Filed 8/19/13 Cooper v. Superior Court CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CRAIG BRIAN COOPER, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. THE PEOPLE, Real Party in Interest.	B250388 (Los Angeles County Super. Ct. No. NA027451)

ORIGINAL PROCEEDINGS in Mandate. William C. Ryan, Judge. Petition denied.

Craig Brian Cooper, in pro. per., for Petitioner.

No appearance by Respondent.

No appearance by Real Party in Interest.

On April 3, 2013 the trial court denied with prejudice Craig Brian Cooper's petition for recall of sentence pursuant to Penal Code section 1170.126[1] on the ground Cooper is ineligible for resentencing. (§ 1170.126, subd. (f).) Cooper attempted to file a notice of appeal by mail in late June 2013. The notice was considered untimely and marked inoperative by the Los Angeles Superior Court.

Thereafter, Cooper petitioned this court for writ of mandate, which, in effect, is an application for relief from default for failure to file a timely notice of appeal. For the reasons discussed below, the order denying Cooper's petition is not appealable. Accordingly, the current application is deemed a petition for writ of mandate challenging respondent superior court's April 3, 2013 order itself. As such, it is summarily denied.

1. *The Right To Appeal in a Criminal Case*

The right of appeal is statutory, and a judgment or order is not appealable unless expressly made so by statute. (*People v. Totari* (2002) 28 Cal.4th 876, 881; *People v. Mazurette* (2001) 24 Cal.4th 789, 792.) As relevant here, an inmate like Cooper may appeal from "any order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b).)

"If interpreted broadly, the phrase 'affecting the substantial rights of the party' in section 1237, subdivision (b) 'would apply to any postjudgment attack upon the conviction or sentence' because '[t]he court's denial of relief in any such situation could affect the defendant's substantial rights. However, decisional authority has limited the scope of the phrase, defining appealability more narrowly.'" (*People v. Loper* (2013) 216 Cal.App.4th 969, 973, quoting *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980.)

2. *Proposition 36, the Three Strikes Reform Act of 2012*

Proposition 36, the Three Strikes Reform Act of 2012, amended sections 667 and 1170.12, effective November 7, 2012, to limit three strikes sentences to current convictions for serious or violent felonies and a limited number of other felonies unless the People plead and prove the offender has a prior strike conviction that falls within one

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[1] Statutory references are to the Penal Code.

of several enumerated categories. The Act also established a procedure, enacted as new section 1170.126, for qualified inmates serving indeterminate life sentences under the three strikes law to seek resentencing as a second strike offender under the terms of the amended law.

The resentencing process under section 1170.126 involves three distinct phases after an inmate has petitioned the court for the requested relief pursuant to section 1170.126, subdivision (d).[2] First, the court conducts an initial review of the petition, together with a copy of the inmate's criminal records to the extent they are available, to determine whether the inmate satisfies the minimum statutory requirements for relief specified in section 1170.126, subdivision (d) (the initial screening or phase 1). Second, if the petition demonstrates a prima facie basis for relief, the court conducts an evidentiary hearing to determine whether the inmate has, in fact, met all statutory requirements for relief and whether resentencing of the inmate as a second strike offender will pose an unreasonable risk of danger to public safety (the qualification hearing or phase 2). (§ 1170.126, subd. (f); see Couzens & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2013) §§ 14.1, 14.4, pp. 14-2, 14-9 to 14-13.) Third, if the inmate is eligible and resentencing is not found not to pose a danger to public safety, the court conducts a new sentencing hearing (phase 3).

3. *The Denial of a Petition for Recall of Sentence at the Initial Screening Phase (Phase 1) Is Not an Appealable Order*

We consider here only the appealability of an order denying a petition for recall of sentence at the initial screening phase (phase 1)—an issue currently before the Supreme Court, which granted review of both our decision in *Teal v. Superior Court* (2013) 217 Cal.App.4th 308, review granted July 31, 2013, S211708, holding a phase 1 order is not appealable (but reviewable by way of writ), and the decision of our colleagues in

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[2] The petition must identify all of the charged felonies that resulted in the third strike sentence and all of the prior strikes alleged and proved under sections 667, subdivision (d), and 1170.12, subdivision (b). (§ 1170.126, subd. (d).)

Division One of this court in *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted July 31, 2013, S212017, concluding such an order is appealable.

Section 1170.126, subdivision (a), expressly limits the right to have the trial court consider whether an inmate should be resentenced to those individuals who satisfy the statutory eligibility requirements set forth in section 1170.126, subdivision (e): "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).) That is, inmates do not have a right to a qualification hearing (phase 2) unless they first make a prima facie showing they meet the statutory eligibility requirements as determined by the court at the initial, phase 1 screening.

The threshold eligibility determination (phase 1) is made by applying express objective criteria to information set forth in the petition filed by the inmate: Is the inmate currently serving a third strike life term? Is that life term for conviction of a felony or felonies that are not defined as serious or violent felonies by sections 667.5, subdivision (c), or 1192.7, subdivision (c)? If the current felony is not a serious or violent offense, was the current sentence imposed for any of the offenses listed in section 667, subdivision (e)(2)(C)(i)–(iii), or section 1170.12, subdivision (c)(2)(C)(i)-(iii)? Are any of the inmate's prior convictions for felonies listed in sections 667, subdivision (e)(2)(C)(iv), or 1170.12, subdivision (c)(2)(C)(iv)?

Because an inmate has no right to a phase 2 qualification hearing absent a prima facie showing that he or she satisfies the statutory eligibility requirements for sentencing relief, the trial court's phase 1 screening determination is not, in our view, a postjudgment order affecting the substantial rights of the party and is not appealable under section 1237, subdivision (b). (See, e.g., *People v. Loper*, *supra*, 216 Cal.App.4th at p. 974 [order denying recall of sentence under the compassionate release provisions in § 1170, subd. (e), is not appealable]; *People v. Druschel* (1982) 132 Cal.App.3d 667, 668 [because defendant has no right to move for recall of sentence pursuant to § 1170,

subd. (d), denial of such a motion does not affect the defendant's substantial rights and is not appealable]; cf. *People v. Gallardo*, supra, 77 Cal.App.4th at pp. 980-981 [order denying a petition for writ of error *coram nobis* is not appealable absent showing petition stated a prima facie case for relief]; see also *People v. Totari*, *supra*, 28 Cal.4th at p. 885, fn. 4.)

In considering an inmate's right to counsel in proceedings under section 1170.126, Judge Couzens and Justice Bigelow compare the procedure under section 1170.126 to a habeas corpus proceeding "where the petitioner's right to counsel does not attach until the court determines petitioner has made a *prima facie* case for relief and issues an order to show cause," citing *In re Clark* (1993) 5 Cal.4th 750, 779, and conclude, "it does not appear the defendant is entitled to counsel for the initial preparation of the petition or in connection with its initial screening." (Couzens & Bigelow, *supra*, § 14.6, at p. 14-17.) If, contrary to our conclusion, the phase 1 initial screening were held to affect the substantial rights of the inmate under section 1237, subdivision (b), it would seem to follow that the inmate has a right to be represented by counsel at the initial screening proceeding. (See *People v. Crayton* (2002) 28 Cal.4th 346, 362 ["[t]he 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"].)

4. *Cooper's Petition Is Summarily Denied*

Although no appeal lies from a phase 1 order denying an inmate's petition for recall of sentence, at least until the issue is resolved by the Supreme Court, we will treat inoperative notices of appeal in these cases as petitions for a writ of mandate or habeas corpus. (See *People v. Segura* (2008) 44 Cal.4th 921, 928 [treating purported appeal from nonappeable order as petition for writ of habeas corpus in the interest of judicial economy]; *Drum v. Superior* Court (2006) 139 Cal.App.4th 845, 853 [uncertainty in the law respecting appealability of the order in question is proper ground for treating a purported appeal as a petition for a writ of mandate]; *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367 [same; "appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate"].)

We have read and considered Cooper's petition for writ of mandate and attached exhibits. We have also examined the file in proceeding number B106716, Cooper's direct appeal from the judgment in Los Angeles Superior Court case number NA027451, which affirmed Cooper's conviction for possession of cocaine and his sentence to an indeterminate term of 25 years to life under the three strikes law. As reflected in our nonpublished opinion in Cooper's direct appeal, his two prior strike convictions were for lewd and lascivious acts with a child under the age of 14 (§ 288) and sexual penetration with a foreign object by force (§ 289, subd. (a)(1)(A)), both of which are disqualifying prior convictions under sections 1170.126, subdivision (e)(3), and 667, subdivision (e)(2)(C)(iv). Accordingly, the petition is denied.

This order is final as to this court upon filing. (Cal. Rules of Court, rule 8.490(b)(1).

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.*

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