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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re

MATTHEW FELIX VARGAS,

on Habeas Corpus.

B237440

(Los Angeles County
Super. Ct. No. SA055948)

ORIGINAL PROCEEDING on petition for writ of habeas corpus. Katherine Mader, Judge. Petition granted.

Law Offices of Joseph Shemaria and Joseph Shemaria for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Assistant Attorneys General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Respondent.

* * * * *

We grant petitioner Matthew Felix Vargas’s petition for writ of habeas corpus. Vargas shows that his appellate counsel rendered ineffective assistance by failing to challenge the validity of the gang enhancement on the ground that the prosecution improperly relied on criminal conduct that took place after the charged offense to prove a “pattern of criminal gang activity” under Penal Code section 186.22.¹

FACTS AND PROCEDURE

Vargas was convicted of first degree murder occurring on September 2, 2003. Firearm use and criminal street gang enhancements were found true. At Vargas’s jury trial, Officer Jason Bendinelli testified as a gang expert. In his opinion, Vargas was a member of the Santa Monica 17th Street gang. Bendinelli testified that two other members of the Santa Monica 17th Street gang committed felonies. Specifically, Hector Godinez was convicted of attempted murder on June 12, 2006, and Albert Mesa was convicted of threatening a witness on August 18, 2005.

The court sentenced Vargas to 53 years to life, consisting of 25 years to life for murder, an additional 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), and 3 years for the gang enhancement (§ 186.22, subd. (b)(1)(A)). The Attorney General correctly points out that the court erred in sentencing Vargas to a three-year term for the gang enhancement and should have instead set the minimum parole eligibility of 15 years because Vargas committed a felony punishable by imprisonment for life. (§ 186.22, subd. (b)(5); *People v. Harper* (2003) 109 Cal.App.4th 520, 527.)

On appeal, Vargas’s appellate counsel argued that the gang enhancement was not supported by substantial evidence but failed to argue that crimes occurring after Vargas’s criminal conduct were insufficient to establish a pattern of criminal gang activity as defined in section 186.22. We affirmed Vargas’s conviction and found substantial evidence supported the gang enhancement. (*People v. Vargas* (Aug. 29, 2008, B196486) [nonpub. opn.])

¹ All statutory references are to the Penal Code unless otherwise stated.

In a petition for writ of habeas corpus filed in the California Supreme Court, Vargas argued, among other things, that he received the ineffective assistance of appellate counsel because his appellate counsel did not argue that the crimes committed by other Santa Monica 17th Street gang members after the date of Vargas's crime were insufficient to prove a pattern of criminal gang activity required by section 186.22.

The California Supreme Court issued an Order to Show Cause stating: "The Secretary of the Department of Corrections and Rehabilitation is ordered to show cause before the Court of Appeal, Second Appellate District, Division Eight, when the matter is placed on calendar, why appellate counsel was not ineffective for failing to challenge the validity of the criminal street gang enhancement on the ground that the prosecution cannot rely on acts that take place *after* the current charged offense as predicate offenses to prove the 'pattern of criminal gang activity' required by . . . section 186.22, subdivisions (b)(1) and (e). (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1458; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1383; *People v. Godinez* (1993) 17 Cal.App.4th 1363, 1365 [(*Godinez*)].)"

DISCUSSION

1. The Gang Enhancement Must Be Reversed

To prove a gang enhancement under section 186.22, the prosecution must prove that the defendant was a member of a criminal street gang "whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

(§ 186.22, subds. (b), (f).) "Pattern of criminal gang activity" is defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [certain specified] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

In *Godinez, supra*, 17 Cal.App.4th 1363, the court struck a gang enhancement because it was based on acts committed by other gang members *after* the defendant's

crime had been committed.² The court held that “a defendant’s sentence cannot be enhanced on the basis of acts committed by others months and years after his crime had been completed. For this reason, a ‘pattern of criminal gang activity’ within the meaning of section 186.22 cannot be established by use of predicate crimes which occur *after* the crime for which the defendant is being tried.” (*Id.* at p. 1365.) The court further explained that the “[u]se of acts occurring after a defendant’s commission of charged offenses to establish the existence of a ‘pattern of criminal gang activity’ within the meaning of section 186.22 . . . deprives the defendant of notice, in advance of his conduct, that his acts will fall within the proscription of section 186.22. Due process entitles a defendant to notice, *before* he acts, of the criminality and consequences of his conduct.” (*Id.* at p. 1369.) Other cases have followed *Godinez*. (See *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1458; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1383.)

The Attorney General argues that *People v. Loeun* (1997) 17 Cal.4th 1 implicitly overruled *Godinez*. In *Loeun*, the court held that “when the prosecution chooses to establish the requisite ‘pattern’ by evidence of ‘two or more’ predicate offenses committed on a single occasion by ‘two or more persons,’ it can . . . rely on evidence of the defendant’s commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member.” (*Loeun*, at p. 10.) While the Attorney General characterizes *Loeun* as holding a “subsequent” crime may be used to constitute a pattern of criminal gang activity, the Supreme Court described the crimes as “contemporaneous,” and the case does not support the Attorney General’s argument that criminal conduct after the charged offense would support the section 186.22 enhancement. (*Loeun*, at p. 10; see also *People v. Zermeno* (1999) 21 Cal.4th 927, 932-933.) In short, *Loeun*, which concerned contemporaneous criminal conduct, does not implicitly overrule *Godinez*, which concerned criminal conduct *after* the charged offense.

² *Godinez* was disapproved on another ground in *People v. Russo* (2001) 25 Cal.4th 1124, 1134.

Although two offenses that occur on the same occasion may satisfy the requirement, the law is clear that offenses occurring after the charged offense, as in this case, do not. Because the prosecution relied only on offenses occurring after Vargas's criminal conduct to establish a "pattern of criminal gang activity," the prosecution failed to prove the gang enhancement. Appellate counsel should have raised this issue on appeal and the failure to do so was prejudicial because it would have required striking the gang enhancement. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [to show ineffective assistance of counsel, defendant must show both deficient performance and that defendant suffered prejudice]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 [same].) Thus, Vargas has demonstrated that he received the ineffective assistance of appellate counsel.

2. Retrial on the Gang Enhancement Is Not Barred

The remaining question is whether double jeopardy protections preclude retrial of the gang enhancement. In *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*), the court considered whether principles of double jeopardy barred retrial of an enhancement after an appellate finding of evidentiary insufficiency. Quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494 (*Apprendi*), the *Seel* court explained: "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Seel*, at pp. 546-547.) Federal double jeopardy protections preclude a retrial of an element of a greater offense reversed for insufficiency of the evidence. (*Id.* at pp. 547-550.) Basically, the *Seel* court extended *Apprendi* "to bar retrial of a penalty allegation after the equivalent of an acquittal under the federal double jeopardy clause." (*People v. Anderson* (2009) 47 Cal.4th 92, 116 (*Anderson*).)

The requirements of *Apprendi* "apply only when a penalty or enhancement has the potential to increase a defendant's punishment beyond the statutory maximum." (*Anderson, supra*, 47 Cal.4th at p. 117, fn. 11.) In *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 (*Sengpadychith*), the court distinguished felonies punishable by a

determinate term and felonies punishable by an indeterminate term. For the latter, “the gang enhancement provision [describing the minimum parole eligibility] does not alter the indeterminate term of life imprisonment; it merely prescribes the minimum period the defendant must serve before becoming eligible for parole.” (*Ibid.*)

Here, under *Sengpadychith*, the 15-year minimum parole eligibility requirement did not alter Vargas’s indeterminate term. Therefore, under *Seel*, double jeopardy does not bar retrial of the gang enhancement.

DISPOSITION

The petition for writ of habeas corpus is granted. The three-year gang enhancement under section 186.22 is stricken. The case is remanded to the trial court with the following directions: If the People do not elect to retry Vargas on the gang enhancement within the time specified in section 1382, subdivision (a)(2), the trial court shall proceed as if the remittitur constitutes a modification of the judgment and shall amend the abstract of judgment to strike the three-year gang enhancement and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. If the gang enhancement is retried, evidence of gang activities by other gang members occurring after the crime for which Vargas was charged shall be excluded.

The Clerk of this court is directed to forward a copy of this opinion to the State Bar upon the issuance of the remittitur. (Bus. & Prof. Code, § 6086.7, subd. (a)(2).)

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.