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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS EARL WHITEHURST,

Defendant and Appellant.

B297359

(Los Angeles County
Super. Ct. No. KA097954)

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

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Thomas Earl Whitehurst purports to appeal from an order denying his petition for writ of habeas corpus. Such an order is not appealable. (*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1064.) A defendant “whose petition has been denied by the superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal.” (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) While we have discretion to treat the appeal as a petition for writ of habeas corpus (see *People v. Young* (1991) 228 Cal.App.3d 171, 179), we decline to do so and dismiss the appeal.

BACKGROUND

The trial court noted in its memorandum of decision, “[i]n 2013, [Whitehurst] was convicted, pursuant to an agreed-upon disposition, of two counts of assault with a deadly weapon or by any means likely to produce great bodily injury upon the person of a peace officer or firefighter (Pen. Code, § 245, subd. (c)),¹ one count of driving with willful or wanton disregard for the safety of persons or property while fleeing from a pursuing peace officer (Veh. Code, § 2800.2, subd. (a)), one misdemeanor count of resisting a peace officer (§ 148, subd. (a)(1)), and one misdemeanor count of violating Vehicle Code section 20002, subdivision (a). [Whitehurst] was sentenced to 13 years in state prison, composed of four years for the first count, doubled pursuant to sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d), with an additional five years pursuant to

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

section 667, subdivision (a)(1). Time imposed on the remaining counts was ordered to run concurrent to the time imposed on the first count.”

Whitehurst did not file a timely notice of appeal from the judgment. On April 24, 2014, we denied his application to file a belated notice of appeal. (*People v. Whitehurst* (Apr. 24, 2014, B255556).)

On August 20, 2018, Whitehurst filed a petition for writ of habeas corpus, seeking resentencing pursuant to Senate Bill Nos. 1392 and 1393, and Proposition 57. The court denied that petition on October 2, 2018. Whitehurst filed the instant, almost identical, petition for writ of habeas corpus on January 8, 2019.

DISCUSSION

We appointed counsel to represent Whitehurst in this appeal. After review of the record, Whitehurst’s counsel filed an opening brief requesting this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. On October 29, 2019, we sent a letter to Whitehurst, advising him that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. We received no response.

We have examined the entire record. As the trial court observed with respect to the Senate Bill No. 1392 and Proposition 57 claims, Whitehurst is not permitted to raise these claims in a successive petition in the absence of new evidence or a substantive change in the law. (*In re Reno* (2012) 55 Cal.4th 428, 454-455; *In re Clark, supra*, 5 Cal.4th at pp. 769-770.) Thus, he is not entitled to relief on these bases.

Senate Bill No. 1393, which became effective January 1, 2019, provided trial courts with discretion to strike prior serious felony convictions for purposes of sentence enhancement under section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1.) It applies retroactively to all cases in which the judgment is not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973; see *People v. Brown* (2012) 54 Cal.4th 314, 319-324.) As the trial court noted, the 2013 judgment of conviction is final. Whitehurst therefore is not entitled to the benefit of Senate Bill No. 1393.

Having examined the record, we are satisfied that no arguable legal issues exist and that Whitehurst's counsel has fully complied with her responsibilities. Whitehurst's purported appeal is ineffective. He cannot state a prima facie claim for relief (*In re Figueroa* (2018) 4 Cal.5th 576, 586-587), and thus there is no basis upon which we can treat the appeal as a petition for writ of habeas corpus. The appeal must be dismissed.

DISPOSITION

The appeal is dismissed.
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JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

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