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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.

KENNETH RAYMOND CALIHAN,

Defendant and Appellant.

A145192

A145691

(Mendocino County  
Super. Ct. Nos. CR11363 &  
SCUKCR15-26381)

Appellant Kenneth Raymond Calihan appeals from orders denying his petitions for relief under Proposition 47 (Pen. Code, § 1170.18).<sup>1</sup> Appellant’s counsel has raised no issue on appeal 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; *People v. Wende* (1979) 25 Cal.3d 436.) Appellate counsel advised appellant of his right to file a supplementary brief to bring to this court’s attention any issue he believes deserves review. (*People v. Kelly* (2006) 40 Cal.4th 106.) Appellant has not filed such a brief. We have reviewed the entire record, find no arguable issues, and affirm.

**BACKGROUND**

In 1993, appellant was convicted of attempted burglary. (§§ 664, 459.) According to the Court of Appeal decision affirming this conviction, he pled no contest

<sup>1</sup> All undesignated section references are to the Penal Code.

to the charge after “a neighbor saw appellant using a small knife to try to pry open a window.” (*People v. Calihan* (July 30, 1993, A060698) [nonpub. opn.]<sup>2</sup>) Appellant was sentenced to a three year prison term.

In March 2015, appellant filed a petition for writ of habeas corpus, claiming he was eligible to have his prior felony conviction reduced to a misdemeanor pursuant to Proposition 47. In April, the superior court construed the petition as one for relief under Proposition 47 and summarily denied it on the ground that “attempted burglary of a house is not eligible for Proposition 47 relief.”

In May, appellant filed a request to recall his sentence, again arguing his 1993 felony conviction should be reduced to a misdemeanor.<sup>3</sup> In July, the superior court denied the request, finding it lacked jurisdiction to recall the sentence and again noted his conviction was not eligible for relief under Proposition 47.

#### DISCUSSION

We have reviewed the record and have found no arguable appellate issues.

Section 459.5, added by Proposition 47, provides shoplifting—defined as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours” (with a ceiling on the value of property taken)—is a misdemeanor. No other form of burglary was designated a misdemeanor pursuant to Proposition 47. Appellant’s conviction is not eligible for relief under Proposition 47.

Appellant’s motions were reviewed by a judge who was not his sentencing judge. The 1993 sentencing judge is apparently no longer a judge in Mendocino County Superior Court; in any event, because appellant’s offense was not eligible for resentencing under Proposition 47, he was not prejudiced by any error in the judicial

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<sup>2</sup> We grant appellant’s September 24, 2015 request that we take judicial notice of this unpublished decision. (Evid. Code, § 452, subd. (d); Cal. Rules of Court, rule 8.1115(b).)

<sup>3</sup> He also appeared to argue he was not informed at the time of his plea that the conviction could be used to enhance his sentence in future cases, and claimed he received ineffective assistance of counsel.

assignment. (§ 1170.18, subd. (l) [“If the court that originally sentenced the petitioner is not available, the presiding judge shall designate another judge to rule on the petition or application.”].)

Appellant was not represented by counsel on his petitions. However, “[t]he procedure under section 1170.18 may be considered comparable to a habeas proceeding where the petitioner's right to counsel does not attach until the court determines petitioner has made a prima facie case for relief and issues an order to show cause. (See [*In re Clark* (1993) 5 Cal.4th 750, 779] [‘if a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns.’].) Therefore, it does not appear the defendant is entitled to counsel for the initial preparation of the petition or in connection with its initial screening.” (Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2015) § 25:8 (rel 7/2015).)

Appellant did not request a hearing and therefore none was required. (§ 1170.18, subd. (h) [“Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f).”].)

#### DISPOSITION

The orders are affirmed.

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SIMONS, J.

We concur.

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JONES, P.J.

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BRUINIERS, J.