Filed 12/9/15 In re Ross CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JAYVION ROSS, on Habeas Corpus.	B267168 (Los Angeles County Super. Ct. No. MA058292)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Eric P. Harmon, Judge. Petition granted.

Alex Coolman, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Michael C. Keller, Deputy Attorney General, for Respondent.

Petitioner Jayvion Ross (petitioner) filed a habeas petition in the trial court asserting the prosecution failed to turn over *Brady*[1] material in his underlying criminal case—specifically, records documenting a police interrogation in which he claims to have been subjected to improper and coercive tactics. The trial court denied his habeas petition on procedural grounds, faulting him for not raising the claim on direct appeal; the trial court also denied the petition on the merits, doubting whether the factual allegations in his petition were true. We hold the trial court applied the wrong legal standard in summarily denying the habeas petition and we direct the trial court to reevaluate the petition under the appropriate legal framework.

BACKGROUND

Petitioner participated in a series of robberies with an armed crew that targeted medical marijuana delivery drivers. Petitioner was eventually apprehended by the police and charged in an information with conspiracy to commit robbery (Penal Code[2] § 182, subd. (a)(1)), kidnapping to commit robbery (§ 209, subd. (b)(1)), and other offenses.

In pre-trial discovery, the prosecution produced to the defense records of two recorded police interviews of defendant. The first interview, conducted by Los Angeles County Deputy Sherriff Daniel Ament, took place on December 28, 2012. Petitioner did not admit committing any crimes during that interview. The second interview took place on January 2, 2013, and was conducted by Los Angeles County Deputy Sherriff Dale Parisi. During this interview, petitioner confessed to participating in three different robberies. During petitioner's trial on the charged offenses, the prosecution introduced statements made by petitioner during the January 2, 2013, interview with Deputy Parisi. The jury convicted petitioner on the robbery charges, and others.

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1 *Brady v. Maryland* (1963) 373 U.S. 83. Material subject to the *Brady* rule is material that is "favorable to the accused, either because it is exculpatory, or because it is impeaching." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.)

2 Undesignated statutory references that follow are to the Penal Code.

Approximately one year after his conviction, in February 2015, petitioner filed a habeas petition in the trial court. Petitioner alleged the police interviewed him a third time—in between the December 28 and January 2 interviews—but failed to produce records of this third interview in pre-trial discovery. Petitioner claimed Deputy Ament and another Hispanic investigator conducted this third interview and did not provide him with a lawyer when he asked for one. Petitioner also claimed the investigators came to his jail cell before the January 2 interview and told him that he would get a "county lid" (six months in jail) if he admitted to Deputy Parisi that he stole the marijuana during one of the charged robberies. In addition, petitioner asserted the prosecution failed to produce a recording of a post-arrest telephone call he made to his mother from jail in which he made statements that he believes corroborate his assertion there in fact was a third, undisclosed interview with investigators that took place before the January 2 interview used against him at trial.

The trial court issued an order on July 20, 2015, summarily denying the habeas petition on procedural and substantive grounds. The trial court found petitioner's habeas petition procedurally defective because he "failed to exhaust his appellate remedies," explaining that habeas review was "unavailable for claims that could have been litigated on appeal." The trial court "[n]evertheless" examined petitioner's claims on the merits. The court described the legal framework under which its examination would proceed as follows: "[T]he court finds that [the petition] does not support a prima facie case for relief. The court reaches this finding upon both a consideration of the particular facts and issues raised in the moving papers. In a habeas proceeding, the burden of proof is on petitioner to establish by a preponderance of the evidence substantial, credible evidence [of] the contentions upon which he seeks habeas relief." The court concluded that petitioner had not met his burden because "the court is not satisfied that such a tape [of the claimed third interview] even exists" and in any event, any discovery violation was harmless because of the overwhelming evidence of guilt presented at trial.

On September 30, 2015, petitioner filed a petition for habeas corpus in this court, arguing the trial court applied the wrong legal standard in summarily denying his habeas petition and advancing the same *Brady* claims he made below. We issued an order to show cause on October 22, 2015, seeking the parties views as to why the trial court should not be directed to set aside its July 20, 2015, summary denial of petitioner's habeas corpus petition and to reconsider its ruling applying the correct legal standard.

DISCUSSION

Respondent concedes the trial court incorrectly applied controlling precedent in summarily denying petitioner's habeas corpus petition, and petitioner, of course, agrees. We direct the trial court to vacate its July 20, 2015, order and to reconsider whether petitioner is entitled to an order to show cause under a correct application of the principles in *People v. Duvall* (1995) 9 Cal.4th 464 (*Duvall*).[3]

A. Procedural Ruling

Generally, a defendant is procedurally barred from raising a claim of error that was or could have been raised on direct appeal. (*In re Harris* (1993) 5 Cal.4th 813, 829 (*Harris*); *In re Dixon* (1953) 41 Cal.2d 756, 759 (*Dixon*).) Claims that require consideration of matters outside the appellate record, however, are properly raised in a habeas petition and are not subject to the procedural bar discussed in *Harris* and *Dixon*. (In re *Sakarias* (2005) 35 Cal.4th 140, 169 [claim based substantially on facts outside appellate record does not trigger the procedural default rules in *Harris* and *Dixon* because it could not have been adequately presented on direct appeal]; see also *People v. Seumanu* (2015) 61 Cal.4th 1293, 1375; *In re Reno* (2012) 55 Cal.4th 428, 449-450 ["Frequently used to challenge criminal convictions already affirmed on appeal, the writ of habeas

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3 We express no opinion on whether the allegations in the petition state a prima facie case for relief. (*Duvall*, *supra*, at p. 475.) That determination will be made by the trial court in the first instance.

corpus permits a person . . . to bring before a court evidence from outside the trial or appellate record. . . . "].) Because petitioner's *Brady* claim is based substantially on facts outside the appellate record, namely the asserted discovery violations, the trial court erred in finding his petition procedurally barred.

B. Ruling on the Merits

In response to a dramatic increase in habeas corpus filings and its belief that a proper understanding of the procedural requirements applicable to habeas corpus petitions is a matter of statewide concern, our Supreme Court summarized the applicable rules in *Duvall, supra*, 9 Cal.4th 464: "To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and '[i]f the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists.' [Citation] . . . [¶] An appellate court receiving such a petition evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC. [Citations.] 'When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues.' [Citation.] Issuance of an OSC, therefore, indicates the issuing court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*Id.* at pp. 474-475.) After considering the return to a habeas petition and the traverse, a court may appoint a referee and order an evidentiary hearing if it finds material facts in dispute. (*Id.* at p. 478.) Conversely, if there are no disputed factual questions, a court can decide the merits of the petition without an evidentiary hearing. (*Ibid.*)

The trial court here cited *Duvall* but incorrectly applied its teachings. As quoted above, *Duvall* requires a court—at the initial pleading stage—to accept factual allegations

in a habeas petition as true in deciding whether an order to show cause should issue. Here, the trial court's summary denial did not accept petitioner's allegations as true, and it appears the court may have incorrectly believed that petitioner was required to prove his contentions by a preponderance of the evidence at the preliminary stage of the proceedings before a formal order to show cause issues. The trial court must therefore reassess petitioner's habeas petition without imposing a procedural default, accepting its allegations as true and deciding whether it states a prima face case under *Duvall*.

DISPOSITION

Let a writ of habeas corpus issue directing the superior court to set aside its July 20, 2015, summary denial of petitioner's habeas corpus petition and to reconsider its ruling consistent with *Duvall*, *supra*, 9 Cal.4th 464 and this opinion.

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BAKER, J.

We Concur:

TURNER, P.J.

MOSK, J.