

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DIXON, JR.,

Defendant and Appellant.

F069718

(Super. Ct. No. F03908336-1)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Ralph Nunez, Judge.

Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

-ooOoo-

* Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

Larry Dixon, Jr. filed a motion to be resentenced pursuant to the provisions of the Three Strikes Reform Act of 2012 (the Reform Act). The trial court denied the motion finding Dixon was ineligible for resentencing pursuant to the provisions of the Reform Act. Appellate counsel concluded there were no appealable issues in this case. After reviewing the file, we agree and will affirm the trial court's judgment.

FACTUAL AND PROCEDURAL SUMMARY

The Underlying Offenses

This court affirmed Dixon's conviction on direct appeal in *People v. Dixon* (2007) 153 Cal.App.4th 985. The following facts are taken from this opinion. In 2002, Dixon and an accomplice armed themselves with firearms and robbed four different tellers in a bank. Dixon was found guilty of four counts of second degree robbery after a court trial. (Pen. Code,¹ § 211.) The trial court also found true a deadly weapon enhancement (§ 12022, subd. (b)), found Dixon had suffered two prior convictions which constituted strikes within the meaning of section 667, subdivisions (b)-(i), had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and had suffered seven prior convictions which resulted in prison sentences within the meaning of section 667.5, subdivision (b). The trial court denied Dixon's request to strike one or more of his prior strike convictions (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), and sentenced him to a total third strike term of 121 years to life.

The Reform Act

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which amended Penal Code sections 667 and 1170.12 and added section 1170.126. [Citation.] Under the ‘Three Strikes’ law (§§ 667, subds. (b)-(i), 1170.12) as it existed prior to Proposition 36, a defendant convicted of two prior serious or violent felonies was subject as a third strike offender to a sentence of 25 years to life upon conviction of *any* third felony. [Citation.] Now, under the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

prospective provisions of the Reform Act (set forth in §§ 667, 1170.12), a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the current third felony is a *serious or violent* felony. [Citation.] Thus, if the third felony is not a serious or violent felony and none of four enumerated disqualifying exceptions or exclusions applies, the defendant will be sentenced as a second strike offender. [Citation.]

“Of particular importance here, the *retrospective* part of the Reform Act provides a means whereby, under three specified eligibility criteria and subject to certain disqualifying exceptions or exclusions, a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious or violent felony conviction. [Citations.] However, even if the resentencing eligibility criteria are satisfied and none of the disqualifying exceptions or exclusions applies, the prisoner is *not* entitled to resentencing relief under the Reform Act as a second strike offender if the trial court, in its discretion, determines that such resentencing ‘would pose an unreasonable risk of danger to public safety.’ [Citations.]” (*People v. White* (2014) 223 Cal.App.4th 512, 517, fn. omitted.)

The Current Proceedings

On April 14, 2014, Dixon filed a “Declaration in Support of Request to Recall Sentence.” In his declaration, Dixon requested the trial court resentence him pursuant to the provisions of the Reform Act asserting none of his prior convictions were violent or serious. He asserted the trial court could not determine if his prior convictions were strikes because it did not have his prison package (969b packet) *at the sentencing hearing*.

The trial court summarily denied the motion. First, it construed the motion as one for relief under the Reform Act, but found Dixon was statutorily ineligible for a reduced sentence. Second, it denied Dixon’s attempt to challenge the validity of his prior strike convictions as improper and not cognizable in a motion pursuant to the Reform Act. Third, to the extent Dixon was moving to recall his sentence, the trial court denied the motion as untimely.

DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 stating that after reviewing the record she did not identify any arguable issues in the appeal. By letter dated December 29, 2014, we invited Dixon to submit any issues he wished us to consider. Dixon filed a supplemental brief on January 16, 2015. In this brief he makes the same arguments he made to the trial court. He asserts he was “eligible and suitable” for resentencing under the Reform Act. He also argues the trial court (for the trial which resulted in the four robbery convictions) erred in determining he had suffered two prior convictions which constituted strikes within the meaning of the three strikes law because the prison package (969b package) was not available at the sentencing hearing.

As the above summary explains, the retrospective provisions of the Reform Act would permit him to be resentenced only if his current convictions, i.e., the bank robbery convictions, are not serious or violent felonies. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126, subd. (b).) Therefore, to be eligible and suitable for resentencing under the Reform Act, Dixon must prove his bank robbery convictions are not serious or violent felonies as those terms are defined by statute. (§§ 667.5, subd. (c), 1192.7, subd. (c).)

Robbery is both a violent felony (§ 667.5, subd. (c)(9)), and a serious felony (§ 1192.7, subd. (c)(19)). Therefore, Dixon is statutorily ineligible for resentencing under the Reform Act.

The argument that Dixon’s prior convictions that constituted strikes (i.e., the two strikes convictions that made him eligible for the third strike sentence for the bank robbery) is similarly without merit for three independent reasons, any one of which would require us to reject his argument. First, the trial court found these convictions to be strikes within the meaning of the three strikes law at trial, not at the sentencing

hearing. Therefore, the fact the prison package was not available at the sentencing hearing is irrelevant.

Second, any challenge to this finding should have been made on the direct appeal from his bank robbery conviction, not five years after the judgment became final. (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 961, fn. 11 [arguments not timely or fully made deemed forfeited].)

Third, the record in this appeal is either inadequate to support the argument, or proves the argument wrong. The only document related to these prior convictions in the record is an abstract of judgment for a 1992 conviction. This abstract lists the first conviction as robbery. As stated above, any robbery is a serious and violent felony and thus constitutes a strike conviction. The fact the abstract also lists four counts of grand theft is irrelevant.

As for the second strike conviction, apparently a 1988 conviction in Fresno County Superior Court case No. 382299-6, even were we inclined to consider Dixon's argument, there is nothing in the record for us to review to determine if this conviction constitutes a serious or violent felony. We note, however, that in his brief Dixon describes the convictions from this action as two robberies, which, we repeat once again, are serious and violent felonies. It is Dixon's obligation to provide a complete record for us to review, and his failure to do so precludes review of this issue even if it was timely presented. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) We repeat that the argument is not timely as it should have been presented on direct appeal from the bank robbery convictions.

DISPOSITION

The order appealed from is affirmed.