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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ALAN McGEE, Defendant and Appellant.	E079915 (Super.Ct.No. FSB900485) OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Dismissed.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Petitioner Anthony Alan McGee is serving a third-strike sentence of 25 years to life for domestic violence. In 2022, he filed a petition, in propria persona, to modify and reduce his sentence. The trial court denied the petition. Petitioner appealed. His appointed appellate counsel filed a "non-issue" brief, purportedly pursuant to *People v.*

Wende (1979) 25 Cal.3d 436 (*Wende*). Petitioner then filed a personal supplemental brief.

We will hold that, on these facts, the trial court had no jurisdiction to modify the sentence. It follows that we have no jurisdiction to hear the appeal; we must dismiss.

I

STATEMENT OF THE CASE

In 2009, in a jury trial, petitioner was convicted of domestic violence (Pen. Code, § 273.5, subd. (a))[1] and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).[2] Two strike prior convictions (§§ 667, subds. (b)-(i), 1170.12) and one prior prison term enhancement (§ 667.5, subd. (b)) were found true.[3] Petitioner was sentenced to two concurrent terms of 25 years to life in prison, plus one year on the prior prison term enhancement.

In 2010, in petitioner's direct appeal, we modified the judgment by staying one of the two concurrent terms under section 654; otherwise, we affirmed. (*People v. McGee* (Aug. 31, 2010, E048572) 2010 Cal.App. Unpub. LEXIS 6939 [nonpub. opn.].)

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[1] All further statutory citations are to the Penal Code.

[2] The information that is in the record charges only a single count of domestic violence. Evidently there was an amended information that is not in the record.

[3] Although the record is not clear — especially as we do not have the operative information — apparently the jury also found a prior serious felony enhancement (§ 667, subd. (a)) true, but the trial court struck it.

In 2013, petitioner filed a petition for resentencing under then-recent amendments to the three strikes law. (§ 1170.126.) The trial court denied the petition; it found him ineligible for relief because his strike priors were sexually violent offenses. (See § 1170.126, subd. (e)(3).) In 2014, we affirmed the denial. (*People v. McGee* (Mar. 18, 2014, E059550) 2014 Cal.App. Unpub. LEXIS 1906 [nonpub. opn.].)

In 2020, for unknown reasons, the trial court amended the abstract of judgment. It omitted the conviction for assault by means of force likely to produce great bodily injury and the prior prison term enhancement, so as to leave only the term of 25 years to life on the domestic violence conviction.[4]

In 2022, petitioner filed a petition to reduce his sentence. He cited section 17, subdivision (b), section 667, subdivision (f)(2), Assembly Bill No. 1540 (2021-2022 Reg. Sess.) (AB 1540), and Senate Bill No. 567 (2021-2022 Reg. Sess.) (SB 567).[5] He argued that the sentence constituted cruel and unusual punishment, and that he fell outside the spirit of the three strikes law. The trial court denied the petition because "defendant has already been resentenced."

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[4] On the record that we have, there is considerable uncertainty about what the charges and allegations were, what the jury found, and how petitioner was sentenced. Nevertheless, according to the most recent amended abstract of judgment, petitioner is serving one term of 25 year to life for domestic battery. In other words, the only charges and allegations that matter anymore are the domestic violence charge and the two strike priors. These clearly were alleged, and found true by the jury.

[5] The petition actually cited "A.B. 567," but there is no bill with that number that is relevant.

II

PETITIONER IS NOT ENTITLED TO RESENTENCING

Appellate counsel asked us to review the record independently under *Wende*. However, *Wende* does not apply to an appeal from the denial of postconviction relief. (*People v. Delgadillo* (2022) 14 Cal.5th 216, 226.) Thus, we have no obligation to conduct an independent review of the record.

We note, however, that our notice telling petitioner that he could file a supplemental brief was "suboptimal," because it cited *Wende*, and thus it arguably implied that we *would* review the record independently. (*People v. Delgadillo*, *supra*, 14 Cal.5th at p. 222.) Therefore, we have conducted an independent review, even though not required to do so, to ensure that any error in our notice was harmless.

Petitioner argues that he is outside the spirit of the three strikes law because (1) the conviction for domestic violence is no longer a strike, (2) he never committed either of the strike prior crimes again, and (3) all of the enhancements have been "removed," stricken, or stayed.

These facts do not entitle petitioner to resentencing. In fact, on this record, there are no grounds on which he could seek resentencing.

"The general rule is that 'once a judgment is rendered and execution of the sentence has begun, the trial court does not have jurisdiction to vacate or modify the sentence.' [Citations.] And, '[i]f the trial court does not have jurisdiction to rule on a motion to vacate or modify a sentence, an order denying such a motion is nonappealable,

and any appeal from such an order must be dismissed.' [Citations.]" (*People v. King* (2022) 77 Cal.App.5th 629, 634.)

"There are important exceptions to this rule. Section [1172.1] gives a trial court the authority to recall a sentence on its own motion within 120 days of the defendant's remand, or at any time upon a request by various law enforcement officials. [Citation.] The Legislature has also created other specific statutory avenues for incarcerated defendants to seek resentencing in particular cases. [Citations.] If a modification does not make a substantive change to a sentence but simply corrects a clerical error, the trial court has the inherent power to correct its own records at any time. [Citation.] And a trial court may of course rule on a defendant's challenge to an unlawful sentence in a properly filed petition for a writ of habeas corpus. [Citation.]" (*People v. King*, *supra*, 77 Cal.App.5th at p. 637.)

The petition cited four statutory authorities.

First, it cited section 1385. However, petitioner's conviction was final. "[S]ection 1385 does not allow a trial court to act after a judgment has become final. [Citations.]" (*People v. Chavez* (2018) 4 Cal.5th 771, 781.)

Second, it cited Penal Code section 667, subdivision (f)(2). That subdivision allows a trial court, on the motion of the prosecutor, to dismiss or strike a strike prior allegation based on insufficiency of the evidence. Here, however, the prosecutor made no such motion; petitioner also did not show that the evidence was insufficient. And again, because the conviction was final, the trial court no longer had any such discretion.

Third, it cited AB 1540. AB 1540 became effective on January 1, 2022. At the time, existing law already allowed a trial court to resentence a defendant serving an otherwise final sentence on the recommendation of the Board of Parole Hearings, the county correctional administrator, or the district attorney. (Former § 1170, subd. (d)(1), Stats. 2018, ch. 1001, § 2.) AB 1540 "moved the[se] recall and resentencing provisions . . . to new section 1170.03.[6] [AB] 1540 also clarified the Legislature's intent regarding procedural requirements and the provision's application to 'ameliorative laws . . . that reduce sentences or provide for judicial discretion, regardless of the date of the offense of conviction.' [Citation.] In addition, where requests for recall and resentencing are made, [AB] 1540 added a presumption in favor of recall and resentencing. [Citation.]" (*People v. McMurray* (2022) 76 Cal.App.5th 1035, 1038.) AB 1540 also added the Attorney General as an official authorized to recommend resentencing. (Stats. 2021, ch. 719, § 3.) Here, no authorized official recommended resentencing; petitioner filed the petition for resentencing on his own initiative. Accordingly, AB 1540 does not apply.

Fourth and finally, it cited SB 567. Like AB 1540, SB 567 also became effective January 1, 2022. SB 567 limited the trial court's discretion to impose an upper term sentence. (§§ 1170, subd. (b), 1170.1, subd. (c), Stats. 2021, ch. 731, §§ 1.3, 2.) It does not apply to a final conviction. (See *People v. Jones* (2022) 79 Cal.App.5th 37, 45.) It also does not provide for any new kind of petition for resentencing. And, in any event, petitioner was not sentenced to any upper term.

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6 Since moved again to section 1172.1. (Stats. 2022, ch. 58, § 9.)

For the sake of completeness, we note that section 1172.75 — originally enacted as former section 1171.1 and effective January 1, 2022 (Stats. 2021, ch. 728, § 3) — invalidates a prior prison term enhancement imposed under section 667.5, subdivision (b). (§ 1172.75, subd. (a).) It requires the Secretary of the Department of Corrections and Rehabilitation and county correctional administrators to report persons serving such an enhancement term to the sentencing court (*id.*, subd. (b)), and it allows the sentencing court, upon receiving such a report, to resentence the person. (*Id.*, subd. (c).)

Here, petitioner was not reported to the sentencing court; he filed a petition for resentencing himself. More important, back in 2020, the trial court had already eliminated his prior prison term enhancement. Presumably this (and/or petitioner's prior section 1170.126 petition) is what the trial court was referring to when it said, "defendant has already been resentenced."

If there is any other basis for resentencing, petitioner forfeited it by failing to raise it in his petition below.

In sum, the trial court did not have jurisdiction to resentence petitioner. It follows that we must dismiss the appeal.

IV

DISPOSITION

The appeal is dismissed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.