Filed 12/21/16 P. v. Alvarez 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

STEVEN A. ALVAREZ,

Defendant and Appellant.

B270999

(Los Angeles County Super. Ct. No. VA098455)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Law Offices of James Koester and James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In March 2016, Steven A. Alvarez filed a motion to vacate the judgment arising out of his 2007 conviction, by no-contest plea, of violating former Penal Code section 12021 for being an ex-felon in possession of a firearm. After the trial court construed Alvarez's motion as a petition for writ of habeas corpus, the court denied the petition. Alvarez timely appealed that ruling. We appointed counsel to represent him on appeal. After reviewing the record, counsel filed an opening brief requesting this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. Alvarez has filed a supplemental opening brief.

We will affirm the trial court's ruling.

DISCUSSION

We have examined the entire record and are satisfied that appellate counsel has fully complied with his responsibilities and that no arguable appellate issues exist. (See *Smith v. Robbins* (2000) 528 U.S. 259, 278 [120 S.Ct. 746]; *People v. Wende*, *supra*, 25 Cal.3d at p. 443.)

Alvarez's 2007 conviction arose out of a late-night encounter with a woman at a bar, after which he followed her to the parking garage of her apartment complex. Responding to the report of a prowler, police arrived to find Alvarez and the woman (she was asleep) in her parked car. According to the probation report, the woman told officers she believed that Alvarez had stolen her purse (apparently at the bar). Police found a handgun in Alvarez's nearby parked car. Although originally charged with being an ex-felon in possession of a firearm, possession of a deadly weapon, receiving stolen property, attempted rape and two counts of burglary (former Pen. Code, §§ 12021, subd. (a)(1),

12020, subd. (a)(1);[1] Pen. Code, §§ 496, 664/261, 459),[2] Alvarez eventually pled no contest to the single charge of being an ex-felon in possession of a firearm and was sentenced to a term of 32 months.

On March 2, 2016, Alvarez filed a "Motion to Vacate Judgment" in the trial court, which the court construed as a petition for a writ of habeas corpus and then denied because the petition raised issues that were not cognizable on habeas review, and because the petition presented claims that had already been raised and rejected in a previous habeas petition.

Alvarez's petition made two explicit due process claims: (1) the prosecutor had improperly withheld documentation from him that would have proved his original, underlying conviction was for a misdemeanor, not a felony, and therefore he could not have been guilty of being an ex-felon in possession of a firearm; and (2) he must be resentenced because, in violation of section 1192.6, subdivisions (a) and (c), the record does not contain explanations for why his no contest plea was accepted and why the other charges were dismissed. In addition, Alvarez

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[1] The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005, 16010.) Former section 12021, subdivision (a), was recodified without substantive change at section 29800, subdivision (a) operative January 1, 2012. (Cal. Law Revision Com. com., 14 Deering's Ann. Pen. Code (2012 ed.) foll. § 29800, p. 921.)

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

implicitly claimed that the search of his car amounted to a Fourth Amendment violation.

The trial court rejected these claims because they had been raised and rejected before, and because—even assuming the facts in Alvarez's petition were true—he had failed to "allege facts establishing a prima facie case for habeas relief." Alvarez has not demonstrated that the trial court erred.

" 'This court has never condoned abusive writ practice or repetitious collateral attacks on a final judgment. Entertaining the merits of successive petitions is inconsistent with our recognition that delayed and repetitious presentation of claims is an abuse of the writ. [¶] "It is the policy of this court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner." ' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 455.) Although Alvarez filed a supplemental brief in this case, he never disputes the trial court's assertion that the claims asserted in his petition have been previously raised and rejected. For this reason alone, Alvarez's petition was properly denied.

Even if we were to consider his substantive claims on their merits, we would still conclude that Alvarez's petition was properly denied by the trial court.

Alvarez's "withheld documentation" claim is predicated on a fundamental misapprehension of California law. Alvarez incorrectly believes that he was improperly convicted of being an ex-felon in possession of a firearm on the ground that he was not, in fact, an ex-felon. This misapprehension appears to stem from his mistaken belief that the crime underlying his "ex-felon"

status was actually a misdemeanor, not a felony, because it was a so-called "wobbler" (see § 17) that the trial court had designated as a misdemeanor by sending him to the California Youth Authority (C.Y.A.) to serve his sentence.

However, the record demonstrates that Alvarez's underlying offense was attempted murder with enhancements for firearm use and great bodily injury (§§ 664/187, 12022.5, 12022.7), for which he was sentenced in 1991 to a prison term of 14 years. Attempted murder is not a wobbler and the trial court would not have been authorized to reduce that offense to a misdemeanor. The minimum penalty for attempted murder is a felony sentence for five, seven, or nine years.[3] Alvarez's initial placement in a C.Y.A. facility was apparently a matter of housing

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[3] The attempt statute, section 664, subdivision (a), provides: "If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years." The possible punishments for murder, as provided for by section 190, are the following: "(a) Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. . . . [¶] Except as provided in subdivision (b), (c), or (d) [providing for enhanced sentences in certain situations], every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life." (§ 190, subd. (a).) Alvarez has mistakenly relied on a case, *People v. Navarro* (1972) 7 Cal.3d 248, that did involve a wobber, to wit, "[a]ssault with a deadly weapon (Pen. Code, § 245) [which] carries optional sentences." (*Id*. at p. 266.)

convenience, not because the trial court had determined that his offense was a misdemeanor; Alvarez was later transferred to a state prison from which he was apparently paroled in 1997.

Alvarez's resentencing claim is based on the assertion that the record does not comply with subdivisions (a) and (c) of section 1192.6,[4] which require statements on the record explaining why the defendant was allowed to enter a plea bargain involving a designated sentence and the dismissal of some charges. However, it is clear that this and similar statutes were "designed to benefit the public and not defendants" (*People v. Gonzales* (1986) 188 Cal.App.3d 586, 590), that "the defendant may not challenge the validity of a conviction based upon the prosecutor's failure to state reasons at the time of the defendant's plea" (*People v. Claire* (1991) 229 Cal.App.3d 647,

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[4] Section 1192.6 provides, in pertinent part: "(a) In each felony case in which the charges contained in the original accusatory pleading are amended or dismissed, the record shall contain a statement explaining the reason for the amendment or dismissal. [¶] . . . [¶] (c) When, upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony . . . the prosecuting attorney recommends what punishment the court should impose or how it should exercise any of the powers legally available to it, the prosecuting attorney shall state the specific reasons for the recommendation in open court, on the record."

654),[5] and that "[a] litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when 'To hold otherwise would permit the parties to trifle with the courts.' [Citation.]" (*In re Griffin* (1967) 67 Cal.2d 343, 348.)

"The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception: Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their

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[5] *Claire* involved Vehicle Code section 23103.5, subdivision (a), which requires: "If the prosecution agrees to a plea of guilty or nolo contendere to a charge of a violation of Section 23103 [reckless driving] in satisfaction of, or as a substitute for, an original charge of a violation of Section 23152 [driving under the influence], the prosecution shall state for the record a factual basis for the satisfaction or substitution, including whether or not there had been consumption of an alcoholic beverage or ingestion or administration of a drug, or both, by the defendant in connection with the offense. The statement shall set forth the facts that show whether or not there was a consumption of an alcoholic beverage or the ingestion or administration of a drug by the defendant in connection with the offense." "The purpose of the directive of section 23103.5, subdivision (a), that the prosecutor state the facts of intoxication for the record . . . is to make it evident to the court and the public that the prosecutor is in fact engaging in the practice of plea bargaining a drunk driving charge down to a reckless driving charge." (*People v. Claire*, *supra*, 229 Cal.App.3d at p. 653.)

bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295.) By pleading no contest to the single charge of ex-felon in possession of a gun, in return for the dismissal of five other charges and a 32-month sentence, Alvarez received the benefit of his bargain.

Moreover, Alvarez was convicted of this offense in 2007; even if he had standing to assert this claim, there would be no point in having the case sent back to the trial court for a statement of reasons after so many years. "Appellant clearly was not prejudiced in any way by the prosecutor's failure to state reasons. Appellant . . . would not be aided at all by[ ] a remand to have the prosecutor on the prior charges state what those reasons were; and given the lapse of time since those convictions, such a remand would serve no purpose in protecting the public interest." (*People v. Claire*, *supra*, 229 Cal.App.3d at p. 655.)

As for Alvarez's implied claim that the search of his car was illegal: "It is settled that habeas corpus is not available to challenge the receipt of evidence allegedly obtained by an unconstitutional search and seizure. [Citations.]" (*In re Malloy* (1967) 66 Cal.2d 252, 255; accord *In re Sterling* (1965) 63 Cal.2d 486, 487.)

In his supplemental brief, Alvarez tries to add a claim that the statute outlawing possession of a firearm by an ex-felon violates his right to bear arms under the Second Amendment. Even if this brand new claim were to be considered on its merits, it would fail because it is plainly incorrect. (See, e.g., *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571, 581 ["although in *District of Columbia v. Heller* (2008) 554 U.S. 570 [171 L.Ed.2d 637, 128 S.Ct. 2783] (*Heller*), the United States Supreme Court struck

down the District of Columbia handguns ban, *Heller* recognized and affirmed certain traditional limitations on the right to bear arms and 'identified an expressly nonexclusive list of "presumptively lawful regulatory measures," stating "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." [Citations].' [Citation.]"].)

DISPOSITION

The judgment denying Alvarez's habeas corpus petition is affirmed.

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EDMON, P. J.

We concur:

ALDRICH, J.

GOSWAMI, 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.