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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.

VINCENT RUBIO,

Defendant and Appellant.

B293506

(Los Angeles County
Super. Ct. No. YA092378)

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

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Vincent Rubio appeals from the judgment entered following his no contest plea to one count of assault with a firearm and one count of

assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1) & (a)(2)).¹ We have conducted an independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and conclude that no arguable issues exist. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

Around 11:00 p.m. on April 15, 2015, Justin Alvarez was sitting in his car on a street in the City of Torrance. Appellant approached the car, tapped on the window with a baseball bat, and asked Alvarez to get out of the car. When Alvarez refused, appellant hit the door with the bat, denting the door. Appellant then took a revolver out of his jacket and told Alvarez to get out of the car. Alvarez lowered the window, and appellant placed the gun against his head. Appellant accused Alvarez of having an affair with appellant's wife and demanded Alvarez's identification and cell phone. Alvarez gave appellant his driver's license and cell phone and denied knowing appellant or his wife. Appellant threatened to kill Alvarez and continued to hit Alvarez's car with the bat. At some point, appellant walked away and hid the gun behind a fence. When the police arrived, appellant threw the bat under Alvarez's car.

Appellant was charged by information with count 1, second degree robbery (§ 211); count 2, assault with a firearm (§ 245, subd. (a)(2)); count 3, assault with a deadly weapon (§ 245, subd. (a)(1)); and count 4,

¹ Unspecified statutory references will be to the Penal Code.

² The facts are taken from the transcript of the preliminary hearing.

misdemeanor vandalism under \$400 (§ 594, subd. (a)). The information further alleged personal use of a firearm (§ 12022.53, subd. (b)) as to count 1, and personal use of a firearm (§ 12022.5) as to count 2.

On July 18, 2016, appellant entered no contest pleas to counts 2 and 3 and admitted the firearm enhancement as to count 2. On August 24, 2016, the court sentenced appellant to the agreed-upon term of nine years, calculated as follows: count 2, the high term of four years, plus a consecutive mid term of four years for the firearm enhancement; and count 3, a consecutive one-year term (one-third the mid term). Counts 1 and 4 were dismissed pursuant to the plea negotiation.

“On October 11, 2017, the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.) into law, effective January 1, 2018.” (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 54.) Senate Bill No. 620 “amended section 12022.5, subdivision (c), and section 12022.53, subdivision (h), . . . to give the trial court discretion to strike, in the interest of justice, a firearm enhancement imposed under those two statutes.” (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079–1080.) On June 26, 2018, appellant filed a petition in the trial court asking the court to exercise its discretion to strike or to impose a lesser sentence on his firearm enhancement.

The trial court denied the petition on August 16, 2018. The court stated that appellant was sentenced on August 24, 2016. The 120-day period provided by section 1170, subdivision (d)(1), to recall a sentence and resentence a defendant accordingly had passed. The court further reasoned that Senate Bill No. 620 applies retroactively only to cases not yet final on appeal and that appellant’s case was final prior to the

amendment's effective date. Finally, the court reasoned that appellant had accepted a negotiated sentence and therefore could not "complain about his decision to accept that disposition." Appellant timely appealed.

DISCUSSION

After review of the record, appellant's court-appointed counsel filed an opening brief asking this court to review the record independently pursuant to the holding of *Wende, supra*, 25 Cal.3d 436.

On March 12, 2019, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. No response has been received to date.

"Generally, 'where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed' if the amended statute takes effect before the judgment of conviction becomes final. [Citations.]" (*People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1321.) "State convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." [Citations.]' [Citation.]" (*Id.* at p. 1325.) Appellant had 60 days to file a notice of appeal and a statement of reasons for issuance of a certificate of probable cause, and he had 90 days to petition the United States Supreme Court for a writ of certiorari. (See *ibid.* [citing § 1237.5; Cal. Rules of Court, rules 8.304(a) & (b) and 8.308(a); U.S. Supreme Ct.

Rules, rule 13.1].) His conviction accordingly was final before January 1, 2018, the effective date of the amendment.

We have independently reviewed the record and conclude that there are no arguable issues on appeal. (See *Wende, supra*, 25 Cal.3d at pp. 441–442; see also *Smith v. Robbins* (2000) 528 U.S. 259, 278-279 [upholding the *Wende* procedure].)

DISPOSITION

The order appealed from is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.