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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC COWAN,

Defendant and Appellant.

D066572

(Super. Ct. No. SCD133703)

APPEAL from an order of the Superior Court of San Diego County,

David J. Danielsen, Judge. Affirmed.

Alissa Bjerkhoel, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 1998, a jury found Cowan guilty of feloniously robbing five separate individuals (counts 1, 2, 6, 8 and 9). The jury found true personal use of handgun enhancements as to counts 1 and 2. The jury also found Cowan guilty of one count each of felony conspiracy to commit robbery (count 4) and felony attempted robbery (count 5).

The trial court determined Cowan was not entitled to a trial by jury on the strike prior allegations and found those allegations to be true. The trial court sentenced Cowan to 140 years to life.

"On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended [Penal Code] sections 667 and 1170.12 and added section 1170.126 (hereafter the Act). The Act changes the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law a recidivist with two or more prior strikes who is convicted of any new felony is subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.) (Undesignated statutory references are to the Penal Code.)

In 2014, Cowan filed a motion to recall his sentence under section 1170.126, which the trial court denied. Cowan timely appealed.

Counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 raising the following possible but not arguable appellate issues, whether (1) the trial court erred when it denied Cowan's motion to modify his sentence under the reformed three strikes law, (2) Cowan's prior strike convictions arise from the same act such that they constitute only a single prior strike conviction under *People v. Vargas* (2014) 59 Cal.4th 635, and (3) the trial court denied

his constitutional right to a jury trial on the issue of whether his prior convictions qualified as strikes or whether he was the perpetrator of the prior crimes. We offered Cowan the opportunity to file his own brief on appeal and he has done so. We will consider Cowan's brief in the discussion.

DISCUSSION

We have examined the entire record and are satisfied that Cowan's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 119, 124.) "Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence . . . to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12 as those statutes have been amended by the [Reform Act.]" (§ 1170.126, subd. (b).) However, an inmate is not eligible for modification if he or she is sentenced currently for a felony defined as serious and/or violent under subdivision (c) of section 667.5 or subdivision (c) of section 1192.7. (§ 1170.126, subd. (e)(1).)

Under subdivision (c)(9) of section 667.5, "[a]ny robbery" is a violent felony. Under section 1192.7, subdivision (c)(1)(19), robbery is a serious felony. Hence, the Legislature and the voters have precluded Cowan from any reconsideration of sentence

based on the Act and its reforms. Accordingly, the trial court properly denied Cowan's petition.

In his supplemental brief, Cowan contends the denial of his petition for sentence modification violated his constitutional right to equal protection because he was never convicted of rape, murder or child molestation and he should not have been treated any differently than other nonviolent three-strike offenders that received relief under the Act. We disagree.

Contrary to Cowan's argument, the Act is not limited to rapists, murders or child molesters. The Act "requires that murderers, rapists, child molesters, *and other dangerous criminals* serve their full sentences." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) rebuttal to argument against Prop. 36, p. 53, original italics omitted, italics added.) The ballot arguments in favor of the Act repeatedly stressed that dangerous criminals, namely those convicted of a serious or violent felony, would not receive any benefit whatsoever from the proposed amendments to the Three Strikes law. (*People v. Yearwood, supra*, 213 Cal.App.4th at p. 171 [citing ballot pamphlet arguments].)

The Legislature's definition of crimes and imposition of different sentences for crimes of differing severity are subject to rational basis review. (See *People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Here, the classification used by section 1170.126—inmates who might be eligible for a lighter sentence under the new three strikes law may petition for recall of sentence, but inmates who are categorically ineligible (because of a serious or violent third strike) may not—is undeniably rational. Cowan does not argue to the contrary and we reject his equal protection argument.

Additionally, Cowan appears to argue that his conviction on count 9 must be reversed because this count was previously dismissed. Cowan's 1998 convictions are long since final and the validity of these convictions were not before the trial court on the motion to recall the sentence and are not properly before us. We find no arguable appellate issues have been presented by the materials filed by Cowan. Additionally, competent counsel has represented Cowan on this appeal.

DISPOSITION

The order denying Cowan's petition to recall his sentence is affirmed.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.