

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CLARLTON AUDETTE,

Defendant and Appellant.

C073291

(Super. Ct. No. 02F6333)

On May 11, 2004, a jury convicted defendant Carlton Audette of attempted second degree robbery (Pen. Code, §§ 664/ 211--count 1), possession of methamphetamine (Health & Saf. Code, § 11377--count 2), transportation of methamphetamine (Health & Saf. Code, § 11379--count 3) and possession of an injecting device, a misdemeanor (Health & Saf. Code, § 11364--count 4). The jury also found that defendant had six prior serious felony convictions.

Defendant was sentenced to prison for a term of 63 years to life on count 1 and to consecutive terms of 25 years to life on counts 2 and 3, with the term on count 2 stayed pursuant to Penal Code section 654. Defendant was sentenced to time served on count 4. The aggregate was 88 years to life. Defendant appealed and we reversed the convictions on counts 2 and 3 for insufficiency of the evidence and dismissed those charges. Defendant's resulting sentence was 63 years to life.

On December 6, 2012, defendant filed a motion for resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126). The sole basis for the motion was defendant's assertion that his committing offense, attempted robbery, is not serious or violent. Citing Penal Code section 1192.7, subdivisions (c) (19) and (c) (39), which establish that attempted robbery is a serious felony, the superior court summarily denied the petition. Defendant has appealed from the court's denial of his motion.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief in conformity with *People v. Wende* (1979) 25 Cal.3d 436, and asks this court to review the record and determine whether it reflects any arguable issues on appeal.

While defendant's appeal has been pending, we filed our decision in *People v. Leggett* (2013) 219 Cal.App.4th 846, wherein we concluded that "an order denying relief under [Penal Code] section 1170.126 is not appealable if it denies a petition that was erroneously filed by an individual whose indeterminate three strikes sentence is based on a conviction for any serious or violent felony." (*Id.* at p. 854.) Because defendant's sole contention is based upon his mistaken belief that attempted robbery is not a serious felony, which it is, we dismiss the purported appeal.

DISPOSITION

The appeal is dismissed as having been taken from a nonappealable order.

\_\_\_\_\_ HULL \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.