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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.

SILVIO C. HERNANDEZ,

Defendant and Appellant.

B282328

Los Angeles County

Super. Ct. No. KA030778-01

APPEAL from a post-judgment order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

Defendant Silvio Hernandez appeals from the trial court's denial of his petition for recall and resentencing under Proposition 36, the Three Strikes Reform Act of 2012. His appointed counsel filed a brief raising no legal issues and requested that this court conduct an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm the order.

BACKGROUND

In 1996, defendant was convicted of possession of a firearm by a felon in violation of former Pen. Code,¹ § 12021, subd. (a)(1). After the trial court found that he had suffered two prior serious or violent felony convictions within the meaning of section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d), it sentenced him to a term of 25 years to life in state prison. In an opinion filed in 1997, this court affirmed the judgment. (*People v. Hernandez* (April 30, 1997, B106260 [nonpub. opn.].)

On March 8, 2013, defendant filed a "Petition for Recall of Sentence pursuant to Three Strikes Reform Act of 2012 [Penal Code section 1170.126]." Defendant asserted that he is qualified for relief under Proposition 36, and resentencing him under the Act would not pose an unreasonable risk of danger to public safety (§ 1170.126, subd. (f)). The People opposed defendant's petition. On April 24, 2017, the court denied the petition. The court explained that defendant was ineligible for relief under

¹ All undesignated statutory references are to the Penal Code.

Proposition 36 because during the commission of the underlying crime, he was armed with a firearm.

Defendant filed a timely notice of appeal. Defendant's court-appointed counsel filed an opening brief that summarizes the relevant procedural history of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised of his right to file a supplemental brief and, on September 11, 2017, he filed a supplemental brief.² While he challenges his 1996 conviction, defendant does not challenge the court's 2017 denial of his petition under Proposition 36.

DISCUSSION

"Under the 'Three Strikes' law as originally enacted in 1994, an individual convicted of any felony offense following two prior convictions for serious or violent felonies was subject to an indeterminate term of life imprisonment with a minimum term of no less than 25 years. [Citations.] In 2012, the electorate passed the Three Strikes Reform Act of 2012 (Reform Act or Act) (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)), which amended the law to reduce the punishment prescribed for certain third strike defendants." (*People v. Conley* (2016) 63 Cal.4th 646, 651.)

² Defendant also submitted a "Notice of Lodging Documents" (notice) and a "Supplemental Reporter's Transcript on Appeal" (transcript). The notice and transcript are deemed filed as of September 11, 2017 and, on our own motion, we augment the record on appeal to include them.

“The Reform Act changed the sentence prescribed for a third strike defendant whose current offense is not a serious or violent felony. [Citation.] Under the Reform Act’s revised penalty provisions, many third strike defendants are excepted from the provision imposing an indeterminate life sentence (see Pen. Code, § 1170.12, subd. (c)(2)(A)) and are instead sentenced in the same way as second strike defendants (see *id.*, subd. (c)(2)(C)): that is, they receive a term equal to ‘twice the term otherwise provided as punishment for the current felony conviction’ (*id.*, subd. (c)(1)). A defendant does not qualify for this ameliorative change, however, if his current offense is . . . one in which he used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury (*id.*, subd. (c)(2)(C)(iii)).” (*People v. Conley, supra*, 63 Cal.4th at pp. 652–653.) Such defendants continue to receive third-strike sentences for nonserious, nonviolent crimes. (*Ibid.*; see § 667.5, subd. (c) [list of violent felonies]; § 1192.7 [list of serious felonies]; § 1192.8 [additional serious felonies for purposes of § 1192.7].)

“In addition to reducing the sentence to be imposed for some third strike felonies that are neither violent nor serious, the Act provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.). . . . Like a defendant who is being sentenced under the new provisions, an inmate is disqualified from resentencing if any of the exceptions set forth in section 667, subdivision (e)(2)(C) and section 1170.12, subdivision (c)(2)(C) are present. (§ 1170.126, subd. (e).) In contrast to the rules that apply to [initial] sentencing, however, the rules governing resentencing [also] provide that an inmate will be denied recall of his or her sentence

if ‘the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.126, subd. (f).)” (*People v. Johnson* (2015) 61 Cal.4th 674, 682.)

Here, the court ruled that because defendant was armed with a firearm during the commission of the current offense, he was ineligible for the Act’s remedial provisions. We conclude that it is plain from the statutory elements of defendant’s conviction that his sentence was imposed for being armed with a firearm, and he is therefore ineligible for recall and resentencing under section 1170.126, subdivision (e)(2). (See *People v. White* (2016) 243 Cal.App.4th 1354, 1357 [defendant was disqualified from resentencing because he was armed during the commission of the offense and convicted of being a felon in possession of a firearm under former section 12021]; *People v. Reaves* (1974) 42 Cal.App.3d 852, 856–857 [“A person is armed with a deadly weapon when he simply carries such weapon or has it available for use in either offense or defense.”]; *People v. Wade* (2016) 63 Cal.4th 137 [loaded firearm in a backpack was “on the person” as required to sustain a conviction for carrying a loaded firearm on the person because it was in defendant’s immediate control].)

We have examined the entire record and are satisfied that no arguable issues exist, and that defendant has received adequate and effective appellate review of the order entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278.)

DISPOSITION

The order is affirmed.

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LAVIN, 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.