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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD HOWARD PLUMP,

Defendant and Appellant.

B277636

(Los Angeles County
Super. Ct. No. TA047294)

APPEAL from an order of the Superior Court of the County of Los Angeles, Allen J. Webster, Judge. Dismissed.

Jonathan B. Steiner and Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill, Deputy Attorney General, and Theresa Patterson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant appeals from a postjudgment order denying his petition for writ of habeas corpus, including his request to recall his sentence under Penal Code section 1170.126.¹ We conclude the order denying defendant's petition is not appealable and dismiss the appeal.

PROCEDURAL BACKGROUND

In an information filed in May 1997, the Los Angeles County District Attorney charged defendant in count 1 with possession for sale of cocaine in violation of Health and Safety Code section 11351; and in count 2 with possession of a firearm by a felon in violation of former section 12021, subdivision (a)(1). The District Attorney alleged that in the commission of count 1, defendant was personally armed with a firearm within the meaning of section 12022, subdivision (c). The District Attorney further alleged as to counts 1 and 2 that defendant had suffered two prior strike convictions within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i).

A jury found defendant guilty on counts 1 and 2, that he was personally armed with a firearm in the commission of count 1, and he had suffered two prior strike convictions.

The trial court sentenced defendant on count 1 to a term of 25 years to life under the Three Strikes law, plus a consecutive four-year term based on the firearm enhancement; on count 2, the trial court sentenced him to a concurrent term of 25 years to life.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

Defendant appealed from his judgment of conviction and this court affirmed the judgment in July 1998 (*People v. Plump* (July 28, 1998, B116291) [nonpub. opn.]).

In July 2013, following the passage of Proposition 36, defendant filed a petition for recall of sentence pursuant to section 1170.126. The trial court concluded his current sentences were for violent or serious felonies under sections 1170.12, subdivision (c) and 667.5, subdivision (c), rendering defendant ineligible for resentencing under section 1170.126, and denied the petition.

In June 2016, defendant filed the petition for writ of habeas corpus that is the subject of this appeal. Defendant based his petition on three grounds: (1) he was entitled to resentencing under section 1170.126, subdivision (b) because his current offenses for possession of cocaine for sale and possession of a firearm by a felon were not violent or serious felonies; (2) one of his two prior strike convictions should have been stricken because each offense stemmed from a single act and those offenses could not be considered separate strike convictions for purposes of Three Strikes sentencing; and (3) the Three Strikes law was unconstitutional because it violated due process.

The trial court denied the petition for writ of habeas corpus, finding defendant failed to allege facts sufficient to establish a prima facie case for habeas relief and the petition merely reiterated issues that were previously rejected in his appeal and an earlier habeas petition.

Defendant filed an appeal from the trial court's "denial of motion to recall per [section] 1176.126 (motion was filed on habeas form)."

DISCUSSION

Defendant's counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asking us to independently review the record to determine if there are any arguable issues on appeal. We notified defendant of his right to file a letter brief raising any grounds for appeal, contentions, or arguments he wanted us to consider. In response, defendant submitted a letter brief raising the same issues he asserted in the trial court in support of the petition for a writ of habeas corpus.

Because it appeared from the record that defendant may have appealed from a nonappealable order or orders, we asked the parties to submit letter briefs on the following two issues:

1. Because the record reflects that the trial court previously denied defendant's March 2013 motion to recall his sentence under section 1170.126, and it does not appear from the record that defendant filed a timely appeal from that ruling, is defendant barred under the finality of judgments doctrine from now appealing from the denial of his second motion to recall his sentence under section 1170.126?

2. Are the other two issues raised in support of defendant's petition for writ of habeas corpus reviewable on direct appeal, particularly in light of defendant's notice of appeal which limits the issues on appeal to his eligibility for resentencing under section 1170.126?

In his letter brief in response to our request, defendant contends he is not barred from refiling his petition for recall of sentence under section 1170.126 if he has a "legitimate basis" for doing so, such as a change in the case law. Defendant does concede the order denying his petition on the other two grounds

is not directly appealable, but suggests we review and resolve those issues under our habeas corpus jurisdiction.

The Attorney General's letter brief acknowledges a postjudgment order denying a petition to recall a sentence pursuant to section 1170.126 is directly appealable, citing section 1237, subdivision (b) and *Teal v. Superior Court* (2014) 60 Cal.4th 595, 598. Nevertheless, the Attorney General maintains this case is distinguishable because it involves a repeat request to recall the sentence under section 1170.126, but is not based on any change in the law or different facts. The Attorney General also asserts an order denying a petition for writ of habeas corpus is not appealable, citing *In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.

We conclude the denial of defendant's request to recall his sentence under section 1170.126 is not appealable. The request was simply a renewal of the initial unsuccessful petition to recall the sentence, and defendant did not appeal from that ruling. Under the doctrine of finality of judgments, defendant is prohibited from "further contest of an issue once [it has been] judicially decided." (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 181 Cal.App.4th 752, 771.) We further conclude the denial of defendant's habeas corpus petition based on the other two grounds cannot be challenged on direct appeal. (*In re Clark, supra*, 5 Cal.4th at p. 767, fn. 7.)

The appeal from the denial of defendant's petition to recall his sentence and for writ of habeas corpus must therefore be dismissed.

DISPOSITION

The appeal is dismissed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Orange Superior Court, appointed by the Chief Justice pursuant to article VI, section 6, of the California Constitution.