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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.

DONALD DOUGLAS CASILLAS,

Defendant and Appellant.

E062618

(Super.Ct.No. FVA022294)

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.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Donald Douglas Casillas appeals from an order denying his petition for recall of his indeterminate life term under Penal Code section 1170.126, subdivision (f).¹ We will affirm the order.

I

BACKGROUND

On September 8, 2004, pursuant to a plea agreement, defendant pled guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Defendant also admitted that he had suffered two prior serious and/or violent felony strike convictions (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), to wit, first degree residential robbery (§ 211) and forcible penetration by foreign object (§ 289).² In return, the trial court suspended the proceedings, withheld pronouncement of sentence and judgment, and placed defendant on probation under the terms and conditions of the Diversion Program for a period of 18 months pursuant to section 1000.

Within two months of being granted diversion pursuant to section 1000, defendant tested positive for methamphetamine. On August 25, 2006, the trial court found defendant to be in violation of his terms of diversion by using a controlled substance. On March 9, 2007, the trial court revoked defendant's diversion, denied probation, and

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

² Defendant's prior offenses occurred in 1992 when he broke into a neighbor's house, beat and sexually assaulted the victim, and then burglarized the home. Following a plea agreement, defendant received 20 years and was required to register as a sex offender.

sentenced defendant to 25 years to life in state prison in accordance with the plea agreement.

On November 6, 2012, the electorate passed Proposition 36, also known as the Three Strikes Reform Act of 2012 (the Reform 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 November 4, 2014, defendant filed a petition to recall his sentence and to be resentenced under section 1170.126. The trial court denied the petition on November 25, 2014, finding defendant ineligible for resentencing under section 1170.126, subdivision (e), due to his prior conviction for forcible penetration by a foreign object. Defendant filed a timely notice of appeal on December 29, 2014.

II

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him on appeal. Counsel has filed a brief under the authority of *People v. Wendt* (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 conduct an independent review of the record.

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

As previously stated, on November 6, 2012, the voters approved Proposition 36, the Reform Act, which amended sections 667 and 1170.12, and added section 1170.126. The Reform Act changes the requirements to sentence a third strike offender to 25 years to life in prison. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*)). Under the Three Strikes law as it existed prior to the Reform Act (former §§ 667, subds. (b)-(i); 1170.12), a defendant who had previously been convicted of two or more serious or violent felonies was subject to an indeterminate sentence of 25 years to life upon his or her conviction of any new felony. The Reform Act changed the Three Strikes law by reserving indeterminate life sentences for cases where the new offense is also a serious or violent felony, unless the prosecution pleads and proves an enumerated disqualifying factor. In all other cases, a recidivist defendant will be sentenced as a second strike offender, rather than a third strike offender. (*Yearwood*, at pp. 167-168, citing §§ 667, 1170.12; *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1286.)

The Reform Act also created a “post-conviction release proceeding” whereby a three strikes prisoner who is serving an “indeterminate life sentence” for a crime that was not a serious or violent felony—and who is not otherwise disqualified—may have his or

her sentence recalled and be resentenced as a second strike offender, unless the court “determines that resentencing . . . would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subds. (a), (f), (m); *Yearwood, supra*, 213 Cal.App.4th at p. 168.)

As the court explained in *Yearwood*, a “prisoner is eligible for resentencing as a second strike offender if all of the following are shown: (1) the prisoner is serving an indeterminate life sentence for a crime that is not a serious or violent felony; (2) the life sentence was not imposed for any of the offenses appearing in sections 667, subdivision (e)(2)(C) and 1170.12, subdivision (c)(2)(C); and (3) the inmate has no prior convictions for any of the offenses appearing in clause (iv) of section 667, subdivision (e)(2)(C) or clause (iv) of section 1170.12, subdivision (c)(2)(C).” (*Yearwood, supra*, 213 Cal.App.4th at p. 170, citing § 1170.126, subd. (e).) If the prisoner satisfies these criteria, “the prisoner shall be resentenced as a second strike offender ‘unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’” (§ 1170.126, subd. (f).)” (*Yearwood*, at p. 170.)

It is undisputed that defendant’s commitment offense of possession of methamphetamine is “not defined as serious and/or violent felon[y]” and that he otherwise meets the eligibility requirements of subdivision (e)(1) of section 1170.126. However, defendant is ineligible for resentencing pursuant to section 1170.126, subdivision (e)(3), due to his prior conviction for forcible penetration by a foreign object

and his mandatory sexual registration requirement. (See §§ 667, subd. (e)(2)(c)(iv); Welf. & Inst. Code, § 6600, subd. (b).)

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

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.