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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL GRAJADA MAGDALENO,

Defendant and Appellant.

G052252

(Super. Ct. No. 96NF2773)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Thomas A. Glazier, Judge. Affirmed.

Michael Grajada Magdaleno, in pro. per.; and Wayne C. Tobin, under
appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

In 1997, a jury found defendant Michael Grajada Magdaleno guilty of first degree burglary. (Pen. Code §§ 459, 460, subd. (a); all further undesignated statutory references are to this code.) The trial court also found defendant had suffered three serious and/or violent felony convictions for assaulting peace officers with a deadly weapon (§ 245, subd. (b)), and two other felony convictions for unlawfully driving or taking vehicles (Veh. Code, § 10851, subd. (a)). The trial court sentenced defendant to a total term of 30 years to life in state prison.

After the electorate approved Proposition 47, defendant petitioned the trial court to reduce his residential burglary conviction to a misdemeanor and be resentenced accordingly. (§ 1170.18, subds. (a) & (f); *People v. Awad* (2015) 238 Cal.App.4th 215, 218.) The trial court denied the petition, concluding burglary did not fall within section 1170.18's list of nonserious, nonviolent felonies subject to being reclassified as misdemeanors.

Defendant timely appealed from the ruling and we appointed counsel to represent him. Counsel submitted a brief that, while not arguing against defendant, informed the court he had found no arguable issues to assert on defendant's behalf. (*Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493]; *People v. Wende* (1979) 25 Cal.3d 436.) To assist in our independent examination of the record, counsel suggested we consider the following potential issue: whether the trial court erred in denying defendant's petition for resentencing under section 1170.18.

Defendant was notified of his right to file his own written argument and he submitted a supplemental brief. (*People v. Kelly* (2006) 40 Cal.4th 106.) In the brief, defendant contends: (1) the trial court abused its discretion under section 1385 by failing to strike his prior convictions for resentencing; (2) he was deprived of due process when the trial court denied the petition without allowing him to present oral argument; and (3) the dwelling he entered was neither pled nor proved to be inhabited at the time he committed the burglary.

We have considered appellate counsel's proposed issue and defendant's contentions and conclude they are all without merit. First, section 1170.18, subdivision (a) lists the specific offenses that can be redesignated as misdemeanors and allow for resentencing. It does not include burglary, let alone first degree burglary.

Second, defendant's supplemental brief is premised on his having petitioned for relief under section 1170.126, enacted as part of the Three Strikes Reform Act of 2012 when the electorate approved Proposition 36. Defendant never sought relief under that Act. But even had he done so, a trial court is precluded from exercising its section 1385 discretion to strike prior convictions in determining an inmate's eligibility for resentencing under the Act. (*People v. Brown* (2014) 230 Cal.App.4th 1502, 1511, 1513.)

Third, the trial court did not summarily deny defendant's petition. It explained to him that "Residential burglaries are not within the provisions of Prop[osition] 47." Since defendant did not meet the criteria of section 1170.18, subdivision (a), the trial court lacked authority to do anything other than deny the petition.

Finally, defendant's claim that the prosecution failed to plead and prove he burglarized an inhabited dwelling is meritless. "A charge of 'burglary' includes burglary of whatever degree, and a first degree verdict thereon need not include the circumstances which constitute such degree." (*People v. Nunez* (1970) 7 Cal.App.3d 655, 663.) In any event, the appellate record reflects defendant was charged by information with burglarizing an "inhabited dwelling" (capitalization omitted) and the abstract of judgment shows he was convicted of burglary in the first degree. (§ 460, subd. (a) ["Every burglary of an inhabited dwelling house . . . or the inhabited portion of any other building, is burglary of the first degree".]) From this we conclude defendant's argument is frivolous.

Having independently reviewed the record as required under *Anders v. California, supra*, 386 U.S. 738, *People v. Wende, supra*, 25 Cal.3d 436, and *People v. Kelly, supra*, 40 Cal.4th 106, we conclude there are no arguable issues on appeal.

DISPOSITION

The postjudgment order denying defendant's section 1170.18 application is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.