FILED WITH PERMISSION

No. S211708

SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OCT 01 2013

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Deputy

BENNIE JAY TEAL,	(Court of Appeal, Second Appellate District, Division Two, No. B247196)
Petitioner,	
v.	(Los Angeles Superior Court No. NA026415, Hon. William C. Ryan, Judge)
SUPERIOR COURT OF LOS ANGELES COUNTY,	
Respondent;	
THE PEOPLE OF THE STATE OF CALIFORNIA,	
Real Party in Interest.	

PETITIONER'S OPENING BRIEF ON THE MERITS

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	)	
THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Real Party in Interest.	)	
	)	

PETITIONER'S OPENING BRIEF ON THE MERITS

ISSUE ON REVIEW

By order of this Court, filed July 31, 2013, the issue presented by this case is "Did defendant have the right to appeal the trial court's denial of his petition to recall his sentence under Penal Code section 1170.126, part of the Three Strikes Reform Act of 2012, when the trial court held he did not meet the threshold eligibility requirements for resentencing?"

STATEMENT OF THE CASE

In 1996, petitioner was convicted of making a criminal threat. (Pen. Code, § 422.) Because petitioner had two prior serious convictions, he was sentenced to an indeterminate life term under the Three Strikes Law. (Pen. Code, §§ 667, 1170.12.) (CT[1] 1, 10) Following the November, 2012, passage of Proposition 36, petitioner filed a motion to recall his sentence and re-sentence him to a determinate term sentence. (Pen. Code, § 1170.126.) In his motion, petitioner argued that, while his current offense is now defined as a serious felony, it was not so defined when he was convicted, and thus, he did not have a current conviction for a serious felony and so was not statutorily excluded from the provisions of Proposition 36. He also argued that, while he had a prior conviction for a violation of Penal Code section 262, which is a crime listed in Welfare and Institutions Code section 6600, subdivision (b), he was not thereby excluded from the operation of Proposition 36, because he had never been the subject of a Sexually Violent Predator petition and civil commitment proceeding. (CT 1-27)

The court, without a hearing, determined that petitioner was not eligible for recall and re-sentencing because his current conviction was for a serious felony, and so denied the motion. (CT 28-32)

1/ The record consists of a single volume of a Clerk's Transcript (hereinafter "CT").

Petitioner timely filed a Notice of Appeal from the denial of his statutory post-judgment motion. (CT 34)

ARGUMENT

PETITIONER HAS THE RIGHT TO APPEAL THE DENIAL OF HIS MOTION

Proposition 36, passed by the voters in the election held November 6, 2012 amended the Three Strikes Law to provide for second "strike," i.e., doubled sentencing, for defendants whose current offense is neither violent nor serious and who are not otherwise excluded from benefitting from the statute under specific statutory criteria.

The initiative amended Penal Code sections 667, subdivision (e)(2), and 1170.12, subdivision (c)(2), by adding subdivision (C) to provide that a defendant with two or more prior "strikes" must be sentenced as a second "striker" under subdivisions (c)(1) and (e)(1), rather than subdivisions (c)(2) and (e)(2), unless the present offense is a violent or serious offense, an enumerated sex offense or other enumerated excluded

offense,[2] or unless the prior strike offense is a violent, or otherwise enumerated, sex or other excluded offense.[3]

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[2]/ The amendment reads in relevant part as follows: "(C) If a defendant has two or more prior serious and/or violent felony convictions as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7 that have been pled and proved, and the current offense is not a serious or violent felony as defined in subdivision (d), the defendant shall be sentenced pursuant to paragraph (1) of subdivision (e) [which provides for a doubled sentence] unless the prosecution pleads and proves any of the following: (i) The current offense is a controlled substance charge, in which an allegation under Section 11370.4 or 11379.8 of the Health and Safety Code was admitted or found true. (ii) The current offense is a felony sex offense, defined in subdivision (d) of Section 261.5 or Section 262, or any felony offense that results in mandatory registration as a sex offender pursuant to subdivision (c) of Section 290 except for violations of Sections 266, and 285, paragraph (1) of subdivision (b) and subdivision (e) of Section 286, paragraph (1) of subdivision (b) and subdivision (e) of Section 288a, Section 311.11, and Section 314. (iii) During the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.

[3]/ The amendment reads in relevant part as follows: (iv) The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies: (I) A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. (V) Solicitation to commit murder as defined in Section 653f. (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.

The initiative also added section 1170.126 to provide that a defendant previously sentenced under the Three Strikes Law to a life sentence, who would have qualified under the initiative for a second "strike" sentence, can file a motion to recall that sentence with the court that sentenced him, be appointed counsel, and obtain a re-sentencing.[4]

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[4]/ The amendment reads in relevant part as follows: The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence.
(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.

. . . .

(d) The petition for a recall of sentence described in subdivision (b) shall specify all of the currently charged felonies . . . and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12. (e) An inmate is eligible for resentencing if: (1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7. (2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. (3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of

The instant case involves the question of whether a defendant who has filed a recall motion which is denied by the trial court on the basis of a finding of ineligibility is entitled to appeal that denial to the Court of Appeal. Petitioner's answer is that the trial court's denial of a recall petition constitutes "an order after judgment affecting the substantial rights of the party" (Pen. Code, § 1237 (b)), and it is therefore properly brought before the Court of Appeal by way of appeal. (*People v. Totari* (2002) 28 Cal.4th 876.)

This Court has recognized that, in a number of instances, the Legislature has authorized defendants in criminal cases, whose judgments have previously been executed, to file post-judgment motions which address some aspects of that judgment. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 337, fn. 2.) In those instances, if the statutorily-authorized post-judgment motion is denied, the defendant has the right to appeal that denial as an order after judgment affecting substantial rights. (*People v. Totari*, *supra*, 28 Cal.4th at pp. 886-887.)

In *Totari*, *supra*, the defendant filed a petition to vacate a judgment under Penal Code section 1016.5, alleging that the trial court had failed to properly advise him of the immigration consequences of his plea. In upholding the defendant's right to appeal, this

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subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12. (f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e).

Court carefully examined the parameters of section 1237, subdivision (b).[5] Focusing on the fact that the legislature had specifically authorized the motion pursuant to section 1016.5, this Court said this, "Once the Legislature has determined that a noncitizen defendant has a substantial right to be given complete advisements and affords defendant a means to obtain relief by way of a statutory postjudgment motion to vacate . . . a denial order qualifies as an 'order made after judgment affecting the substantial rights of the party'." (*Id.* at pp. 886-887.)

The Courts of Appeal have used substantially similar reasoning in addressing the application of section 1237, subdivision (b), to various statutorily authorized post-judgment motions. For instance, Penal Code section 1237.1 provides that a claim of error in the computation of a defendant's presentence credits which was not brought to the trial court's attention prior to imposition of judgment must be raised in a post-judgment motion filed in the trial court. The losing party on such a motion has been held to then have the right to appeal as an appeal from order made after judgment affecting substantial rights. (Pen. Code, §§ 1237, subd. (b), § 1238, subd. (a)(5); *People v. Delgado* (2012) 210 Cal.App.4th 761, 767.)

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[5]/ For example, the Court explained that section 1237, subdivision (b) would not allow an appeal from the denial of a post-judgement motion if the issue raised by the motion could have been raised on appeal from the judgement itself. (*People v. Totari, supra*, at p. 882.) That limitation on the scope of section 1237(b) is itself subject to exceptions. (*Ibid.*, see *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981.)

A defendant committed to a state hospital after a finding of insanity (Pen. Code, § 1026) may file an application for restoration, release, or outpatient treatment. (Pen. Code, § 1026.2.) The denial of that application has been recognized as appealable as an order after judgment affecting the substantial rights of the party. (*People v. Sword* (1994) 29 Cal.App.4th 614, 619, fn. 2; *People v. McDonough* (2011) 196 Cal.App.4th 1472, 1488.)

Defendants found incompetent to stand trial (Pen. Code, §§ 1368, 1370) may be subjected to the involuntary administration of medication under certain circumstances. The statute gives the defendant the right to have a trial court review of any involuntary medication order. (Pen. Code, § 1370, subd. (a)(2)(B)(v).) The courts have held that the defendant may obtain appellate review of a trial court's order allowing the involuntary administration of medication as a post-judgment order affecting substantial rights. (*People v. Christiana* (2010) 190 Cal.App.4th 1040, *People v. O'Dell* (2005) 126 Cal.App.4th 562, 566 and footnote 2.)

In many circumstances, the law does not specifically provide for post-judgment motions, but a situation arises where the trial court acts on a defendant's case following an initial imposition of judgment. Modifications and revocation of probation are two such instances. That is, a defendant has been, following conviction and entry of judgment, placed on probation. That probation is subsequently modified or even revoked. That act of revoking or modifying probation has been recognized by this Court as

appealable as from an order after judgment affecting substantial rights because the defendant has a substantial right to remain on probation absent a violation of its terms or conditions, or to remain on probation under the terms originally ordered. *People v. Vickers* (1972) 8 Cal.3d 451, 453, fn. 2; *People v. Tijerina* (1969) 1 Cal.3d 41, 47-48; *People v. Douglas* (1999) 20 Cal.4th 85, 91.)

Similarly, for defendants committed to state hospitals after a finding of insanity (Pen. Code, § 1026) may be released to outpatient status on recommendation of the hospital and approval of the court. (Welf. & Inst. Code, § 1604.) An order denying release to outpatient status has been held to be appealable as an appeal from an order after judgment affecting substantial rights (*People v. Cross* (2005) 127 Cal.App.4th 63, 66.)

Under Penal Code section 1203.05, probation reports are open to the public without restriction for 60 days after judgment is pronounced or probation is granted, whichever is earlier. After that time, however, only specified persons retain the right to unfettered access. Nonspecified persons can gain access only "by order of the court, upon filing of a petition therefor by the person." (Pen. Code, § 1203.05, subdivision (b).) The issue arose whether a trial court's grant of access to a new organization could be appealed by the defendant. The court held that it could because the statute was essentially designed to protect the defendant's confidentiality and privacy. Thus, an order allowing a breach of that confidentiality was something that affected the defendant's substantial rights and hence was appealable. (*People v. Connor* (2004) 115 Cal.App.4th 669, 685, 687.)

Thus, it is widely recognized that where the Legislature has conferred upon defendants the right to file a post-judgment motion and in instances where it hasn't but the law otherwise allows a court to issue an order which affects a defendant's rights, he has the statutory right to appeal an order as one affecting his substantial rights.

The court below appears to rely on the argument that the order in the instant case is not appealable because a defendant statutorily ineligible to file a recall motion or one who has a losing issue cannot claim a substantial right has been affected by the denial of a motion that he necessarily would lose.

But, courts need to differentiate between motions lost based on a court's findings and motions denied based on lack of jurisdiction. In the latter case, that is, where the court has no jurisdiction or authority to grant a motion, courts have routinely held that section 1237, subdivision (b) does not authorize an appeal of such a motion because there is no substantial right of the party affected by the court's action. (See e.g., *People v. Turrin* (2009) 176 Cal.App.4th 1200 [post-judgment motion to modify a sentence filed more than 120 days after imposition of the sentence]; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-982 [post-judgment motions to vacate, petitions for writ of *error coram nobis*].)

In all other situations, where the court has jurisdiction to grant or deny the defendant's request, the determination of whether a ruling on a motion affects the substantial rights of the defendant and is thus appealable under Penal Code section 1237,

subdivision (b), must be made in the abstract and based upon the assumption that the ruling was erroneous. The Court of Appeal's position that such rulings are not appealable turns upon the assumption that the rulings are correct. This reasoning is flawed because no *correct* ruling on any motion will, in the particular case, affect the substantial rights of the party against whom the ruling is made. Subdivision (b) is not premised on whether a correct ruling adversely affects the particular defendant. It is designed to permit the defendant to test on appeal whether the ruling against him was correctly decided. Thus, the question should turn on whether, assuming the defendant is right, and the ruling is wrong, the denial of the motion adversely affected the defendant's substantial rights.

It is clear that an *erroneous* determination of whether a defendant is eligible for a sentence recall under Penal Code section 1170.126 does, in fact, adversely affect his substantial rights. It is equally clear therefore that making the right to appeal the denial of such a motion on eligibility grounds turn on whether in fact the defendant is eligible creates two classes of cases involving identical rulings on identical motions, some of which are appealable and some of which are not. And, that the determination of whether the issue is appealable will require an examination of the issue on the merits.

Such a rule does not simplify the process, further the ends of justice, or follow the general rules of appeal. To make the determination of appealability dependant on the assumption that the defendant will *lose* on appeal puts the cart before the horse. Traditionally, the determination of whether a ruling effects the substantial rights of a

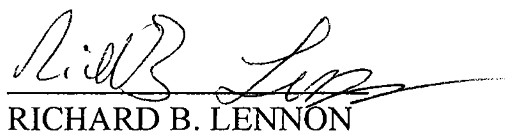
defendant is based upon whether the ruling has the *potential* to do so. For example, the denial of a Penal Code section 1170, subdivision (d), defense "motion" to recall the sentence is not appealable. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193.) This is so because *no* defendant has the right to make such a motion. Thus, in *no* instance could *any* ruling on the motion adversely affect a substantial right of the defendant. (*Ibid.*) On the other hand, the denial of a motion seeking to correct the award of pre-sentence credits, or vacate a conviction based on the failure of the court to inform the defendant regarding immigration consequences, and the myriad of other situations discussed earlier in this Brief is appealable, not because the defendant will surely win, but because a defendant potentially *could* win.

Therefore, this Court should hold that the denial of a statutory motion to recall a sentence filed under Penal Code section 1170.126 is appealable, regardless of whether the defendant establishes eligibility.

Dated: September 20, 2013

Respectfully submitted,
CALIFORNIA APPELLATE PROJECT

JONATHAN B. STEINER
Executive Director



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WORD COUNT CERTIFICATION
People v. Benny Jay Teal

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 3,166 words.

RICHARD B. LENNON

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On September 23, 2013, I served the within

APPELLANT'S OPENING BRIEF ON THE MERITS

in said action, by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed September 23, 2013 at Los Angeles, California.

GRACE MEDINA