Filed 4/3/17 P. v. Clark CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ARTHUR CLARK, Defendant and Appellant.	B267365 (Los Angeles County Super. Ct. No. YA062995)

APPEAL from an order of the Superior Court of Los Angeles County, Eric C. Taylor, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant William Arthur Clark appeals from the order denying his post-judgment "motion for resentencing." Clark was convicted in 2007 of possession of a firearm by a felon, possession of a controlled substance (two counts), and manufacturing a controlled substance, with arming in commission of a drug offense, prior prison term, prior serious felony conviction, and prior drug conviction findings. (Pen. Code, §§ 12021, 12022, 667.5, 667, subd. (b)–(i); Health & Saf. Code, §§ 11350, 11370.2, subd. (b), 11379.6.)[1] He was sentenced to state prison for 30 years. We affirmed his convictions and his sentence. (*People v. Clark* (May 29, 2008, B199861) [nonpub. opn.].)

On July 29, 2015, Clark filed a motion in the trial court asking to be resentenced (post-judgment motion). The trial court entered an order denying the motion, and it is from this order that Clark now appeals.

As we discuss, we find no error, and thus we affirm.

BACKGROUND

Although Clark was convicted on four counts in 2007, he received concurrent prison terms on three of those counts. His post-judgment motion was addressed only to the sentence imposed for his conviction on count five, a violation of Health and Safety Code section 11379.6 (manufacturing a controlled substance). On this count, the trial court sentenced Clark to a term of 30 years, consisting of the following: 14 years for violating section 11379.6 (the high term of seven years, doubled under the Three Strikes law), plus four years on the arming

---

[1] All further statutory references are to the Penal Code unless otherwise specified.

enhancement (§ 12022, subd. (c)), plus a consecutive 12 years based on four prior drug conviction enhancements (Health & Saf. Code § 11370.2, subd. (b)).

In his post-judgment motion, Clark asserted the trial court should dismiss or strike three of the four prior drug conviction enhancements in light of *People v. Sasser* (2015) 61 Cal.4th 1 (*Sasser*), which Clark asserted would have the effect of reducing his sentence by nine years. The District Attorney opposed this request, arguing that Clark was not entitled to any relief under *Sasser*.

After noting that a copy of Clark's motion had been mailed to the attorney who represented Clark at trial, and that that attorney had neither filed a recommendation nor contacted the court, the trial court ruled on Clark's motion in the absence of either Clark or any attorney representing him. In a minute order, the court held: "After reviewing the motion for resentencing and attached response from the District Attorney, the request is denied. [¶] Further, there is no reason this issue could not have been brought on appeal. No legal cause."

CONTENTION

Clark contends he had a right, guaranteed under the Sixth Amendment to the United States Constitution, to counsel at the hearing on his post-judgment motion. Clark contends that because he was denied his right to counsel, we must remand to the trial court for another hearing on his motion at which he is represented by counsel.

DISCUSSION

1. *Sixth Amendment right to counsel.*

"The Sixth Amendment right to the assistance of counsel applies *at all critical stages* of a criminal proceeding in which the

substantial rights of a defendant are at stake. [Citation.]" (*People v. Crayton* (2002) 28 Cal.4th 346, 362, italics added.) However, the "right to appointed counsel extends to the first appeal of right, and no further." (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [107 S.Ct. 1990] ["We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, [citation], and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further."].)[2]

Clark argues that the Sixth Amendment right to counsel extends to sentencing proceedings, but this is true only as to plenary sentencing hearings (either at the defendant's original trial or after a reversal and remand for new sentencing); it is not true as to the kind of partial sentence reduction that Clark sought in his post-judgment motion.

In *People v. Rouse* (2016) 245 Cal.App.4th 292, another division of this court recently discussed the right to counsel at a resentencing hearing.[3] The court's analysis is useful here, and thus we quote it at some length:

" 'It is beyond dispute that "[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." [Citations.]' (*Marshall v. Rodgers* (2013) 569 U.S. __ [133 S.Ct. 1446, 1449,

---

[2] Clark had appointed counsel for the 2008 appeal from his conviction, and he is being represented by appointed counsel in this appeal.

[3] The issue before the court in *Rouse* was the defendant's right to counsel after he was found eligible for resentencing under Proposition 47.

185 L.Ed.2d 540]; *People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*) ['A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution.'].)

"Sentencing is a critical stage in the criminal process within the meaning of the Sixth Amendment. (*Doolin*, *supra*, 45 Cal.4th at p. 453; accord, *Mempa v. Rhay* (1967) 389 U.S. 128, 134–137 [88 S.Ct. 254, 19 L.Ed.2d 336].) A defendant is entitled under state and federal law to the assistance of counsel when a sentence is vacated on appeal and remanded for a new sentencing hearing. ' "[W]hen a criminal sentence is vacated because one of the convictions has been reversed, it becomes void in its entirety; the sentence—including any enhancements—has 'been wholly nullified and the slate wiped clean.' " [Citation.] Consequently, when a sentence is vacated and remanded for re-sentencing, the district court has the discretion to "reconstruct the sentence." [Citation.] . . . Therefore, [the defendant's] presence and his counsel's presence [are] a necessity, not a "luxury." [Citation.]' (*Hall v. Moore* (11th Cir. 2001) 253 F.3d 624, 627–628; see also *People v. Rodriguez* (1998) 17 Cal.4th 253 [remanding for new sentencing hearing to be conducted in the presence of the defendant and his counsel where trial court had erroneously refused to consider the defendant's *Romero* motion believing it lacked discretion to strike qualifying priors under the Three Strikes law].) [¶] . . . [¶]

"The United States Supreme Court has declined to extend the Sixth Amendment right to counsel to postconviction proceedings. (See, e.g., *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [107 S.Ct. 1990, 95 L.Ed.2d 539].) Federal courts have

consistently ruled that an incarcerated defendant has no constitutional right to counsel with respect to statutory postconviction motions seeking a reduction in sentence. (See, e.g., *United States v. Webb* (11th Cir. 2009) 565 F.3d 789, 794–795 [motion pursuant to 18 U.S.C. § 3582 seeking reduction in sentence based on post-sentencing amendments to federal sentencing guidelines]; *United States v. Reddick* (2d Cir. 1995) 53 F.3d 462, 465 [same]; *United States v. Taylor* (4th Cir. 2005) 414 F.3d 528, 530 [motion to reduce a final sentence pursuant to Fed. Rules Crim. Proc., rule 35(b)]; *United States v. Palomo* (5th Cir. 1996) 80 F.3d 138, 142–143 [same].)

"Moreover, in *Dillon v. United States* (2010) 560 U.S. 817 [130 S.Ct. 2683, 177 L.Ed.2d 271] (*Dillon*), the Supreme Court, while not specifically addressing the right to counsel, held that the Sixth Amendment was not implicated by an incarcerated defendant's motion for a sentence modification pursuant to title 18 of the United States Code section 3582(c)(2). The court concluded that a statutory motion under section 3582(c)(2) requesting a reduction in sentence based on intervening amendments to the federal sentencing guidelines did 'not authorize a sentencing or resentencing proceeding. Instead, it provides for the "modif[ication of] a term of imprisonment" by giving courts the power to "reduce" an otherwise final sentence in circumstances specified by the [Sentencing] Commission.' (*Dillon*, at p. 825 [130 S.Ct. 2683].) A district court, in ruling on such a motion, 'does not impose a new sentence in the usual sense.' (*Id*. at p. 827 [130 S.Ct. 2683].) The court explained that the statutory remedy merely represented 'a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments' (*id*. at p. 828 [130 S.Ct. 2683]) to the sentencing

guidelines, and therefore did not 'implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.' (*Ibid.*)

"Several California courts have adopted the reasoning of *Dillon* when called upon to address petitions for resentencing brought pursuant to Penal Code section 1170.126. Section 1170.126 is the resentencing provision enacted as part of the Three Strikes Reform Act of 2012 (Proposition 36), which was passed two years before Proposition 47. . . .

"One of the most notable cases relying on the logic of *Dillon* is *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279 (*Kaulick*). Finding the analysis of *Dillon* 'equally applicable,' *Kaulick* concluded the remedial aspects of Proposition 36 were 'an act of lenity on the part of the electorate.' (*Kaulick*, at p. 1304.) And, that Penal Code section 1170.126 'does not provide for wholesale resentencing of eligible petitioners. Instead, it provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, such as dangerousness, do not implicate Sixth Amendment issues. Thus, there is no constitutional requirement that the facts be established beyond a reasonable doubt.' (*Kaulick*, at pp. 1304–1305; see also *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1336 [§ 1170.126 provides a 'limited mechanism' for a sentence reduction and is distinguishable from other plenary sentencing proceedings]; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1315, fn. 9 [noting that a petition for resentencing under Prop. 36 is not the same as a plenary resentencing hearing following the vacating of a sentence on appeal].)" (*People v. Rouse*, *supra*, 245 Cal.App.4th at pp. 296–299.)

The court in *Rouse* noted that, applying these principles, several courts had found no right to counsel in connection with a petition to establish eligibility for resentencing under Proposition 47. (See, e.g., *People v. Rivas–Colon* (2015) 241 Cal.App.4th 444, 451–452 (*Rivas–Colon*) [no 6th Amendment right to jury trial on facts related to the value of property to establish eligibility for resentencing under section 1170.18].) The case before the *Rouse* court was different, however, because "[d]efendant passed the eligibility stage. The court ruled his petition was meritorious and he was entitled to be resentenced[]" on all counts, including on the non-Proposition 47 counts. (*People v. Rouse*, *supra*, 245 Cal.App.4th at p. 299.) Accordingly, the court said, the sentencing hearing at issue "was akin to a plenary sentencing hearing at which [defendant's] substantial rights were in jeopardy without the assistance of counsel." (*Id.* at p. 299.)

In the present case, unlike in *Rouse*, a court has not determined that the defendant is entitled to resentencing. Accordingly, the proceeding in the trial court was not "akin to a plenary sentencing hearing," and thus defendant was not entitled to be represented by counsel.

2. *Due process concerns.*

Although defendant's only assertion of the right to counsel was under the Sixth Amendment, we recognize that under *In re Clark* (1993) 5 Cal.4th 750, due process may require the appointment of counsel in some post-judgment proceedings. "An imprisoned defendant is entitled by due process to reasonable access to the courts, and to the assistance of counsel if counsel is necessary to ensure that access, but neither the Eighth Amendment nor the due process clause of the United States Constitution gives the prisoner, even in a capital case, the right

to counsel to mount a collateral attack on the judgment. [Citation.] This court has held, however, that if a petition attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns. [Citation.]" (*Id*. at pp. 779–780.)

This rule does not assist Clark in this case, however, because he cannot establish a prima facie case for relief under *Sasser*. Our Supreme Court held in *Sasser* that a *single* five-year prior serious felony conviction enhancement (§ 667, subd. (a)) may be added only once to multiple determinate terms (arising out of multiple present convictions). *People v. Sasser*, *supra*, 61 Cal.4th at p. 7 ["Sasser [properly] argued that an enhancement based on a prior conviction may be applied only once to multiple determinate terms"].) Here, on the other hand, Clark is claiming that *multiple* enhancements for prior convictions were improperly imposed to enhance a *single* term imposed for a single present conviction. The two situations are completely different and, therefore, *Sasser* is inapposite.

As the Attorney General points out, Clark had his sentence for a *single* violation of Health and Safety Code section 11379.6 enhanced by four 3-year enhancements, based on his four prior drug convictions under Health and Safety Code section 11370.2, subdivision (b), which states: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11378.5, 11379.5, 11379.6, 11380.5, or 11383 shall receive, in addition to any other punishment authorized by law . . . a full, separate, and consecutive three-year term for *each* prior felony conviction of, or for *each* prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6,

11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment." (Health & Saf. Code, § 11370.2, subd. (b), italics added.) *Sasser* does not provide a legal basis for Clark's claim that his sentence on count 5 should be reduced by nine years.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

---

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