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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.

ANTHONY L. TARKINGTON,

Defendant and Appellant.

B279234

Los Angeles County

Super. Ct. No. BA134487

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

Kelly C. Martin, under appointment by the Court of  
Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

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## INTRODUCTION

Defendant Anthony Tarkington appeals from an order entered following the denial of his petition to seal his arrest records under Penal Code section 851.8. Following our independent examination of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude no arguable issues exist. Accordingly, we affirm.

## PROCEDURAL AND FACTUAL HISTORY

In an information filed on December 18, 1996, appellant was charged with one count, the June 22, 1996 murder of Donald Ray Fitzpatrick, committed willfully, unlawfully, and with malice aforethought, and accomplished with the personal use of a deadly and dangerous weapon, a knife. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b).)<sup>1</sup> The information further alleged that, on March 21, 1978, appellant had been convicted of a serious felony (§ 667, subd. (a)(1)), assault with a deadly weapon. (§ 245, subd. (a).) It was further alleged that appellant had incurred four serious or violent prior convictions, one in 1978 and three in 1982. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

At trial, Eric Black and Fidencio Chavez testified that appellant and Fitzpatrick argued. Using his fists, appellant punched Fitzpatrick in the face and head. Appellant then stabbed Fitzpatrick in the shoulder and later stabbed him in the stomach. Chavez testified that he followed appellant and, at trial, both he and Black identified appellant as the one who attacked and stabbed the victim.

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<sup>1</sup> Further statutory references are to the Penal Code.

During trial, the court granted a motion under section 1118.1, holding that the evidence did not establish the elements of first degree murder as to premeditation and deliberation. On August 25, 1997, however, a jury convicted appellant of second degree murder (§ 187, subd. (a)) with the personal use of a deadly weapon, a knife (§ 12022, subd. (b)), and, on the following day, found true the allegations that he had three prior “strike” convictions (§§ 667, subd. (b)-(i) and 1170.12, subd. (a)-(d)) and one prior felony conviction. (§ 667, subd. (a).) On September 25, 1997, the trial court imposed a sentence of 46 years to life in prison, calculated at 15 years to life for the murder, tripled under section 667, subdivision (b) through (i), plus one year for the section 12022, subdivision (b) enhancement. We affirmed his conviction in a non-published opinion filed on August 19, 1998. (B117520.)

On September 22, 2016, appellant filed a petition in the trial court to seal and destroy his arrest records under section 851.8. The court denied the petition on the basis that appellant was convicted of second degree murder on the same facts and testimony adduced on the first degree murder charge.

Appellant timely appealed. Appellant’s court-appointed counsel filed an opening brief, asking this court to review the record independently pursuant to *Wende, supra*, 25 Cal.3d 436. We advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. On September 7, 2017, appellant timely filed his supplemental brief.

## DISCUSSION

In his supplemental brief, appellant contends that the trial court's section 1118.1 order regarding the first degree murder charge entitles him to have his arrest records sealed and destroyed under section 851.8, subdivision (e).

Section 1118.1 provides in pertinent part: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

Section 851.8, subdivision (e)<sup>2</sup> authorizes a court to order the sealing and destruction of arrest records upon acquittal, but only if the arrestee is factually innocent of the charge.

" 'Section 851.8 is for the benefit of those defendants who have not committed a crime. It permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action. . . . Hence, much more than a failure of the prosecution to convict is required in order to justify the sealing and destruction of records under section 851.8.' [Citation.]" (*People v. Adair* (2003) 29 Cal.4th 895, 905.)

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<sup>2</sup> Section 851.8, subdivision (e) provides: "Whenever any person is acquitted of a charge and it appears to the judge presiding at the trial at which the acquittal occurred that the defendant was factually innocent of the charge, the judge may grant the relief provided in subdivision (b) [sealing and destruction of arrest record]."

The trial court's determination that there was no evidence of premeditation or other factors necessary to prove that the murder was of the first degree, by itself, does not entitle appellant to relief under section 851.8, subdivision (e). He has the burden to show that he is factually innocent of the murder. (*People v. Adair, supra*, 29 Cal.4th at p. 909.) Appellant cannot carry this burden because the jury found true the facts necessary to support a second degree murder conviction involving the same victim, i.e., appellant attacked and fatally stabbed Fitzgerald on June 22, 1996.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the order entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

**DISPOSITION**

The order is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.\*

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