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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

OTIS FITZGERALD ERVIN,

Defendant and Appellant.

B269589

(Los Angeles County
Super. Ct. No. MA048340)

APPEAL from an order of the Superior Court of Los Angeles
County, Lisa M. Chung, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

This is a *Wende* appeal from a post-judgment order denying appellant Otis Fitzgerald Ervin's motion to vacate a judgment. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) For the reasons that follow, we affirm.

A jury convicted Ervin of second degree robbery on June 9, 2010. (Pen. Code, § 211, the robbery case.)¹ During the robbery case, he was charged with attempting to dissuade a witness while released on bail. (§ 136.1, subd. (a)(2)) and with an on-bail sentence enhancement (§ 12022.1). A different jury convicted him of that charge, and the trial court found the on-bail allegation true. In both prosecutions, the court found allegations of prior felony convictions (a 1991 robbery and 2001 grand theft) and prior prison terms to be true. At a consolidated sentencing hearing in August 2010, Ervin received 15 years in the robbery case, with a consecutive 12-year term in the attempted witness intimidation case. He appealed from the judgment in each case. In an unpublished opinion, we affirmed the convictions, but reduced the aggregate sentence from 27 years to 21 years. (Case No. B227021.) As here relevant, we modified the sentence on the attempted dissuading count to impose a consecutive sentence of two years, doubled under the Three Strikes law to four years, and a consecutive two years for the section 12022.1 enhancement. Later, we denied Ervin's petitions for writ of habeas corpus in case Nos. B240092, B247027 and B249784.

In 2015, Ervin filed three post judgment motions. The first two attacked the robbery conviction. They sought to vacate the conviction

¹ Section references are to the Penal Code.

for lack of jurisdiction, and to enter a default judgment. The trial court denied both motions on October 28, 2015. In Ervin's subsequent *Wende* appeal, we affirmed the court's ruling in an unpublished opinion. (Case No. B268787.)

The third motion, filed December 16, 2015, is the subject of the current appeal. The motion attacked the attempted dissuading conviction, arguing that because at arraignment defense counsel waived reading of the information and statement of rights, and entered a not guilty plea on defendant's behalf, the court lacked jurisdiction to proceed with the prosecution. The trial court denied the motion on December 29, 2015, and defendant appeals from that ruling.

His appointed counsel filed a *Wende* brief requesting that we independently review the record for arguable issues. Ervin was advised of his right to file a supplemental brief, and has done so.

Ervin first contends, as he did in his motion to vacate, that the court lacked jurisdiction in his attempted dissuading case, because he did not personally waive the statement of rights at his arraignment and enter a not guilty plea. However, any defect in the arraignment was forfeited by Ervin's failure to object, and, in any event, the law does not preclude defense counsel, on behalf of the client, from waiving the reading of the information and statement of rights and entering a not guilty plea. (See *People v. Hill* (1967) 251 Cal.App.2d 391, 393; *People v. Herrera* (1962) 209 Cal.App.2d 748, 751-752.)

Next, Ervin contends that his sentence of two years for the attempted dissuading conviction (which was doubled under the Three Strikes law to four years) exceeded the term prescribed by law. Because

that issue was not raised in the trial court in connection with the motion to vacate, it is beyond the scope of this appeal. In any event, defendant is incorrect. The punishment for attempting to dissuade a witness (§ 136.1, subd. (a)(2)) is the same as for dissuading a witness (§ 136.1, subd. (a)(1)): “imprisonment in a county jail for not more than one year or in the state prison.” Thus, attempted dissuading is not subject to section 664, under which an attempt is punishable by one-half the term prescribed for the completed offense “where no provision is made by law for the punishment” of the attempted crime. Further, the reference in section 136.1, subdivision (a) to “imprisonment in a county jail for not more than one year or in the state prison,” means that when the offense is sentenced as a felony, the range of punishment is “16 months, or two or three years in the state prison.” (§ 18.) Thus, two years is the middle term for attempted dissuading. Finally, as we explained in Ervin’s appeal from the judgment of conviction, pursuant to section 1170.15, the court was allowed to impose a full consecutive sentence for the violation of section 136.1 and was not limited by section 1170.1, which provides that a consecutive sentence is one-third of the middle term of imprisonment. (Case No. B227021, fn. 5.) Thus, Ervin’s sentence of two years for his attempted dissuading conviction, which was doubled under the Three Strikes law, was not in excess of the court’s jurisdiction.

Based on our independent analysis of the appellate record, we find there is no arguable issue on appeal. (*People v. Kelly* (2006) 40 Cal.4th 106, 121; *People v. Kent* (2014) 229 Cal.App.4th 293, 300.) Therefore, we affirm the denial of the motion to vacate.

DISPOSITION

The order is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.