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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY CEDRIC RILEY,

Defendant and Appellant.

H036748

(Santa Clara County

Super. Ct. No. CC806663)

Defendant Anthony Cedric Riley pleaded no contest to two counts of inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)) and one count of criminal threats (Pen. Code, § 422), and he admitted that he had suffered two prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) that were also serious felony convictions (Pen. Code, § 667, subd. (a)) and had served prison terms for two prior felony convictions (Pen. Code, § 667.5, subd. (b)). The trial court struck one of the two strikes. It then expressed the intent to impose the minimum two strikes sentence, which the prosecutor informed the court was a prison term of 17 years and four months. Defendant's trial counsel did not challenge the prosecutor's representation or argue for a lower prison term. The trial court imposed that term.

On appeal, defendant contends that his trial counsel was prejudicially deficient in failing to argue to the trial court that it had discretion to impose a prison term of 16 years because the court could have, and there is a reasonable probability that it would have,

found that the criminal threats count occurred on the same occasion and arose from the same set of operative facts as one of the infliction of corporal injury counts. We agree. Accordingly, we will reverse the judgment and remand the matter for the trial court to exercise its discretion in this regard.

I. Background

At the preliminary examination, defendant's wife Mary-Ann Elizabeth Johnson testified that the couple had married on June 30, 2007, after a seven-month relationship. In July 2007, on the 30-day anniversary of their wedding, defendant and Johnson shared a bottle of wine. Later that evening, they got into an argument. After the argument had ended, defendant hit her 10 to 15 times in the face and head with his fist and pulled her hair. He ripped her shirt off, and, while holding her by her hair, he telephoned his father and said "I'm going to kill her. I'm going to kill her.'" Johnson was "scared" and "terrified," but she did not contact the police because defendant "didn't leave my side." Johnson sought medical attention for her injuries, which included four broken teeth. She lied about the cause of her injuries because she was trying to protect defendant, who was on parole.

On October 11, 2007, defendant and Johnson got into another argument, and he punched her in the nose. Again, she sought medical attention but lied about the cause of her broken nose, which required surgery. Johnson did not report this incident to the police.

Between the October incident and April 22, 2008, defendant did not hit Johnson. However, he "almost daily" threatened to kill her. She believed his threats and was scared. On at least one occasion during this period, they were in a car, and he "would wrench the steering wheel and say 'I'm going to kill you.'" When she was afraid, she would sleep locked in the bathroom or would leave the house and sleep in a hospital

parking lot. On April 22, 2008, defendant threatened to kill Johnson, and she called the police. At that time, Johnson also reported the prior incidents to the police.

Defendant was held to answer on a complaint charging him with a single count of inflicting corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)) with a great bodily injury allegation (Pen. Code, § 12022.7, subd. (e)). An information was subsequently filed charging him with two such counts, one in October 2007 and one in July 2007, both with great bodily injury allegations, and one count of criminal threats (Pen. Code, § 422) “[o]n or about and between July 10, 2007 and April 22, 2008.” In addition, the information alleged that defendant had suffered two prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) that were also serious felony convictions (Pen. Code, § 667, subd. (a)) and had served prison terms for two prior felony convictions (Pen. Code, § 667.5, subd. (b)).

Defendant’s trial counsel moved for dismissal of one of the great bodily injury allegations and the criminal threats count on the ground that they were not supported by evidence presented at the preliminary examination. The prosecutor responded to this motion by arguing that there had been at least four criminal threats. As the prosecutor viewed it, one criminal threat occurred in July 2007 at the time of the first beating. Another occurred between October 2007 and April 2008 when defendant repeatedly told Johnson that he was going to kill her. A third occurred when defendant threatened to kill Johnson while they were in a car. The fourth criminal threat occurred on April 22, 2008, the day that Johnson contacted the police. “I only have charged it as one count of 422 to encompass this entire area and I was going to ask for [a unanimity] instruction when we get to that point.” The court denied defendant’s motion. It expressly found that there was sufficient evidence to support the criminal threats count based on “the incident that happened in July.”

In July 2010, defendant entered into a plea agreement with the prosecution. He pleaded no contest to all three counts and admitted all of the special allegations except

the great bodily injury allegations in exchange for dismissal of those allegations and a cap on his prison term of 25 years to life. The parties stipulated that the preliminary examination transcript provided the factual basis for defendant's pleas and admissions.

The probation report asserted that "the present [criminal threats] offense" had occurred on April 22, 2008, although it also described defendant's other threats. The probation officer noted: "Due to [the] Strike Law, a sentence as prescribed in the negotiated plea currently cannot be reached." Consecutive sentences were "recommended . . . as these offenses occurred on different occasions." The probation report recommended imposition of a sentence of 75 years to life consecutive to 10 years.

Defendant asked the court to exercise its discretion to strike both of the strike findings. In December 2010, the trial court struck one of the two strike findings, and it asked the probation department to provide an updated probation report. The following colloquy then occurred. "[The Court:] It's probably my intention, based upon our conversations before, to impose what the court believes is the mitigated term of 17 eight which is, with one strike, the minimum sentence that the court believes can be imposed. But I need the appropriate documentation and input from probation in order to do that. [¶] Was it not 17 eight that we came up with? [¶] Speaker #3: I don't believe so. Just one second, your honor. [¶] The Court: Sure. [¶] (District Attorney [and] Public Defender conferring.) [¶] Mr. Dick [the prosecutor]: Your honor, my calculations are the court has five options: It's either 17 four. 18 four. 19 four, 20 four or 21 four. I believe that that's the limitations -- let me just have one second -- on the maximum on that. [¶] I apologize, your honor, it's up to 23 four, between 17 four and 23 four, and it can be any of those numbers in between. [¶] The Court: And so, again, it would be the court's intention to impose the mitigated term under the law, with the imposition of a single strike as indicated, for a period of 17 years four months. [¶] . . . [¶] So that sentencing itself will, essentially, be a formality" Defendant's trial counsel made no attempt to dispute the prosecutor's assertions regarding the court's "options."

In the probation department's supplemental report, it set forth the composition of the trial court's "suggested" sentence of 17 years and four months, which contemplated consecutive terms for the three counts.

At the January 2011 sentencing hearing, defendant's trial counsel made no argument regarding the length of the prison sentence, and the trial court sentenced defendant to 17 years and four months in state prison. This sentence was composed of the lower doubled term of four years for one of the two infliction of corporal injury counts, a consecutive doubled one-third the midterm of two years for the other infliction of corporal injury count, a consecutive doubled one-third the midterm of one year and four months for the criminal threats count, and a consecutive 10-year term for the two Penal Code section 667, subdivision (a) enhancements. The court struck the punishment for one of the prison priors and stayed the punishment for the other under Penal Code section 1385. Defendant timely filed a notice of appeal challenging only his sentence.

II. Discussion

The sole issue on appeal is whether defendant's trial counsel was prejudicially deficient in failing to argue to the trial court that the "minimum sentence that . . . can be imposed" was not 17 years and four months but 16 years because the trial court had discretion to impose a concurrent term for the criminal threats count.

When a defendant challenges his conviction based on a claim of ineffective assistance of counsel, he must prove that counsel's performance was deficient and that his defense was prejudiced by those deficiencies. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland*, at p. 687.) "Judicial

scrutiny of counsel's performance must be highly deferential . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, at p. 689.)

Defendant's trial counsel was plainly deficient in failing to recognize that the minimum sentence was not 17 years and four months but 16 years.

If a defendant is found to have suffered one or more strikes, as defendant was here, and "there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section." (Pen. Code, § 1170.12, subd. (a)(6).)

Here, the prosecutor charged a single criminal threats count over a period of time that encompassed both of the infliction of corporal injury counts. The prosecutor also acknowledged that one of the criminal threats that formed a potential basis for the criminal threats count had occurred on the same occasion as the July infliction of corporal injury count. Furthermore, the court that denied defendant's motion to dismiss the criminal threats count based its ruling that there was sufficient evidence to support the criminal threats count on the July incident when both infliction of corporal injury and a criminal threat occurred. Hence, it should have been readily apparent to defendant's trial counsel that the court could find that the criminal threats count had occurred "on the same occasion" and arisen from "the same set of operative facts" as the July infliction of corporal injury count. Had the court made such a finding, it could have imposed a concurrent, rather than consecutive, term for the criminal threats count, thereby reducing defendant's total prison sentence to 16 years, rather than 17 years and four months.

The Attorney General argues that defendant's trial counsel's failure to make such an argument was "reasonable" because "trial counsel had a reasoned basis to believe that [the criminal threats count] did not arise from the same set of operative facts as [the infliction of corporal injury counts]." Even if there was "a reasoned basis" for finding

that the criminal threats count did not occur on the same occasion as or arise from the same set of operative facts as either of the infliction of corporal injury counts, defense counsel, as defendant's advocate, had an obligation to promote defendant's interest, which was also supported by the record.

The Attorney General also argues that defendant's trial counsel's failure to argue for a concurrent term on the criminal threats count was not deficient because there was "no good faith basis that such a legal argument was supported by the record." The record actually contains a substantial basis for such an argument, as we have pointed out above. Both the prosecutor and the court relied on the July incident to support the criminal threats count when defendant's dismissal motion was denied.

Finally, the Attorney General asserts that defendant has failed to show prejudice because the trial court would not "have been amenable to a legal argument that was contradicted by the record of the preliminary hearing." The evidence presented at the preliminary examination reflected that there were several criminal threats, among them one during the July 2007 infliction of corporal injury offense. The argument that defendant's trial counsel failed to make was not "contradicted" but confirmed by the record of the preliminary examination.

Defendant has established that there is a reasonable probability that the trial court would have credited the omitted argument. The court expressed the intent to impose the "minimum sentence that . . . can be imposed" and asked counsel to advise it what that was. When the prosecutor asserted that the minimum sentence was 17 years and four months, the court imposed that sentence. If the court had understood that it had the discretion to impose a lower minimum sentence of 16 years, there is a reasonable probability that it would have done so.

III. Disposition

The judgment is reversed. On remand, the trial court shall decide whether to exercise its discretion to impose a concurrent, rather than consecutive, term for the criminal threats count.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.