Filed 10/9/15 P. v. Guderian CA2/4
Received for posting 11/10/15

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. THOMAS JEFFERSON GUDERIAN, Defendant and Appellant.	B257328 (Los Angeles County Super. Ct. No. BA 152571)
In re THOMAS JEFFERSON GUDERIAN, on Habeas Corpus.	B260787 (Los Angeles County Super. Ct. No. BA 152571)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan and J.D. Smith, Judges. Judgment affirmed. ORIGINAL PROCEEDING; petition for writ of habeas corpus. Petition denied.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant, Appellant, and Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Garett A. Gorlitsky, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Thomas Jefferson Guderian appeals from an order denying his petition for resentencing under Proposition 36, the Three Strikes Reform Act of 2012. (Pen. Code, § 1170.126.)[1] The order is affirmed.

Defendant also petitions for a writ of habeas corpus, seeking to overturn his life sentence under *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*). The petition is denied.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, defendant was convicted by a jury of one felony count of possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) After finding two prior strike allegations to be true,[2] the trial court imposed an indeterminate sentence of 25 years to life under the Three Strikes law. This court affirmed the judgment in April 2000. (*People v. Guderian* (Apr. 25, 2000, B128895) [nonpub. opn.].)

Proposition 36, which was adopted in November 2012, amended the Three Strikes law by limiting the imposition of an indeterminate life sentence to those defendants whose third felony is defined as serious or violent. The initiative allowed those serving a life sentence for a third felony that was neither serious nor violent to file a petition for a recall of sentence and to request resentencing under Proposition 36. (§ 1170.126, subd. (b).)

Defendant filed a petition to recall his sentence and for resentencing under Proposition 36 in January 2013. He argued that he was eligible for resentencing because his third felony, possession of methamphetamine, is neither serious nor violent.

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[1] Unless otherwise indicated, all further undesignated statutory references are to the Penal Code.

[2] In a bifurcated proceeding, the trial court found true the allegation that defendant was convicted of first degree residential burglary (§ 429) and robbery (§ 211) in Los Angeles County Superior Court case No. A960981. (§§ 1170.12, subds. (a)-(d), 667, subds (b)-(i).) The court also found true the allegation that he was convicted of unlawful possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1), in San Bernardino County Superior Court case No. F0097773. That conviction rendered defendant ineligible for diversion or deferred entry of judgment under section 1000. (Health & Saf. Code, § 11370.1, subd. (b).)

(§1170.126, subd. (e)(1) [inmate serving indeterminate life term for a felony that is neither serious nor violent is eligible for resentencing].) Finding that defendant had made a prima facie showing of eligibility, the trial court issued an order to show cause as to why the petition should not be granted.

The People contended that a prior conviction of a sexually violent offense, as defined in subdivision (b) of Welfare and Institutions Code section 6600, rendered petitioner ineligible for resentencing under Proposition 36 (§§ 1170.126, subd. (e)(3), 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I)),[3] and that defendant had suffered a 1977 conviction in Florida for sexual battery,[4] which is equivalent to forcible sodomy under section 286, subdivision (c)(2)(A),[5] and is a sexually violent offense.

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[3] Resentencing under Proposition 36 is not available to an inmate if (1) the current sentence is for a serious drug offense, a felony sex offense requiring registration as a sex offender, or a felony involving a firearm, a deadly weapon, or the intent to cause great bodily injury; or (2) the inmate has a prior conviction of one of the felonies Proposition 36 designates as the most serious and violent offenses. (§ 1170.126, subd. (e)(2) & (3).)

The disqualifying felonies are (a) sexually violent offenses, as defined in subdivision (b) of section 6600 of the Welfare and Institutions Code; (b) oral copulation, sodomy, sexual penetration, or a lewd or lascivious act involving a child under 14 years of age; (c) any homicide offense, including any attempted homicide; (d) solicitation to commit murder; (e) assault with a machine gun on a peace officer or firefighter; (f) possession of a weapon of mass destruction; and (g) any serious or violent felony offense punishable in California by life imprisonment or death. (§§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv).)

[4] "A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison or in county jail under subdivision (h) of Section 1170 if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction." (§ 667.5, subd. (f).)

[5] "Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286, subd. (a).)

Defendant argued that the minimum elements of a Florida sexual battery conviction are not equivalent to forcible sodomy under section 286. The Florida statute defines sexual battery as either "oral, anal, or vaginal *penetration by, or union with*, the sexual organ of another[.]" (Fla. Stats. Tit. XLIV, ch. 794, § 794.011, italics added.) Because mere contact or "union" is sufficient, the Florida statute can be violated without penetration, while the California statute requires "sexual penetration, however slight." (§ 286, subd. (a).)

In order to show that the Florida conviction was equivalent to forcible sodomy, the People provided certified court documents from the Florida criminal case. Those documents showed there was a negotiated settlement agreement, and that defendant pleaded guilty to the allegation that he used "his penis [to] penetrate the anus of [the victim] without the consent of [the victim] and . . . did coerce [the victim] to submit by threatening to use force or violence likely to cause serious personal injury on, of and to [the victim], and [the victim] reasonably believed that . . . [defendant] then and there had the present ability to execute said threats, in violation of Section 794.011, Florida Statutes." Based on the language of the guilty plea, the People argued the sexual battery conviction included forcible penetration of the anus, which satisfied all of the elements of forcible sodomy under section 286, subdivision (c)(2)(A), and constituted a sexually violent offense under subdivision (b) of Welfare and Institutions Code section 6600.

The trial court found by a preponderance of the evidence that defendant had suffered a prior conviction for a sexually violent offense, which rendered him ineligible for resentencing. (§ 1170.126, subd. (e)(3).) The petition was denied, and this timely appeal followed. (§ 1237, subd. (b); *Teal v. Superior Court* (2014) 60 Cal.4th 595, 601.)

"Any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years." (§ 286, subd. (c)(2)(A).)

While the appeal was pending, defendant filed a petition for writ of habeas corpus. (*In re Thomas Jefferson Guderian*, B260787.) The habeas petition is addressed in part II below.

DISCUSSION

I

In post-Proposition 36 cases, a defendant with two or more prior strike convictions who is convicted of a third felony that does not satisfy the statutory definition of a "serious" or "violent" felony will be sentenced as a second strike offender unless the prosecution pleads and proves a disqualifying factor, such as a prior conviction of a sexually violent offense. (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033 (*Osuna*); §§ 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I).)

When defendant was convicted in 1998 of one felony count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), which is neither a violent nor serious felony, the prosecution was not required to plead and prove a disqualifying factor—such as his prior conviction of a sexually violent offense—in order for the court to impose an indeterminate life sentence under the Three Strikes law. Although Proposition 36 presents individuals such as defendant "with an opportunity to be resentenced to a lesser term, unless certain facts are established, [they are] nonetheless still subject to the third strike sentence based on the facts established at the time [they were] originally sentenced." (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1303 (*Kaulick*).)

Defendant argues the People are prohibited from using his Florida conviction as a disqualifying factor because it was not pleaded and proved beyond a reasonable doubt during the original trial proceedings on the methamphetamine charge.[6] As several courts have noted, however, the language of Proposition 36 is silent on this point, and this

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[6] Defendant concedes this issue was not raised below, but asks that we review the issue in order to forestall the inevitable claim of ineffective assistance of trial counsel. Without determining whether the issue was forfeited, we will reach the merits.

omission presumably was intentional. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 656–657 (*Guilford*); *Osuna*, *supra*, 225 Cal.App.4th at pp. 1033–1034; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058; *Kaulick*, *supra*, 215 Cal.App.4th at p. 1303, fn. 26.) When defendant was tried on the methamphetamine charge, the court found true the allegations that he had suffered two prior strike convictions for residential burglary and robbery. The two prior strike convictions were sufficient to impose a life sentence under the original Three Strikes law, and the prosecution was not required to prove an additional factor or prior conviction in order to elevate a determinate sentence to an indeterminate life sentence. "The prosecutor had no reason to know the law would later be changed to make a defendant eligible for an indeterminate, 'third strike' sentence only if certain circumstances were pleaded and proved." (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1334 (*Bradford*).) Accordingly, "the prosecutor lacked the incentive to plead and prove the eligibility criteria at issue at the time the case was originally adjudicated." (*Id.* at pp. 1333–1334.)

Defendant argues that *Bradford's* reasoning does not apply because that case involved a disqualifying factor—whether the petitioner was armed with a deadly weapon during the commission of the offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii))—rather than a disqualifying prior conviction.[7] We disagree. We see

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[7]In *Bradford*, the defendant had been convicted of three counts of second degree burglary and four counts of petty theft with a prior, for which he was serving a third-strike sentence. He petitioned for resentencing under Proposition 36, but was found ineligible based on the exclusion that applies if, during the commission of the current offense, the defendant was armed with a deadly weapon. (*Bradford*, *supra*, 227 Cal.App.4th at p. 1327; §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) In making that determination, the trial court reviewed the appellate opinion in the original proceedings. The defendant appealed, arguing the deadly weapon allegation was never pled and proven in the original proceedings, and the trial court's denial of his resentencing petition was based on an incomplete statement of facts, was erroneous, and was a violation of his constitutional rights to a jury trial and due process. The appellate court reversed and remanded for a new hearing, concluding "the trial court must make this factual determination based solely on evidence found in the record of conviction. Petitioner has no right to a jury trial or to a formal hearing but must be provided an

no reason to distinguish between a disqualifying factor and a disqualifying prior conviction, because both render a petitioner ineligible for resentencing.

Defendant also contends the trial court's consideration of facts beyond the minimal elements of his prior sexual battery conviction is a violation of the Sixth Amendment. We disagree. According to *Bradford*, "there is no constitutional violation in considering facts not decided by a jury at a postconviction proceeding pursuant to section 1170.126." (*Bradford, supra*, 227 Cal.App.4th at p. 1334, citing *Dillon v. United States* (2010) 560 U.S. 817 (*Dillon*).)

Defendant questions *Bradford's* reliance upon *Dillon*, and asks that we diverge from *Bradford* on that basis. We see no reason to do so. *Dillon* involved an inmate's petition for a reduction in sentence in *excess* of revised federal sentencing guidelines. The district court granted a reduction in sentence, but refused to diverge from the revised guidelines. The Third Circuit affirmed. (*United States v. Dillon* (3d Cir. 2009) 572 F.3d 146.) The United States Supreme Court granted certiorari to consider the defendant's argument that the district court had discretion to diverge from the revised guidelines in resentencing him. The Supreme Court rejected the defendant's underlying assumption that he was entitled to a new sentencing hearing. The Court explained that sentence modification proceedings under 18 United States Code section 3582(c)(2) are not new sentencing hearings. Sentence modification proceedings, which result from a "congressional act of lenity," are not constitutionally required. (*Dillon, supra*, 560 U.S. at p. 828.) "Viewed that way, proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have the essential facts found by a jury beyond a reasonable doubt." (*Ibid.*)

The same is true for postconviction proceedings under Proposition 36. (*Bradford, supra*, 227 Cal.App.4th at p. 1334.) For those who were sentenced before Proposition 36 was adopted, the initiative authorizes a downward modification in sentence that is not

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opportunity to be heard before the court determines ineligibility based on unadjudicated facts." (*Bradford, supra*, 227 Cal.App.4th at p. 1327.)

constitutionally required but is a result of the electorate's "act of lenity." (*Dillon, supra*, 560 U.S. at p. 828.) We agree with *Bradford* that postconviction proceedings under section 1170.126 do not implicate the right to a jury trial at which the prosecution must prove the essential facts beyond a reasonable doubt. (*Bradford, supra*, 227 Cal.App.4th at p. 1334.)

Defendant claims "there can be no comparison between the modification to the federal sentencing guidelines at issue in *Dillon*, and the amendment to the Three Strikes law to reflect its original intent . . . ."[8] Defendant seeks to equate the denial of his petition to recall his sentence with an increase in his sentence. He argues that the original intent of the Three Strikes law was to limit the most severe penalty—a life sentence—to those defendants whose third felony was violent and/or serious. But the language of the original Three Strikes law does not support that theory.

The trial court, by denying defendant's petition, did not unlawfully increase his sentence based on evidence not presented to a jury. Defendant's constitutional rights were not violated. The constitutional concerns that led the Court in *United States v. Booker* (2005) 543 U.S. 220 (*Booker*) to render the federal sentencing guidelines advisory are not present here.[9]

The procedure followed by the trial court was approved in *People v. Guerrero* (1988) 44 Cal.3d 343, which stated "the court may look to the entire record of conviction

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[8] Defendant cites *People v. Lo Cicero* (1969) 71 Cal.2d 1186, which held that because "[t]he denial of opportunity for probation . . . is equivalent to an increase in penalty," a disqualifying prior conviction must be pleaded and proved. (*Id.* at p. 1193.) Because *Lo Cicero* did not involve the retroactive application of a revised sentencing law, it provides no support for defendant's argument.

[9] *Dillon* explained that before *Booker*, "facts found by a judge by a preponderance of the evidence often increased the mandatory Guidelines range and permitted the judge to impose a sentence greater than that supported by the facts established by the jury verdict or guilty plea. . . . We held in *Booker* that treating the Guidelines as mandatory in these circumstances violated the Sixth Amendment right of criminal defendants to be tried by a jury and to have every element of the offense proved by the Government beyond a reasonable doubt. . . . [¶] To remedy the constitutional problem, we rendered the Guidelines advisory . . . ." (*Dillon, supra*, 560 U.S. at p. 820.)

to determine the substance of the prior foreign conviction." (*Id.* at p. 355; *Guilford, supra,* 228 Cal.App.4th at p. 659 [in considering a recall petition, trial court may consider facts of the crime as shown by the record]; *Kaulick, supra,* 215 Cal.App.4th at p. 1302 [three strikes law allows trial court to examine entire record of prior conviction to determine whether facts meet definition of a disqualifying factor].) Because the record of conviction in the Florida case disclosed that defendant was charged with anal penetration with threats of force or violence, and that he entered a guilty plea to the charged offense, the evidence supports the finding that defendant was convicted of a crime that contained all of the elements of forcible sodomy (§ 286, subd. (c)(2)(A)), and constituted a sexually violent offense (Welf. & Inst. Code, § 6600, subd. (b)), which is a disqualifying prior conviction. (§§ 1170.126, subd. (e)(3), 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I).)

Defendant's reliance on the Supreme Court's recent decision in *People v. Johnson* (2015) 61 Cal.4th 674 is misplaced. As defendant acknowledged at oral argument, *Johnson* addressed a different issue: whether a defendant who is serving a third-strike sentence for a serious and violent felony is nevertheless eligible for resentencing as to *another* count that is neither serious nor violent. The Court concluded that Proposition 36 calls for a "count-by-count approach to sentencing." (*Id.* at p. 690.) But that analysis does not apply to defendant, who was convicted on only one count, and has a disqualifying prior conviction of a sexually violent offense. On that point, the Supreme Court noted that "if an inmate's prior convictions include any of the super strikes that are incorporated into section 1170.126, subdivision (e)(3), he or she will be disqualified from the resentencing provisions, because a *prior* offense is present as to each current offense." (*Id.* at p. 693.) For these reasons, the count-by-count sentencing analysis in *Johnson* is not applicable.

II

In his habeas petition, defendant argues that his indeterminate life sentence must be set aside because, as in *Vargas, supra,* 59 Cal.4th 635, his two prior strike

convictions—residential burglary[10] and robbery[11]—were based on a single act. We disagree.[12]

Vargas does not apply. The case involved the "rare" and "extraordinary" situation in which the defendant's two prior strike convictions were based on the same act of forcibly taking the victim's car. (*Vargas*, *supra*, 59 Cal.4th at pp. 641–642, 645.) The Court held that because the prior "carjacking and robbery convictions were based on the same act of taking the victim's car by force" (59 Cal.4th at p. 640), "the trial court was required to dismiss one of defendant's two prior strike convictions." (*Id.* at p. 645.) The *Vargas* court repeatedly pointed out that the case before it involved only a single criminal act. (*Id.* at pp. 637, 640, 642, 643, 646, 648.)

That is not the situation here. Although both the residential burglary and robbery were committed at the victim's apartment, there were multiple criminal acts. The facts as stated in the appellate opinion in that case indicate that the crime of residential burglary was committed when the defendant forcibly entered the victim's apartment for the purpose of committing a felony. Once he did so, the burglary crime was complete. His further acts of robbery, during which the victim was bound, gagged, and threatened with a knife by the defendant, constituted a different crime. (*People v. Guderian* (Nov. 6,

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[10] "Every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) Burglary of an "inhabited dwelling house" is burglary of the first degree. (§ 460, subd. (a).) As used in section 460, "'inhabited' means currently being used for dwelling purposes, whether occupied or not." (§ 459.)

[11] Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) In addition to the use of force or fear, "'robbery also includes the element of asportation and appropriation of another's property. The escape of the thief with his ill-gotten gains . . . is as important to the execution of the robbery as gaining possession of it.' [Citations.]" (*People v. Gomez* (2008) 43 Cal.4th 249, 256–257.)

[12] In light of our determination that *Vargas* is inapplicable, we do not reach the People's contention that *Vargas* does not apply retroactively.

1989, B036190) [nonpub. opn.].) Because the additional threats and acts of violence were extraneous to the burglary, there were multiple criminal acts. *Vargas*, which involved only a single criminal act, is inapplicable.

DISPOSITION

The order denying the petition for resentencing under Proposition 36 is affirmed. The petition for writ of habeas corpus is denied.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.