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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.

ORLANDO PEREZ,

Defendant and Appellant.

B264301

(Los Angeles County
Super. Ct. No. KA038260)

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

Paul Kleven, under appointment by the Court of
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters,
Assistant Attorney General, Michael R. Johnsen and Paul S.

Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Orlando Perez appeals from an order dismissing his petition to recall his sentence and for resentencing under Proposition 36, the Three Strikes Reform Act of 2012, and Proposition 47, the Safe Neighborhoods and Schools Act. (Pen. Code, §§ 1170.126, 1170.18.)¹ Defendant also argues that his Sixth and Fourteenth Amendment rights to counsel and to due process were violated because the trial court did not hold a hearing on his *Marsden*² and *Faretta*³ motions. The order of dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, a jury convicted defendant of petty theft with a prior (§ 666). He was found to have suffered two prior strike convictions in 1986: robbery (§ 211), for which he received an 11-year prison term; and kidnapping for robbery (§ 209, subd. (b)), for which his sentence was stayed pursuant to a former version of section 654. Pursuant to the Three Strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), defendant was sentenced to a term of 25 years to life for

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

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

³ *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

his conviction of petty theft with a prior.

In November 2012, the voters approved Proposition 36, which amended the Three Strikes law by limiting the imposition of an indeterminate life sentence to those defendants whose third felony is defined as serious or violent under sections 667.5 or 1192.7. The initiative allowed those serving a life sentence for a third felony that is not defined by those sections as serious or violent to petition for recall of their sentence and resentencing. (§ 1170.126, subd. (b).)

In November 2014, the voters approved Proposition 47, which further amended the Three Strikes law by reclassifying numerous theft and drug felonies as misdemeanors, including petty theft with a prior. (§ 1170.18, subd. (a).) The initiative allowed those serving a sentence for a felony conviction now classified as a misdemeanor to petition to recall their sentence and for resentencing. (§ 1170.18, subd. (a).)

Defendant filed two petitions to recall his sentence pursuant to these propositions. The trial court granted an order to show cause on the issue of defendant's eligibility for resentencing under the Proposition 36 provision, section 1170.126.

A person is ineligible for resentencing under Propositions 36 and 47 if he or she has "suffered a prior serious and/or violent felony conviction" that is "punishable in California by life imprisonment or death." (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)(VIII).) Defendant argued that because the court had stayed

execution of sentence on the kidnapping for robbery charge, that particular conviction does not constitute a disqualifying “conviction” under Propositions 36 and 47. He reasoned that since the term “conviction” has no uniform or unambiguous meaning, its meaning must be determined through statutory construction. He argued that the purpose and intent of both Propositions 36 and 47 support the conclusion that when execution of sentence is stayed on a prior conviction, it does not constitute a disqualifying “conviction” under Propositions 36 and 47.

The People argued that defendant was ineligible for resentencing as a result of his prior conviction for kidnapping for robbery. Kidnapping is an offense punishable by life imprisonment. (§ 209, subd. (b)(1).) Because of this, defendant’s prior conviction of kidnapping for robbery falls under the exception of both propositions, and he is ineligible for resentencing. The People alternatively argue that defendant’s criminal history and prison disciplinary record show that he poses an unreasonable risk of danger to public safety and thus is not suitable for resentencing.

Before the trial court made its final ruling on the resentencing petition, defendant submitted a *Marsden* motion requesting discharge of his counsel and a *Faretta* motion asking that he be allowed to represent himself. The trial court notified defendant that it would address his motions if he filled out a *Faretta* waiver after discussing the matter with his attorney. Defendant did not file a waiver

and continued to be represented by his appointed counsel on his resentencing petition.

On April 6, 2015, the trial court denied both petitions for resentencing on the ground that defendant's prior conviction of kidnapping for robbery constitutes a serious and violent felony punishable by life imprisonment or death, which is a disqualifying conviction. (§§ 667, subd. (e)(2)(C)(iv)(VIII), 1170.12, subd. (c)(2)(C)(iv)(VIII).) This timely appeal followed.

DISCUSSION

I

We review issues of statutory interpretation de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) In doing so, we apply the same rules of construction to statutes, whether enacted through the legislative or initiative process. (*People v. Park* (2013) 56 Cal.4th 782, 796; *People v. Briceno* (2004) 34 Cal.4th 451, 459.) In interpreting a statute, words must be given the usual and ordinary meaning of the language used. (*People v. Ramirez* (2009) 45 Cal.4th 980, 987.) When the statutory language is clear, courts must enforce the statute as written. (*People v. Sylvester* (1997) 48 Cal.App.4th 1493, 1496.)

Here, the statutory language is clear and unambiguous. An inmate is ineligible for recall and resentencing under both Propositions 36 and 47 if “[t]he defendant suffered a prior serious and/or violent felony conviction” that is “punishable in California by life

imprisonment or death.” (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)(VIII).)

Defendant’s prior conviction of kidnapping for robbery (§ 209, subd. (b)(1)), a serious and violent felony punishable in California by life imprisonment, falls within the ineligibility provisions of Propositions 36 and 47, thus rendering him ineligible for resentencing under the plain language of the statute. Defendant argues that his kidnapping for robbery conviction does not render him ineligible because neither proposition declares that penal action may be based on a stayed conviction. He relies on *People v. Pearson* (1986) 42 Cal.3d 351, 361 [disapproved on other grounds in *People v. Vidana* (2016) 1 Cal.5th 632, 650–651], which prohibits the use of a prior conviction for which the execution of sentence is stayed for enhancement purposes absent express statutory language allowing such use. But resentencing under Propositions 36 and 47 is not an enhancement and does not disadvantage a defendant. *Pearson* does not assist defendant’s argument because his stayed conviction was not used as a sentencing enhancement. By finding him ineligible for resentencing, the court left intact his original indeterminate life sentence. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [“finding an inmate is not eligible for resentencing under section 1170.126 does not increase or aggravate that individual’s sentence; rather, it leaves him or her subject to the sentence originally imposed”].)

Defendant in the 1986 robbery and kidnapping case received a benefit under section 654 that no longer exists. Because the kidnapping for robbery conviction carries a longer potential term of imprisonment than robbery (§§ 213, 209, subd. (b)), the court would not have the option to stay the punishment for kidnapping for robbery under current law. Although the sentence on the kidnapping for robbery conviction was stayed under a former version of section 654, it is a conviction nonetheless. (*People v. Benson* (1998) 18 Cal.4th 24, 42.) Moreover, the stay of a *sentence* on a prior disqualifying conviction does not eliminate the requirement of a defendant's eligibility for resentencing. (§ 1170.12, subd. (b)(1) [conviction "is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor"].)

II

Defendant also argues that his Sixth Amendment right to counsel was implicated when the trial court failed to conduct a hearing on his *Marsden* and *Faretta* motions. A "*Faretta* right, once asserted, may be waived or abandoned." (*People v. Dunkle* (2005) 36 Cal.4th 861, 909 [disapproved on other ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22].) A defendant can also abandon his request under *Marsden* to substitute counsel. (*People v. Vera* (2004) 122 Cal.App.4th 970, 981–982.) A defendant's conduct may indicate an abandonment or withdrawal of a *Marsden* or *Faretta* motion. (*People v. Kenner* (1990) 223 Cal.App.3d 56, 62.)

Here, the trial court invited defendant to renew his *Faretta* motion by requesting that he fill out a waiver form. Defendant did not do so. Instead, he acquiesced to his counsel's representation on the resentencing motion. It is clear that defendant abandoned both his *Faretta* and *Marsden* motions. Thus, the trial court did not violate defendant's right to counsel or due process rights by choosing not to conduct a hearing on the matter.⁴

Even if the trial court erred in not holding a hearing, “a ‘miscarriage of justice’ should be declared only when the court, ‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.) There was no “miscarriage of justice” or violation of due process given that the trial court would have reached the same result of defendant's ineligibility even if a *Faretta* and *Marsden* hearing had been held. (*Ibid.*) There is nothing in the record before us to indicate that a result more favorable to defendant would have been reached. The trial court did not violate defendant's due process rights.

⁴ The Attorney General argues that defendant had no right to counsel during his eligibility proceedings. We express no opinion on that issue. (*See People v. Rouse* (2016) 245 Cal.App.4th 292, 301 [holding that the right to counsel attaches at the resentencing stage but expressing no opinion on whether it attaches at the eligibility phase].)

DISPOSITION

The order denying the petition for resentencing is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.