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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN A. JOHNSON,

Defendant and Appellant.

A140608

(Alameda County Sup. Ct.
No. 124337)

Appellant John A. Johnson (Johnson) appeals the trial court’s denial of his petition to recall his sentence under the Three Strikes Reform Act of 2012, added by Proposition 36 (the Reform Act). (See Pen. Code, § 1170.126.)¹ Johnson’s appellate counsel has filed an opening brief in which no issues are raised, and asks this court for an independent review of the record to determine whether there are any arguable issues. (*Anders v. California* (1967) 386 U.S. 738 (*Anders*); *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)). Appellate counsel advised Johnson of his right to file a supplemental brief to bring this court’s attention to any issues he believes deserve review, and we received briefing from Johnson on August 8, 2014. (*People v. Kelly* (2006) 40 Cal. 4th 106.) We have independently reviewed the entire record, including Johnson’s supplemental contentions. Finding no arguable appellate issues, we affirm.

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

I. BACKGROUND

In 1990, after a jury trial, Johnson was found guilty of two counts of second degree robbery while armed with a firearm (§§ 211, 12022, subd. (a)). (*People v. Johnson* (Mar. 26, 1997, A074024) pet. for review denied June 16, 1997 [nonpub. opn.].) He had initially been charged with eight armed robberies of commercial businesses which occurred between March and June 1990 in Oakland and Berkeley, including four bank robberies. As a result of these convictions, Johnson was sentenced to 88 months in state prison. Johnson had been released on parole for less than 10 months when he was again arrested in May 1995 for robbing an Oakland bank. He was found guilty of second degree robbery (§§ 211, 212.5, subd. (c)) following a jury trial in 1995. Given his two prior robbery convictions, the trial court sentenced Johnson under the then-current three strikes law to an indeterminate sentence of 30 years to life.

Johnson's direct appeal was unsuccessful. (*People v. Johnson, supra*, A074024 [nonpub. opn.].) Thereafter, a series of petitions for writs of habeas corpus were also denied. (See *In re John A. Johnson on Habeas Corpus* (April 25, 2013, A138433); *In re John Arthur Johnson on Habeas Corpus* (July 26, 2012, A135955), review denied Sept. 20, 2012; *In re John A. Johnson on Habeas Corpus* (Dec. 28, 2011, A134077), review denied Feb. 29, 2012; *In re John A. Johnson on Habeas Corpus* (July 7, 2011, A132459); *In re John A. Johnson on Habeas Corpus* (Jan. 28, 2010, A127290); *In re Johnson on Habeas Corpus* (May 31, 2001, A095033); *In re Johnson on Habeas Corpus* (Dec. 18, 1998, A083901).)

In October 2013, Johnson filed the instant petition seeking modification of his sentence under the Reform Act. The trial court denied the petition in a written decision on December 3, 2013, concluding that Johnson's prior strikes, along with his 1995 robbery conviction, made him ineligible for relief under section 1170.126. Johnson's timely notice of appeal brought the matter before this court.

II. DISCUSSION

Preliminarily, we note that appellate courts are divided on the issue of whether an order denying a petition under section 1170.126 is appealable, and the matter is currently

pending before the California Supreme Court. (See e.g., *People v. Haynes* (2014) 225 Cal.App.4th 997, review granted July 9, 2014, S218982; *People v. Wortham* (2013) 220 Cal.App.4th 1018, review granted Jan. 15, 2014, S214844 (*Wortham*); *People v. Leggett* (2013) 219 Cal.App.4th 846, review granted Dec. 18, 2013, S214264; *Teal v. Superior Court* (2013) 217 Cal.App.4th 308, 311, review granted July 31, 2013, S211708; *People v. Hurtado* (2013) 216 Cal.App.4th 941, 945, review granted July 31, 2013, S212017.) One of these cases—*Wortham*—was decided by this division in October 2013 and concluded that the denial of a petition under the Reform Act is an appealable order because it “affects a substantial right.” (*Wortham, supra*, 220 Cal.App.4th at pp. 1022-1023.) Unless and until the Supreme Court decides otherwise, we will continue to follow the rationale in *Wortham* and entertain such appeals.²

Even assuming an order denying relief under the Reform Act is generally appealable, the question still remains as to whether an appellant may take advantage of the procedural protections afforded by *Wende, supra*, 25 Cal.3d 436, or *Anders, supra*, 386 U.S. 738, and seek independent review of the matter in this court. In this regard, we note that at least one appellate court recently concluded that *Wende* review is not available with respect to such denials because there is no due process right to independent review in this context. (*People v. Anderson* (2014) 229 Cal.App.4th 925 pet. for review filed Oct. 22, 2014 [opinion issued after grant of rehearing].) However, a petition for Supreme Court review has been filed in *Anderson*, and given the general uncertainty in this area, we will conduct an independent review of the proceedings.

Turning to the merits, we conclude that the trial court properly determined that Johnson is not entitled to resentencing under section 1170.126. Pursuant to that section,

² Indeed, even were we to conclude that the order denying the petition was a nonappealable order, we could and would, in the interest of judicial economy and because of uncertainty in the law, treat Johnson’s appeal as a petition for writ of mandate or habeas corpus and reach the merits of his claim. (See *People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as writ of habeas corpus in the interest of judicial economy and because issue is of general concern]; *Drum v. Superior Court* (2006) 139 Cal.App.4th 845, 852-853 [treating appeal as writ of mandate due to uncertainty in the law].)

an inmate is eligible to file a petition for resentencing under the Reform Act only if he or she is serving a sentence imposed after conviction “of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.” (§ 1170.126, subd. (b).) As stated above, Johnson is currently serving an indeterminate sentence of 30 years to life for robbery. Robbery is a “violent felony” under section 667.5, subdivision (c)(9). It is also a “serious felony” under section 1192.7, subdivision (c)(19). Accordingly, Johnson is manifestly ineligible for resentencing.

In fact, Johnson concedes he is not entitled to resentencing under the plain language of section 1170.126. However, citing *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, he argues that a literal application of the statute to his situation would lead to “absurd consequences the voters did not intend.” Specifically, he complains that application of the plain language of section 1170.126 to his situation would violate his due process and equal protection rights because it would allow individuals with criminal records that are more extensive in length, seriousness, and violence to qualify for resentencing, while he is excluded merely because of the seriousness of his current felony. A due process challenge in the sentencing context fails if the enactment is reasonably related to a proper legislative goal. (*People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1328-1329 (*Kilborn*).) Similarly, under an equal protection analysis, a legislative classification must bear a “rational relationship” to a legitimate governmental purpose. (*Id.* at p. 1331.) The legitimate purposes underlying the Reform Act, as described in the ballot materials for Proposition 36, are increasing public safety, saving money, and making room in prison for dangerous felons. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171.)

While Johnson may not agree with how the Reform Act was structured, we cannot say that it’s classifications are irrational. Denying resentencing to those *most recently* convicted of a serious or violent felony could reasonably be seen as a means to increase public safety by keeping currently dangerous felons incarcerated for longer periods of time. Similarly, allowing resentencing of those whose *most recent* criminal

activity was neither serious nor violent could rationally be viewed as a cost saving measure, which would make room in prison for more serious offenders without sacrificing public safety. As one appellate court aptly noted in a related context: “The real quarrel of appellant, we believe, is that the Legislature, first, and the people of California, second, by approving the initiative statute under which he was sentenced, have acted unwisely. But the wisdom of their choice is not subject to judicial review, so long as it is rational.” (*Kilborn, supra*, 41 Cal.App.4th at p. 1330.)

III. DISPOSITION

The trial court’s order is affirmed.

REARDON, ACTING P.J.

We concur:

RIVERA, J.

BOLANOS, J.*

* Judge of the San Francisco City and County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.