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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY LEE RIGGINS,

Defendant and Appellant.

H042882 & H043352

(Santa Clara County

Super. Ct. Nos. 162864, 144785,

108118 & 139353)

On July 17, 1986, in Santa Clara County case No. 108118, appellant, Rodney Lee Riggins, pled guilty to possession of marijuana for sale (Health & Saf. Code, § 11359). On September 11, 1986, the court placed appellant on probation in that case. On September 26, 1990, in case No. 139353, appellant pled guilty to possession of a controlled substance in jail. (Pen. Code, § 4573.6.) The court again placed him on probation. On June 12, 1991, in case No. 144785, appellant pled no contest to robbery and admitted a prison prior. (Pen. Code, § 211/212.5, subd. (b), 667.5, subd. (b).) On August 26, 1991, the court sentenced appellant to three years in state prison. On May 4, 1993, in case No. 162864, appellant pled no contest to second degree robbery, second degree burglary, and possession of stolen property. (Penal Code § 459/460, subd. (b), 496, 211/212.5, subd. (b).) On July 15, 1993, he was sentenced. He was placed on probation for a period of five years and was ordered to enter and complete a two-year substance abuse program.

On August 7, 2015, appellant filed a “Petition for Resentencing” (Petition) pursuant to Penal Code section 1170.18 in case Nos. 92992, 108118, 139353, 116461, 144785 and 162864.¹ On August 19, 2015, the prosecutor filed a response to appellant’s Petition in case No. 162864, agreeing that appellant’s convictions for possession of stolen property and commercial burglary were eligible for designation as misdemeanors. However, he opposed designating the robbery conviction as a misdemeanor, contending it was ineligible under the statute. On September 2, 2015, the court granted the petition in part. It ordered the stolen property and commercial burglary convictions be “designated as misdemeanors for all purposes.” However, it found the robbery conviction ineligible and denied the request to designate that conviction as a misdemeanor. On September 15, 2015, appellant timely filed a notice of appeal from that order. That appeal was designated as appeal H042882 in this court.

On September 8, 2015, the prosecutor filed an additional response to appellant’s August 7th petition, opposing the request in case Nos. 108118, 139353 and 14485 on the basis that appellant’s convictions for robbery, possession of a controlled substance in jail and possession of marijuana for sale were not eligible for designation as misdemeanors under Penal Code section 1170.18. On September 11, 2015, the court entered an order in each of these three cases denying appellant’s petition. The court found that these convictions were *not* eligible. The clerk of the trial court served the orders by mail on the same day. Over five months later, on February 26, 2016, appellant was allowed to file a notice of appeal from the orders entered in case Nos. 108118, 139353 and 144785. That appeal was designated appeal number H043352 in this court. Nothing in the record reveals that the court entered an order on the petition as to case No. 92992—a 1983 conviction for Penal Code section 476A; or case No. 116461—a 1987 conviction for

¹ We do not have a record of the convictions in case Nos. 92992 or 116461 in the record before us, and they are not enumerated or described in appellant’s brief. The only reference to these cases is in appellant’s Proposition 47 Petition.

Penal Code section 666. Additionally, nothing in the record, explains why appellant's appeal was not deemed late by the trial court under California Rules of Court, Rule 8.308, and marked received instead of filed. (Cal. Rules of Court, rule 8.308(d).)

In both appeals, we appointed the Sixth District Appellate Program Counsel Paul Couenhoven to represent appellant in this court. Mr. Couenhoven neither sought relief to file a late appeal, nor moved to have the appeals considered together, even though the appeals arose from orders on the same Petition. Nor did Mr. Couenhoven attempt to supplement the marginally sufficient record in appeal H043352.² Instead Mr. Couenhoven filed an opening brief in both appeals pursuant to *People v. Serrano* (2012) 211 Cal.App.4th 496 (*Serrano*), which states the case and the facts but raises no specific issues.

Pursuant to *Serrano*, we notified appellant of his right to submit written argument in his own behalf within 30 days. On April 25, 2016 and on June 16, 2016, we received a supplemental brief from appellant in both appeals. In his briefs appellant states that the trial court erred by not appointing counsel to represent him at the trial court level. He further argued that the denial was not supported by substantial evidence, was prejudicial in violation of the Fourteenth Amendment of the United States Constitution, and was in violation of his due process rights. Despite appellant's contentions, the convictions for which the trial court denied relief are not eligible for designation as misdemeanors under Penal Code section 1170.18, subdivision (f). Therefore, appointment of counsel, and further hearings into the value of the stolen property was not necessary. As to appeal H042882 nothing in the appellant's brief raises an arguable issue. Therefore, we must dismiss that appeal. (*Serrano, supra*, 211 Cal.App.4th at pp. 503-504.) Appeal H043352 poses additional problems.

² We note, for example, that appeal H043352 does not even contain a copy of appellant's Petition below.

Although *Serrano* does not require us to independently review the record on appeal for error, we must nonetheless conduct a cursory review of the record in order to verify and establish the scope of this court’s jurisdiction. (*ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 212, reh. den. (Jul. 25, 2016) citing *Olson v. Cory* (1983) 35 Cal.3d 390, 398 [“ ‘the question of appealability goes to our jurisdiction, we are duty bound to consider it on our own motion’ ”]; see also, *Rescue Army v. Municipal Court of City of Los Angeles* (1946) 28 Cal.2d 460, 464 [A basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance].) In the process of this review, we noticed several deficiencies in the treatment of appellant’s case at every stage of the proceedings. First, we noted that the District Attorney only filed responses to four of the six prior convictions listed in appellant’s Petition. Second, the trial court only ruled on the convictions for which it received responses. Third, the trial court improperly allowed appellant to file the appeal more than three months late. Finally, the clerk of this court and counsel on appeal both also failed to note the apparent untimeliness of the appeal, and counsel failed to seek relief for the untimely appeal. As appeal H043352, from the order issued as to case Nos. 108118, 139353 and 144785 is untimely, it must be dismissed for that reason. (Cal. Rules of Court, rule 8.104(b); *Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 762.)

Both appeals requiring dismissal would normally end our inquiry. In this instance, however, because the trial court failed to issue an order on two of the convictions enumerated in the Petition, we sought further briefing from counsel to address our concern. On August 18, 2016 we received a letter brief and request for judicial notice from Mr. Patrick McKenna, on appellant’s behalf.³ Although Mr. McKenna’s letter attempted to respond to the court’s concerns, perhaps because of the confusing and deficient record, he failed to note or seek relief from the untimely appeal. His letter brief

³ The appellant’s request for judicial notice submitted in conjunction with the supplemental letter brief is granted.

also failed to make mention of case No. 116461, one of the two cases enumerated in appellant's Petition, for which the trial court failed to enter an order. Despite these numerous problems, we are now convinced that our review on appeal has sufficiently addressed and protected appellant's rights. Case No. 92992 appears to be a conviction of Penal Code section 476a, passing bad checks, and case No. 116461 appears to be a conviction of Penal Code section 666, petty theft with a prior. Because neither of these convictions is eligible for designation as a misdemeanor under Penal Code section 1170.18, subdivision (f), no purpose would be served by remanding the case to the trial court.

DISPOSITION

Appeal H042882 is dismissed. Appeal H043352 is dismissed as untimely.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

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