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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 LEMON GRAVES,

Defendant and Appellant.

E062778

(Super.Ct.No. FSB059410)

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.

Anita P. Jog, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant David Lemon Graves appeals from an order denying his petition for recall of his indeterminate life term under Penal Code section 1170.126, subdivision (f).<sup>1</sup> We will affirm the order.

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

On December 7, 2006, defendant and another male adult attempted to open the window of a residence. The victim, who was inside the residence, overheard defendant and his accomplice talking about going in the residence because they believed no one was inside, and called the police. When the victim's sister opened the curtains, defendant and his accomplice fled on foot. Defendant was detained and identified as the suspect by the victim in an infield lineup.

On January 5, 2007, a first amended information was filed, charging defendant with attempted first degree burglary with a non-accomplice person present in the residence (§§ 664/459). The first amended information also alleged that defendant had suffered two prior strike convictions (§§ 1170.12, subd. (a)-(d), 667, subds. (b)-(i)) for a 1992 rape (§ 261) and a 1991 first degree burglary (§ 459).

On May 2, 2008, a jury found defendant guilty as charged.

On May 5, 2008, a second amended information was filed adding a third prior strike conviction (§§ 1170.12, subd. (a)-(d), 667, subds. (b)-(i)) for a 1992 first degree

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The factual background is from the probation officer's report.

burglary conviction. On that same day, after defendant waived his right to a jury trial on his prior strike convictions, the trial court found the prior strike conviction allegations to be true.

On September 12, 2008, the trial court denied defendant's motion to strike one or more of his prior strike convictions and sentenced defendant to an indeterminate term of 25 years to life in state prison with credit for time served.

On February 2, 2011, following an appeal to this court, an amended abstract of judgment was filed correctly reflecting defendant's presentence custody credits.

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).)

In October 2014, defendant sent a letter to the court requesting the court reduce his sentence in light of the Reform Act. The trial court denied the request on December 16, 2014. The court found defendant did not satisfy the criteria under section 1170.126, subdivision (e), because his commitment offense for attempted first degree burglary with

a person present is a serious offense, and therefore defendant was ineligible for resentencing under the Reform Act.

Defendant filed a timely notice of appeal on January 22, 2015.

## 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 changed 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, subs.(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 attempted first degree burglary with a person present is a serious felony. (See §§ 1170.126, subd. (e)(1), 1192.7, subds. (c)(18) & (c)(39).) As such, defendant was ineligible for resentencing under the Reform Act.

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 request to recall his sentence and to be resentenced is affirmed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

CODRINGTON  
J.