

NOT TO BE PUBLISHED

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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ANTHONY LEWIS,

Defendant and Appellant.

C077759

(Super. Ct. No. 11F05669)

Appointed counsel for defendant John Anthony Lewis has filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Because defendant failed to file timely his notice of appeal, we will dismiss for lack of jurisdiction.

We provide the following brief description of the procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

Based on an incident in July 2011, defendant was charged with felony unlawfully taking or driving a vehicle with a prior conviction for vehicle theft (Veh. Code, § 10851, subd. (a); Pen. Code, § 666.5, subd. (a)—count one);¹ felony knowingly receiving a stolen vehicle (§ 496d, subd. (a)—count two); felony evasion of a peace officer (Veh. Code, § 2800.2, subd. (a)—count three); misdemeanor driving under the influence of alcohol or any drug (Veh. Code, § 23152, subd. (a)—count four); misdemeanor being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)—count five); and misdemeanor resisting peace officers (§ 148, subd. (a)(1)—count six). It was also alleged defendant had six prior prison terms. (§ 667.5, subd. (b).)

Jury trial began in April 2013. Although defendant failed to appear on the fourth day of trial, the trial court proceeded after determining defendant voluntarily absented himself. (§ 1043.) Defendant was still absent the following day when the jury found him guilty of all counts except count two, which was in the alternative to count one. (See *People v. Garza* (2005) 35 Cal.4th 866, 876; see also § 1043.) The jury also found true defendant's prior conviction for vehicle theft and prior prison terms.

On May 31, 2013, in the presence of defendant's lawyer but not defendant, the trial court sentenced defendant to a total aggregate sentence of 10 years eight months in state prison, including the upper term of four years for count one, eight months (one-third the midterm) for count three, and six years for the prior prison terms. On the misdemeanors, the court on count four ordered informal probation of five years plus time served and on counts five and six denied probation. The trial court confirmed this

¹ Undesignated statutory references are to the Penal Code.

sentence during a hearing on September 17, 2014, in the presence of defendant and his counsel.

On November 4, 2014, defendant appealed, well outside the 60-day time limit for the May 31, 2013 sentencing order.² (Cal. Rules of Court, rule 8.308(a).) The record was prepared and in April 2015 we appointed counsel to represent defendant on appeal. On January 22, 2016, defendant's appointed counsel filed a motion with this court to (a) construe defendant's notice of appeal as timely, or, in the alternative, (b) to expand the appointment to include a habeas petition. On February 19, 2016, this court granted defendant's motion to expand the appointment and denied defendant's motion to construe his notice of appeal as timely because he did not meet the standard of *In re Benoit* (1973) 10 Cal.3d 72.³

Counsel filed an opening brief that sets forth the facts of the case and asks us to determine whether there are any arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d 436.) Counsel advised defendant of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

Regardless, we lack jurisdiction to consider any contentions because defendant failed to file his appeal within 60 days after he was sentenced. (Cal. Rules of Court, rule 8.308; see *People v. Mendez* (1999) 19 Cal.4th 1084, 1094 [“An untimely notice of appeal is ‘wholly ineffectual: . . . the appellate court has no power to give relief, but must dismiss the appeal on motion or on its own motion.’ ”].) Accordingly, we shall dismiss defendant's appeal.

² Defendant's notice of appeal indicated the date of the trial court's judgment or order was September 17, 2014.

³ The appeal was not dismissed at that time.

DISPOSITION

The appeal is dismissed.

BUTZ, Acting P. J.

We concur:

MURRAY, J.

DUARTE, J.