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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUE FRICKS,

Defendant and Appellant.

B295577

(Los Angeles County
Super. Ct. No. SA061582)

APPEAL from an order of the Superior Court of Los Angeles County, Leslie E. Brown, Judge. Appeal dismissed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Marque Fricks appeals the denial of his motion for modification of sentence. We have conducted an independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We conclude that no arguable issues exist. Moreover, because the order denying Fricks's motion for modification of sentence was not appealable, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On October 24, 2006, the District Attorney filed an information charging Fricks with two counts of robbery (Pen. Code, § 211;¹ counts 1 & 2) against two different victims. Count 1 additionally alleged the personal use of a firearm, under section 12022.53, subdivision (b). Count 2 alleged the personal use of a firearm, under section 12022.5, subdivision (b). Fricks was also charged with one count of commercial burglary (§ 459; count 3). The information also alleged that Fricks had suffered a prior felony conviction under the Three Strikes law.²

A jury convicted Fricks on all counts.³ The firearm allegations were found true.

On February 27, 2007, the trial court sentenced Fricks. On count 1, the trial court imposed the middle term of three years

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

² Sections 1170.12, subdivisions (a)–(d), 667, subdivisions (b)–(i).

³ The record does not indicate whether the jury took any action on the strike prior conviction allegation. However, the trial court did not sentence Fricks pursuant to the Three Strikes law.

and a consecutive term of 10 years for the firearm enhancement. On count 2, it imposed one year and a consecutive term of three years four months for the firearm enhancement. The term for count 2 was to be served consecutively to count 1. On count 3, the trial court stayed the sentence pursuant to section 654. The total aggregate term of imprisonment was 17 years 4 months. Fricks was awarded 210 days of custody credits. The trial court imposed a restitution fine of \$200 and a \$20 court security fee. It imposed and stayed a parole revocation restitution fine of \$200.

On November 18, 2018, Fricks filed a motion for modification of sentence. Specifically, he complained about the imposition of the firearm enhancement under section 12022.5, subdivision (b), because he never discharged a firearm, causing great bodily injury.⁴ On December 17, 2018, the trial court read, considered and denied the motion.

On January 28, 2019, Fricks timely filed a notice of appeal.

On June 26, 2019, Fricks's appointed appellate counsel filed a *Wende* brief raising no issues and asking this court to independently review the record. Counsel advised Fricks that he may file a supplemental brief with this court within 30 days of the filing of his opening brief. On July 15, 2019, this court received a letter from Fricks.⁵

⁴ Section 12022.5, subdivision (b), does not require the discharge of the firearm. It only requires the personal use of the firearm.

⁵ In the letter, Fricks asked this court to consider the following: (1) the prior strike conviction allegation was not found true; (2) terms on both firearm enhancements could not be imposed, pursuant to section 1170.11; (3) the facts did not support imposing terms on both firearm enhancements; and

DISCUSSION

We have independently reviewed the entire record. We are satisfied that no arguable issues exist and Fricks has received effective appellate review of the order of denial of his motion. (*Smith v. Robbins* (2000) 528 U.S. 259, 277–279; *People v. Kelly* (2006) 40 Cal.4th 106, 123–124; *Wende, supra*, 25 Cal.3d at p. 443.) Additionally, in his letter to this court, which we will consider as a supplemental brief, Fricks presents no cognizable claim challenging the ruling from which this appeal is taken.

Here, the trial court no longer had jurisdiction to recall Fricks’s sentence from 2007. A court can only recall a sentence on its own motion within 120 days after the original sentence was imposed. (§ 1170, subd. (d); *Dix v. Superior Court* (1991) 53 Cal.3d 442, 456.) The trial court properly denied Fricks’s motion to modify his sentence because it was without jurisdiction to recall the sentence. (*People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725; *People v. Chamizo* (2019) 32 Cal.App.5th 696, 700.)

Moreover, the trial court’s order denying Fricks’s motion for modification of sentence was not appealable. An order made after judgment is only appealable if it affects a defendant’s substantial rights. (§ 1237, subd. (b).) Because we have concluded the trial court no longer had jurisdiction to recall Fricks’s sentence when it issued the order denying his motion, the denial could not have affected his substantial rights. (*Chlad, supra*, 6 Cal.App.4th at p. 1726; *Chamizo, supra*, 32 Cal.App.5th at p. 701; *People v. Roe* (1983) 148 Cal.App.3d 112, 118.)

(4) the abstract of judgment did not reflect that count 3 was stayed pursuant to section 654.

Accordingly, the appeal must be dismissed. (*Chlad*, at pp. 1726—1727.)

DISPOSITION

The appeal is dismissed.

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HANASONO, J.*

We concur:

EDMON, P. J.

DHANIDINA, J.

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