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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN STOVALL,

Defendant and Appellant.

B293842

(Los Angeles County
Super. Ct. No. BA106916)

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

Richard B. Lennon and Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

In 1995, a jury convicted defendant Melvin Stovall (defendant) of one count of selling a controlled substance in violation of Health and Safety Code section 11352(a). The jury also found true allegations defendant sustained three prior convictions: a 1973 conviction for assault with intent to commit murder (former Pen. Code,¹ § 217), a 1980 conviction for voluntary manslaughter (§ 192), and a 1981 conviction for robbery (§ 211). Defendant's 1973 conviction for assault with intent to commit murder was by plea pursuant to a plea agreement.² Defendant was sentenced to a term of 25 years to life with the possibility of parole. Over the ensuing years, defendant filed several habeas corpus petitions seeking reversal of his sentence, all of which were denied.

In January 2013, defendant, representing himself, filed a petition for recall of sentence pursuant to section 1170.126, a statute enacted in 2012 as part of Proposition 36. His initial petition was denied without prejudice because defendant did not specify all of the prior strike convictions alleged and proved in the underlying criminal proceedings and did not state he had served the petition on the People. Defendant then re-filed the petition, the court issued an order to show cause why the requested relief should not be granted, and the People filed an opposition.

¹ Undesignated statutory references that follow are to the Penal Code.

² The information which led to the 1973 conviction charged defendant with attempted murder (§ 664/187), robbery (§ 211), assault with intent to commit murder (§ 217), and assault with a deadly weapon (§ 245, subd. (a)).

The trial court held a hearing on defendant's Proposition 36 petition in May 2018 and took the matter under submission. It later denied the petition, finding defendant's prior conviction for assault with intent to commit murder (former section 217) is a disqualifying conviction that renders him ineligible for relief. Though former section 217 was not specifically enumerated in Proposition 36, the court found the crime was effectively attempted murder, a disqualifying offense.

Defendant appealed the denial of his Proposition 36 petition, and this court appointed counsel to represent him. After examining the record, defendant's attorney filed an opening brief that raised no issues but stated she remained available to provide additional briefing if invited by this court. On April 25, 2019, we sent defendant a letter advising he could personally submit a supplemental brief within 30 days. We received no response. Then, taking her up on her invitation to provide briefing if requested, we asked defendant's attorney to address whether defendant's 1973 conviction by plea of assault with intent to commit murder qualifies as "[a]ny homicide offense, including any attempted homicide offense" within the meaning of the pertinent statutory provisions.

Having considered defense counsel's supplemental brief and having examined the record ourselves, we are satisfied defendant's attorney on appeal has complied with the responsibilities of counsel and no arguable issue exists. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-82; *People v. Kelly* (2006) 40 Cal.4th 106, 122-24; *People v. Wende* (1979) 25 Cal.3d 436, 441.) The ameliorative provisions of Proposition 36 do not apply to a defendant who has a prior conviction for attempted murder, and defendant's 1973 conviction is just that. (§§ 1170.126(e)(3);

1170.12(c)(2)(C)(iv); 667(e)(2)(C)(iv); *People v. Koontz* (1984) 162 Cal.App.3d 491, 495-96 [considering whether prior conviction for assault with intent to commit murder supported sentence enhancement for prior conviction of a serious felony under sections 667 and 1192.7 and concluding “an assault with intent to commit murder *is* attempted murder”]; see also *People v. Avena* (1996) 13 Cal.4th 394, 416, fn. 2 “[t]he Legislature repealed section 217 effective January 1981, after several judicial decisions pointed out that assault with intent to commit murder is but one form of attempted murder”]; see also *People v. Valencia* (2017) 3 Cal.5th 347, 369 [we presume voters are aware of existing law at the time an initiative is enacted].)

DISPOSITION

The trial court’s order is affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.