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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.

DAVID DAWSON,

Defendant and Appellant.

E062663

(Super.Ct.No. FSB06601)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

David C. Dawson, in pro. per.; Cindi B. Mishkin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant David Dawson appeals from an order denying his petition for recall of his indeterminate life term and for resentencing under Penal Code section 1170.18.¹ We find no error and will affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND²

On January 15, 1995, officers were dispatched to investigate a robbery in progress at a Thrifty Drug Store in Colton. Upon arrival, the officers surrounded the store and saw three men, later identified as defendant and codefendants Charles Singletary and Ivan Ray, walking from the business. The three men began to run and a female employee of the business pointed toward them, yelling, “ ‘That’s them.’ ”

An officer arrested defendant and before searching him, defendant informed the officer that he had a handgun. The officer found a .45-caliber handgun and a roll of clear plastic packing tape in defendant’s possession. Another officer tackled and handcuffed codefendant Singletary, and found a black ski mask, a pair of gloves, and a small vial of methamphetamine in his possession. The officer also found a handgun in the same area Singletary was arrested. A third officer arrested codefendant Ray and saw Ray drop a handgun. Upon his arrest, officers noted Ray had a beanie on his head and was wearing gloves. Officers also found a mask in Ray’s jacket pocket.

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

² The factual background is taken from the probation report.

The store manager reported that he had heard someone rattling his office door and upon looking out the window, he saw two men crouched by the door, placing ski masks over their faces. The store manager also saw a third person who appeared to be acting as a look-out. When the two men crouched by the door realized the store manager was calling the police, all of the men walked quickly out of the store. Officers determined that Ray and Singletary were the men crouched by the door while defendant acted as the look-out. All three men were identified in an infield lineup.

On February 9, 1995, an information was filed against defendant and codefendants Ray and Singletary. Specifically, the information charged defendant with attempted robbery (§§ 664/211; count 1) and possession of a firearm by a felon (former § 12021, subd. (a); count 4). The information also alleged that defendant had suffered two prior serious felony convictions (§ 667, subd. (a)) and two prior strike convictions (§ 667, subds. (b)-(i)) for a 1984 attempted robbery and a 1988 robbery. Subsequently, on May 24, 1995, a jury found defendant guilty of counts 1 and 4, and in a bifurcated proceeding, the trial court found true the prior conviction allegations.

On November 15, 1996, defendant was sentenced to a total term of 25 years to life pursuant to sections 1170.12, subdivision (c)(1), and 667, subdivision (e)(1).

On November 4, 2014, voters enacted Proposition 47, entitled “the Safe Neighborhoods and Schools Act” (hereafter Proposition 47). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) As of its effective date, Proposition 47 classifies as misdemeanors certain drug- and theft-related offenses that previously were

felonies or “wobblers,” unless they were committed by certain ineligible defendants.
(§ 1170.18, subd. (a).)

On December 5, 2014, defendant filed a petition to recall his sentence and for resentencing pursuant to section 1170.18. To support his petition, defendant attached transcripts of preliminary hearing testimony and trial testimony from various witnesses. In his petition, defendant argued that the record of conviction must be considered in assessing his petition under Proposition 47 and that facts elicited at trial established his crimes constituted misdemeanor shoplifting and receiving stolen property. Further, had Proposition 47 been in effect at the time of his trial, his convictions would be shoplifting within the meaning of section 459.5 and receiving stolen property within the meaning of section 496, subdivision (a).

On December 5, 2014, the trial court considered and denied defendant’s petition, finding defendant did not satisfy the criteria in section 1170.18 and that defendant was not eligible for resentencing.³ Defendant filed a timely notice of appeal from that order on December 17, 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. Wende*

³ The court’s minute order of the petition to recall hearing also notes that defendant’s presence had been waived.

(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, and he has done so. In his supplemental brief, defendant asserts that (1) the trial court abused its discretion, acted in excess of its jurisdiction, and violated his due process rights by failing to consider the entire record of conviction prior to denying his Proposition 47 petition; and (2) the waiver of his appearance at the hearing on his petition violated his constitutional right to be present.

As previously noted, Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by ineligible defendants. These offenses were previously designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). “Proposition 47: (1) added chapter 33 to the Government Code (section 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377.” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.)

Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person “currently serving” a felony sentence for an offense that is now a misdemeanor under Proposition 47 may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or

amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) Subdivision (c) of section 1170.18 defines the term “ ‘unreasonable risk of danger to public safety,’ ” and subdivision (b) of the statute lists factors the court must consider in determining “whether a new sentence would result in an unreasonable risk of danger to public safety.” (§ 1170.18, subds. (b), (c).)

Here, assuming, without deciding, a trial court must examine a defendant’s record of conviction before denying a Proposition 47 petition, the record of conviction supports defendant’s convictions for attempted robbery and felon in possession of a firearm as charged in the information. As such, defendant is “currently serving” a sentence for offenses that are ineligible under Proposition 47. Moreover, the time for challenging the basis for his conviction on appeal has passed. (See *Lackawanna County Dist. Attorney v. Coss* (2001) 532 U.S. 394, 401, 403-404 [once a conviction is no longer open to direct or collateral attack because a defendant either failed to appeal or did so unsuccessfully, the conviction is conclusively valid for sentencing purposes].) We therefore reject defendant’s first claim of error.

We also reject defendant’s assertion that the trial court’s waiver of his appearance at the petition to recall hearing violated his constitutional right to be present. Section 1170.18 does not require an evidentiary hearing to determine eligibility that is

unequivocally established in the record. The trial court may determine eligibility based on the record. (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 805 [Fourth Dist., Div. Two]; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.) Here, the jury found that defendant committed attempted robbery and felon in possession of a firearm. No factual issue as to eligibility remained at the time of his Proposition 47 petition for recall and resentencing. Defendant was ineligible for resentencing as a matter of law and no hearing was required to determine whether he was ineligible for resentencing under section 1170.18.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

III

DISPOSITION

The order denying defendant's Proposition 47 petition for recall and resentencing is affirmed.

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RAMIREZ

P. J.

We concur:

MILLER

J.

CODRINGTON

J.