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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRAXTON GEORGE BERKLEY,

Defendant and Appellant.

E059384

(Super.Ct.No. FMB1000296)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

On February 25, 2011, a jury found defendant and appellant Braxton George Berkley guilty of driving under the influence (Veh. Code, § 23152, subd. (a), count 1)

and driving with a blood-alcohol level of 0.08 percent or more (Veh. Code, § 23152, subd. (b), count 2). On June 17, 2011, the trial court sentenced defendant to a determinate term of seven years as follows: six years on count 1; six years on count 2 to run concurrent with count 1; and one year under Penal Code section 667.5, subdivision (b). Defendant appealed. In a nonpublished opinion (*People v. Berkley* (Sept. 14, 2012, E053903)), we affirmed the judgment, but ordered the sentence on count 2 to be stayed under Penal Code section 654.

On April 24, 2013, the trial court denied defendant's petition for rehearing to modify his sentence stating that the court no longer had jurisdiction. On June 24, 2013, defendant filed a petition for resentencing under Penal Code sections 1170.12, subdivision (c)(1), and 667, subdivision (e)(1). On August 1, 2013, the trial court considered defendant's petition as a request for resentencing under Penal Code section 1170.126. The court then denied defendant's petition because the amendment to the three strikes law (Prop. 36, as approved by voters, Gen. Elec. (Nov. 7, 2012)) applies only to those cases in which defendant is serving an indeterminate sentence under the three strikes law. The trial court reasoned that because defendant is serving a determinate term, and only had one strike, the amendment to the three strikes law did not apply to defendant.

On August 9, 2013, defendant filed a notice of appeal from the denial of his request for modification of sentence.

ANALYSIS

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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RICHLI
Acting P. J.

We concur:

KING
J.

MILLER
J.