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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICENTE LOPEZ, Defendant and Appellant.	H037070 (Monterey County Super. Ct. No. SS062791)

Defendant Vicente Lopez was convicted by a jury of two counts of attempted murder in violation of Penal Code sections 664 and 187, subdivision (a).[1] The jury did not find that the crimes had been committed with premeditation, as these counts had been charged. The jury also convicted Lopez of three counts of assault with a firearm in violation of section 245, subdivision (a)(2); and one count of street terrorism in violation of section 186.22, subdivision (a). The jury additionally found true that Lopez had inflicted great bodily injury within the meaning of section 12022.7, subdivision (a) with respect to all counts except one assault charge; that the offenses except street terrorism were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1); and that the offenses except one assault charge were committed with the personal use of a firearm within the meaning of sections 12022.53 or

[1] Further unspecified statutory references are to the Penal Code.

12022.5. On the first count of attempted murder, Lopez was sentenced to nine years in prison, plus 25 years to life for the use of a firearm causing great bodily injury, and 10 years for the criminal street gang allegation, for a total sentence on this count of 44 years to life in prison.

On appeal, Lopez posits that had he been convicted of premeditated attempted murder, an assertedly more serious crime, his sentence would have been four years shorter. This is because section 186.22, subdivision (b)(1), which adds 10 years to a determinate sentence for a conviction for a violent felony committed for the benefit of a criminal street gang, would not have applied and subdivision (b)(5) of this section would have applied instead. This latter subdivision would have required that Lopez serve 15 years of an indeterminate sentence for attempted premeditated murder before being paroled, thus not adding any time to the sentence. Lopez contends, for the first time on appeal, that this asserted discrepancy in sentencing violates his right to equal protection. In the event this claim is determined to be forfeited, he alternatively contends that his counsel's failure to raise the claim below constituted ineffective assistance of counsel. We conclude that the claim has indeed been forfeited and that Lopez has failed to demonstrate ineffective assistance of counsel. We therefore affirm the judgment.

STATEMENT OF THE CASE

I. *Factual Background*[2]

Around 3:00 a.m. on October 13, 2006, Silvino Ayala was riding his bike to a friend's house in Seaside. Ayala had previously been an active member of the Seaside Norteno gang but had been expelled two years before for being a "snitch" after he testified in court against another Norteno gang member, considered the worst act a gang member can do. Retaliation for such a confirmed act can be lethal. That night, Ayala came upon Lopez and Mauricio Morales, who were walking towards him on the street.

[2] We take the underlying facts from the trial testimony and the probation report.

Ayala had grown up in Seaside with Lopez, whom Ayala knew to still be an active Norteno gang member. Some weeks before, Lopez had asked Ayala to provide his "paperwork," meaning police reports or other documents showing the degree of Ayala's previous cooperation with authorities. Lopez said he wanted the "paperwork" so he could "clear [Ayala's] name" and allow him back into the Norteno gang.

As Ayala recognized the two men walking towards him on the street, he stopped his bike. When they made contact with Ayala, Lopez and Morales asked him several times if he had any methamphetamine, and they invited him into a nearby alley to use drugs with them. Ayala was frightened of the two men, believing them to be out to harm him for having cooperated with authorities against a fellow gang member. He told the men that he didn't have any drugs on him but that he would go home and get some methamphetamine for them and return, hoping that this would get him out of the immediately threatening situation.

As Ayala turned to leave on his bike, he heard Lopez ask Morales to "give him a pipe," which Ayala thought referred to a gun. He saw Morales hand Lopez a gun and threw his backpack at them in an effort to get away. Ayala saw Lopez point the gun at his head and he crouched down to avoid being shot. Ayala heard the weapon click twice but it failed to fire. Then Ayala slapped the gun to the side, but at the same time he heard a shot and felt a bullet graze the side of his head.

Ayala tried to get off his bike. He and Lopez struggled and Lopez hit him in the head with the gun. Ayala pushed Lopez away and tried to flee but ran into a fence. He heard another shot and was struck by a second bullet in the back near his shoulder. Ayala then rushed towards Lopez and the two struggled. During their struggle, the gun became tangled in Lopez's sweatshirt. Ayala managed to grab the sweatshirt and the gun, which he determined was out of bullets, and threw both items under a parked car. Lopez and Morales then punched and kicked Ayala until he fell to the ground. They continued to

punch and kick him while he was on the ground, and they wanted to know where the gun and sweatshirt were.

At that point, a woman nearby, having heard the ruckus, yelled that she had called police and that they were on their way. Lopez and Morales fled the scene on foot, but police found Morales and detained him. Ayala got on his bike, until he made contact with police and began receiving emergency medical care for his injuries. Morales was brought to where Ayala was being attended. Ayala identified him as the person who was with the shooter, Lopez, and who had joined Lopez in beating him up during and after the shooting. Ayala told police that he knew both Morales and Lopez, and that the three had been Norteno gang members but were no longer friendly. Ayala was taken to the hospital, where he was treated for two gunshot wounds and another head injury. The treating doctor observed that the bullets' near misses of Ayala's skull and vital organs made him the "luckiest patient [the doctor had] ever seen."

Morales later admitted to police that he had brought the gun to the encounter concealed in his waist but said that Lopez had grabbed it from him and shot Ayala.[3] Lopez disappeared after the shooting but was arrested three years later.

II. *Procedural Background*

After being bound over for trial, Lopez was charged by amended information filed April 20, 2011, with two counts of attempted premeditated murder in violation of sections 187, subdivision (a) and 664 (counts 1 & 2); two counts of assault with a firearm in violation of section 245, subdivision (a)(2) (counts 3 & 4); assault with force likely to cause great bodily injury in violation of section 245, subdivision (a)(1) (count 5); and street terrorism in violation of section 186.22, subdivision (a) (count 6). The information also alleged the enhancement of great bodily injury within the meaning of

[3] Morales was later convicted by plea and was sentenced to nine years, eight months in prison. He is not a party to this case.

section 12022.7, subdivision (a) as to all counts; the criminal street gang enhancement within the meaning of section 186.22, subdivision (b)(1) as to counts 1-5; and use-of-firearm allegations within the meaning of section 12022.53, subdivisions (b)-(d) as to counts 1 and 2, and section 12022.5, subdivision (a) as to counts 3, 4, and 6. At trial, count 5 was amended to substitute a third charge of assault with a firearm in violation of section 245, subdivision (a)(2) instead of a violation of subdivision (a)(1) and to add the use-of-firearm enhancement provided at section 12022.5, subdivision (a) in addition to the other already pleaded enhancements.

After a jury trial, Lopez was convicted on all counts, but the jury was unable to find that Lopez had committed attempted murder willfully and with deliberation and premeditation as charged, reducing counts 1 and 2 to non-premeditated attempted murder. The jury also found all enhancement allegations true except those concerning the personal use of a firearm and infliction of great bodily injury with respect to count 5.

The People submitted a sentencing memorandum in which they outlined Lopez's prior criminal history, which was composed of a significant and violent record as a juvenile. The memorandum argued the presence of aggravating factors and requested that Lopez be sentenced for attempted murder (counts 1 & 2, concurrent) to the upper term of nine years, plus 10 years consecutive for the gang enhancement, plus 25 years to life for the firearm enhancement, for a term of 44 years to life in prison; for assault (counts 3 and 4) to a total term of 27 years as to each count, stayed under section 654; for assault (count 5) to a total term of nine years, concurrent with counts 1 and 2; for street terrorism (count 6) to a term of 16 years, concurrent to counts 1, 2, and 5; for a total term of 44 years to life in prison.

The probation report outlined Lopez's juvenile criminal history, including his gang involvement. It also addressed possible factors in aggravation and lack of factors in mitigation and base sentencing ranges, along with special allegations and enhancements

and accompanying sentencing ranges for these, where applicable.[4] The report generally recommended that Lopez be sentenced to "the term prescribed by law."

At sentencing on June 17, 2011, the court announced that it would "follow the People's recommendation," noting that in addition to attempted murder, Lopez "was convicted of other crimes for which consecutive sentence could have been imposed but for which concurrent sentences are being imposed." The court accordingly sentenced Lopez on count 1 to the upper term of nine years, plus 10 years consecutive for the gang enhancement, plus 25 years to life consecutive for the use-of-firearm enhancement, for a total of 44 years to life in prison. The court imposed the same sentence with respect to count 2, concurrent. As to counts 3 and 4, the court imposed as to each the upper term of four years, plus an additional 10 years consecutive for the gang enhancement, plus an additional 10 years consecutive for the firearm enhancement, plus an additional three years consecutive for the great bodily injury enhancement, for a total of 27 years as to each, all stayed under section 654. As to count 5, the court imposed the upper term of four years, plus an additional five years consecutive for the gang enhancement, for a total of nine years, to be served concurrently to counts 1 and 2. As to count 6, the court imposed the upper term of three years, plus an additional three years consecutive for the great bodily injury enhancement, plus an additional 10 years consecutive for the firearm enhancement, for a total of 16 years, to be served concurrent to counts 1, 2, and 5. Thus, the total term imposed on all counts with accompanying enhancements was 44 years to life.

Defendant timely appealed.

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[4] As to counts 3-5, the probation report noted the enhancement at section 12022.5, subdivision (a) presented a range of three, four, or 10 years. As to count 6, the report presented the same range for the same enhancement but noted that this additional term would be "consecutive."

DISCUSSION

I. Defendant's Equal Protection Claim is Forfeited

As Lopez points out, attempted murder with premeditation is punishable by an indeterminate top sentence of 15 years to life in prison. (§§ 187, 189, 190, subd. (a), & 664, subd. (a).) Attempted murder without premeditation, of which Lopez was convicted, is punishable by a determinate sentence with an upper term of nine years, as was imposed here. (*Ibid*.) But he was also sentenced on this count to an additional 25 years to life for the firearm enhancement under section 12022.53. And ten years was added to the base nine-year term under section 186.22, subdivision (b)(1)(C), the applicable enhancement if a defendant is convicted of a violent felony for the benefit of, at the direction of, or in association with any criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members, and the defendant receives a determinate base term. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004 (*Lopez*).) "Section 186.22(b)(1)(C) does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' (Pen. Code § 186.22, subd. (b)(5).)" (*Lopez, supra*, at p. 1004.) Where this is the case, section 186.22, subdivision (b)(5) applies instead and imposes a minimum term of 15 years before the defendant may be considered eligible for parole rather than an additional term for years. Even if, as here, the sentence for an enhancement adds an indeterminate or life term to a base term, if the base term for the particular crime is a determinate term, as here, then subdivision (b)(1)(C) of section 186.22 applies to add 10 years to the total term instead of subdivision (b)(5) merely affecting time served before parole eligibility. (*People v. Sok* (2010) 181 Cal.App.4th 88, 94-95; *People v. Montes* (2003) 31 Cal.4th 350, 353, 359-361.)

Thus, as defendant acknowledges, based on the attempted-murder-without-premeditation offense of which he was convicted, plus enhancements, he was properly sentenced on count 1 to 44 years to life. His challenge rests on the assertion that had he

instead been convicted of attempted murder with premeditation, an arguably more serious crime, he would have received a shorter sentence on this count of 40 years to life, composed of an indeterminate base term of 15 years to life (§§ 187, 189, 190, subd. (a), 664, subd. (a)), plus 25 years to life for the firearm enhancement (§ 12022.53), with a minimum parole eligibility of 15 years for the gang enhancement under section 186.22, subdivision (b)(5). He contends, for the first time on appeal, that this alleged disparity violates principles of equal protection.

Respondent, for its part, contends first that Lopez's equal protection claim has been forfeited, but that it fails on the merits in any event. We conclude that the claim has indeed been forfeited.

" ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590, quoting *United States v. Olano* (1993) 507 U.S. 725, 731.) The purpose of the forfeiture doctrine " 'is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

Our high court has applied the doctrine of forfeiture in a variety of contexts to bar claims not preserved in the trial court in which the appellant, as here, had asserted an abridgement of fundamental constitutional rights. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971, disapproved on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Courts in a number of instances have specifically found that unpreserved equal protection claims, such as the one made by defendant here, were forfeited. (See, e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14 [claim that denial of motion to exclude testimony based upon possible hypnosis of witness violated equal protection forfeited]; *People v. Burgener* (2003) 29 Cal.4th 833, 861, fn. 3 [claim that practice of supplementing jury panels with additional minority prospective jurors violated equal protection forfeited]; *People v. Carpenter* (1997) 15 Cal.4th 312, 362 [claim that denial of severance motion violated equal protection forfeited], superseded by statute on other grounds as recognized in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, superseded by statute on other grounds as recognized in *Sharp v. Superior Court* (2012) 54 Cal.4th 168, 172; *People v. Sumahit* (2005) 128 Cal.App.4th 347, 354, fn. 3 [claim that departmental practice of not recording SVP interviews violated equal protection forfeited]; *People v. Hall* (2002) 101 Cal.App.4th 1009, 1024 [claim that interpretation of statute authorizing AIDS testing violated equal protection forfeited].)

The forfeiture doctrine generally "applies in the context of sentencing as in other areas of criminal law." (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 (*Sheena K.*).) For instance, in *People* v. *Scott* (1994) 9 Cal.4th 331, 352, the high court held that a defendant cannot complain for the first time on appeal about the trial court's failure to state reasons for a sentencing choice, reasoning that "[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id*. at p. 353; see also *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [People forfeited its unpreserved challenge to court's failure to state reasons for not imposing restitution fine, a decision constituting discretionary sentencing choice]; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511-1512 [defendant's unpreserved claim that the court committed sentencing error by failing to specify its reasons for selecting an upper term sentence forfeited].)

As it applies to sentencing error claims, there is a narrow exception to the forfeiture doctrine recognized by the high court for sentences that are not authorized under the law. As the Supreme Court explained in *People v. Smith* (2001) 24 Cal.4th 849, 852, "We have . . . created a narrow exception to the waiver rule for ' "unauthorized sentences' or sentences entered in "excess of jurisdiction." ' [Citation.] Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.] We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable." But Lopez's claim here is not one concerning the imposition of an unauthorized sentence that would fall within the "narrow exception to the waiver rule" for unpreserved claims of sentencing error. (*People v. Smith*, *supra*, 24 Cal.4th at p. 852.)

While acknowledging that the forfeiture doctrine applies to the claim, Lopez requests that we exercise discretion to reach it anyway because, he asserts, "it presents an important issue of constitutional law" that can be reached in any event through his alternative claim for ineffective assistance of counsel. But, as respondent notes, appellate discretion to reach unpreserved constitutional claims is generally exercised in circumstances not present here—where the claims present pure questions of law on undisputed facts; or concerning enforcement of a penal statute, where the asserted error fundamentally affects the validity of the judgment or important policy issues are at stake. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Smith* (2001) 24 Cal.4th 849, 852-853; *Sheena K.*, *supra*, 40 Cal.4th at pp. 888-889; *People v. Delacy* (2011)

192 Cal.App.4th 1481, 1493; *In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.) We decline to exercise such discretion here where Lopez's claim involves not pure questions of law but the trial court's myriad discretionary sentencing choices as applied to his specific crimes.[5]

We accordingly conclude that Lopez's equal protection claim concerning alleged disparity in the length of his sentence has been forfeited.

II. *Defendant Has Failed to Demonstrate Ineffective Assistance of Counsel*

Anticipating forfeiture, Lopez contends in the alternative that his attorney's failure to have objected to his sentence below on equal protection grounds constituted ineffective assistance of counsel.

An ineffective assistance of counsel claim requires a showing that "counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial." (*People v. Seaton* (2001) 26 Cal.4th 598, 666, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "[T]he burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also *People v. Weaver* (2001) 26 Cal.4th 876, 961.) This means that the defendant "must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to [the] defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]"

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[5] Lopez suggests that the remedy for the equal protection violation he asserts is that the base sentence for the crime of attempted murder without premeditation of which he was convicted can be reduced from the upper term of nine years to the lower term of five years, eliminating the four-year disparity.

(*People v. Kipp* (1998) 18 Cal.4th 349, 366, quoting *Strickland, supra*, 466 U.S. at p. 686.)

The first element of an ineffective assistance of counsel claim "requires a showing that 'counsel's representation fell below an objective standard of reasonableness.' [Citations.]" (*In re Marquez* (1992) 1 Cal.4th 584, 602-603, quoting *Strickland, supra,* 466 U.S. at p. 688.) " 'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . .' and must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) Further, "[i]f the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*Ibid.; People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [where record is lacking on appeal, ineffective assistance claim more appropriately litigated via habeas proceeding].)

As to the second element of a claim of ineffective assistance of counsel, a defendant must show that he was prejudiced by counsel's conduct, that is, it is reasonably probable a more favorable result would have obtained absent counsel's failings. (*Strickland, supra*, 466 U.S. at p. 688; *People v. Lucas* (1995) 12 Cal.4th 415, 436; *In re Cordero* (1988) 46 Cal.3d 161, 180.) " 'The proof . . . must be a demonstrable reality and not a speculative matter.' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 656; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) But the court need not determine that counsel's performance was indeed deficient before examining the prejudice asserted as a result of the alleged deficiencies. "If it is easier to dispose of an ineffectiveness claim on

the ground of lack of prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.)

It is against this backdrop that we examine defendant's claim of ineffective assistance in his counsel's failure to have objected to his sentence on equal protection grounds.

"The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in similar fashion." (*People v. Leng* (1999) 71 Cal.App.4th 1, 11.) First, we ask whether the two classes are similarly situated with respect to the purpose of the law in question, but are treated differently. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 (*Cooley*).) If groups are similarly situated but treated differently, the state must then provide a rational justification for the disparity. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200-1201.) Thus, " '[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.]" (*Cooley, supra*, 29 Cal.4th at p. 253.) In addition, "[o]ne who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation." (*People v. Black* (1941) 45 Cal.App.2d 87, 96; *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212.) Simply put, the record must contain evidence showing that appellant is actually aggrieved by the law he attacks. (*People v. Black, supra*, 45 Cal.App.2d at p. 96.)

In sum, Lopez cannot show that had he been convicted of premeditated attempted murder, he would have in fact been sentenced to four years less than he was. The range of sentencing options that would be presented to the trial court in that event precludes such a showing. As it is, the court exercised discretion to impose concurrent sentences that could have been imposed consecutively, and it may well not have done so for a more

serious crime. This, in and of itself, precludes a showing that Lopez was aggrieved by "the juncture of the three laws," as he puts it, that resulted in him being sentenced to 44 years to life rather than four years less, assuming this sort of confluence of laws could result in an equal protection violation.

Given this inherent failure of his equal protection argument, Lopez cannot demonstrate that he suffered any prejudice as a result of his counsel's failure to have asserted the claim below. Moreover, because the trial court had a variety of sentencing options before it, including consecutive sentences that would have resulted in a sentence more than twice as long, and did not impose the most punitive one, counsel could well have had good tactical reason not to object to the sentence meted out. Thus, Lopez has failed to establish either element of ineffective assistance of counsel—his counsel's deficient performance or prejudice as a result.

DISPOSITION

The judgment is affirmed.

Duffy, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.