Filed 12/24/19 In re Chamberlain CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re LEE CHAMBERLAIN, on Habeas Corpus.	B300885 (Los Angeles County Super. Ct. No. BA198121)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Craig J. Mitchell, Judge. Petition denied.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Michael R. Johnsen and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

This matter is before us following the California Supreme Court's issuance of an order to show cause, returnable before this court, on petitioner Lee Chamberlain's petition for writ of habeas corpus. The Supreme Court ordered the Department of Corrections and Rehabilitation to show cause "why petitioner is not entitled to relief pursuant to *People v. Gallardo* (2017) 4 Cal.5th 120 [(*Gallardo*)], and why *Gallardo, supra,* 4 Cal.5th 120 should not apply retroactively on habeas corpus to final judgments of conviction." The decision in *Gallardo* established a new rule for determining whether alleged prior convictions qualify to increase a defendant's sentence. *Gallardo* overruled *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*) "insofar as it authorizes trial courts to make findings about the conduct that 'realistically' gave rise to a defendant's prior conviction." (*Gallardo*, *supra*, at p. 134.) Rather, *Gallardo* held that "[w]hile a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Id.* at p. 124.)

Division Seven of this court recently held in *In re Milton* (2019) __ Cal.App.5th __ [Dec. 3, 2019; 2019 DJDAR 11278] that *Gallardo* does not apply retroactively to final judgments of conviction. We agree with the *Milton* court's reasoning and conclusion. Moreover, even if *Gallardo* were retroactive to final judgments, we conclude petitioner is not

entitled to relief under *Gallardo*. We discharge the order to show cause and deny the petition.

BACKGROUND

The issues in this habeas petition arise from the trial court's determination, made as part of a judgment of conviction entered in 2000, that petitioner's prior 1992 conviction of violating Penal Code section 245, subdivision (a)(1),[1] qualified as a strike (former §§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)) and a serious felony (§ 667, subd. (a)(1)), because defendant personally used a deadly or dangerous weapon in committing the offense. We explain the relevant background.

Conviction and Sentence

In 2000, a jury convicted petitioner of second degree robbery (§ 211), assault with a deadly weapon (§ 245, subd. (a)(1)), mayhem (§ 203), and torture (§ 206), with personal use of a deadly and dangerous weapon (§ 12022, subd. (b)) and infliction of great bodily injury (§ 12022.7, subd. (a)) in all counts. The information also alleged two prior convictions as strikes and serious felonies: a 1985 conviction of second degree robbery (§ 211), and the prior conviction at issue here, a 1992 conviction under former section 245, subdivision (a)(1), described in the information as "ASSAULT WITH DEADLY WEAPON WITH GBI."

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[1] Unspecified section references are to the Penal Code.

The jury found that petitioner had suffered the two prior convictions, and the trial court found that both qualified as strikes and serious felonies. At that time, petitioner's prior 1992 conviction under former section 245, subdivision (a)(1) could qualify as a serious felony and strike only if petitioner personally used a deadly or dangerous weapon during the offense, or if he personally inflicted great bodily injury on any person other than an accomplice. (Former § 1192.7, subds. (c)(8), (c)(23); see *People v. Ringo* (2005) 134 Cal.App.4th 870, 884 [crucial date for determining whether prior conviction qualifies is the date of the charged offense].) In deciding the nature of the 1992 conviction, the trial court examined the preliminary hearing transcript from the 1992 case, and concluded that petitioner stabbed the victim, thus making the 1992 conviction a strike and a serious felony based on petitioner's personal use of a deadly and dangerous weapon. The court sentenced petitioner to an overall term of 61 years to life.[2]

Petitioner's First Appeal (*B142144)*

In petitioner's first direct appeal, B142144 (filed July 2001), we issued an unpublished opinion in which we reversed the trial court's finding that the 1992 conviction qualified as a strike and serious felony.

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[2] Petitioner was sentenced as follows: 25 years to life for robbery; 25 years to life for assault with a deadly weapon; 1 year for use of a deadly weapon (§ 12022, subd. (b)(1)); and 10 years for two prior serious felony enhancements (§ 667, subd. (a)(1)). The court imposed and stayed two terms of 25 years to life for mayhem and torture; three 1-year terms for use of a deadly weapon (§ 12022, subd. (b)(1)); and three 3-year terms for inflicting great bodily injury (§ 12022.7, subd. (a)).

Because the 1992 prior conviction had resulted from a jury trial, not a guilty plea, we held that under *People v. Houck* (1998) 66 Cal.App.4th 350, the trial court had erred in relying on the preliminary hearing transcript rather than the trial transcript to ascertain the nature of the offense. We remanded the matter for a retrial on the nature of the 1992 conviction, and for resentencing, but affirmed the judgment in all other respects. Petitioner's petitions for review and writ of certiorari were denied in 2001 and 2002, respectively.

Retrial on 1992 Prior Conviction and Second Appeal (B156417)

On remand, the trial court held a new trial on the nature of the 1992 conviction, again concluded that the conviction qualified as a strike and serious felony, and re-imposed the original sentence. Petitioner appealed for a second time.

As reflected in our unpublished opinion in that appeal, B156417 (filed December 2002), the trial court took judicial notice of three documents from the 1992 conviction: the 1992 amended information, the jury verdict form, and the abstract of judgment.[3] The trial court also reviewed a transcript of the victim's trial testimony. As we

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[3] We notified the parties of our intent to take judicial notice of the 1992 amended information, verdict form, abstract of judgment, and jury instructions that were refused, withdrawn, and given to the jury in case No. BA054760, as they appear in the trial court file in case No. BA198121. Petitioner objected to our taking judicial notice of the jury instructions on the grounds of relevance. We overrule the objection and take judicial notice of the jury instructions, amended information, verdict form, and abstract of judgment. (Evid. Code, § 452, subd. (d).)

summarized in our opinion, the trial court stated that the victim's trial testimony showed that that the victim "was stabbed by [petitioner]; that as a result of being stabbed by [petitioner], the victim was cut, received stitches, was sutured and at the time he testified, still bore a scar from the knife wound." We also stated that the verdict form "reflected [that petitioner] was found guilty in count 2 of ADW with a knife," and that the trial court "noted that . . . count 2 of the information charged [petitioner] with committing ADW with 'a knife,' the 'actual verdict form' reflected [that] the jury expressly found [petitioner] guilty of count 2, i.e., 'the crime of assault with a deadly weapon, to wit, knife,' and the abstract of judgment reflected [that] he was convicted of the crime in count 2."[4]

In his direct appeal from the reinstated judgment, petitioner contended that the trial court erred in considering the transcript of the victim's testimony from the 1992 case, rather than considering the

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[4] The 1992 amended information alleged: "ASSAULT GREAT BODILY INJURY AND WITH DEADLY WEAPON, in violation of PENAL CODE SECTION 245(a)(1), a Felony, was committed by [petitioner], who did willfully and unlawfully commit an assault upon [the victim] with a deadly weapon, to wit, knife, and by means of force likely to produce great bodily injury."

The actual verdict form states: "We, the Jury . . . find [petitioner] guilty of the crime of ASSULT [*sic*] WITH A DEADLY WEAPON, to wit, a knife, in violation of Section 245(a)(1) Penal Code, a felony, as charged in Count 2 of the Information."

The abstract of judgment reflects petitioner was convicted in count 2 under section 245, subdivision (a)(1), and lists the crime as "ASSLT W/ DEADLY WEAPON & GBI."

entire transcript of the trial.[5] We disagreed, concluding that petitioner had failed to establish the relevance of the remainder of the trial testimony: "[Petitioner] does not dispute that the trial testimony of the 1992 ADW victim was sufficient to establish he was the one who used the knife during the attack." As we noted, "[d]uring the trial, the victim positively identified [petitioner] as the knife wielder, and his testimony established [that] there was only one perpetrator." "Accordingly, it was [petitioner's] burden to refute such evidence of his personal use of a dangerous and deadly weapon by showing that it was someone else, not he, who wielded that knife. Clearly, [petitioner] knew what his defense was in that matter. If such defense primarily was that he was simply an aider and abettor, not the knife wielder, then it was incumbent on [petitioner] to point this out and to identify what evidence was presented to support such [a] defense. This he did not do. He therefore failed to show that any of the untranscribed portions of the 1992 oral trial was relevant."

We also noted, in any event, "that the additional portion of the 1992 ADW oral trial proceedings subsequently transcribed establish that [petitioner] did not rely on the defense that an accomplice, not he, wielded the knife." As we summarized: "A review of [the July 9, 1992 trial] transcript reflects that on that day the defense commenced and [petitioner] presented the testimony of two witnesses, Ron Carman, a Los Angeles County deputy probation officer, and Rebecca Schreiber, a

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[5] As of the time of the retrial on the 1992 conviction, only the trial testimony of the victim in that case had been transcribed.

public defender investigator. Carman essentially testified that he contacted the victim by telephone and prepared a report of his statements. He did not testify as to what those statements were. Schreiber testified that she contacted Josephine Villalobos, a witness, by phone and that Villalobos 'indicate[d] quite firmly she did not want to talk to [Schreiber] because [she] was working with the defense, and her friend had been a victim of [petitioner].' [¶] Afterwards, [petitioner's] attorney informed the court and the prosecutor that 'officer Martinez' was the only remaining defense witness and that he would not be available until July 13, a Monday. He expected to examine Martinez regarding the victim's statements as recited in the police report, which were allegedly contradictory to the victim's testimony and the testimony of another witness at trial regarding whether the victim walked up to or ran over to the police after the stabbing; whether the stabbing occurred in front of the bar or after the victim ran off; and how the victim was stabbed. The court then continued the matter to July 13 to allow the defense to examine the officer. The proceedings on July 13, 1992, and any proceedings thereafter were not transcribed."

Petitions for Writ of Habeas Corpus

Following the Supreme Court's decision in *Gallardo*, petitioner filed petitions for writs of habeas corpus in the trial court and this court, arguing that his sentence was prohibited because it was based on a fact (i.e., personal use of a deadly weapon) the jury did not necessarily find in rendering its verdict. After both petitions were denied,

petitioner filed a habeas petition in the Supreme Court. The Supreme Court issued an order to show cause returnable to this court "why petitioner is not entitled to relief pursuant to [*Gallardo*], and why *Gallardo* . . . should not apply retroactively on habeas corpus to final judgments of conviction."

We agree with *In re Milton* that *Gallardo* does not retroactively apply to final convictions, and in the alternative find that petitioner is not entitled to relief under the rule of *Gallardo*.

DISCUSSION

Division Seven of this court recently held that *Gallardo* does not apply retroactively to convictions that became final before *Gallardo* was decided. (*In re Milton, supra,* __ Cal.App.5th __ [2019 DJDAR at p. 11280; 2019 WL 6485068] (*Milton*).) The *Milton* court came to this conclusion under the framework of *Teague v. Lane* (1989) 489 U.S. 288, and in *In re Johnson* (1970) 3 Cal.3d 404. (*Milton*, *supra*, at pp. 11281–11284 [*Teague* analysis], 11284–11285 [*Johnson* analysis].) The parties in this case agree *Teague* and *Johnson* dictate whether *Gallardo* should be afforded retroactive application.

We agree with the *Milton* court that *Gallardo* should not be afforded retroactive effect because (1) *Gallardo* stated a new procedural rule of criminal procedure that neither prevents an impermissibly large risk of an inaccurate conviction nor alters our understanding of the bedrock procedural elements essential to a fair proceeding (*Teague*, *supra*, 489 U.S. at pp. 307, 311; *Schriro v. Summerlin* (2004) 542 U.S.

348, 352–353); (2) *Gallardo* is not intended to vindicate a right essential to the reliability of the fact-finding process, but is instead intended to limit the universe of information a court may consider when determining what a jury necessarily found in rendering its verdict (*Johnson*, *supra*, 3 Cal.3d at p. 411); (3) *Gallardo* departed from the long-standing practice of reviewing the entire record of conviction to evaluate the nature of a prior offense (*id.* at p. 410); and (4) the effect of applying *Gallardo* would be burdensome and could deprive criminal law of "much of its deterrent effect" (*Teague*, *supra*, 489 U.S. at p. 309; *Johnson, supra*, 3 Cal.3d at p. 410).

Even if *Gallardo* were retroactive to final judgments, petitioner is not entitled to relief under *Gallardo*. The Sixth and Fourteenth Amendments of the United States Constitution entitle a criminal defendant to "'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 (*Apprendi*).) A defendant's Sixth Amendment right to a jury trial extends to "those disputed facts that may not be formally designated as 'elements' of the offense, but nevertheless expose the defendant to additional punishment." (*Gallardo*, *supra*, 4 Cal.5 at p. 128.)

In *McGee, supra,* 38 Cal.4th 682, the California Supreme Court ruled "*Apprendi* does not preclude a court from making sentencing determinations related to a defendant's recidivism." (*Id.* at p. 707.) However, "the inquiry is a limited one and must be based upon the record of the prior criminal proceeding" to determine "whether that

record is sufficient to demonstrate that *the conviction* is of the type that subjects the defendant to increased punishment under California law." (*Id.* at p. 706.) In the event the elements do not resolve the issue of qualifying the offense as a serious felony, the trial court must examine the prior conviction's record to assess "whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." (*Ibid.*)

In *Gallardo,* our Supreme Court considered recent decisions by the United States Supreme Court (e.g., *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*); *Mathis v. United States* (2016) 136 S.Ct. 2243 (*Mathis*)), and overruled *McGee* "insofar as it authorizes trial courts to make findings about the conduct that 'realistically' gave rise to a defendant's prior conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 134.)

The defendant in *Gallardo* was alleged to have suffered a prior strike based on her conviction for assault with a deadly weapon under a former version of section 245. (*Gallardo*, *supra*, 4 Cal.5th at p. 123.) The defendant had pleaded guilty to the assault but did not specifically admit that she used a deadly weapon when she entered her plea. (*Id.* at p. 136.) A bench trial on the defendant's prior conviction resulted in a true finding, but the trial court's "sole basis for concluding that defendant used a deadly weapon was a transcript from a preliminary hearing." (*Id.* at p. 136 ["Nothing in the record shows that defendant adopted the preliminary hearing testimony as supplying the factual basis for her guilty plea"].)

After reviewing *Descamps* and *Mathis*, the *Gallardo* court held that the trial court improperly relied on the preliminary hearing transcript to find "a disputed fact about the conduct underlying defendant's assault conviction that had not been established by virtue of the conviction itself." (*Gallardo, supra*, 4 Cal.5th at pp. 124–125.) The court explained that "when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.' (*Descamps, supra*, 570 U.S. at p. 269.)" (*Gallardo, supra,* 4 Cal.5th at p. 124.) The court held "that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. (*McGee, supra*, 38 Cal.4th at p. 706.) That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' (*Descamps, supra*, at p. 269.) The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Gallardo*, *supra,* 4 Cal. 5th at p. 136.) The court remanded the matter "to permit the People to demonstrate to the trial court, based on the record of the prior plea proceedings, that

defendant's guilty plea encompassed a relevant admission about the nature of her crime." (*Id.* at p. 139.)

Despite disapproving the trial court's reliance on the preliminary hearing transcript to make an independent determination of a disputed fact, *Gallardo* did not designate or define the universe of documents a sentencing court may use to identify "those facts . . . the jury was necessarily required to find to render a guilty verdict." (*Gallardo*, *supra*, 4 Cal.5th at p. 136.) Instead, the court left intact earlier precedent that permits a sentencing court to review the evidence presented at trial (though not to make an independent factual determination as to the defendant's conduct based on that evidence) (e.g., *People v. Equarte* (1986) 42 Cal.3d 456 (*Equarte*)), and to review prior appellate opinions (e.g., *People v. Trujillo* (2006) 40 Cal.4th 165; *People v. Woodell* (1998) 17 Cal.4th 448 (*Woodell*)).

Equarte is instructive. The defendant in *Equarte* argued his conviction for assault with a deadly weapon under former section 245, subdivision (a)(1), did not constitute a serious felony because "the jury never found . . . that defendant had '*personally* used a dangerous or deadly weapon,' one of the necessary elements of subdivision (c)(23)." (*Equarte*, *supra*, 42 Cal.2d at p. 466.) Finding no merit to defendant's claim, the Supreme Court found there was "no doubt" the trial court properly found personal use of a deadly weapon "since the evidence at trial clearly demonstrated that there had been no accomplice in this case." (*Id.* at pp. 460, 467.)

In the present case, were *Gallardo* to apply retroactively to petitioner's final judgment, the trial court's consideration of the amended information, verdict form, and judgment of conviction from the 1992 case would not be improper. Those documents are part of the record of conviction, and the trial court used them not to make an independent judgment as to the conduct that was realistically the basis of the conviction, but rather to show that in convicting petitioner, the jury necessarily found that the assault was committed with a deadly weapon, a knife. Indeed, the verdict form specifically recited that the jury found petitioner guilty of "the crime of ASSULT [*sic*] WITH A DEADLY WEAPON, to wit, a knife."

The only remaining question under *Gallardo* would be whether in convicting petitioner, the jury necessarily found that he personally used a knife, or whether the jury might have found him guilty on a theory of vicarious liability not involving personal use of the knife. The trial court reviewed the transcript of the victim's testimony in the 1992 case. To the extent the court considered that transcript to make an independent judgment that petitioner personally used a deadly or dangerous weapon based on disputed facts, that use could arguably violate *Gallardo*. But the record before us in this habeas proceeding establishes that, in fact, the victim's testimony at the 1992 trial was undisputed as to the fact that he was stabbed by one man, and that no other person was involved. As we noted in our opinion in B156417, at the retrial whether the 1992 conviction qualified as a strike and serious felony, petitioner did not contend that there was evidence to suggest someone else used the knife. More to the point, we noted that, in fact,

the available record of the 1992 trial established that there was no evidence presented to show that anyone other than the perpetrator who used the knife was involved in the assault. To the contrary, the 1992 jury instructions required a finding "beyond a reasonable doubt that the [petitioner] is the person who committed the crime with which he is charged. [¶] If, after considering the circumstances of the identification . . . you have a reasonable doubt whether [petitioner] was the person who committed the crime, you must give [him] the benefit of that doubt and find [him] not guilty." (Former CALJIC No. 2.91.) In light of the jury instructions, the jury must have found petitioner was the person who used a deadly weapon, to wit, knife, during the assault.[6]

Significantly, *Gallardo* does not prohibit consideration of the evidence presented at the trial in which the prior conviction occurred, if that evidence was not disputed and, as such, necessarily demonstrates a fact the jury found in returning a guilty verdict. Here, as established by the entire record presented in this habeas corpus petition, there was no dispute at the trial resulting in the 1992 conviction that the perpetrator of the assault personally used a knife and had no accomplice. Hence, the record shows beyond any doubt that, in finding petitioner guilty of "assault with a deadly weapon, to wit, knife," the jury necessarily found the qualifying fact that petitioner personally used a deadly and dangerous weapon. There is no other explanation for the jury's verdict.

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[6] None of the jury instructions, whether refused by the court, withdrawn by the parties, or given to the jury, set forth theories of aiding and abetting or vicarious liability.

Therefore, on the record presented in this habeas corpus proceeding, the trial court's consideration of the victim's testimony from the 1992 trial does not entitle petitioner to relief under *Gallardo*. It was not error under the rule of *Gallardo*, because, as now appears, the victim's testimony that there was only one perpetrator and no accomplice was undisputed at the 1992 trial, and consideration of that testimony demonstrates that the jury necessarily found petitioner personally used a deadly or dangerous weapon. In the alternative, based on the same reasoning, any error under the rule of *Gallardo* premised on the trial court's consideration of the victim's testimony to determine the conduct underlying the 1992 offense was harmless beyond a reasonable doubt: there is no doubt that the jury in the 1992 trial found that petitioner personally used a deadly and dangerous weapon. (*Chapman v. California* (1967) 386 U.S. 18, 24 ["the beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 ["an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"].)

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DISPOSITION

The order to show cause is discharged, and petition for writ of habeas corpus is denied.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.