

APPENDIX A

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS HARRIS,

Defendant and Appellant.

H045257

(Santa Clara County

Super. Ct. No. 190602)

Defendant Nicholas Harris appeals from the trial court's order granting in part and denying in part his petition for recall of his sentence under the Three Strikes Reform Act of 2012 (the Reform Act). (Pen. Code, §§ 667, 1170.12, 1170.126.)¹ In part, the trial court concluded that Harris was not eligible for resentencing on his conviction for dissuading a witness in furtherance of a conspiracy (§ 136.1, subd. (c)(2)). When Harris committed his crime, dissuading a witness was not considered a serious felony. By the time the electorate passed the Three Strikes Reform Act, dissuading a witness was classified as a serious felony under section 1192.7, subdivision (c)(37) and was therefore ineligible for resentencing under section 1170.126. On appeal, Harris contends that classifying his conviction as a serious felony violates the ex post facto clause and principles of due process and equal protection. As we explain, we reject his contentions and affirm the trial court's order.

¹ Unspecified statutory references are to the Penal Code.

BACKGROUND²

1. *Harris's Convictions and Sentence*

In 1997, a jury convicted Harris of two counts of grand theft by false pretenses (§§ 484, 487, subd. (a)) and one count each of access card forgery (§ 484f, subd. (b)), escape from jail (§ 4532, subd. (b)(1)), and dissuading a witness in furtherance of a conspiracy (§ 136.1, subd. (c)(2)). The jury also found true the allegation that one of the grand thefts involved a taking of more than \$150,000 in value from the victim. (Former § 12022.6, subd. (b).) The trial court denied Harris's *Romero*³ motion and sentenced him to consecutive sentences of 25 years to life on the two grand theft convictions as well as the escape from jail conviction. The trial court imposed a concurrent 25 years to life sentence on the conviction for dissuading a witness, and an additional 25 years to life sentence was imposed, but stayed under section 654, on his conviction for access card forgery term. With the two-year enhancement imposed on one of the grand theft convictions, Harris was originally sentenced to a total term of 77 years to life. We affirmed his conviction in June 2000. (*People v. Miller* (2000) 81 Cal.App.4th 1427.)

2. *Federal Habeas Corpus Proceedings*

In 2010, the Northern District of California granted Harris's petition for writ of habeas corpus, finding he was "entitled to habeas corpus relief as to his conviction of one of the two counts of grand theft" because there was insufficient evidence to support that conviction. (*Harris v. Garcia* (N.D.Cal. 2010) 734 F.Supp.2d 973, 981.) The federal court held that Harris was not otherwise entitled to relief and expressly stated his continued incarceration on his remaining convictions was lawful. With respect to the

² On our own motion, we take judicial notice of our opinion in Harris's prior appeal, *People v. Superior Court (Harris)* (Mar. 18, 2016, H041594) [nonpub. opn.]. Our summary of the pertinent procedural history includes information taken from our prior opinion. We omit the underlying facts of Harris's convictions because they are not relevant to the issues raised on appeal.

³ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

unsupported grand theft conviction it ordered: “[T]he conviction and the portion of petitioner’s sentence based thereon are VACATED. Within 60 days of the date this order is filed, the [People] shall seek a recalculated sentence from the state superior court” (*Id.* at p. 1018.)

3. *Resentencing Following Remand from Federal Court*

Upon remand from the federal court, Harris sought to bring a renewed *Romero* motion in connection with his resentencing. The trial court concluded the federal court’s order did not allow for such a motion and refused to consider it. The trial court dismissed Harris’s conviction for grand theft as directed but noted that dismissal of that particular conviction removed the basis for staying Harris’s 25 years to life sentence for access card forgery under section 654. Accordingly, the trial court imposed a consecutive 25 years to life sentence on the access card forgery conviction and resentenced Harris to a total term of 77 years to life.

Harris appealed, arguing the trial court erred by failing to consider his renewed *Romero* motion, an argument the People conceded. In a brief unpublished opinion, we accepted the People’s concession, and reversed and remanded for a renewed *Romero* hearing and resentencing. (*People v. Harris* (Dec. 12, 2012, H036908, H037667) [nonpub. opn.] (the 2012 opinion).) In the 2012 opinion, we quoted *People v. Hill* (1986) 185 Cal.App.3d 831, 834 as follows: “When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.”

4. *Proceedings Culminating in Petition for Writ of Mandamus*

In May 2014 Harris filed a petition for a recall of his sentence⁴ asking that the trial court find him eligible for resentencing under section 1170.126 of the Three Strikes Reform Act. Harris argued his conviction for dissuading a witness, which he committed in 1995, should not be treated as a strike because it was not classified as a serious felony until 2000 (see § 1192.7, subd. (c)(37)). In part, Harris argued that classifying his conviction for dissuading a witness as a serious felony would violate the ex post facto clause and his due process rights. Harris further argued that even if he were found ineligible for resentencing on his conviction for dissuading a witness, he was still eligible for resentencing on his remaining counts, all of which were nonserious, nonviolent offenses.

On July 2, 2014, Harris filed a second petition arguing that he was entitled to “automatic, non-discretionary sentencing” under the new version of section 667 created by the Reform Act. In this petition, Harris contended that the judgment originally entered against him in 1997 was “not yet final” and he should be treated as if he were being sentenced for the first time.

The People opposed both petitions, arguing that Harris was entitled to nothing more than a *Romero* hearing. The People also argued that Harris’s dissuading a witness count should be treated as a serious felony for sentencing purposes and that such a conviction rendered him ineligible for resentencing pursuant to the Reform Act.

The trial court rejected the People’s arguments and ruled it was obligated to treat Harris as if he were being sentenced for the first time. The trial court explained: “I am reading the remand that came from the Court of Appeal [i.e., the 2012 opinion] on this

⁴ Section 1170.126, subdivision (b) provides that a “person serving an indeterminate term of life imprisonment . . . may file a *petition* for a recall of sentence . . .” (Italics added.) Harris titled his request for recall of his sentence as a motion. We will refer to it as a petition for clarity.

particular case to be very clear, that I was to conduct a complete re-sentencing of Mr. Harris, regardless of [the] fact that the federal court had, in fact, found that four of the terms remained, one went. [¶] . . . [¶] . . . [T]he Court of Appeal [said] I was to re-sentence and it quoted the language from *Hill* indicating that one error can infect everything. I think that . . . really is a command to redo the entire process.”

As a result, the trial court concluded Harris was not eligible for resentencing under section 1170.126 because he “is not *currently* serving an indeterminate life sentence.” (Italics added.) The trial court further agreed with Harris that, as an unsentenced defendant, his convictions for grand theft, access card forgery and escape from jail “cannot be life cases [anymore].” As to Harris’s conviction for dissuading a witness, the court acknowledged there was still a possibility this offense was subject to an indeterminate term of 25 years to life. The trial court set Harris’s *Romero* hearing for December 5, 2014, at which it would also decide whether Harris could be sentenced to 25 years to life on that one conviction and would pronounce sentence on all four remaining counts.

5. *The Petition for a Writ of Mandamus*

The People petitioned this court for a writ of mandamus, which we granted. (*People v. Superior Court (Harris)* (Mar. 18, 2016, H041594) [nonpub. opn.].) In our unpublished opinion, we concluded that the trial court should not have treated Harris as if he had never been sentenced for his convictions in 1997. We further held that the trial court should have simply held a *Romero* hearing, as we ruled in 2010. We observed that if the trial court did not elect to strike one or more of Harris’s prior strikes, Harris could then be evaluated under the Reform Act for *recall* of his sentence.

We also determined that under the California Supreme Court’s decision in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), Harris’s current sentence included one disqualifying offense under section 1170.126, subdivision (e)(1), his conviction for

dissuading a witness. However, under *Johnson*, one disqualifying conviction is not enough to render an inmate ineligible for resentencing because eligibility must be evaluated “on a count-by-count basis.” (*Johnson, supra*, at p. 688.) Thus, we concluded that the trial court must evaluate Harris’s eligibility for resentencing on a count-by-count basis and deny resentencing entirely if resentencing him would “pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).)

6. *Proceedings Following Our Mandamus Order*

On July 21, 2016, the trial court reimposed Harris’s sentence with the understanding that he would file a *Romero* motion. Subsequently, Harris submitted a *Romero* motion, which the People opposed. On July 20, 2017, the trial court denied Harris’s *Romero* motion.

On August 10, 2017, the trial court considered Harris’s previously filed petitions under section 1170.126. The trial court stated that it believed that this court’s decision on the People’s mandamus petition indicated that Harris was eligible for resentencing on all counts except for his conviction for dissuading a witness. Thereafter, the trial court resentenced defendant to eight years for his grand theft conviction, one year and four months for his access card forgery conviction, and one year and four months for his jail escape conviction. The trial court did not resentence Harris on his conviction for dissuading a witness, and his sentence of 25 years to life on that conviction remained intact.

DISCUSSION

On appeal, Harris argues that classifying his conviction for dissuading a witness in furtherance of a conspiracy (§ 136.1, subd. (c)(2)) as a serious felony violates the ex post facto clause and principles of due process and equal protection. He insists that *Johnson*,

supra, 61 Cal.4th 674 is not controlling because it did not consider these constitutional provisions. As we explain, we find no merit in Harris’s contentions.⁵

1. *Classification of Section 136.1 for the Purposes of Resentencing Under Section 1170.126*

In *Johnson*, *supra*, 61 Cal.4th 674, the California Supreme Court determined as a matter of statutory construction that “for purposes of resentencing under section 1170.126, the classification of the current offense as serious or violent is based on the law as of November 7, 2012, the effective date of [the Three Strikes Reform Act].” (*Id.* at p. 687.) At the time Harris committed his offense, witness dissuasion was not considered a serious felony. “In March 2000, the voters approved Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, which among other changes, added to the list of serious felonies, ‘intimidation of victims or witnesses, in violation of [Penal Code s]ection 136.1’ (Pen. Code, § 1192.7, subd. (c)(37).)” (*People v. Neely* (2004) 124 Cal.App.4th 1258, 1261.) Thus, on the effective date of the Reform Act, section 136.1, subdivision (c)(2) was considered a serious felony for purposes of resentencing under section 1170.126.

Harris acknowledges that this court is bound by *Johnson*’s statutory interpretation of section 1170.126. However, he argues that *Johnson* did not consider the constitutional arguments that he now raises and is therefore not controlling. We agree. Since “[c]ases are not authority for matters not considered,” we proceed to address the merits of his arguments. (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

⁵ Preliminarily, the People argue that Harris has forfeited his constitutional arguments. In his 2014 petition, Harris argued that construing his conviction for dissuading a witness as a serious felony would violate the ex post facto clause and his due process rights. Harris did not re-raise these arguments when the trial court resentenced him in 2017. We assume without deciding that no forfeiture occurred and reject Harris’s claims on the merits.

2. *Ex Post Facto* Violation

Harris argues that classifying his conviction for dissuading a witness as a serious felony for the purposes of section 1170.126 violates the ex post facto clause of the United States Constitution. (U.S. Const., art. I, § 10, cl. 1.)

In *Calder v. Bull* (1798) 3 U.S. 386 (*Calder*), the United States Supreme Court discussed the meaning of the federal ex post facto clause and described three types of laws that were ex post facto laws: “1st. Every law that makes an action, done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2nd. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3rd. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. . . .” (*Id.* at p. 390.) In other words, “Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.” (*Collins v. Youngblood* (1990) 497 U.S. 37, 43.)

Harris insists that considering his conviction for dissuading a witness as a serious felony runs afoul of the second *Calder* formulation and results in a law that aggravates a crime or makes it greater than it was when it was committed. (*Calder, supra*, 3 U.S. at p. 390.) Harris argues that if his crime was considered a serious felony at the time he committed his offense, he would have been subject to a five-year enhancement for every separate prior serious felony conviction. (See § 667, subd. (a); *People v. Williams* (2004) 34 Cal.4th 397.) However, Harris himself concedes that “this blatant ex post facto violation did not occur in the present case.” Applying the definition of serious felonies as it existed on November 7, 2012, to determine Harris’s eligibility for resentencing under section 1170.126 does not aggravate his crime or change his original punishment.

Next, Harris argues that reclassifying his conviction for dissuading a witness as a serious felony altered his “*effective sentence*,” rendering him ineligible for a

newly-enacted benefit that would dramatically reduce his punishment in violation of the third *Calder* formulation. (*Calder, supra*, 3 U.S. at p. 390.)

First, Harris relies on *Weaver v. Graham* (1981) 450 U.S. 24. *Weaver* involved a state statute that reduced the amount of conduct credits that could be applied to a prisoner's sentence. (*Id.* at p. 26.) The United States Supreme Court determined that the statute could not be applied to those prisoners whose crimes were committed before the statute's effective date. (*Id.* at p. 36.) The Supreme Court concluded that the new statute "constrict[ed] the inmate's opportunity to earn early release, and thereby ma[de] more onerous the punishment for crimes committed before its enactment," violating the prohibition against ex post facto laws. (*Id.* at pp. 35-36.)

Harris also relies on *Lynce v. Mathis* (1997) 519 U.S. 433. In *Lynce*, the United States Supreme Court determined that a state statute that canceled awards of early release credits to prison inmates *after* the credits had already been awarded violated the ex post facto clause of the federal Constitution. (*Id.* at pp. 441-447.)

Finally, Harris cites to *In re Lomax* (1998) 66 Cal.App.4th 639. In *Lomax*, the First Appellate District concluded that a Department of Corrections regulation that prevented prisoners from obtaining reinstatement of conduct/work credits that were forfeited for misconduct violated the prohibition against ex post facto laws when applied to prisoners whose misconduct was committed before the regulation was promulgated. (*Id.* at pp. 647-648.)

Weaver, *Lynce*, and *Lomax* are distinguishable because they involved statutes or regulations that effectively *increased* the amount of time that defendants would spend incarcerated, thereby aggravating their punishment. Here, classifying section 136.1, subdivision (c)(2) as a serious felony for purposes of resentencing under section 1170.126 does not increase Harris's original sentence. It simply means that

Harris is not eligible for a *decreased* sentence under section 1170.126. As there is no increase in Harris's punishment, there is no violation of the ex post facto clause.

3. *Due Process*

Harris argues that the interpretation of section 1170.126 set forth in *Johnson, supra*, 61 Cal.4th 674 runs afoul of due process principles because “the state effectively ‘promised’ [him] that, whatever other severe consequences there would be from his conviction for witness dissuasion under section 136.1, [the] offense was not a ‘serious’ felony, and carried none of the penal consequences of these aggravated category of crime.” Citing *Bouie v. City of Columbia* (1964) 378 U.S. 347, Harris insists that ex post facto principles that prohibit the legislative enactment of retroactive increases in punishment similarly apply when the retroactive change of law stems from a judicial decision such as *Johnson*.

Again, Harris's arguments are premised on the mistaken presumption that the interpretation of section 1170.126 adopted by *Johnson* increases his punishment. Harris's punishment is the same as it was when it was originally imposed. There was no increase in his punishment. Under these circumstances, we find no due process violation.

4. *Equal Protection*

Finally, Harris claims that under *Johnson*, he is improperly treated more harshly than “a similarly situated hypothetical person who committed the same crimes, on the same dates as [he], but who had managed to avoid being tried until after the effective date of [the Three Strikes Reform Act].” Harris argues that such a person—who, for example, may have been a fugitive from justice or was mentally incompetent during the ensuing years—would not be facing a third-strike life sentence if sentenced after the effective date of the Three Strikes Reform Act.

Harris essentially argues that he should be entitled to the same sentence as someone sentenced *after* the effective date of a statute that lessens punishment for the

same crimes. Analogous arguments have been rejected by the California Supreme Court. (*People v. Floyd* (2003) 31 Cal.4th 179, 188-192 (*Floyd*).) In *Floyd*, the Supreme Court determined that prospective application of the Substance Abuse and Crime Prevention Act of 2000, which amended state law to require that certain adult drug offenders receive probation, to defendants sentenced after its effective date did not violate equal protection principles. (*Floyd, supra*, at pp. 188-192.) In its analysis, the *Floyd* court stated, “Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court.” (*Id.* at p. 188.) The *Floyd* court reasoned, “ ‘[T]he 14th Amendment does not forbid statutes and statutory changes that have a beginning, and thus to discriminate between the rights of an earlier and later time.’ ” (*Id.* at p. 191.)

Moreover, unless the alleged discrimination “burdens a fundamental right” or “targets a suspect class,” the challenged law will not violate equal protection principles if it bears a rational relationship to a legitimate governmental interest. (*Romer v. Evans* (1996) 517 U.S. 620, 631; *Floyd, supra*, 31 Cal.4th at p. 191.) Limiting eligibility for resentencing for defendants who are presently serving sentences for convictions that are classified as serious felonies as of the effective date of the Reform Act serves a legitimate state interest by enhancing public safety. (See *People v. Yearwood* (2013) 213 Cal.App.4th 161, 175 [enhancing public safety was key purpose of the Reform Act].) As a result, we find no equal protection violation.

DISPOSITION

The order is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.

APPENDIX B

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SUPREME COURT
FILED

APR 15 2020

Court of Appeal, Sixth Appellate District - No. H045257 Jorge Navarrete Clerk

S261063

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

NICHOLAS HARRIS, Defendant and Appellant.

The petition for review is denied.

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Chief Justice