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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.

ANTWAIN DEVON BUTLER,

Defendant and Appellant.

B276497

(Los Angeles County  
Super. Ct. No. BA239497)

APPEAL from an order of the Superior Court of Los Angeles County, Douglas Sortino, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Antwaine Devon Butler is appealing from the denial of his post-judgment motion for modification of sentence. After the notice of appeal was filed, the superior court clerk was unable to locate defendant's moving papers. The trial court then explained its ruling in a certified settled statement. At the request of defense counsel, the record on appeal has been augmented to include that settled statement.

Defense counsel filed a *Wende* brief that raised no potentially arguable issues.<sup>1</sup> Concerned by the omission of his moving papers from the record on appeal, defendant submitted a separate request to treat the appeal as a petition for writ of habeas corpus. (See *In re Harris* (1993) 5 Cal.4th 813, 826–827 [where record on appeal is insufficient to rule on appellant's claim, appellant may seek habeas relief by alleging facts, which, if true, would entitle appellant to relief].) We decline to do so. Because the certified settled statement provides a sufficient record for appellate review, defendant has an adequate remedy through direct appeal. Finding no arguable issue on appeal, we affirm the order of denial.

In November 2002, defendant shot and killed a 14-year-old male victim. Following a jury trial, defendant was convicted of first degree murder and was sentenced to a term of 50 years to life. We affirmed his conviction on appeal in 2005. (*People v. Butler* (2005) 127 Cal.App.4th 49.)

In 2016, defendant filed a post-conviction motion for modification of sentence. Judge Douglas Sortino considered the motion in chambers on July 6, 2016, without the presence of the parties or court reporter. According to the settled statement, the

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<sup>1</sup> *People v. Wende* (1979) 25 Cal.3d 436.

basis for the motion for modification of sentence was “that California’s felony murder rule had been recently ruled unconstitutional.” Finding no legal basis for this assertion, Judge Sortino denied the motion.

In his supplemental brief on appeal, defendant relies on *Johnson v. United States* (2015) 576 U.S. \_\_\_\_ [135 S.Ct. 2551, 192 L.Ed.2d 569] (*Johnson*). In that case, the defendant challenged a federal sentencing enhancement under the Armed Career Criminal Act of 1984 (Act). The enhancement applies to those with three or more prior convictions of a violent felony, which was defined in the residual clause of the Act as “conduct that presents a serious potential risk of physical injury to another.” (*Id.* at pp. 2555–2556, citing 18 U.S.C. § 924(e)(2)(B).) The *Johnson* court held that the defendant’s prior conviction of unlawful possession of a short-barreled shotgun did not qualify as a violent felony under the residual clause, and reversed the enhancement. (*Id.* at p. 2563.) Defendant’s reliance on *Johnson* is misplaced. Unlike *Johnson*, in this case no enhancement was imposed under the residual clause of the Act. Moreover, contrary to defendant’s assertion, *Johnson* did not invalidate the felony murder rule.

Based on our independent analysis of counsel’s brief, defendant’s supplemental brief, and the entire 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.)

**DISPOSITION**

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.