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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GUSTAVO FLORES, Defendant and Appellant.	D069624 (Super. Ct. No. SCD116295)

APPEAL from an order of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

In 1996, a jury convicted Gustavo Flores of first degree burglary of an inhabited dwelling (Pen. Code, §§ 459, 460, subd. (a), 1192.7, subd. (c)(18).)[1] In a bifurcated proceeding, the court found true allegations Flores suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12), which included two prior residential burglary convictions and an attempted residential burglary conviction. The court sentenced Flores to a term of 40 years to life. In doing so, the court denied Flores's motion to strike his prior convictions indicating it would not strike his prior convictions, even if it had the discretion to do so under the three strikes law. The court noted a life sentence was not excessive for a succession of serious felonies, such as residential burglary, which the court characterized as "a very serious crime."

This court affirmed the judgment in Flores's direct appeal. Although Flores was sentenced before the Supreme Court clarified in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 that trial courts retain discretion to strike prior serious felony convictions under the three strikes law, there was no error because the trial court clearly indicated it would not have exercised its discretion to strike Flores's prior felonies since they involved residential burglaries.[2]

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1 All further undesignated statutory references are to the Penal Code unless otherwise indicated.

2 On our own motion, we take judicial notice of the record and this court's decision in *People v. Flores* (Jan. 29, 1997, D025886 [nonpub. opn.]). (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

In 2015, Flores filed a petition under section 1170.18, which was enacted as part of the Safe Neighborhoods and Schools Act (Proposition 47), to reduce his residential burglary conviction to a misdemeanor and be resentenced accordingly. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 1, p. 70.) The court denied the petition, finding residential burglary is not eligible for resentencing under Proposition 47.

Flores appeals the denial of his petition. His appointed appellate counsel filed a brief requesting we independently review the record for error. (See *People v. Wende* (1979) 25 Cal.3d 436, 441-442.) Having done so and having identified no reasonably arguable appellate issues, we affirm the order.

BACKGROUND[3]

In October 1995 Flores knocked on the door of his neighbor's home. When there was no response, he broke a window and entered the home through the front door. A minor resident, who was home at the time, found Flores standing in the living room. Flores fled, but was apprehended by officers. Flores had a fresh wound on his hand. The minor identified Flores and DNA testing linked Flores to the blood left on the window blinds at the scene.

DISCUSSION

Flores's appointed appellate counsel filed a brief summarizing the facts and proceedings below. Counsel presented no argument for reversal and instead requested

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3 We draw the background from the probation report and portions of the trial transcripts submitted with Flores's petition.

we review the record for error as mandated by *People v. Wende*, *supra*, 25 Cal.3d at pages 441-442.

To aid our review, and consistent with *Anders v. California* (1967) 386 U.S. 738, 744, counsel identified one possible appellate issue: whether a conviction under sections 459 and 460 may be eligible for relief under Proposition 47? A residential burglary conviction under sections 459 and 460 is not included in the list of nonserious, nonviolent felonies subject to reclassification as misdemeanors under section 1170.18, subdivision (a). Therefore, the court properly denied Flores's petition.

We granted Flores permission to file a supplemental brief on his own behalf. He did so. Although the arguments are not clearly articulated, Flores apparently contends as follows: (1) the prior strike convictions should not have been alleged in "mass," each prior should have been pleaded and proven to a jury, and his first strike for residential burglary should not have been considered a strike because he served only 180 days in jail; (2) Flores's counsel provided ineffective assistance by failing to challenge untrue or erroneous statements in the underlying pleadings or the probation report regarding the prior convictions or for not seeking "specific performance" of the terms of the prior plea agreement; (3) Flores was denied due process because he was not informed when he was previously convicted that "in the future he would and could be subject to any new amendments, laws or enactments by the voters or legislation, that the priors could be used in more ways than or in any way the court or the prosecutor determined," and the same jury did not decide the issue of guilt and the truth of the prior conviction allegations; (4)

the three strikes law violated his due process rights; and (5) the three strikes law discriminates against the "Three Strikers" as a class of people.

Flores's contentions challenge the underlying true findings regarding Flores's prior convictions and the validity of the underlying sentence. The validity of the court's earlier findings and sentencing decisions were not properly before the trial court on the petition for resentencing under Proposition 47 and are not properly before us on an appeal from the order denying the petition for resentencing. (See *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1257 [defendants are limited "to the statutory remedy, set forth in section 1170.18, of petitioning for recall of sentence (*id.*, subd. (a)) or applying for designation of felony convictions as misdemeanors (*id.*, subd. (f)), as appropriate"].)

To the extent Flores's contentions allege ineffective assistance of counsel, this claim cannot be resolved on the present record. (*People v. Kelly* (2006) 40 Cal.4th 106, 126, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [claim of ineffective assistance of counsel based on extra-record evidence should be decided in a habeas corpus proceeding rather than on direct appeal].)

As requested by counsel, we reviewed the record for error and did not find any reasonably arguable appellate issues. Flores has been competently represented by counsel in this appeal. We deny Flores's request for an evidentiary hearing or discovery in this appeal.

DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

PRAGER, J.*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.