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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

D085533

Plaintiff and Respondent,

v.

(Super. Ct. No. SCN319198)

JERSON H. GARCIA,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of San Diego County, Sim von Kalinowski, Judge. Dismissed.

Heather E. Shallenberger, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

MEMORANDUM OPINION

Jerson H. Garcia purports to appeal from the trial court's December 13, 2024 minute order denying his request for recall and modification of sentence. After conducting an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, *Anders v. California* (1967) 386 U.S. 738 (*Anders*), and *People v. Delgadillo* (2022) 14 Cal.5th 216 (*Delgadillo*) and

considering Garcia’s supplemental brief, we conclude the trial court’s order is not appealable and we therefore dismiss the appeal.

I.

Background

In October 2013, a jury found Garcia guilty of eight counts of robbery (Pen. Code,¹ § 211), one count of assault with a deadly weapon (§ 245, subd. (a)(1)), one count of resisting arrest (§ 148, subd. (a)(1)), and one count of hit and run (Veh. Code, § 20002, subd. (a)). The jury also found true gang enhancements (§ 186.22, subd. (b)(1)) as to counts one through nine. The trial court sentenced him to an aggregate prison term of 17 years and 4 months, consisting of the midterm of three years for one count of robbery, plus 10 years for the gang enhancement; and one-third the midterm of three years for another count of robbery, plus three years and four months for the gang enhancement. The terms on the remaining counts were stayed pursuant to section 654.

In Garcia’s direct appeal in 2016, we rejected his claims that “the trial court abused its discretion in failing to bifurcate trial of the gang enhancements; pretrial identification procedures were unduly suggestive; jury instructions allowed the jurors to equate motive with intent, lessening the burden needed for conviction; and the prosecution failed to produce sufficient evidence showing that the charged offenses benefited a criminal gang for the purposes of the alleged gang enhancements” and affirmed the judgment. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1353 (*Garcia*).) The California Supreme Court denied his petition for review.

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

In March 2024, Garcia filed a request pursuant to section 1172.1 for recall of his sentence and resentencing on the grounds he received “[two] Gang Enhancement (186.22) Benefit for Street Gang on the same case” and his “Gang Enhancements are longer than [his] base term.” The trial court appointed counsel for Garcia. Garcia’s counsel filed a brief requesting the dismissal of the gang enhancements and reduction in sentence based on his status as a youthful offender and his difficult childhood. The prosecution opposed recall of the sentence citing Garcia’s 11 rule violations while in prison, including three violent acts of battery and one instance of drug smuggling.

In December 2024, the trial court declined Garcia’s request to recall his sentence. Reviewing Garcia’s prison records, the court highlighted an incident in which Garcia was involved with two others in beating another inmate and “it took in excess of four CS gas grenades from correction officers to stop the defendant and his companion.” The court noted a second incident two years later where Garcia “committed an unprovoked attack on another inmate,” and a third incident where he attacked another inmate. The court explained that “over the past five and a half years [Garcia’s] bad conduct significantly outbalanced his good conduct to the extent his classification score increased by almost three times.” The court also considered the positive documents regarding Garcia’s acceptance of responsibility, enrollment in college and AA classes. The court explained that given Garcia’s significant decline in his conduct and classification score in the last five and a half years, it declined to recall his sentence.

II.

Discussion

Garcia’s appointed appellate counsel has filed a brief raising no arguable issues and invited this court to independently review the record

under *Delgadillo*, *supra*, 14 Cal.5th 216 and *Anders*, *supra*, 386 U.S. 738. To assist this court in its review, counsel identified the following potential issue: “Whether the trial court was required to initiate the resentencing procedure based on the amendments to Penal Code 186.22 under Assembly Bill 333 (2021-2022 Reg. Sess.)?” Garcia filed a supplemental letter brief alleging there is “insufficient evidence to sustain the gang allegations under Assembly Bill 333.”

Section 1172.1 authorizes a trial court to recall a previously imposed sentence and resentence the defendant. It provides “the court may, on its own motion, within 120 days of the date of commitment or at any time if the applicable sentencing laws at the time of original sentencing are subsequently changed by new statutory authority or case law.” (§ 1172.1, subd. (a)(1).) When recalling and resentencing under this statute, the court is required to “apply any changes in law that reduce sentences or provide for judicial discretion so as to eliminate disparity of sentences and to promote uniformity of sentencing.” (*Id.*, subd. (a)(2).) And the court may reduce a defendant’s term of imprisonment in the interests of justice “regardless of whether the original sentence was imposed after a trial or plea agreement.” (*Id.*, subd. (a)(3).)

Recall and resentencing a matter in order to apply the ameliorative benefits of changes in law such as Assembly Bill No. 333 is authorized by section 1172.1. But by the statute’s plain terms, Garcia is not entitled to apply for postsentence relief under section 1172.1. Nor can he invoke section 1172.1 to compel resentencing. The statute expressly provides: “A defendant is not entitled to file a petition seeking relief from the court under this section. If a defendant requests consideration for relief under this section, *the court is not required to respond.*” (§ 1172.1, subd. (c), italics added; see *People v. Faustinos* (2025) 109 Cal.App.5th 687, 695 (*Faustinos*)

[“[t]hough the court can act on its own motion, defendants may not petition under section 1172.1” and if the defendant requests consideration for relief under the statute, the court is not required to respond].)

Thus, the trial court was within its authority to take no action on Garcia’s request for recall and resentencing. (§ 1172.1, subd. (c).) This conclusion compels dismissal of Garcia’s appeal from the court’s minute order denying his petition. Because “[a] defendant is not entitled to file a section 1172.1 petition nor to receive a ruling if he nevertheless files one,” it follows that “an appeal from an order acting on his petition (*whether couched as a denial, dismissal, or any other statement that the court is not acting*) does not affect the defendant’s substantial rights.” (*Faustinos, supra*, 109 Cal.App.5th at p. 696.) We therefore “lack the authority to rule on the merits of appeals from orders filed in response to a defendant’s attempt to seek resentencing under section 1172.1. (§ 1237, subd. (b).)” (*Faustinos*, at p. 696.) Because there is no appealable order, we dismiss the appeal. (*Id.* at p. 700.)

As to Garcia’s claim of insufficient evidence under the amendments to section 186.22 by Assembly Bill No. 333, we conclude the amendments do not apply retroactively to Garcia’s judgment. (*People v. Kelly* (2006) 40 Cal.4th 106, 110 [the Court of Appeal must consider appellant’s supplemental contentions].) As of January 1, 2022, Assembly Bill No. 333 amended the evidentiary burden necessary to prove a gang-related enhancement under section 186.22. (Assem. Bill No. 333 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 699, §§ 1–5).) Generally, the presumption of retroactivity of statutory amendments that reduce possible punishment applies to any proceeding which, at the time of that supervening legislation, has not yet reached final disposition in the highest court authorized to review it. (*People v. McKenzie* (2020) 9 Cal.5th 40, 45; *People v. Tran* (2022) 13 Cal.5th 1169, 1206–1207

[amendments to the gang enhancement statute apply retroactively to nonfinal judgments].)

In 2016, Garcia appealed from his judgment of conviction claiming the trial court abused its discretion in failing to bifurcate the trial of the gang enhancements and that the prosecution failed to produce sufficient evidence to support the gang enhancements, among other things. This court affirmed the judgment. (*Garcia, supra*, 244 Cal.App.4th 1349). Garcia then unsuccessfully petitioned for review before the California Supreme Court. (*People v. Rossi* (1976) 18 Cal.3d 295, 302 [judgment is final when affirmed by the appellate court].) Thus, Garcia's judgment is final and the amendments to section 186.22 do not apply retroactively.

DISPOSITION

We dismiss the appeal.

DO, Acting P. J.

WE CONCUR:

KELETY, J.

HUFFMAN, J.*

* Retired Associate Justice of the Court of Appeal, Fourth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.