

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD FOSTER,

Defendant and Appellant.

A147034

(Solano County
Super. Ct. No. FCR187467)

In 2001, Defendant Donald Foster pled no contest to one felony count of possession of heroin in prison under Penal Code section 4573.6,¹ for an agreed upon sentence of three years in state prison to run consecutive to his indeterminate sentence for murder. In 2015, defendant made a motion to be resentenced under Proposition 47. The trial court denied the motion on the ground that Proposition 47 does not apply to convictions under section 4573.6. Defendant timely appealed from that order. Defendant's court-appointed counsel has filed a brief seeking our independent review of the record, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, to determine whether there are any arguable issues for review. Defendant has been informed of his right to file supplemental briefing, and he has not done so. After our independent review of the record, we find no errors or other issues requiring further briefing, and we affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

In an information filed February 28, 2001, defendant was charged with one felony count of possessing illegal substances in state prison, that is, heroin (count 1; § 4573.6), along with a special allegation of a prior strike based on his 1980 conviction for second degree murder (§ 187) and personal use of a firearm (§ 12022.5). At the time he was charged, defendant was serving a life term for murder.

Pursuant to a plea agreement, defendant pled no contest to count 1, the heroin possession charge, in exchange for which the court struck the enhancement and imposed the middle term of three years in state prison, to run consecutive to his life sentence for murder.

On October 21, 2015, defendant filed a document entitled “Motion to Reduce Felony to Misdemeanor, Pursuant to Proposition 47.” He sought to reduce his felony conviction for possession of heroin in state prison to a misdemeanor pursuant to Proposition 47. Defendant argued that since the charge was “only a simple possession of a controlled substance that is listed in § 11350(a) of the Health and Safety Code, it is a misdemeanor and not a felony as that was the voter’s intent.” Defendant also contended in his motion that “to maintain this charge as a felony not only violates the will of the People of the State of California when they passed Proposition 47, but also violates §§ 654 of the California Penal Code as well as 4573.6 of the California Health and Safety Code which are the very same crimes. Punishment for the same offense but in different ways is a direct violation of P.C. § 654.” Defendant asked the court to reduce the felony to a misdemeanor or, in the alternative, “stay the term and/or the sentence and run the term as concurrent with the Petitioner’s life sentence or make the sentence as time served.”

On October 21, 2015, the superior court denied the motion in a written order that concluded “Proposition 47 does not apply to violations of Penal Code §4573.6.”

Defendant filed a notice of appeal of his “Denial of motion under Prop 47” on November 2, 2015.

REVIEW

We have reviewed the record on appeal for any arguable issues. Defendant's petition for resentencing was filed pursuant to Proposition 47, which is codified at section 1170.18, subdivision (a).² That section lists certain crimes for which a defendant may be eligible to be resentenced. Section 4573.6 is not among them, and the trial court's order was correct.

We are uncertain as to what defendant intended by referring to section 654 in his motion for resentencing. Section 654 does not appear relevant or applicable to his petition for resentencing under Proposition 47. Further, section 654 is not the "same crime[]" as section 4573.6.

In any event, we conclude there are no arguable issues within the meaning of *People v. Wende, supra*, 25 Cal.3d 436.

DISPOSITION

The order denying the petition for resentencing is affirmed.

² "On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) Section 1170.18 "was enacted as part of Proposition 47." (*Rivera*, at p. 1089.)

Miller, J.

We concur:

Kline, P.J.

Stewart, J.

A147034, *People v. Foster*