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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOE LUIS HIDALGO, JR., Defendant and Appellant.	F070507 (Super. Ct. No. SC070458) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

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

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* Before Kane, Acting P.J., Poochigian, J. and Smith, J.

Joe Luis Hidalgo, Jr. petitioned the trial court to be resentenced pursuant to the Three Strikes Reform Act of 2012 (the Act). The trial court denied the petition, concluding Hidalgo was ineligible for resentencing. We affirm the order denying the petition.

FACTUAL AND PROCEDURAL SUMMARY

Hidalgo filed a petition in the trial court seeking resentencing pursuant to Penal Code section 1170.126,[1] which was enacted as part of the Act. Hidalgo admitted in his petition that he was sentenced to a third strike sentence after being convicted of possession of a firearm by a felon in violation of former section 12021, subd. (a)(1) (see now § 29800, subd, (a)(1)). The testimony from the preliminary hearing on the underlying conviction established that Hidalgo was arrested after he was observed riding a bicycle with an unloaded rifle in his possession. The rifle was not tested to determine if it was operable.

The prosecution opposed Hidalgo's petition contending he was ineligible for resentencing. The trial court agreed and denied the petition.

DISCUSSION

Appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 asserting that after reviewing the file she could not identify any arguable issues. By letter dated May 11, 2015, we invited Hidalgo to inform this court of any issues he wished us to consider. Hidalgo responded to our invitation by filing a supplemental brief. After a thorough review of the record and Hidalgo's brief, we agree with appellate counsel there are no arguable issues in this appeal.

Section 1170.126, enacted as part of the Act, defines those eligible for resentencing as inmates serving an indeterminate third strike sentence, and:

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1 All statutory references are to the Penal Code.

(1) not serving a sentence for a crime that is listed as a serious or violent felony in sections 667.5, subd. (c) and 1192.7, subd. (c);

(2) not serving a sentence for a crime under the circumstances listed in section 667, subdivision (e)(2)(C), clauses (i) through (iii), or section 1170.12, subdivision (c)(2)(C), clauses (i) through (iii); and

(3) who does not have a prior conviction for an offense appearing in section 667, subdivision (e)(2)(C), clause (iv), or section 1170.12, subdivision (c)(2)(C), clause (iv). (§ 1170.126, subd. (e).)

If an inmate is eligible under the statute, then he must be resentenced "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).)

Thus, the statute requires the trial court to conduct a two-step analysis before an inmate may be resentenced. First, the trial court must determine if the inmate is eligible for resentencing. If the inmate is eligible for resentencing, the trial court must decide if resentencing the inmate would pose an unreasonable risk of danger to public safety. An inmate will be resentenced only if he or she is eligible, and the trial court concludes he or she does not pose an unreasonable risk of danger to public safety. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1299.) If the inmate is ineligible for resentencing, or the trial court concludes in the exercise of its discretion the inmate would pose an unreasonable risk if danger to public safety, then the petition is denied.

In this case, the trial court denied the petition, concluding Hidalgo was ineligible for resentencing because he was serving a sentence for a crime committed under the circumstances found in section 667, subdivision (e)(2)(C)(iii). This section applies if, during the commission of the offense leading to his or her third strike sentence, the inmate "used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." Since Hidalgo was carrying a rifle when he was arrested, i.e. he was armed with a firearm when he was arrested, this section renders him

ineligible for resentencing. We reached the same conclusion in *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030–1032.

Hidalgo's brief appears to make two arguments. First, he asserts the trial court erred by failing to invoke the will of the voters as demonstrated through the passage of the Act. We reject this argument because the language of the Act as passed by the voters makes Hidalgo ineligible for resentencing. Thus, the trial court followed the will of the voters,

Second, Hidalgo argues the United States Supreme Court's opinion in *Johnson v. United States* (2015) ___ U.S. ___ [135 S.Ct. 2551] (*Johnson*) has invalidated the Three Strikes law, requiring he be resentenced. Hidalgo is wrong for two reasons. First, the issue in this appeal is whether Hidalgo is eligible for resentencing under the Act, and not the validity of the Three Strikes law.

Second, *Johnson* is inapposite. In *Johnson* the Supreme Court held the residual clause in the Armed Career Criminal Act of 1984 was unconstitutionally vague. (18 U.S.C. § 924(e)(2)(B); *Johnson*, *supra*, 135 S.Ct. at pp. 2556–2560.) The Armed Career Criminal Act provides a defendant's sentence be increased to a minimum of 15 years and a maximum of life if the defendant had three or more prior convictions for a serious or violent felony. (18 U.S.C. § 924 (e)(1).) The residual clause of the Armed Career Criminal Act is found in the definition of "'violent felony.'" This clause provided that a defendant committed a violent felony if the crime was punishable by more than one year in prison and involved "conduct that presents a serious potential risk of physical injury to another." (18 U.S.C. § 924(e)(2)(B)(ii).) The Supreme Court concluded that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law." (*Johnson*, *supra*, at p. 2557.)

Johnson is not relevant to the Three Strikes law because the Supreme Court construed specific language in a federal statute which does not have any counterpart in the Three Strikes law. In other words, the language at issue in *Johnson* does not appear anywhere in the Three Strikes law and, therefore, provides no support for Hidalgo's argument. We also note Hidalgo's argument is undermined by the fact the Supreme Court did not invalidate the Armed Career Criminal Act, only the residual clause. Accordingly, enhanced sentences will still be imposed under the remaining provisions of the Armed Career Criminal Act.

DISPOSITION

The order denying Hidalgo's petition for resentencing is affirmed.