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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. AHDANTE ABDOULA HARRIS, Defendant and Appellant.	B281043 (Los Angeles County Super. Ct. No. SA028237)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark E. Windham, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 1997, appellant Ahdante Abdoula Harris was convicted of robbery and unlawful possession of a firearm by a felon. The jury also found true allegations that appellant personally used a firearm during the commission of the robbery, and that he suffered two prior convictions for robbery. Citing appellant's two prior robbery convictions, the trial court sentenced appellant under the Three Strikes law to a total term of 34 years to life. We affirmed the convictions and sentence in 1998, and the Supreme Court denied appellant's petition for review.

In January 2017, appellant filed a motion for modification of his sentence. He argued that his sentence violated Penal Code section 654[1] and that his two prior robbery convictions, which he suffered pursuant to a single plea agreement, should have counted as a single prior strike. The trial court denied his motion, and appellant timely appealed. His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)) requesting that we conduct an independent review of the record. We have done so and conclude that no arguable issues exist. Accordingly, we affirm.

BACKGROUND

In 1991, appellant pled no contest to two counts of robbery (§ 211). He further admitted special allegations that he used a deadly weapon, a knife (§ 12022, subd. (b)), in one of the robberies; caused great bodily injury to the victim in that robbery (§ 12022.7, subd. (a)); and personally used a firearm in connection with the second robbery (§ 12022.5, subd. (a)). During his plea colloquy, the prosecutor advised appellant, "the crimes to which you're pleading guilty to today [*sic*] are priorable, meaning should

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

you be convicted of another crime at a later time, the conviction in this case could serve to enhance any conviction you have in the future." Appellant said he understood that advisement. Pursuant to the plea agreement, the court sentenced appellant to a total term of nine years on the first robbery count: the high term of five years, plus an additional year for use of the knife and an additional three years for causing great bodily injury. The court also sentenced defendant to a concurrent term of nine years on the second robbery: the high term of five years, plus the midterm of four years for the firearm use enhancement.

Appellant was released from custody in September 1996. Five months later, in February 1997, he robbed a woman exiting a jewelry store at gunpoint. Later that year, a jury convicted appellant of one count of robbery (§ 211) and one count of unlawful possession of a firearm by a felon (former § 12021, subd. (a)). The jury also found true allegations that appellant personally used a firearm in the commission of the robbery (§ 12022.5, subd. (a)(1)), that he committed the robbery within five years of being released from custody (§ 667.5, subd. (b)), and that he previously had been convicted of two robberies, which were serious felonies (§ 667, subds. (a)(1) & (b)-(i), § 1170.12, subd. (a)). The trial court sentenced defendant to the Three Strikes sentence of 25 years to life on the robbery count, "plus the midterm of four years for the special allegation that the defendant personally used a firearm in the commission of the robbery, plus five years pursuant to 667(a)(1)," for a total of 34 years to life on the robbery count. The court also imposed a sentence of 25 years to life on the firearm possession count, but exercised its discretion to run the sentence concurrently to the 34-years-to-life sentence for the robbery and related enhancements. Appellant's total

sentence thus was 34 years to life. The court also ordered restitution of $200. The court awarded appellant 290 days of time credit and 144 days of good time/work time credits, for a total credit of 434 days in custody.

Appellant timely appealed his convictions and sentence. The appeal, Case No. B118261, was assigned to this Division. Appellant argued that the concurrent sentences the trial court imposed violated section 654 because there was no evidence that he possessed the gun except during the robbery. He also argued that his sentence violated the federal and state constitutional prohibitions against cruel and unusual punishment. We rejected both contentions and affirmed the judgment of the trial court.

Appellant timely filed a petition for review in the Supreme Court. The Supreme Court denied appellant's petition for review on December 22, 1998.

In January 2017, appellant filed a motion in propria persona for modification of his sentence. He argued that his sentence violated section 654 and that his two prior robbery convictions, which he suffered pursuant to a single plea agreement, should count as a single prior strike.

The trial court considered appellant's motion in chambers and denied it. The court's minute order explained: "The record reflects that defendant held a separate intention at the time of his arrest for robbery when he possessed the firearm and these were not fortuitous circumstances. See *People v. Garcia* (2008) 167 CA 4th 1550."

Appellant timely filed a notice of appeal. He also filed a request for the appointment of appellate counsel.

Appellant's appointed counsel filed a *Wende* brief requesting that we conduct an independent review of the record.

We directed counsel to send appellant a copy of the brief and the record on appeal immediately. On June 14, 2017, we advised appellant he had 30 days within which to submit a supplemental letter or brief. Appellant timely filed an "Addendum in Support of Opening Brief" on July 5, 2017. His counsel filed a request for judicial notice of the records in his 1998 appeal and petition for review, which we granted.

DISCUSSION

Appellant raises several arguments in his lengthy supplemental brief. None of them demonstrates an entitlement to resentencing.

Appellant first contends that he should be resentenced under Proposition 57, which the electorate adopted on November 8, 2016. (See *People v. Superior Court* (*Walker)* (2017) 12 Cal.App.5th 687, 694.) He also makes the related argument that "Older Third Strike Inmates Who Have Not Committed Violent Felonies Are Statistically Less Dangerous To The Public Than Younger Inmates With Second Strike Or Determinate Term, Such That Singling Them Out As Ineligible For Parole Consideration Is Irrational And Violative of Equal Protection."

Both of these arguments are forfeited because appellant did not present them in his motion to the trial court. (See, e.g., *People v. Partida* (2005) 37 Cal.4th 428, 435 ["A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct."]; *People v. Alexander* (2010) 49 Cal.4th 846, 880 & fn. 14) ["Defendant did not raise his equal protection claim in the trial court . . . . The claim therefore is forfeited."].)

Even if appellant's Proposition 57 arguments were properly before us, we would conclude that appellant is not entitled to relief under Proposition 57. Proposition 57 added Article 1,

section 32 to the California Constitution. That section provides, in relevant part, "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term of his or her primary offense," defined for these purposes as "the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (Cal. Const., art. I, § 32, subds. (a)(1), (a)(1)(A).) Appellant does not qualify for relief under this provision because the offense he committed, robbery, is not a nonviolent felony offense. To the contrary, it is explicitly classified as a "violent felony" under section 667.5, subdivision (c)(9). (See Cal. Code Regs., tit. 15, § 3490, subd. (c) ["'Violent Felony' is a crime or enhancement as defined in Penal Code section 667.5, subdivision (c)."].) Moreover, even if appellant were eligible for relief under Proposition 57, he would be entitled only to parole consideration, not the resentencing or sentence modification he sought in his motion. Any determination as to appellant's right to parole must be made, in the first instance, by the appropriate agency. As to his equal protection claim, appellant has not demonstrated that violent offenders such as he are similarly situated to nonviolent offenders, or that there is no rational basis for treating those groups differently.

Appellant next contends that he "was eligible to petition for his three strikes sentence to be reduced to a two strikes sentence" under section 1170.126. This argument is forfeited because appellant did not present it in his motion to the trial court. (See, e.g., *People v. Partida*, *supra*, 37 Cal.4th at p. 435.) Even if the argument were properly before us, we would conclude that appellant is not entitled to relief under section 1170.126. That

section was enacted as part of Proposition 36, the Three Strikes Reform Act of 2012 ("the Act"). (*People v. Estrada* (2017) 3 Cal.5th 661, 666.) "Among other reforms, the Act amended the Penal Code to permit recall of sentence for some inmates sentenced for third strike offenses that were neither serious nor violent felonies." (*Ibid.*) "Prior to the approval of Proposition 36, the Three Strikes law imposed a prison term of 25 years to life on a defendant for a felony conviction, even if it was not a serious or violent felony, where the defendant had two or more prior convictions for serious or violent felonies. [Citation.] Following enactment of Proposition 36, defendants are now subject to a lesser sentence when they have two or more prior strikes and are convicted of a felony that is neither serious nor violent, unless an exception applies." (*Id.* at pp. 666-667.) Here, defendant's robbery offense was both a serious and violent felony. (§§ 1170.12, subd. (b)(1), 1192.7, subd. (c)(19) [serious], 667.5, subd. (c)(9) [violent].) He therefore was not eligible for a lesser sentence on that count. He also was not eligible for a lesser sentence on the felon in possession count, because he "was armed with a firearm or deadly weapon" during that offense, which is one of the exceptions to Proposition 36. (§ 1170.12, subd. (c)(2)(C)(iii); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797.)

Even if he were eligible, appellant did not timely seek relief under Proposition 36. Section 1170.126, subdivision (b) allows inmates to file petitions for recall of sentence "within two years after the effective date of [Proposition 36] or at a later date upon a showing of good cause." Proposition 36 became effective in November 2012, more than four years before appellant filed his motion, and he has made no effort to demonstrate good cause for his delay.

Appellant next claims that his sentence must be modified because the sentencing court violated the ex post facto clause by applying section 1387.1 "when defendant was not liable when the section became effective." This argument was not raised below and is forfeited. (See, e.g., *People v. Partida*, *supra*, 37 Cal.4th at p. 435 .) It lacks merit in any event. Even if section 1387.1, which governs the refiling of violent felony charges after two prior dismissals under section 1387, is pertinent here, appellant has not explained how or when the trial court erroneously applied it. Furthermore, the statute was enacted in 1987, well before appellant's 1991 plea and 1997 conviction, and has never been amended; there is no basis to conclude that the ex post facto clause was violated.

We consider the merits of appellant's final argument, because he presented it below. He argues that the trial court should have counted his two 1991 robbery convictions as a single strike rather than two because "the plea colloquy gave reference to one advisement to guilt for a single statute of 211 violation," he and the prosecutor agreed he was pleading only "to a single offense," and the trial court "was required to dismiss one of them, because failure to do so would be inconsistent with the spirit of the three strikes law." We disagree.

The record includes a transcript of appellant's 1991 change-of-plea hearing. That transcript reveals that appellant repeatedly was informed that he would be pleading to two separate robbery charges and stated that he understood the advisements. The prosecutor told the court, in appellant's presence, that the nature of the parties' bargain was the following: "The defendant will be pleading guilty to count 1 and receive high term on the robbery. He'll be admitting the special

allegation alleged pursuant to Penal Code section 12022, subdivision (b), and receive one year on that, and he'll be admitting the allegation in count 1 to Penal Code section 12022.7 and receive three years on that. He'll also be pleading to count 2, high term of five years, on the 211, and be pleading to the special allegation pursuant to Penal Code section 12022.5, subdivision (a), and receive mid-term [*sic*] four years on that, all concurrent with count 1." The prosecutor also advised appellant directly, "You'll be pleading guilty to count 1, second-degree robbery, and be receiving five years in state prison, high term, on that offense, plus you'll be admitting the personal allegation in count 1 regarding the personal use of a knife, pursuant to Penal Code section 12022, subdivision (b), and receive one year on that, plus you'll also be receiving three years on the second special allegation of inflicting great bodily injury upon [the victim], pursuant to Penal Code section 12022.7, and receive three years on that, and that's how we got the total of nine years in state prison on this case. You'll also be pleading guilty to count 2 on the underlying offense, the 211, receive five years on that, and you'll be pleading guilty to the special allegation in count 2 pursuant to Penal Code section 12022.5, subdivision (a), and receive four years on that special allegation, for a total of nine years, to run concurrently with count 1." The concurrent nature of appellant's sentences did not alter the underlying convictions for two robberies, to which defendant separately and distinctly pled no contest. Likewise, the prosecutor's isolated use of the singular term "conviction" when explaining that the robberies counted as strikes—"should you be convicted of another crime at a later time, the conviction in this case could serve to enhance any conviction you have in the future"— does not negate the fact

that appellant knowingly pled no contest to two separate strike offenses in accordance with the plea agreement.

Appellant relies on *People v. Carmony* (2004) 33 Cal.4th 367 (*Carmony*) to support his contention that the trial court "was required to dismiss" one of his 1991 strike convictions. *Carmony* does not aid him. *Carmony* held that a trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion. (*Id.* at p. 375.) There is no evidence in the record that appellant asked the court to dismiss one of his 1991 convictions, which renders this argument meritless; "any failure on the part of a defendant to invite the court to dismiss under section 1385 . . . waives or forfeits his or her right to raise the issue on appeal." (*Id.* at pp. 375-376.) Even if this argument were preserved at this late stage, appellant has not carried his burden of demonstrating that the trial court's sentencing decision was irrational or arbitrary. (*Id.* at p. 376.) Appellant's prior strike convictions were both for violent robberies in which he personally used dangerous weapons, and he committed his third strike offense within months of being released from prison. The trial court would have been well within its discretion to conclude that appellant fell squarely within the spirit of the Three Strikes Law. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.)

In addition to considering appellant's arguments, we have independently reviewed the entire appellate record pursuant to *Wende*, *supra*, 25 Cal.3d at pp. 441-442. In our independent analysis and judgment, we conclude there is no arguable issue on appeal. (*People v. Kelly* (2006) 40 Cal.4th 106, 121, 123-124.)

DISPOSITION

The order of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.