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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ANDRE E. WATSON,

on Habeas Corpus.

B259946

(Los Angeles County
Super. Ct. No. BA123413)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Petition denied.

Andre E. Watson, in pro. per.; and Melanie K. Dorian, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Ana R. Duarte and John Chang, Deputy Attorneys General, for Respondent.

INTRODUCTION

Petitioner Andre E. Watson filed this petition for a writ of habeas corpus seeking to have his sentence, imposed under the three strikes law, set aside. He contends that under the Supreme Court’s decision in *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*), his two prior strike offenses must be treated as a single strike. We disagree and deny his petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. PETITIONER’S CONVICTIONS

In 1997, petitioner was convicted of second degree murder (Pen. Code,¹ § 187, subd. (a)) and possession of a firearm by a felon (former § 12021, subd. (a)(1)). He was sentenced under the three strikes law (§§ 667, subds. (a)-(i), 1170.12) after he admitted that he had suffered two prior strike convictions. (*People v. Watson* (Nov. 25, 1998, B115997) [nonpub. opn.].)²

The focus of this petition is on the two prior strike convictions that arose out of an incident in 1966. (*People v. Watson* (Super. Ct. L.A. County, 1967, No. A217011).) Petitioner was a passenger in the victim’s car. He pulled out a gun, directed the victim where to drive, and then demanded money from him. Petitioner then stole the car after the victim claimed not to have any money. For this incident, petitioner was convicted of two strikes—robbery (§ 211) and attempted kidnapping for the purpose robbery (§§ 209, 664). (*People v. Watson, supra*, B115997.)

B. THE HABEAS PETITIONS

On August 28, 2014, petitioner filed a petition for writ of habeas corpus in the trial court, seeking reduction of his sentence under *Vargas* (decided on July 10, 2014), which addressed the question “whether two prior convictions arising out of a single act against a

¹ All further statutory references are to the Penal Code.

² Petitioner appealed, contending the trial court abused its discretion in refusing to strike one of his prior convictions under section 1385. We found no abuse of discretion and affirmed. (*People v. Watson, supra*, B115997.)

single victim can constitute two strikes under the Three Strikes law.” (*Vargas, supra*, 59 Cal.4th at p. 637.) The court denied his petition, concluding that *Vargas* did not apply retroactively to his case.

On November 7, 2014, petitioner filed the instant petition in this court on the same ground previously raised in his petition in the trial court. On April 21, 2015, we issued an order to show cause why the petition should not be granted. In their return to the petition, the People do not address whether *Vargas* applies retroactively. Instead, they contend that petitioner is not entitled to relief because he has not shown that the facts underlying the two prior strike convictions fall within the scope of the *Vargas* holding. We therefore will assume, for purposes of this case, that *Vargas* applies retroactively.

DISCUSSION

A. THE VARGAS HOLDING

In *Vargas*, the court explained that the three strikes law envisioned that a typical defendant would have two separate chances to reform before facing a lifetime in prison for a third strike. (*Vargas, supra*, 59 Cal.4th at p. 638.) Nevertheless, the court recognized that not every defendant would have those opportunities based on the holdings in two of its prior cases. In *People v. Fuhrman* (1997) 16 Cal.4th 930, the court held that a defendant may suffer two qualifying felony convictions in the same case when they resulted from “crimes so closely connected in their commission that they were tried in the same proceeding.” (*Vargas, supra*, at p. 638.) In *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), the court concluded that even when a defendant’s “previous two crimes could not be separately punished at the time they were adjudicated because they were committed during the same course of conduct (§ 654), . . . such close factual and temporal connection did not prevent the trial court from later treating the two convictions as separate strikes when the [defendant] reoffended.” (*Vargas, supra*, at p. 638.)

In turning to the facts before it, the *Vargas* court distinguished *Fuhrman* and *Benson*, recognizing that the holdings in those two cases were not controlling. The

Vargas court described the case as raising a different issue: “The instant case presents a more extreme situation: Defendant’s two prior felony convictions—one for robbery and one for carjacking—were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based on the same act, committed at the same time, against the same victim.” (*Vargas, supra*, 59 Cal.4th at p. 638.) The court “conclude[d] this is one of the extraordinary cases [citation] in which the nature and circumstances of defendant’s prior strike convictions demonstrate the trial court was required to dismiss one of them because failure to do so would be inconsistent with the spirit of the Three Strikes law.” (*Id.* at p. 649.)

Although the holding in *Vargas* is narrow, we do not construe it to be limited to its facts. We can conceive of other convictions that might fall within its scope (e.g., a defendant convicted of criminal threats and robbery when the threats were used to instill fear in order to steal the victim’s possessions). The determinative question whenever a defendant contends that he or she has been sentenced on multiple strikes in violation of *Vargas* is whether those strikes arose out of the same criminal act committed against a single victim. This is the analytical focus we use when considering defendant’s claim here.

B. VARGAS IS DISTINGUISHABLE

Given the age of the prior convictions, petitioner was only able to locate a few of the records in that case, including the information, the minute order of the jury verdicts, and the probation officer’s report. He also has provided a transcript of the sentencing hearing in this case that contains his counsel’s argument that the trial court should strike one of the two prior convictions under section 1385. The People object to the use of the probation officer’s report and defense counsel’s argument, claiming that they are inadmissible to prove that the prior convictions arose “out of a single act against a single victim.” (*Vargas, supra*, 59 Cal.4th at p. 637.) We need not resolve this dispute because we conclude that petitioner is not entitled to relief even when we consider this information.

According to the probation officer's report, the victim was driving north on La Brea Avenue in his Cadillac when he stopped to pick up petitioner and Clifford McDaniel at Washington Boulevard. Petitioner got into the front seat, and McDaniel got into the back. When they neared Third Street, petitioner pointed a gun at the victim and told him to turn left at the next corner. When the victim failed to make the turn, petitioner told him: "Turn in a hurry, or I'll kill you." At this point, McDaniel also pulled a gun out and threatened the victim. The victim turned left on Beverly Boulevard and pulled to the curb. The petitioner demanded the victim's money, but the victim stated that he did not have any money. Petitioner and McDaniel then threatened to kill the victim, who exited the car. After the victim left, petitioner and McDaniel drove away in the car. Petitioner was subsequently convicted of robbery and attempted kidnapping for the purpose of robbery.

Based on the facts underlying the two prior strike convictions, this case is distinguishable from *Vargas*. In *Vargas*, the "[d]efendant was convicted . . . of two different crimes (robbery and carjacking) that were based on her commission of the same act (forcibly taking the victim's car)" (*Vargas, supra*, 59 Cal.4th at p. 645.) In this case, petitioner was not convicted of two offenses for the same act. There were multiple acts, including (1) the act of kidnapping the victim (for purposes of robbing him) and (2) the subsequent act of robbing the victim. This case is therefore more like *Benson* than *Vargas*.

In *Benson*, the defendant entered his neighbor's apartment, grabbed her from behind, forced her to the floor, and stabbed her approximately 20 times. (*Benson, supra*, 18 Cal.4th at p. 27.) Even though the defendant's actions occurred during an indivisible course of conduct, he could be punished for two separate strikes under the three strikes law because he committed multiple acts—i.e., residential burglary (by entering the residence to commit a felonious assault); and assault with the intent to murder. *Vargas*, in contrast, involved the single act of robbing a vehicle that was punishable under both the robbery and carjacking statutes. As the court stated in *Vargas* in distinguishing *Benson*: "*Benson* involved multiple criminal *acts* (albeit committed in a single course of

conduct) and not, as here, multiple criminal *convictions* stemming from the commission of a single act.” (*Vargas, supra*, 59 Cal.4th at p. 648.)³

Accordingly, we find that the petition lacks merit.

DISPOSITION

The petition is denied.

BLUMENFELD, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

³ In *Benson*, the court stated that “the electorate and the Legislature rationally could—and did—conclude that a person who committed additional violence in the course of a prior serious felony (e.g., shooting or pistol-whipping a victim during a robbery, or assaulting a victim during a burglary) should be treated more harshly than an individual who committed the same initial felony, but whose criminal conduct did not include such additional violence.” (*Benson, supra*, 18 Cal.4th at p. 35.) In *Vargas*, the court quoted this language and then distinguished *Benson* as follows: “But where, as here, an offender committed but a single act, we disagree she poses a greater risk to society merely because the Legislature has chosen to criminalize the act in different ways.” (*Vargas*, 59 Cal.4th at p. 646.) Throughout the decision, *Vargas* emphasized that the key distinction in *Benson* was the existence of multiple acts—rather than the violent nature of those additional acts—in that case. (See, e.g., *Vargas*, at p. 637 [framing the issue as “whether two prior convictions arising out of a single act against a single victim can constitute two strikes under the Three Strikes law”].)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.