Filed 10/23/12 In re Martinez CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MICHAEL LASHON MARTINEZ, on Habeas Corpus.	B241572 (Los Angeles County Super. Ct. No. SA023514)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Edward B. Moreton, Judge. Writ granted.

Jonathan B. Steiner, California Appellate Project Executive Director, and Richard B. Lennon, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Respondent.

Petitioner Michael Lashon Martinez was sentenced to consecutive terms for four robbery convictions under the "Three Strikes" law. He seeks a writ of habeas corpus, alleging he is entitled to a new sentencing hearing because the trial court failed to consider whether to impose concurrent sentences. We conclude relief is warranted. We will issue a peremptory writ of mandate directing the trial court to conduct a new sentencing hearing, during which it is to exercise its discretion and determine whether petitioner's sentences should be consecutive or concurrent.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, petitioner was convicted of one count of attempted murder, four counts of robbery, and four counts of assault with a firearm, with a finding that he had used a firearm during the commission of the offenses. (Pen. Code, §§ 187, 664, 211, 245, subd. (a)(2), 12022.5, subd. (a).)[1] The court found he had suffered five prior serious felony convictions. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i), 667, subd. (a).) With the acquiescence of the prosecutor, the court vacated the attempted murder conviction. In addition to the sentences for the firearm enhancements, petitioner received four consecutive 25-year-to-life terms for the robberies. The sentence for the assault convictions was stayed pursuant to section 654. (*People v. Martinez* (Feb. 25, 1998, B110602) [nonpub. opn.].)[2]

On February 14, 2011, petitioner filed a petition for writ of habeas corpus in the superior court, alleging the sentencing judge did not understand that it had the discretion to impose concurrent terms for the robberies. The district attorney's office filed an informal response, conceding that "it appears [the sentencing judge] believed the 'three strikes' sentencing scheme required [him] to impose consecutive sentences on all

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

[2] We modified the sentence by reducing the sentence for the firearm allegations to four years each, as that corresponds to the middle term the court imposed.

subordinate terms." It agreed with petitioner that he was entitled to a new sentencing hearing. Nonetheless, the trial court denied the petition for reasons discussed below.

On May 31, 2012, petitioner filed a petition for writ of habeas corpus in this court.[3] On July 27, 2012, we issued an order to the Director of the Department of Corrections and Rehabilitation to show cause why the Los Angeles Superior Court should not be directed to hold a new sentencing hearing. On August 16, 2012, the Attorney General filed a return to the order to show cause and, on August 28, the petitioner filed a traverse.

THE 1997 SENTENCING PROCEEDINGS

After the court trial during which petitioner was found to have suffered five prior serious felony convictions, the parties began discussing the matter of sentencing. The court and the prosecutor discussed their belief that if petitioner received the maximum sentence (which they thought was in the neighborhood of 180 years to life) he would probably be sent to a maximum security facility such as Pelican Bay. After noting that a shorter sentence might allow petitioner to serve his time in a local prison, the prosecutor stated, "I don't think that it's appropriate he gets more than 100 years." In order to secure such a sentence, the prosecutor did not oppose the court's decision to vacate the attempted murder conviction. Nor did he request that sentence be imposed for the prior serious felony convictions pursuant to section 667, subdivision (a). This left four robbery convictions, three assault convictions involving the robbery victims, and a fourth assault conviction involving a person who was not robbed. After concluding that petitioner faced sentence on five counts (the four robberies and the assault committed against a victim who was not robbed), the prosecutor stated, "I also have no objection to vacating

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[3] Petitioner also filed an appeal from the trial court's ruling. On August 14, 2012, we dismissed the appeal because the trial court's order denying his habeas petition is not an appealable order. (*People v. Martinez* (Aug. 14, 2012, B240462) [nonpub. opn.].)

any one of the four robberies to get to 100 years." Sentencing was continued to another date because defense counsel wanted to file a *Romero* motion.[4]

On March 6, 1997, the sentencing hearing was held. Consistent with his desire to have petitioner sentenced to 100 years to life, the prosecutor asked the court to sentence him to consecutive terms of 25-years-to-life on the four robbery counts. In explaining that under the Three Strikes law, multiple convictions constitute a separate strike even if they occur on a single occasion, the court stated, "If you went to the Coliseum on a sell-out night, you rob 100,000 people, you'd have 100,000 counts. They could all go consecutive." Petitioner was sentenced to 120 years to life, consisting of 25 years to life for each of the robbery convictions and five years for each of the attached firearm allegations. With no objection by the prosecutor, the court imposed a concurrent sentence for the section 667, subdivision (a) priors.

DISCUSSION

Initially, the Attorney General alleges that the petition contains pleading deficiencies and must be dismissed. We disagree. "In a habeas corpus proceeding the petition itself serves a limited function. It must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which he [or she] bases his [or her] claim that the restraint is unlawful. (§ 1474.) If, taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue." (*In re Lawler* (1979) 23 Cal.3d 190, 194.) Although the petition failed to specifically name the Director of the Department of Corrections and Rehabilitation as the person who was illegally restraining petitioner, it does state that petitioner is incarcerated at Soledad prison. The petition is in substantial compliance and we will address the merits.

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[4] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

In denying the petition, the trial court cited two reasons. First, after reviewing the transcript of the hearing, it concluded that the trial judge understood its authority to impose concurrent sentences for the robberies. It noted the court stated that if a person was convicted of 100,000 counts of robbery, "[t]hey *could* all go consecutive." (Italics added.) The trial court concluded, "The word 'could' indicates the [sentencing] court's understanding that consecutive sentences were possible, not mandatory." Second, the court observed that, in ruling on petitioner's appeal, we did not modify the sentence insofar as the imposition of consecutive sentences was concerned.

The Attorney General argues that at the time of the 1997 sentencing, there was ample case law establishing that a trial court had the discretion to impose concurrent sentences in Three Strikes cases.[5] Thus, we must assume the sentencing court was aware of the state of the law. She points out, as did the trial court, that the sentencing judge "specifically stated that the 100,000 robbery counts 'could all go consecutive.'" The Attorney General concludes that "[b]y choosing the word 'could' instead of 'would' or 'should,' the [sentencing] judge indicated that he knew he had discretion on whether or not to impose consecutive sentences." We are not persuaded.

The prosecutor convinced the sentencing judge that a term of 100-years-to-life for the robbery convictions was appropriate given petitioner's prior record. It is clear neither recognized that the judge had the discretion to impose concurrent terms. If they had, there would have been no need for the judicial gymnastics described above: (1) the prosecutor acquiesced in the court's decision to vacate the jury's guilty verdict on the attempted murder count; (2) the prosecutor had no objection to vacating one of the four robbery convictions, obviously believing that it was necessary to impose a consecutive sentence for the assault conviction on the victim who was not robbed; (3) the prosecutor did not seek to have petitioner sentenced pursuant to section 667, subdivision (a); and (4) the court illegally imposed a concurrent term for the section 667, subdivision (a)

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[5] The Attorney General concedes that because the robberies were committed at the same time, petitioner could have been sentenced to concurrent terms. (*People v. Hendrix* (1997) 16 Cal.4th 508.)

priors. The statute provides: "The terms of the present offense and each enhancement shall run consecutively." (§ 667, subd. (a)(1).)

With regard to the fact that we did not alter the sentence in resolving the appeal, we were not asked to. In his appeal, petitioner raised a single issue. He asserted that his five prior serious felony convictions should constitute one strike because they were all suffered in the same proceeding. The question whether his robbery sentences were required to be consecutive was not raised.

We have no difficulty concluding that the sentencing judge was unaware he had the discretion to impose concurrent terms. A new sentencing hearing is appropriate.

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to conduct a new sentencing hearing, during which the court is to consider whether to impose consecutive or concurrent terms. If petitioner's sentence is changed, the clerk is directed to prepare a new abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.