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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.

ALEXANDER NODARSE,

Defendant and Appellant.

E064235

(Super.Ct.No. SWF013785)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Alexander Nodarse, in pro. per.; and Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Alexander Nodarse appeals from an order denying his petition for resentencing under Penal Code section 1170.18.<sup>1</sup> We find no error and will affirm the order.

## I

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

A dispute arose between defendant and a coworker named Ernesto Hurtado regarding a \$10 debt owed by Hurtado to defendant. On October 6, 2005, defendant and Hurtado agreed to meet after work at a field near their workplace to fight it out.

Defendant and Hurtado arrived in separate cars. Other coworkers showed up at the site to watch the fight. Hurtado approached the defendant, and when he was approximately 50 feet away from the defendant, he noticed defendant had a sweatshirt. Hurtado asked defendant to remove the sweatshirt and defendant complied. Hurtado saw something in defendant's waistband.

Hurtado turned and headed back towards the car in which he had come. Hurtado heard shots fired in his direction. He turned and saw defendant had a gun. Hurtado saw a couple of shots ricochet off the ground approximately 10 to 15 feet behind him as he ran. He jumped into his coworker's car and returned to the workplace where the police were contacted and a report was made.

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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 taken from this court's nonpublished opinion in defendant's prior appeal. (*People v. Nodarse* (July 29, 2008, E044144) [nonpub. opn.] (*Nodarse I.*))

On October 13, 2006, a second amended information was filed charging defendant with one count of assault with a deadly weapon (§ 245, subd. (a)(2)) with the personal use of a firearm (§ 12022.5, subd. (a)). It was further alleged that defendant had suffered a prior prison term (§ 667.5, subd. (b)), a prior a serious felony conviction (§ 667, subd. (a)), and a prior serious or violent felony strike conviction (§§ 667, subs. (c) & (e)(1), 1170.12, subd. (c)(1)) for a 1996 robbery. It was also alleged that the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b).

Following a jury trial, on June 26, 2007, defendant was convicted of the aggravated assault charge, and the jury found true the gun use allegation. However, in a bifurcated proceeding, the gang allegation was found not true. Defendant subsequently admitted the truth of the prior conviction allegations.

On September 14, 2007, the trial court struck the prior prison term and prior serious felony conviction allegations, and sentenced defendant to a total term of 10 years in state prison with credit for time served.

Defendant subsequently appealed, and this court affirmed defendant's conviction in a nonpublished opinion filed on July 29, 2008. (See *Nodarse I, supra*, E044144.) This court found sufficient evidence in the record to support defendant's conviction, and rejected defendant's claims of prosecutorial misconduct and statute of limitations violation pertaining to his prior convictions. (*Ibid.*)

On December 28, 2012, the California Department of Corrections notified the superior court that defendant's five-year prior serious felony conviction (§ 667, subd. (a)) could not have been legally stayed or stricken. As such, on May 30, 2013, defendant was resentenced to a total term of 13 years in state prison, consisting of the lower term of two years doubled to four years due to the prior strike conviction, plus an additional four years for the firearm use enhancement, plus five years for the prior serious felony conviction.

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 February 24, 2015, defendant filed an amended petition to recall his sentence and for resentencing pursuant to section 1170.18.

On July 6, 2015, the trial court considered and denied defendant's petition, finding defendant's current commitment offense of assault with a deadly weapon is not a qualifying felony. Defendant filed a timely notice of appeal from that order on August 14, 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. 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 makes numerous assertions relating to his conviction and prior conviction for aggravated assault. Specifically, he appears to argue that his counsel was ineffective, his due process rights were violated, the prosecutor committed misconduct, jury tampering had occurred, the police report was falsified, witnesses were intimidated, a purported freedom of information act was violated, and insufficient evidence to show his prior aggravated assault conviction was a strike. We reject these contentions.

As previously noted, Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been 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.)

As previously stated, 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, subs. (b), (c).)

Here, the record of conviction supports defendant’s conviction for assault with a deadly weapon as charged in the second amended information. As such, defendant is “currently serving” a sentence for an offense that is ineligible under Proposition 47. Defendant was ineligible for resentencing as a matter of law. 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, 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 claims of error.

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:

HOLLENHORST

J.

McKINSTER

J.