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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.

ROBERT SERNA MARTINEZ,

Defendant and Appellant.

E062285

(Super.Ct.No. FSB704499)

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.

Cindi B. Mishkin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Robert Serna Martinez appeals from an order denying his petition for recall of his indeterminate life term under Penal Code section 1170.126, subdivision (f).¹ We find no error and will affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND

On November 7, 2007, while pointing a semiautomatic handgun at a woman's head as she sat in the front passenger seat of a parked vehicle, defendant grabbed a Helio cell phone from the woman's hand, her purse, another cellular phone, a wallet belonging to her boyfriend, and a car stereo. Defendant then fled the scene and officers were dispatched in reference to the armed robbery.

Based upon a detailed description of defendant provided by the victim, officers located defendant running in the area and an extensive foot pursuit ensued. During the pursuit, defendant threw a firearm into a vacant field. Eventually, officers cornered defendant, and after an extended struggle, officers gained control of defendant and arrested him. One of the officers recognized defendant as a documented West Side Verdugo Seventh Street gang member with the moniker " 'Joker.' "

A search of defendant's person revealed several nine millimeter rounds of ammunition, cash, the wallet belonging to the victim's boyfriend, 10 grams of methamphetamine, and the victim's cellular phone and sunglasses. Officers located the victim's boyfriend's identification card and a box of nine millimeter ammunition

¹ All future statutory references are to the Penal Code unless otherwise stated.

discarded in a planter along the route of the foot pursuit. The firearm was also recovered, and identified as a Springfield SD9 pistol with its serial numbers removed. The pistol was loaded with one round in the chamber and nine rounds in the magazine. During an infield lineup, the victim and her boyfriend positively identified defendant as the perpetrator of the armed robbery.

On July 9, 2010, a jury found defendant guilty of second degree robbery (§ 211; count 1); possession of a firearm by a felon (former § 12021, subd. (a)(1); count 2); and unlawful possession of ammunition (former § 12316, subd. (b)(1); count 3). The jury also found true that in the commission of the robbery, defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). The jury further found true that in the commission of all charged counts, defendant committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b). In a bifurcated proceeding, the jury found true that defendant had suffered two prior serious felony convictions (§ 667, subd. (a)(1)) and three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). On December 3, 2010, the trial court sentenced defendant to a total term of 55 years to life in state prison with credit for time served as follows: 25 years to life on count 1, plus 10 years for the gun use enhancement, plus 10 years for the gang enhancement, plus two five-year terms for the two prior serious felony convictions. On counts 2 and 3, the court imposed a concurrent term of 25 years to life on each count plus a concurrent term of four years on each count for the gang enhancement.

On November 6, 2012, the electorate passed Proposition 36, also known as the Three Strikes Reform Act (the Act). Among other things, this ballot measure enacted section 1170.126, which permits persons currently serving an indeterminate life term under the “Three Strikes” law to file a petition in the sentencing court, seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subd. (f).) If the trial court determines, in its discretion, that the defendant meets the criteria of section 1170.126, subdivision (e), the court may resentence the defendant. (§ 1170.126, subds. (f), (g).)

On October 16, 2014, defendant filed a petition for resentencing under section 1170.126. The trial court denied the petition on October 30, 2014, finding defendant statutorily ineligible for resentencing under section 1170.126 based on his current commitment offenses and his use of a firearm. Defendant filed a timely notice of appeal on November 5, 2014.

II

DISCUSSION

We appointed counsel to represent defendant on appeal. After examination of the record, 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 conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so.

The Act added section 1170.126, which applies exclusively to those “persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.” (§ 1170.126, subd. (a).) Section 1170.126 sets forth a procedure through which certain prisoners can petition the court for resentencing. Such a person may file a petition to recall his or her sentence and be sentenced as a second strike offender. (§ 1170.126, subd. (b).) An inmate is eligible for such resentencing if none of his or her commitment offenses constitute serious or violent felonies *and* none of enumerated factors disqualifying a defendant for resentencing under Proposition 36 apply. (§ 1170.126, subd. (e).) The Act makes ineligible for resentencing those persons who “[d]uring the commission of the current offense, the defendant used a firearm, [or] was armed with a firearm” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e).) Here, defendant’s current conviction for robbery rendered him ineligible for sentencing under section 1170.126, subdivision (e)(1). (§§ 1192.7, subd. (c)(19) & 667.5, subd. (c)(9).) In addition, defendant was ineligible for resentencing under section 1170.126, subdivision (e)(2), because he used a firearm. Thus, the trial court properly denied defendant’s petition for resentencing.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.