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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.

PHILIP JENKINS,

Defendant and Appellant.

B253411

(Los Angeles County
Super. Ct. No. BA139175)

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

California Appellate Project, Jonathan B. Steiner, Executive Director, Larry
Pizarro for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Philip Jenkins (defendant) appeals¹ from the denial of his petition for recall of sentence made pursuant to Penal Code section 1170.126.² On appeal, appointed counsel for defendant filed an opening brief in accordance with *People v. Wende, supra*, 25 Cal.3d 436 requesting that this court conduct an independent review of the record to determine if there are any issues which if resolved in defendant's favor would require reversal or modification of the judgment or appealable order. On February 24, 2014, we gave notice to defendant that his counsel had failed to find any arguable issues and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wished this court to consider. Defendant filed a supplemental brief in which he contends that his due process and equal protection rights were violated by the denial of his petition for recall of sentence pursuant to section 1170.126. We have reviewed the record and affirm the order.

FACTUAL BACKGROUND

In a previous appeal in this case—*People v. Jenkins* (July 11, 2013, B247487 [nonpub.opn.])—we affirmed the trial court's denial of defendant's petition for recall of sentence pursuant to section 1170.126, and a remittitur was filed in the trial court. Defendant, by his counsel, then filed another petition for recall of sentence pursuant to section 1170.126. The petition stated that defendant was serving a sentence of 25 years to life imposed for his conviction for being a felon in possession of a gun in violation of former section 12021, but also stated that he was serving that sentence for his 1997

¹ The California Supreme Court is currently reviewing whether denial of a section 1170.126 petition for recall and resentencing is an appealable order. (*Teal v. Superior Court* (2013) 217 Cal.App.4th 308, review granted July 31, 2013, S211708; *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted July 31, 2013, S212017.) We assume, without deciding, that the denial order is appealable. In addition, although there is authority that defendant is not entitled to appellate review of the denial of his petition under *People v. Wende* (1979) 25 Cal.3d 436 (*People v. Anderson* (2014) 225 Cal.App.4th 1368, 1371-1376), we review the order.

² All statutory citations are to the Penal Code unless otherwise noted.

conviction for violating Health and Safety Code section 11352, subdivision (a).³ The petition listed his prior strike convictions as murder (§§ 664, 187),⁴ second degree robbery (§ 211), and assault with a firearm (§ 245, subd. (c)). The trial court denied defendant's petition, ruling that his prior conviction of attempted murder came within section 667, subdivision (e)(2)(C)(iv), rendering him ineligible for section 1170.126 relief.

DISCUSSION

Section 1170.126 provides in relevant part: “(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes law] upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence . . . before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section. [¶] . . . [¶] (e) An inmate is eligible for resentencing if: [¶] . . . [¶] (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of

³ The record did not include defendant's criminal history. We obtained copies of defendant's abstract of judgments from the trial court, and order the record augmented to include them. Defendant's 1998 abstract of judgment states that defendant was convicted in 1997 of being a felon in possession of a gun in violation of section 12021. There is no indication in the trial court's file that defendant was previously convicted of violating Health and Safety Code section 11352, subdivision (a).

⁴ Defendant's 1988 abstract of judgment states that defendant was convicted in 1987 of attempted murder in violation of sections 187, subdivision (a) and 664. There is no indication in the trial court's file that defendant was previously convicted of murder. Defendant's 1988 abstract of judgment also states that defendant suffered prior convictions for second degree robbery in violation of section 211, and assault with a firearm in violation of section 245, subdivision (c).

subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.” Section 667, subdivision (e)(2)(C)(iv)(IV) lists, “Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.”

Defendants who have suffered a prior conviction of attempted murder come within section 667, subdivision (e)(2)(C)(iv), rendering them ineligible for recall of sentence pursuant to section 1170.126. Defendant does not dispute that he is ineligible to recall his sentence under section 1170.126 because he had a prior conviction for attempted murder. Defendant’s petition was properly denied.

Defendant contends that his equal protection rights were violated by the trial court’s denial of his petition because section 1170.126 treats him differently than the other three strike offenders who do not have a prior conviction as defined by section 667 (e)(2)(C)(iv). “The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citation.] “This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” [Citation.]” (*People v. Brown* (2012) 54 Cal.4th 314, 328.)

Although section 1170.126 treats defendant differently than the other three strike offenders who do not have a prior conviction as defined by section 667 (e)(2)(C)(iv), defendant of course is not classified the same as those other inmates described by defendant. Section 1170.126 provides a procedural mechanism by which inmates sentenced under the three strikes law may seek modification of their sentences. Qualifying inmates, who have not suffered prior serious or violent convictions listed in sections 667, subdivision (e)(2)(C)(iv) or 1170.12 subdivision (c)(2)(C)(iv), may petition for recall of sentence. Defendant is in a different category. He is among the category of inmates who have suffered those convictions listed in sections 667, subdivision (e)(2)(C)(iv) or 1170.12 subdivision (c)(2)(C)(iv). Inmates in defendant’s category are

ineligible to petition for recall of sentence. The Legislature's definition of crimes and imposition of different sentences for crimes of differing severity are subject to rational basis review. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 837-838.) The effect of section 1170.126 is rational.

Defendant contends that his equal protection rights were violated because a trial court in a different case filed in the Superior Court of California, County of San Bernardino (San Bernardino Superior Court case) granted that defendant's petition for recall of sentence pursuant to section 1170.126 despite his having suffered a prior conviction for murder in violation of section 187.⁵ We do not have the record in that other case and can make no comparison. In any event, defendant essentially argues that the trial court in the San Bernardino Superior Court case erred, and the trial court below should have similarly erred so as to grant his petition. We reject defendant's contention.

Defendant contends that his due process rights were violated because section "1170.126 explicitly lists discretionary criteria the court is free to consider, including any relevant evidence such as a prisoners disciplinary record or record of rehabilitation . . .," but the trial court did not rely on the discretionary criteria. Section 1170.126, provides that, "(f) If the petitioner satisfies the criteria in subdivision (e) [i.e., the petitioner has not suffered a prior serious or violent conviction listed in sections 667, subdivision (e)(2)(C)(iv) or 1170.12 subdivision (c)(2)(C)(iv)], the petitioner shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. [¶] (g) In exercising its discretion in subdivision (f), the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety."

⁵ We deny defendant's request to take judicial notice of a minute order entered by the Superior Court of California, County of San Bernardino.

The trial court does not even reach the discretionary criteria set forth in section 1170.126, which are used to determine that a petitioner will not be resentenced even if the petitioning defendant did not suffer a prior serious or violent conviction listed in sections 667, subdivision (e)(2)(C)(iv) or 1170.12 subdivision (c)(2)(C)(iv). The discretionary criteria were not applicable to defendant because he had a prior conviction for attempted murder—a prior serious or violent conviction listed in section 667, subdivision (e)(2)(C)(iv).

Defendant argues that, “In his petition, [he] presented favorable factors in mitigation such as his exemplary post-conviction record that would have shown that after nearly two decades in prison, he has enhanced his ability to function within the law upon release, and that he currently does not pose an unreasonable risk of to public safety should he be re-sentenced. . . . [¶] . . . [¶] The relevant question is whether there is any evidence in the record that could support a conclusion that [defendant] currently would pose an unreasonable risk of danger to public safety should he be re-sentenced.”

But again, defendant is not eligible for resentencing. Even if he were, he did not produce any evidence in his petition of favorable factors in mitigation. Defendant merely asserted in his petition, without any supporting evidence, that “he does not pose a danger to society, and has truly reformed while in custody.”

In addition to reviewing and addressing the matters raised in defendant’s supplemental brief, we have made an independent examination of the entire record to determine if there are any other arguable issues on appeal. Based on that review, we have determined that there are no other arguable issues on appeal. We are therefore satisfied that defendant’s counsel has fully complied with counsel’s responsibilities under *People v. Wende, supra*, 25 Cal.3d 436.

DISPOSITION

The order is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.