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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.

PAUL DIXON LEWIS,

Defendant and Appellant.

E063680

(Super.Ct.No. RIF1102889)

OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis,
Judge. Affirmed.

Alissa Bjerkhoel, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant Paul Lewis is serving a “Three-Strike” prison sentence of 26 years to
life for possessing marijuana in prison and possessing marijuana for sale. Defendant was
sentenced two and one-half months before the effective date of Proposition 36.

Defendant appeals from the denial of his petition to be resentenced under a retroactive

application of Proposition 36. We affirm because, even if Proposition 36 were to be applied to defendant retroactively, his prior offenses for sexually violent crimes disqualified him from being sentenced to anything other than a third-strike prison term.

STATEMENT OF FACTS AND PROCEDURE

On May 16, 2011, defendant was serving a 49-year prison term after being convicted in 1991 of eight offenses stemming from a prolonged and violent attack on a 15-year-old girl.¹ Corrections officers found 26 plastic bindles of marijuana hidden on defendant's person.

On October 28, 2011, the People filed an information charging defendant in count 1 with possessing marijuana in prison (Pen. Code § 4573.6) and in count 2 with possessing marijuana for sale (Health & Saf. Code, § 11359).² The People also alleged defendant had eight prior strike offenses (§§ 667, subds. (c) & (e)(2)(A) and 1170.12, subd. (c)(2)(A)) and a prior prison term offense (§ 667.5, subd. (b)).

Defendant was convicted on both counts and each of the prior conviction enhancements was found true.

On August 17, 2012, the trial court sentenced defendant to 25 years to life for count one, plus one consecutive year for the prison term prior. The court imposed but stayed the 25-years-to-life sentence for count 2 pursuant to section 654.

¹ Defendant was convicted of violating the following sections of the Penal Code: 264.1 (two counts); 288a, subd. (d); 261, subd. (a)(2) (two counts); 245, subd. (a)(1) (two counts); and 207, subd. (a).

² Section references are to the Penal Code except where otherwise indicated.

Defendant appealed and on December 19, 1993 this court affirmed his conviction in an unpublished opinion in case No. E056993.

While that first appeal was pending, the voters passed Proposition 36, the Three Strikes Reform Act of 2012 (hereafter the Reform Act or the act). The Reform Act became effective on November 7, 2012. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126.) Under the three strikes law as it existed before the passage of the Reform Act, a defendant with two or more strike priors who is convicted of any new felony would receive a sentence of 25 years to life, as was defendant. (Former § 667, subd. (e)(2)(A).) As amended by the act, section 667 provides that a defendant who has two or more strike priors is to be sentenced pursuant to paragraph 1 of section 667(e) - i.e., as though the defendant had only one strike prior - if the current offense is not a serious or violent felony as defined in section 667.5, subdivision (c) or section 1192.7, subdivision (c), unless certain disqualifying factors are pleaded and proven (§§ 667, subs. (d)(1), (e)(2)(C)). As explained below, this provision regarding disqualifying factors is key to the resolution of defendant's appeal.

On August 26, 2014, defendant filed a "Petition for Recall of Sentence Pursuant to California Penal Code § 1170.126." Defendant argued that he should be resentenced because his current convictions are eligible under section 1170.126, subdivision (e) because they are not serious or violent felonies, and because a recall of his sentence would not pose an unreasonable risk of danger to public safety under section 1170.126, subdivision (f).

The court denied the petition on September 15, 2014, because defendant's prior convictions for section 261, subdivision (a)(2), disqualified him under section 1170.126, subdivision (e).

On November 21, 2014, defendant filed a petition for writ of habeas corpus in the trial court seeking to have his convictions reduced to misdemeanors under Proposition 47 (§ 1170.18). The court denied the petition because defendant's current felonies did not qualify. The court's denial of this petition is not a subject of this appeal.

On April 30, 2015, defendant filed a "Motion to Set Aside a Void Sentence Under Retroactive Application of Law," arguing his two drug convictions should be reduced to misdemeanors based on a retroactive application of Proposition 36 because the law went into effect while defendant's appeal was still pending, even though after sentencing. On that same date, the superior court held an ex parte hearing on defendant's motion, at which it denied the motion pursuant to section 667, subdivision (e)(2)(C)(iv)(I) and Welfare and Institutions Code section 6600, subdivision (b). This ruling is the subject of this appeal.

Defendant filed his notice of appeal on May 14, 2015, challenging the denial of his motion on the bases that Proposition 36 was intended to be retroactive and that his appellate attorney provided ineffective assistance for not raising this in the appeal from his conviction. The trial court denied his request for certificate of probable cause. On June 4, 2015, defendant filed an amended notice of appeal stating that he was appealing from an "Order after judgment affective substantial rights of appellant or other order:

Denial of Motion seeking Proposition 36 relief (Pen. Code, §1237, subd. (b)).” The notice specified the date of the judgment appealed from as April 30, 2105.

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* (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 in effect argues two points: (1) Proposition 36 should be applied retroactively to his case because his conviction was not final on appeal when Proposition 36 went into effect; and (2) counsel in both his original appeal (E056993) and this appeal provided ineffective assistance because they each failed to raise the retroactivity issue. We do not reach either of defendant’s claims because, even if Proposition 36 were to be applied to defendant retroactively, defendant has disqualifying prior convictions, as the trial court correctly stated when it denied his latest motion on April 30, 2105. Section 667, subdivision (e)(2)(C)(iv)(I) provides that second strike sentencing does not apply if the prosecution pleads and proves “(iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies: [¶] (I) A ‘sexually violent offense’ as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.” That subdivision specifies that “‘Sexually violent offense’ means the following acts when committed by force, violence,

duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code . . .”

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.

DISPOSITION

The court’s ruling of April 30, 2015, denying the motion to set aside a void sentence under retroactive application of law, is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.