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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEROY AUSTIN,

Defendant and Appellant.

A140057

(Lake County
Super. Ct. Nos. CF22954)

Defendant Leroy Austin appeals from an order denying his petition to recall his indeterminate life sentence under Penal Code section 1170.126.¹ His court-appointed counsel has filed a brief raising no issues, but seeking our independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*). We find no arguable issues and affirm.

I. BACKGROUND

In 1998, defendant pled guilty to second degree robbery and admitted he had been previously convicted of two prior serious or violent felonies. (§§ 211, 667, subds. (b)-(h), 1170.12.) He was sentenced to prison for an indeterminate term of 25 years to life, as was then authorized under the “Three Strikes” law. (Former §§ 667, subd. (e)(2)(A), as amended by Stats. 1994, ch. 12, § 1, eff. Mar. 7, 1994; 1170.12, subd.

¹ Further statutory references are to the Penal Code.

(c)(2)(A), added by Prop. 184, § 1, approved Nov. 8, 1994; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1285 (*Kaulick*.) As a condition of defendant's plea, the People dismissed additional allegations that could have added 25 years to his sentence.

Defendant appealed from the original judgment, arguing his sentence amounted to cruel and unusual punishment. This court rejected that argument and affirmed the judgment in a nonpublished opinion filed December 20, 1999. (*People v. Austin* (A084334).)

On November 6, 2012, the electorate passed Proposition 36, known as the Three Strikes Reform Act. The ballot measure amended sections 667 and 1170.12 to provide that, subject to certain exceptions, a defendant with two prior serious or violent felony convictions is subject to a sentence of 25 years to life only if the current felony is also a serious or violent felony. (*Kaulick, supra*, 215 Cal.App.4th at pp. 1292-1293.) It also enacted section 1170.126, which permits certain prisoners who are currently serving an indeterminate life term as a third strike offender to petition for a recall and resentencing as a second strike offender. (§ 1170.126, subds. (a), (b) & (e)(1); *Kaulick*, at p. 1286.) A prisoner is not eligible for resentencing under section 1170.126 when he or she is serving the indeterminate term for a serious or violent felony as defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c). (§ 1170.126, subd. (e)(1).)

Defendant filed a petition to recall his sentence on December 10, 2012. The court denied that petition on January 15, 2013, on the ground the current offense of second degree robbery was a serious and violent felony. On September 17, 2013, defendant filed a "motion to amend the petition for recall of sentence," accompanied by an amended petition arguing that his commitment offense was a petty theft rather than a robbery. The court denied this motion on September 25, 2013, "for the reason that such amendment does not change the fact this case is not within the class of cases described by the Three Strikes [Reform] Act of 2012." Defendant filed a notice of appeal on October 17, 2013.

II. DISCUSSION

As required by *People v. Kelly* (2006) 40 Cal.4th 106, 124, we affirmatively note appointed counsel has filed a *Wende/Anders* brief raising no issues. Defendant, having been advised of his right to file a supplemental brief, filed such a brief on February 28, 2014. We have considered the arguments raised in that supplemental brief and have independently reviewed the entire record for potential error. We find none.

It is unclear whether an order denying a petition for recall under section 1170.126 is appealable, and that issue is currently under review in the Supreme Court. (See, e.g., *Teal v. Superior Court* (2013) 217 Cal.App.4th 308, review granted July 31, 2013, S211708 [court held order was not appealable]; *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted July 31, 2013, S212017 [court held order was appealable].) In this case, defendant has not timely appealed directly from the order denying his petition for recall under section 1170.126, but from a motion to amend that previously denied petition, making the current appeal's viability even more suspect. (See *People v. De Leon* (1965) 236 Cal.App.2d 530, 532-533 [appeal from order denying motion for new trial upon reconsideration dismissed].)

Even if we assume this appeal is properly before us, the trial court correctly denied defendant's section 1170.126 petition. The recall procedure created by that statute is not available to a defendant whose current conviction is for a serious or violent felony as defined in sections 1192.7, subdivision (c) and 667.5, subdivision (c). (§ 1170.126, subd. (e)(1).) Defendant's current conviction is for second degree robbery, which qualifies as both a serious and a violent felony. (§§ 1192.7, subd. (c)(19), 667.5, subd. (c)(9).)

Defendant seeks to avoid this basic problem by arguing in his supplemental brief that his robbery conviction was really a petty theft of \$100, and that he pled guilty to the wrong offense. As this court noted in its prior opinion in the appeal from the original judgment, "[Defendant] entered a convenience store and robbed the clerk of hundreds of dollars, precipitating a dangerous physical battle between the clerk and his customers and [defendant]. The commission of this offense was obviously planned and premeditated by

[defendant]. Under California law, the current offense qualifies as a ‘serious felony,’ and not a mere ‘theft offense.’ ” (*People v. Austin* (Dec. 20, 1999, A084334) [nonpub. opn].)

We are satisfied defendant’s appointed attorney has fully complied with the responsibilities of appellate counsel and that no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 283.)

III. DISPOSITION

The judgment (order denying defendant’s motion to amend the petition for recall of sentence) is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.