Ct. No. YA008120)

APPEAL from an order of the Superior Court of  
Los Angeles County, Steven R. Vansicklen, Judge. Appeal  
dismissed.

Ann Krausz, under appointment by the Court of Appeal, for  
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Otis Fitzgerald Ervin purportedly appeals from an order denying his motion to vacate a void judgment for lack of subject matter jurisdiction. We dismiss the appeal.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 15, 1991 Ervin was charged in an amended information with one count of second degree robbery (Pen. Code, § 211) with special allegations he had personally used a firearm to commit the offense (Pen. Code, § 12022.5), a principal was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)) and the value of the property taken in the robbery exceeded \$100,000 (former Pen. Code, § 12022.6, subd. (b)). Ervin pleaded not guilty and denied the special allegations.

On December 19, 1991, in the middle of trial, Ervin waived his rights to further jury trial, entered a plea of no contest to second degree robbery and admitted he had personally used a firearm to commit the offense. As part of the negotiated plea agreement, Ervin was sentenced to an aggregate state prison term of seven years. The remaining special allegations were dismissed on the People's motion.

Representing himself nearly 15 years later, Ervin filed a motion to vacate void judgment for lack of subject matter jurisdiction. The motion was denied on July 21, 2016. On August 8, 2016 Ervin appealed from the denial of the order.

### **DISCUSSION**

We appointed counsel to represent Ervin on appeal. After examination of the record counsel filed an opening brief in which no issues were raised. On February 6, 2017 we advised Ervin he had 30 days within which to personally submit any contentions or issues he wished us to consider. On March 10, 2017, we received from Ervin a six-page hand-printed supplemental brief with

attached exhibits in which he argues, “[T]he judgment is void for lack of subject matter jurisdiction because the felony complaint filed on August 7, 1991 did not state (1) any facts, which would support the complainant’s belief that petitioner [*sic*] had committed any felonies as alleged, or (2) any facts relating to the identity of the source of the complainant’s information.”

A felony charge may be initiated by a written complaint verified on information and belief. (Pen. Code, § 806.) If a complaint is filed, the People must present sufficient evidence at a preliminary hearing to persuade the magistrate presiding at the hearing that probable cause exists to believe a crime has been committed and the defendant committed it. (Pen. Code, § 872, subd. (a).) If the prosecution shows probable cause, the magistrate will hold the defendant to answer to the charge in the superior court. (*Ibid.*) After being held to answer the defendant can still move to dismiss the information on the ground he or she has been committed without reasonable or probable cause. (Pen. Code, § 995, subd. (a)(2)(B).) The superior court’s ruling at a section 995 hearing is then reviewable in this court by writ or on appeal. (See *People v. Bautista* (2014) 223 Cal.App.4th 1096, 1101.)

In sum, Ervin had several opportunities in 1991 to present the argument now advanced in his motion to vacate the judgment. The time for him to do so has long since passed, even if he had not pleaded no contest, thereby admitting every element of the offense charged. (See *In re Chavez* (2003) 30 Cal.4th 643, 649.) His nonstatutory posttrial motion to vacate the robbery conviction is wholly without merit, and its denial is not properly raised by appeal. (See *People v. Totari* (2002) 28 Cal.4th 876, 882 [“ordinarily, no appeal lies from an order denying a motion to

vacate a judgment of conviction on a ground which could have been reviewed on appeal from the judgment”].)

We have examined the entire record and are satisfied Ervin’s appellate attorney has fully complied with the responsibilities of counsel and no arguable issue exists. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441-442.) Because Ervin has attempted to appeal from a nonappealable order, we dismiss the appeal.

#### **DISPOSITION**

The appeal is dismissed.

PERLUSS, P. J.

We concur:

ZELON, J.

MENETREZ, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.