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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.

JAMES ROGERS SMITH,

Defendant and Appellant.

B296270

(Los Angeles County
Super. Ct. No. GA070331)

APPEAL from an order of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Appeal dismissed.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant James Rogers Smith appeals the denial of his petition for resentencing. We have conducted an independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We conclude that no arguable issues exist. Because the order denying Smith's petition was not appealable, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On September 11, 2007, the District Attorney filed a three-count information, charging Smith with attempted deliberate and premeditated murder (Pen. Code,¹ §§ 664, 187, subd. (a); count 1), possession of a firearm by a felon (§ 12021, subd. (a)(1); count 2), and evading a peace officer (Veh. Code, § 2800.2, subd. (a); count 3). Count 1 additionally alleged the personal use and discharge of a firearm (§ 12022.53, subds. (b) & (c)) and a gang enhancement (§ 186.22, subd. (b)(1)(C)). The information also alleged that Smith had suffered two prior convictions for which he served prison commitments, under section 667.5, subdivision (b).

A jury convicted Smith on all counts. The firearm and gang allegations were found true. Smith admitted the prior conviction allegations.

On June 18, 2009, the trial court sentenced Smith. On count 1, the trial court imposed 15 years to life and a consecutive term of 20 years for the firearm enhancement. On count 2, the trial court imposed and stayed two years, pursuant to section 654. On count 3, it imposed two years, consecutive to count 1.

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

The court imposed two years for the prior conviction enhancements, under section 667.5, subdivision (b). The total aggregate term of imprisonment was 39 years to life. Smith was awarded 839 days of custody credits. The trial court imposed a restitution fine of \$200, a \$30 criminal conviction assessment, and a \$20 court security fee. It imposed and stayed a parole revocation restitution fine of \$200.

On January 26, 2012, the trial court resentenced Smith on count 3. It appears to have “stayed” two years for the prior conviction enhancements.

On October 10, 2012, the trial court again resentenced Smith, based on his motion for reconsideration of sentencing. The trial court imposed seven years to life on count 1, plus 20 years for the firearm allegation. The sentence on count 2 remained stayed pursuant to section 654. On count 3, the trial court imposed two years, concurrent with count 1. The trial court struck the punishment for the prior conviction enhancements. The total aggregate sentence was 27 years to life. The trial court awarded 2,026 days of custody credit.

On May 13, 2013, this court affirmed the sentence.² On July 17, 2013, the remittitur issued.

On February 20, 2019, the trial court denied Smith’s petition for resentencing.

On March 7, 2019, Smith timely filed a notice of appeal.

On July 31, 2019, Smith’s appointed appellate counsel filed a *Wende* brief raising no issues and asking this court to independently review the record. Counsel advised Smith that he

² *People v. Smith* (May 13, 2013, B245432) [nonpub. opn.].

could file a supplemental brief with this court. On August 26, 2019, this court received a supplemental brief from Smith.

DISCUSSION

Pursuant to Senate Bill No. 620, Smith sought to have the firearm enhancement stricken. The trial court summarily denied Smith's petition, reasoning that the amendment by Senate Bill No. 620 did not apply because his judgment was final prior to its effective date.

We have independently reviewed the entire record. We are satisfied that no arguable issues exist and Smith has received effective appellate review of the order of denial of his motion. (*Smith v. Robbins* (2000) 528 U.S. 259, 277–279; *People v. Kelly* (2006) 40 Cal.4th 106, 123–124; *Wende, supra*, 25 Cal.3d at p. 443.) Additionally, in his supplemental brief, Smith presents no cognizable claim challenging the ruling from which this appeal is taken.

Effective January 1, 2018, the Legislature amended section 12022.53 by adding subdivision (h), which allows a court to exercise its discretion under section 1385 to strike or dismiss the personal use of a firearm enhancement at the time of sentencing. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678.) However, the amendment only applies to nonfinal judgments. (*People v. Johnson* (2019) 32 Cal.App.5th 938, 942; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507.) It does not apply retroactively to cases that are final. (*People v. Hernandez* (2019) 34 Cal.App.5th 323, 327.)

Smith's judgment was final at the time that he submitted his petition.³ The final remittitur issued on July 17, 2013.⁴ The trial court's order was correct.

Moreover, the trial court's order denying Smith's petition is not appealable. An order made after judgment is only appealable if it affects a defendant's substantial rights. (§ 1237, subd. (b).) Because the trial court did not have authority to resentence under Senate Bill No. 620, it lacked jurisdiction to grant Smith's petition. Denial of his petition could not have affected his substantial rights. (*People v. Fuimaono* (2019) 32 Cal.App.5th 132, 135.) Accordingly, the appeal must be dismissed. (*Id.* at p. 135; *People v. Hernandez, supra*, 34 Cal.App.5th at p. 327.)

³ In the *Wende* brief, counsel for Smith concedes that the judgment was final when the petition was submitted to the trial court. However, Smith argues the contrary in his supplemental brief, apparently reasoning that the trial court still has the ability to modify credits or stay a sentence pursuant to section 654 at any time. We reject this argument.

⁴ When a defendant has sought review in the California Supreme Court, the judgment is final 90 days after review is denied. (*People v. Vieira* (2005) 35 Cal.4th 264, 306; *In re Pedro T.* (1994) 8 Cal.4th 1041, 1046.) A petition for writ of certiorari in the United States Supreme Court must be submitted within this time. (U.S. Supreme Ct. Rules, rule 13.) Smith apparently did not seek review in the California Supreme Court.

DISPOSITION

The appeal is dismissed.

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HANASONO, J.*

We concur:

EDMON, P. J.

EGERTON, J.

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