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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY HERNANDEZ LOPEZ,

Defendant and Appellant.

B248218

(Los Angeles County
Super. Ct. No. KA100698)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Wade Olson, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jonathan B. Steiner and Suzan E. Hier, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

A complaint, filed on January 23, 2013, charged Johnny Hernandez Lopez with one count of possession for sale of a controlled substance in violation of Health and Safety Code section 11351, a felony, and one count of possession of a smoking device in violation of Health and Safety Code section 11364.1, subdivision (a), a misdemeanor. The complaint specially alleged as to the Health and Safety Code section 11351 violation that Lopez had a prior serious or violent felony conviction under Penal Code section 245, subdivision (a)(1), that qualified as a strike under the “Three Strikes” law (Pen. Code, §§ 667, subs. (b)-(i), 1170.12, subs. (a)-(d)) and had served two prior prison terms with the meaning of Penal Code section 667.5, subdivision (b).

On February 20, Lopez entered a plea agreement under which the People amended the complaint to add a count for possession of heroin under Health and Safety Code section 11350, subdivision (a), and Lopez pleaded no contest to that count.¹ He also admitted that he had a prior strike conviction in 2005 for a violation of Penal Code section 245, subdivision (a)(1). The trial court found Lopez guilty of possession of heroin in violation of Health and Safety Code section 11350, subdivision (a), and the prior strike allegation to be true. In accordance with the plea agreement, the court sentenced Lopez to a state prison term of 32 months, consisting of the low term of 16 months for the violation of Health and Safety Code section 11350, subdivision (a), doubled pursuant to the Three Strikes law. After receiving his sentence, Lopez stated, “I was just wondering about the strike . . . because at the time when I had took two with half time back in 2005, they never said it was a strike and I’ve been arrested.” The trial court responded that “some of them become strikes after.” Lopez said, “That’s what I was wondering.” Lopez’s counsel added that “[t]his one on the . . . waiver says it is a

¹ According to the postsentence probation report, Lopez was transported to the hospital on January 3 for breathing complications, and, “while they were in route to the hospital [Lopez] had balloons of heroin in his mou[t]h that [were] confiscated.” The police officer who arrived at the hospital was given eight balloons that appeared to contain heroin.

strike with his signature. So it was before.” The court then, on the People’s motion, dismissed the remaining counts and special allegation.

On April 5, Lopez filed a request to recall his sentence, stating that, “I would like to recall my sentence based on my case and past history wasn’t thoroughly looked at. I have no prior strikes, but public [a]ttorney says I have strikes. I have none, I should have half (1/2) time, not 85%. [M]y public [a]ttorney neglected my case and charges, & didn’t thoroughly help me with my case. [M]y plea bargain was 32 months w/85% for possession. I would like my case to be recalled, for [n]o strikes are in my criminal history.” The trial court denied Lopez’s request on that ground that his “sentence is pursuant to an agreed upon disposition between the defense and the [P]eople.”

On April 19, Lopez filed a notice of appeal indicating that his “appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea.”² He also filed a request for a certificate of probable cause in which he stated, “I would like to withdraw my plea bargain for 32 months w/85% for possession based on I have no prior strikes in my past history and I’ve never signed any plea bargains for a strike. I should have half time (1/2), not 85%. [M]y public defender did not thoroughly look up my past criminal history. There was negligence in my case. I signed a plea deal in ‘2005’ for [a]ssault w/[d]eadly weapon for a [t]erm of ‘2’ years w/half time (1/2). NO Strike. My public [a]ttorney says I have a prior strike on record from ‘2005’ but never signed for a strike. I have no strikes. Due to the evidence being contrary to the plea bargain, I would like to move forward for an [a]ppeal[.] I would like to su[b]mit no prior strikes . . . [.]” The trial court denied the request for a certificate of probable cause, and this Court by order dated June 17 directed that Lopez’s appeal is limited to noncertificate issues.

We appointed counsel to represent Lopez on appeal. After examining the record, counsel filed a *Wende* brief raising no issues on appeal and requesting that we

² Lopez’s notice of appeal also indicates that his “appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5,” but it does not appear that he made any such motion.

independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) On August 6, we directed counsel to immediately send the record on this appeal and a copy of the opening brief to Lopez and notified Lopez that he had 30 days to submit by letter or brief any ground of appeal, contention or argument he wished us to consider. We did not receive a response.

We have reviewed the entire record on appeal. The appellate record does not provide a basis for determining on direct appeal that Lopez does not have a prior strike conviction as he admitted in the trial court or that Lopez received ineffective assistance of counsel in connection with his admission of the prior strike allegation (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [claim of ineffective assistance of counsel generally more appropriately addressed in habeas corpus proceeding]). Based on our analysis of the record, we are satisfied that Lopez's appellate counsel has fully complied with his responsibilities and that no arguable appellate issue exists. (*People v. Wende, supra*, 25 Cal.3d at p. 441; *People v. Kelly* (2006) 40 Cal.4th 106, 110.)

DISPOSITION

The judgment is affirmed.

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We concur:

ROTHSCHILD, J.

MALLANO, P. J.

CHANEY, J.