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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.

ALONZO MCKINNEY,

Defendant and Appellant.

B271973

(Los Angeles County  
Super. Ct. No. A972586)

APPEAL from an order of the Superior Court of  
Los Angeles County, David M. Horwitz, Judge. Affirmed.

William L. Heyman, under appointment by the Court of  
Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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In this *Wende*<sup>1</sup> appeal, we affirm the order denying defendant Alonzo McKinney's petition under Proposition 47 for resentencing of a prior robbery conviction. (Pen. Code, § 1170.18.)<sup>2</sup>

### **FACTUAL AND PROCEDURAL BACKGROUND**

In *People v. McKinney* (Dec. 1, 1998, B115835 [nonpub. opn.]), we affirmed defendant's conviction in the current case<sup>3</sup> of assault with a deadly weapon or force likely to produce great bodily injury upon a peace officer, Robert Staggs, in violation of section 245, subdivision (c) (count 1), and resisting an executive officer, Robert Staggs, in violation of section 69 (count 2). Based on defendant's prior serious felony convictions for robbery in May 1986<sup>4</sup> and September 1988,<sup>5</sup> the superior court imposed a Three Strikes sentence of 25 years to life. (§§ 1170.12, subds. (a)-(d), 667, subd. (b)-(i), 211.) Defendant is now serving that sentence.

Following the approval by California voters of Propositions 36 (§ 1170.126) and 47 (§ 1170.18), defendant filed petitions in the current case for relief under each initiative. His petition under Proposition 36 was denied in March 2013, and his petition

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

<sup>2</sup> All further statutory references are to the Penal Code.

<sup>3</sup> Los Angeles County Superior Court case No. BA140260.

<sup>4</sup> Los Angeles County Superior Court case No. A775937.

<sup>5</sup> Los Angeles County Superior Court case No. A972586.

under Proposition 47 was denied in February 2015. Those determinations are now final.<sup>6</sup>

Defendant also filed a petition in the prior robbery case (L.A. County Super. Ct. No. A972586), seeking to have his conviction reduced from a felony to a misdemeanor under Proposition 47 (§ 1170.18). The superior court (Judge David M. Horwitz) denied his petition on September 29, 2016, stating that “Defendant’s conviction of Penal Code section 211 does not qualify for relief under Proposition 47.” Defendant filed a notice of appeal from that order on March 29, 2016 (appellate case No. B271973).

A second notice of appeal was filed in appellate case No. B271973 on April 29, 2016. That appeal was taken from the March 7, 2016 order by Judge Laura F. Priver denying defendant’s motion for DNA testing in the current case (L.A. County Super. Ct. No. BA140260).

On July 5, 2016, attorney William L. Heyman was appointed to represent defendant in appellate case No. B271973. Although the order of appointment referenced only one superior court case number (case No. BA140260), Mr. Heyman was appointed to represent defendant with regard to both the March 29 and April 29, 2016 appeals.

The appeal from the March 7, 2016 order by Judge Priver denying the motion for DNA testing in the current case was dismissed on September 13, 2016. (§ 1405, subd. (k) [order granting or denying motion for DNA testing not appealable].)

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<sup>6</sup> Defendant’s *Wende* appeal from the March 2013 ruling was dismissed in September 2013 (case No. B248013), and his habeas petition from the February 2015 ruling was denied in August 2015 (case No. B264774).

The Supreme Court denied defendant's petition for review on December 14, 2016.

The only appeal now pending is from the September 29, 2015 order denying relief under Proposition 47 in the prior robbery case (L.A. County Super. Ct. No. A972586). On October 31, 2016, Mr. Heyman filed a *Wende* brief that raised no issues. Defendant objected to the *Wende* brief on November 9, 2016, and requested to have Mr. Heyman relieved as appellate counsel. In support, defendant raised issues beyond the scope of Mr. Heyman's representation. Contrary to defendant's contentions, Mr. Heyman has no authority to file motions in superior court to suppress evidence in defendant's current or prior robbery cases, request DNA testing in the current case, or withdraw defendant's plea in the prior robbery case. No proper basis has been shown for relieving Mr. Heyman, whose performance was not deficient. (See *Wende, supra*, 25 Cal.3d at p. 442 ["counsel may properly remain in the case so long as he has not described the appeal as frivolous and has informed the defendant that he may request the court to have counsel relieved if he so desires"].)

Defendant's supplemental brief, filed November 17, 2016, seeks an appellate determination of his right to parole under Proposition 57. This initiative, which was approved in the November 2016 election, is not properly before us. Any determination as to defendant's right to parole under Proposition 57 must be made, in the first instance, by the appropriate agency. To the extent defendant is challenging his conviction of assault with a deadly weapon in violation of section 245, subdivision (c)—he argues that a pencil is not a deadly weapon—we decline to reach that issue, which is not properly before us.

Turning to the merits of the September 29, 2015 order denying relief under Proposition 47, the only issue is whether a conviction under section 211 falls outside the scope of the initiative. Subdivision (f) of section 1170.18 provides: “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” Robbery—which is both a violent felony (§ 667.5, subd. (c)(9)) and a serious and/or violent felony (§ 667, subd. (d)(1))—is not an offense that is eligible for Proposition 47 relief.

We have reviewed the record under *People v. Kelly* (2006) 40 Cal.4th 106, and find no arguable issues. We are satisfied that defendant’s counsel has fully complied with his responsibilities. (*Wende, supra*, 25 Cal.3d at pp. 441–442.)

#### DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.