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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS D. BARNES,

Defendant and Appellant.

A145937

(San Mateo County
Super. Ct. No. SC043431A)

Dennis D. Barnes appeals from an order denying his petition under Proposition 47, Penal Code¹ section 1170.18, to recall and resentence his second degree burglary conviction as a misdemeanor because his prior convictions for attempted murder render him ineligible for such relief. Barnes's appellate attorney has submitted a brief thoughtfully arguing that, contrary to *People v. Brown* (2014) 230 Cal.App.4th 1502 (*Brown*), the court has authority under section 1385 to strike the prior convictions for the purpose of applying section 1170.18. However, the Attorney General has presented substantial reasons why the issue is not properly raised on this appeal. No reply to the Attorney General's arguments has been submitted, and we shall affirm the order on the ground urged by the Attorney General.

In 1998, Barnes was convicted of second degree burglary (§§ 459, 460) and petty theft, and the jury found true the allegation that he had previously been convicted of five counts of attempted murder (§§ 187, 664) with personal use of a firearm (§ 1170.12,

¹ All statutory references are to the Penal Code.

subd. (c)(2)). The court denied a motion to strike the prior convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and sentenced Barnes to state prison as a third strike offender for 25 years to life. In March 2015 Barnes, in propria persona, filed a handwritten petition, accompanied by numerous letters of support, for recall and resentencing of the 1998 conviction under section 1170.18. The trial court denied the petition, explaining: “The defendant has a prior conviction for attempted murder (Penal Code section 664/187) and is thus ineligible for relief pursuant to Penal Code section 1170.18(i).” Barnes promptly filed a notice of appeal from this order.

Barnes’s appellate brief indicates that he is appealing from both the order denying his petition under Proposition 47, and from the denial of a petition which he apparently filed in 2012 for similar relief under Proposition 36. (§ 1170.126.) The issue that Barnes seeks to raise with respect to the denial of his petition under Proposition 47—that the trial court has discretion under section 1385 to strike the prior convictions for the purpose of determining eligibility for relief under section 1170.18—applies equally to a petition under Proposition 36. It was with respect to a Proposition 36 petition that the court in *Brown* held that “the absence of discretionary authority in section 1170.126, subdivision (e)[—similar in substance to section 1170.18, subdivision (i)—]shows the Legislature intended to withhold statutory power of a trial court to exercise its discretion in the furtherance of justice under section 1385 in determining a defendant’s eligibility to be resentenced under [section 1170.126].” (*Brown, supra*, 230 Cal.App.4th at p. 1512.) The court further held that the provision in section 1170.126, subdivision (k)—similar in substance to section 1170.18, subdivision (m)—that “[n]othing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the defendant,” (*Brown*, p. 1512) “does not mean the Legislature intended to give a trial court the authority to exercise its discretion under section 1385 in determining whether a defendant is eligible to be resentenced under [section 1170.126].” (*Brown*, at pp. 512-1513.) Nonetheless, the Attorney General correctly states that the time has long since passed for a timely appeal from the order denying Barnes’s petition under Proposition 36 and, in all

events, Barnes’s current petition seeks relief only under Proposition 47 and his notice of appeal is from only the order denying his Proposition 47 petition.

Moreover, the Attorney General also points out correctly that with respect to the current petition, Barnes made no request that the trial court strike the prior convictions under section 1385. Therefore, the Attorney General argues that the issue has not been preserved. The failure to request the trial court to strike prior convictions waives or forfeits the right to do so on appeal. (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376.) We agree with the Attorney General that the issue was not raised “by implication” in the petition submitted to the trial court, even though submitted in *propria persona*. There simply is no indication that the trial court gave any consideration to whether it had authority to strike the prior convictions, that it was asked to do so, or that it would have done so even if it had concluded that it had the authority to do so.

Although Barnes’s appellate counsel has presented a thoughtful argument that *Brown*—itself a thoughtful decision—was wrongly decided, the issue is not now properly before us, and we indicate no views on the issue. We do note that the many letters of support attached to the petition do not relate to the legal issue urged on appeal but will relate to Barnes’s suitability for parole.

The order denying Barnes’s petition is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.