

Filed 8/15/17 P. v. Hidalgo CA2/5  
Received for posting on 8/17/17

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWIN JOSUE HIDALGO,

Defendant and Appellant.

B280649

(Los Angeles County  
Super. Ct. No. LA059161)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Kellogg, Judge. Affirmed.

Stephen Borgo, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## INTRODUCTION

In 2008, defendant pleaded no contest to two counts of robbery in violation of Penal Code section 211<sup>1</sup> and admitted that he personally used a firearm in violation of section 12022.53, subdivision (b) and that his crimes were committed for the benefit of or at the direction of a criminal street gang in violation of section 186.22, subdivision (b)(1)(B). He was sentenced to a total term of 17 years. In 2016, he filed a petition for resentencing pursuant to section 1170.18, subdivisions (b) and (g). The trial court denied that petition because a violation of section 211 is a felony not subject to reduction. The defendant filed a notice of appeal on January 23, 2017, challenging that denial and the validity of his plea.

Defendant's appointed appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) requesting we independently review the entire record to determine if there are any arguable issues on appeal. We notified defendant he could independently brief any contentions he wanted to have considered. Defendant filed a supplemental brief arguing: (1) that Proposition 47 (§ 1170.18) required that his convictions be reduced to misdemeanors; (2) that an assault not involving a deadly weapon does not qualify as a "serious felony"; (3) sentencing enhancements pursuant to section 186.22, subdivision (b)(1) and section 12022.53, subdivision (b) cannot both be imposed; and (4) the denial of effective assistance of counsel. We affirm the judgment.

---

<sup>1</sup> Further statutory references are to the Penal Code.

## **BACKGROUND**

At a preliminary hearing in June of 2008, Moises G. Baez (victim) testified that he was selling fruit on Kittridge Street near Woodman Avenue in the San Fernando Valley when the defendant and another person (Lopez) demanded money from him. When he told them that he had no money, Lopez pulled out a clip of ammunition and gave it to the defendant who put it in a handgun. The victim became scared and ran from the scene. As he did so, Lopez took a small bag containing about \$60 from the victim's cart. Later in the day, Lopez approached the victim as he was pushing his cart on Kittridge Street. Lopez accused the victim of calling the police and told him that he had "won a death sentence" for doing so. Immediately thereafter, the defendant appeared and asked for more money. When the victim refused to give in to this demand, the defendant took out a handgun and put it under his shirt. Lopez, who was still nearby, took the victim's cell phone. During both encounters, Lopez made hand gestures commonly used by members of the Mara Salvatrucha criminal street gang.

On October 28, 2008, defendant entered the no contest pleas and admissions mentioned above. Pursuant to a plea agreement, he was sentenced to the low term of two years on count 1, plus a consecutive ten year term for the 12022.53, subdivision (b) allegation and a consecutive term of five years for the section 186.22, subdivision (b)(1)(B) allegation. On count 3, the defendant was sentenced to the mid-term of three years, which was to be served concurrently with the sentence on count 1. No appeal of this sentence was filed at that time.

The defendant filed a petition for resentencing in November 2016. In addition to seeking to have the charges reduced to misdemeanors, he claimed that he was eligible for immediate release pursuant to Proposition 57. The judge denied the motion to reduce. No ruling was made regarding Proposition 57 and the defendant does not raise this issue on appeal.

## ANALYSIS

### *A. Petition For Resentencing Under Proposition 47*

The defendant asserts that because the property taken during the encounters with the victim was worth less than \$950 the charges against him should now be reduced to misdemeanors. That would have been a possible outcome if the defendant had been charged with grand theft under section 487.<sup>2</sup> The possible penalties for second degree robbery and the classification of that crime, however, have not changed. Accordingly, the trial court's order denying the request to reduce was correct.<sup>3</sup>

---

<sup>2</sup> Proposition 47 which was passed by voters on November 4, 2014, added Penal Code section 490.2, which reads, in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor. . . ."

<sup>3</sup> Within this same claim defendant requests that this court exercise its discretion and refer him to federal court for immediate deportation. He provides incomplete citations to some federal authorities that supposedly grant such discretion to this

*B. Assault Not Involving A Deadly Weapon*

It is not at all clear why this argument has been made. The defendant admitted that he personally used a firearm during the commission of the robberies. He was not charged with assault with a deadly weapon. No further discussion on this issue is warranted.

*C. Improper Imposition of Both Firearm and Gang Enhancement*

The defendant did not raise the issue concerning firearm and gang enhancements in his motion to reduce the charges to misdemeanors. Even if he had done so, it has no merit. The defendant cites to the case of *People v. Le* (2015) 61 Cal.4th 416, for the proposition that a court is precluded from imposing both a firearm enhancement under section 12022.5, subdivision (a)(1) and a gang enhancement section 186.22, subdivision (b)(1)(B). The *Le* court did make such a statement. The underlying felony considered in that case was the crime of assault with a semi-automatic firearm in violation of section 245, subdivision (b). The court held that it was improper to impose both enhancements “when the crime qualifies as a serious felony solely because it involved firearm use.” (*People v. Le, supra*, 61 Cal.4th at 429.) That is not the situation before this court. The defendant’s convictions are for robbery and qualify as serious felonies not because they necessarily involve the use of a firearm, but because they are specifically designated as such as under section 1192.7,

---

court. Assuming we have such discretion, we decline to make that referral.

subdivision (c)(19). Hence, the defendant is not entitled to any relief on this basis.

*D. Ineffective Assistance of Counsel*

The claim of ineffective assistance of counsel was not raised or discussed at the Proposition 47 hearing. Also, although the defendant in his notice of appeal challenged the validity of the plea, the request for a certificate of probable cause to pursue this matter was denied by the trial court. Accordingly, we will not address either of these issues in this appeal.

*E. Appellate Counsel's Wende Request*

Pursuant to *Wende, supra*, 25 Cal.3d 436, we examined the record to determine if there are any arguable issues on appeal beyond those asserted by the defendant. Based on that independent review, we have determined there are none. Defendant's appointed counsel has fully satisfied his responsibilities under *Wende*.

## DISPOSITION

The order denying the petition for resentencing is affirmed.  
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.\*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

---

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