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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

BRENT SCOTT MILLER,

Defendant and Respondent.

F061962

(Super. Ct. No. CF06901941)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Appellant.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Respondent.

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SEE CONCURRING OPINION

INTRODUCTION

The People contend the superior court erred when it granted Brent Scott Miller's habeas petition, finding that Miller's 2002 prior convictions were improperly used in his

subsequent 2006 conviction¹ as strikes² and when it vacated the 2006 sentence.

According to the People, the judgment should be reversed because Miller did not pursue the correct remedy – a direct attack by a petition for writ of habeas corpus to have his prior 2002 convictions set aside. Instead, he pursued an impermissible indirect attack on his 2002 convictions and strike findings by way of a habeas petition challenging his 2006 sentence. Miller argues that the People have forfeited this claim by failing to raise it below and that the habeas petition was not an improper collateral attack on his prior conviction. We disagree with the People and find that the procedure utilized was proper. We therefore vacate the 2002 convictions and remand to the trial court to allow Miller to withdraw his guilty plea.

PROCEDURAL AND FACTUAL BACKGROUND

2002 Conviction

On November 5, 2002, Miller pleaded no contest to two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).³ Neither the change of plea form nor the transcript reflects any mention that the convictions constituted felony strikes. Miller waived “any and all appellate rights up to and including through sentencing.” The charges stemmed from an altercation in which Miller allegedly struck another individual with the handle of a sledge hammer, although, at the preliminary hearing, the first victim was equivocal as to whether or not he was struck. The officer responding to the scene did not observe an injury to the first victim. Miller also allegedly threw a screwdriver at a

¹ Miller was charged in 2006 for incidents occurring in that year, but convicted in 2007. Throughout this opinion, we refer to this as the “2006 case” or “2006 conviction” because the superior court refers to it as such.

² We use the term “strike” and “strike conviction” as synonyms for “prior felony conviction” within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony that subjects a defendant to the increased punishment specified in the three strikes law.

³ All further statutory references are to the Penal Code unless noted otherwise.

second victim, although it did not strike her and she was not injured. Defendant retained defense counsel Thomas Richardson⁴ and stipulated that there were facts sufficient to support the convictions under *People v. West*.⁵ The superior court noted that “both parties are willing to stipulate due to factual discrepancies [and] that it would be in everyone’s benefit to resolve the case” Miller requested immediate sentencing and the trial court granted him three years probation and time served.

2006 Conviction

On August 6, 2006, Miller was charged in a new information with various felonies. Two strike priors were alleged stemming from his 2002 convictions. Miller again retained attorney Richardson to defend him. Once Miller was informed that he was now facing a 25-year-to-life sentence on the new charges, he discharged Richardson and retained attorney Scott Kinney.⁶ Prior to trial, Kinney filed a motion to withdraw/set aside the 2002 pleas, essentially arguing (1) that Miller was never advised by Richardson or, more importantly, by the trial court, that the 2002 convictions would qualify as strikes in any subsequent proceedings, (2) that his 2002 plea therefore was not knowingly or intelligently entered and (3) he was deprived of his *Boykin-Tahl* rights⁷. The trial court denied the motion to set aside the pleas, concluding that a defendant need not be advised of indirect future consequences of a strike, and the matter proceeded to trial.⁸

⁴ Now deceased.

⁵ *People v. West* (1970) 3 Cal.3d 595.

⁶ Currently ineligible to practice law.

⁷ (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122 (*Boykin-Tahl*).

⁸ Kinney did not argue ineffective assistance of counsel as grounds for relief or mention that Miller had received or relied on erroneous three-strike advice from Richardson when he entered his 2002 pleas.

On June 5, 2007, a jury convicted Miller of inflicting corporal injury on a cohabitant and, outside the presence of the jury, Miller admitted the two prior 2002 convictions for assault with a deadly weapon, which qualified as prior strikes (§ 667, subd. (a)(1)), and for which he had served a prior prison term (§ 667.5, subd. (b)). Miller was sentenced to an aggregate prison term of 41 years to life: 25 years to life, pursuant to the three strikes law, plus two five-year serious felony and two one-year prior prison term enhancements, plus four years for a great bodily injury finding.

On appeal, this court (*People v. Miller* (Feb. 6, 2009, F053486) [nonpub. opn.]) rejected Miller's argument that the superior court erred when it denied his pretrial motion in the 2006 case to withdraw/set aside his no contest pleas to the 2002 prior strike convictions, explaining that a defendant must be advised of the "direct consequences of conviction," but not "secondary, indirect or collateral consequences" of conviction, such as future use of a conviction, citing *People v. Moore* (1998) 69 Cal.App.4th 626, 630 and *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457. We affirmed Miller's 2006 conviction, but reduced his sentence to 35 years to life by deleting one each of the five-year and one-year enhancements. A subsequent petition for review in the California Supreme Court (No. S171328) was denied.

2009 Superior Court Habeas Corpus Petition

In November of 2009, Miller filed a petition for writ of habeas corpus in the superior court attacking the use of the 2002 prior convictions in his 2006 sentencing on new and different constitutional grounds--effective assistance of counsel by both Richardson in 2002 and Kinney in 2006. The superior court denied the petition, finding that Miller was improperly attempting to collaterally attack his 2002 plea and that he had failed to state a prima facie case for relief.

2010 Court of Appeal Habeas Corpus Petition

In March of 2010, Miller filed a virtually identical habeas petition and exhibits in support of the petition in this court. The petition alleged, inter alia, that he was denied

effective assistance of counsel when (1) Richardson told him that the two felonies, to which he pled in 2002, were not strikes, and that he would not have entered a plea to the convictions had he known they were strikes; (2) Kinney in the 2006 case failed to raise the issue of predecessor counsel's incorrect legal advice in the motion to withdraw/set aside the 2002 plea; and (3) Kinney failed to argue that one of the 2002 prior convictions did not constitute a serious felony for strike purposes. Miller prayed that this court “[i]ssue a writ of habeas corpus to have [Miller] brought before it, to the end that he might be discharged from his unconstitutional confinement and restraint, and/or be relieved of his unconstitutional sentence under the Three Strikes law” and “[g]rant such other and further relief as may be appropriate and necessary to dispose of the matter as justice may require.”

Miller's evidence that Richardson misadvised him included a letter Richardson wrote to Miller and to the local bar association in connection with a fee dispute. The letter includes an admission by Richardson that, in 2002, he told Miller the offenses would not be treated as strikes.

The People filed an informal opposition to the petition for writ of habeas corpus, arguing that the proper vehicle for Miller's claim was a writ of error *coram nobis* seeking to withdraw his pleas in the 2002 case and that the pending habeas petition constitutes an “improper, indirect attack on the 2002 prior convictions used to sentence petitioner pursuant to the Three Strikes law [in the 2006 case].” In support of the argument that Miller was making an improper, indirect attack on his 2002 convictions, the People pointed to Miller's use of the case number from the 2006 case rather than the 2002 case, and his prayer, which asks that he might be relieved of his “unconstitutional sentence under the Three Strike law.” As argued by the People, Miller “does not pray that his 2002 prior convictions be vacated or set aside or that he be allowed to withdraw his pleas in the 2002 case,” which, if he had, would indicate a direct attack on the 2002 prior convictions, in violation of *Garcia v. Superior Court* (1997) 14 Cal.4th 953 (*Garcia*).

The People acknowledged however that, assuming *arguendo*, the petition raised issues that could be heard, Miller had stated a *prima facie* showing for relief in his first two claims of ineffective assistance of counsel, but not in the third.

Miller filed a reply to the informal response, correctly arguing that *coram nobis* was not the appropriate remedy for an ineffective assistance of counsel claim, but only when a plea was induced by misstatements of a public official, which did not occur in this case. He also argued that his habeas petition was not an improper attack of a prior conviction in violation of *Garcia*,⁹ since he was not seeking to challenge his 2002 priors *during the prosecution* of his 2006 case. That prosecution was over and done, and affirmed by this court after appeal. Instead, he argued his habeas petition was a proper attack on the 2002 convictions, citing *People v. Adamson* (1949) 34 Cal.2d 320, and 6 Witkin and Epstein, California Criminal Law (3d ed. 2000) section 38, page 567: “With expansion of the function of habeas corpus in this state, an application for that writ has become the proper remedy to attack collaterally a judgment of conviction which has been obtained in violation of fundamental constitutional rights.” As stated in his reply, he was seeking:

“to set aside the 2002 felony convictions constituting the two serious priors that subjected [Miller] to a Three Strike sentence of twenty-five years to life. This is exactly what a court can do under the expansive provisions of a habeas corpus petition. No [pending] trial will be postponed. No mini-trial will take place while a larger trial is pending. This court can appoint a referee to take evidence – or remand the case to the Fresno County Superior Court for an evidentiary hearing.”

As Miller explained, none of the judicial efficiency or other policy considerations expressed in *Garcia* were present in a post-conviction habeas proceeding.

⁹ In *Garcia, supra*, 14 Cal.4th 953 the California Supreme Court held, for judicial efficiency and other policy reasons, that a defendant cannot collaterally challenge, in a pending prosecution, a prior conviction for ineffective assistance of counsel, where the previous prior is alleged as a sentencing enhancement in the pending case.

Miller also explained that, although the habeas petition was filed with the 2006 case number in the caption, the 2002 case number is duly referred to in the body of the petition and that the People were “exalting form over substance to suggest that [Miller] is making an improper attack because the 2002 case number is not listed as part of the caption.” In fact, the alleged ineffective assistance of counsel relating to the 2002 plea and conviction is identified as “Claim No. 1” in the habeas petition.

Miller also countered the People’s criticism that he failed “to explicitly ask to withdraw his pleas in the 2002 case,” by citing the prayer for relief in which Miller requested an evidentiary hearing on the facts alleged in the Petition, and his request that the court “[g]rant such other and further relief as may be appropriate and necessary to dispose of the matter as justice may require.” As argued by Miller, if, after an evidentiary hearing, Miller was successful in persuading the court that he would not have pled guilty to the 2002 felonies if he had known they constituted strikes, the court would then have the authority to vacate or set aside the conviction, which would be the functional equivalent of a plea withdrawal. Just as in an appeal, the state would then have the right to retry petitioner for the 2002 offenses.

Order to Show Cause Issued

This court subsequently concluded that, given the factual concessions by the Attorney General, Miller had made a prima facie showing entitling him to issuance of an order to show cause (OSC) returnable before the superior court.¹⁰ On July 19, 2010, we ordered that the Department of Corrections and Rehabilitation show cause why Miller was not entitled to “appropriate relief” and that a written return “shall be served and filed by the Attorney General on or before 30 days from the date of this order, or on a date set by the Fresno County Superior Court for good cause, whichever is later.”

¹⁰ We noted the Attorney General had conceded that respondent “states a prima facie case for relief in his first two ineffective assistance of counsel claims.” (Capitalization omitted.)

Hearing on Order to Show Cause

On November 3, 2010, the superior court, Judge Hamlin, held a hearing on the OSC. The superior court noted that Miller's earlier petition had been denied because he did not have a right to be advised by the trial court as to the collateral consequences of his plea but "upon review from the Fifth District [in the OSC], it is clear that there is a more significant issue here, not just whether he had some Due Process or Fifth Amendment right to be properly advised of the collateral consequences of his plea, but rather whether his misadvice or incorrect advice from his previous attorney would violate his Sixth Amendment right to [e]ffect[ive]... representation of counsel."

Neither the Attorney General nor the District Attorney appeared. The superior court noted that the People had not filed a return; that the Attorney General had notice of the hearing; that Miller's counsel had contacted the Deputy Attorney General that morning and was told by the deputy attorney general that he had forwarded the matter to the District Attorney's office for them to appear; and that the District Attorney made no appearance and did not contact the court. The superior court stated that the People "having failed to file a return, have foregone the opportunity to participate in the ... merits of the claim" But the superior court also noted that the People's appearance "wouldn't make a whole lot of difference if they were here given the circumstances that are before me."

The superior court stated it had reviewed the petition and attached exhibits submitted to this court and then heard testimony from Miller. Miller testified that he would not have pled to the 2002 offenses if he had known they were strikes but would have instead taken his case to trial. Miller signed a declaration stating that, at the time he entered his pleas in 2002, Attorney Richardson specifically told him that "the charges were not strikes nor could they ever be charged as strikes," and that Richardson repeated this assertion when Miller retained him for the 2006 offenses. When the prior convictions were then charged as strikes, Miller sought new counsel, Kinney, who

informed him that the 2002 convictions could be charged as strikes. Although Kinney filed a pretrial motion to withdraw/set aside the 2002 plea, he failed to bring to the court's attention that Miller entered his earlier plea upon representation by Richardson that the offenses would never be charged as strikes. After Miller was convicted on the 2006 offenses, he contacted Richardson, who sent him a letter stating:

“What I told you in 2002 was under the current law your plea would not be treated as a strike. I also cautioned you that the strike laws were constantly changing.”

Superior Court Ruling on Habeas Petition

Based upon the evidence before it, the superior court found that Miller had met his burden and established by a preponderance of the evidence that he had been misadvised in the 2002 prior case about the status of the offenses he was pleading to – that the crimes were clearly strikes at the time; that the benefit he received by way of the plea was not disproportionate to the maximum sentence he could have received had he gone to trial; and that the evidence against Miller was “thin” and there were “serious” problems with witness testimony and it would have been illogical for Miller to accept the plea if he had known that the charges would become strikes on his record.

The superior court stated that “[t]he challenge here is as to the effect of the 2002 conviction on his sentencing in his 2006 case.” The superior court was “of the view that through this [habeas] proceeding [Miller] may not set aside the pleas in that 2002 case,” but that he could “attack the enhanced penalty he received in his 2006 case as a result of the use of those priors from the 2002 case, and his collateral attack today in this [habeas] proceeding would not invalidate the prior convictions or the sentence imposed as to those convictions, but it would prohibit the People from using those prior convictions to impose the enhanced punishment pursuant to the Three Strikes Law,” citing *People v. Horton* (1995) 11 Cal.4th 1068, 1129. The superior court then found that, while it “cannot and will not” set aside the convictions in the 2002 case, it would set aside or vacate

respondent's sentence in the 2006 case that was based on the 2002 convictions. The court stated that Miller "should not be punished in the 2006 case in any respect for the conviction and sentence in the 2002 case. So that means I am setting aside not only their use as strikes and as serious felony priors under 667 (a), but also as a prison prior under 667.5 (b). He faces then a maximum of nine years before Judge Nunez" at resentencing.

Re-Sentencing

On December 9, 2010, after the matter was re-referred to the probation department for a supplemental report and recommendation, the superior court, this time Judge Nunez, again vacated the previously imposed sentence on the 2006 conviction and re-sentenced Miller to an aggregate prison term of nine years: four years for inflicting corporal injury on a cohabitant, plus four years for the great bodily injury, plus one year for a prior prison term enhancement.

The deputy district attorney was present at the resentencing hearing. Miller's counsel reiterated the entire history of the writ process before requesting that Miller be sentenced to the midterm. The district attorney, who was the prosecutor on the 2006 case, recounted some of the facts of that case, describing the crime as an "unprovoked" and "extremely brutal act." The district attorney argued that Miller had a lengthy criminal history and there appeared to be no mitigating factors. She then requested that the court sentence Miller to the maximum of nine years. The district attorney noted that she was "unaware of what occurred with the appellate process, as well as the writ process, and ... was only made aware after Judge Hamlin made his decision regarding the two prior strikes, so [she could not] offer ... any further information as to what exactly occurred." But she acknowledged that there was "no problem with notice at all in this case"

DISCUSSION

Forfeiture

When the real party in interest does not file a return, it forgoes the opportunity to participate in the court's determination of the merits of the petitioner's claim. (*In re Serrano* (1995) 10 Cal.4th 447, 455.) Here, on July 19, 2010, this court ordered that the Department of Corrections and Rehabilitation show cause why Miller was not entitled to appropriate relief and that a written return "shall be served and filed by the Attorney General on or before 30 days from the date of this order, or on a date set by the Fresno County Superior Court for good cause, whichever is later." No response was received from the Attorney General or the District Attorney and neither appeared at the hearing on the OSC in the superior court on November 3, 2010. The People make no argument that notice was defective. The People have therefore forfeited the opportunity to appeal the merits of Miller's ineffective assistance of counsel claim.

But the People argue that there is "no such thing as a default on habeas corpus" and the present appeal is cognizable as it "raises a pure question of law." The People contend that Miller's "collateral attack" on his 2002 convictions should be barred "because to permit it would enable [Miller] to essentially undue a final plea bargain, whereby he would avoid the consequences of his prior convictions in the instant case while still retaining the benefits he had acquired from that plea bargain in his prior case." The People's argument is that the judgment should be reversed because Miller has not pursued the correct remedy – i.e., a petition for writ of habeas corpus to have his prior convictions set aside *in his prior 2002 case*, as opposed to having the strike findings set aside *in his subsequent 2006 case*." This is then the question before us.

Applicable Law

When sentencing a criminal defendant, a trial court may not rely on a prior felony conviction obtained in violation of the defendant's constitutional rights. (*People v. Allen* (1999) 21 Cal.4th 424, 426-427.) Thus, for example, a criminal defendant can

collaterally attack a prior conviction via a motion to strike in a subsequent prosecution, based on denial of counsel (*Gideon* error)¹¹ (*Garcia, supra*, 14 Cal.4th at p. 963) or failure to observe a defendant's *Boykin-Tahl* rights to a jury trial, silence, and confrontation. (*People v. Sumstine* (1984) 36 Cal.3d 909, 918-919, citing *Boykin v. Alabama, supra*, 395 U.S. 238 and *In re Tahl, supra*, 1 Cal.3d 122.)

However, a criminal defendant cannot collaterally challenge a prior conviction by a motion to strike or set aside in a subsequent prosecution, based on a claim of ineffective assistance of counsel. This is because such a challenge often requires (1) factual investigations of prior counsel's conduct and strategic decisions, (2) reconstruction of remote events, and (3) review of potentially voluminous records. (*Garcia, supra*, 14 Cal.4th at pp. 962, 965-966.) The *Garcia* court explained that permitting collateral challenges to prior convictions, *in subsequent prosecutions*, based on ineffective assistance of counsel in the prior case, would substantially delay and/or protract proceedings in the current offense, thereby undermining important policies of efficient and effective judicial administration of justice and the important interest of promoting the finality of judgments. (*Id.* at pp. 962, 965.)

If a defendant wishes to challenge the constitutional validity of a prior conviction based upon ineffective assistance of counsel, he must proceed by way of a petition for habeas corpus. (*People v. Allen, supra*, 21 Cal.4th at p. 429; see also *People v. Pope* (1979) 23 Cal.3d 412, 428, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) If such a challenge is successful and the prior conviction is set aside, the conviction no longer constitutes a proper basis for increased punishment for a defendant's subsequent offenses, and the defendant may then obtain reduction of the sentence that

¹¹ *Gideon v. Wainwright* (1963) 372 U.S. 335 (*Gideon*).

was imposed on the basis of the invalid prior conviction. (*Garcia, supra*, 14 Cal.4th at p. 966.)

So the question before us, as argued by the People, is whether Miller's current habeas petition is an improper attack on his 2002 prior convictions as they were used in the 2006 case and, if so, should he then be required to challenge the 2002 convictions directly in another habeas corpus proceeding.

Our review of the proceedings below leads us to conclude that Miller did use a correct procedure – he made a direct attack on his 2002 conviction (as well as the 2006 case) via a habeas petition. This is evident from the scope of Miller's habeas petition (where he clearly challenges the 2002 plea based on ineffective assistance of counsel) and his reply to the informal response filed in this court (where he specifically requested that his 2002 conviction be set aside), which the superior court stated it reviewed prior to its determination, as well as the People's informal opposition. The superior court then held an evidentiary hearing, at which the People elected to present no argument and make no appearance, to resolve any factual dispute and subsequently found that Miller was denied effective assistance of counsel at the time of his pleas in the 2002 case. The trial court, reasoning that it could not set aside the 2002 convictions, instead vacated the 2006 sentence.

Finding that the proper procedure was used by Miller, we conclude that the trial court, despite its reasoning to the contrary, did have the authority to vacate the 2002 convictions. Following further briefing of the parties to address whether the matter should be remanded back to the trial court to vacate the convictions or whether this court may do so on its own, we agree with Miller that, in this case, the latter is the appropriate action. Because all factual issues have been resolved below and the issue before us is purely a matter of law, we need not remand and may instead vacate the 2002 convictions on our own. (*People v. Rodgers* (1978) 79 Cal.App.3d 26, 33.)

We also requested in further briefing that the parties address whether the nine-year sentence imposed by Judge Nunez on December 9, 2010, in the 2006 conviction was proper if the 2002 convictions are set aside. The People argue that, should the prior 2002 convictions be vacated, the nine-year sentence improperly includes a prior prison term enhancement based on the 2002 case. Miller disagrees, correctly pointing out that, on appeal in this court (*People v. Miller* (Feb. 6, 2009, F053486) [nonpub.opn]), we directed that the abstract of judgment be amended to eliminate the one-year prior prison term enhancement for Miller’s 2002 convictions and to retain the one-year prison term enhancement related to his 1989 conviction. Accordingly, at resentencing on the 2006 conviction, the information before the court was complete and accurate when it imposed the nine-year term. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.)

DISPOSITION

The judgment is affirmed. The conviction in the 2002 case is vacated and the case is remanded to the trial court to allow Miller to withdraw his guilty plea. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1482.)

FRANSON, J.

WE CONCUR:

KANE, ACTING P.J.

POOCHIGIAN, J.

POOCHIGIAN, J., Concurring.

I concur because of the very specific, unique facts of this case, including but not limited to, the various waivers by omission and express concessions made by the People in both the superior court and in this appeal.

POOCHIGIAN, J.

I CONCUR:

KANE, ACTING P.J.