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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re CHRISTOPHER EWING on Habeas Corpus.	B297362 (Los Angeles County Super. Ct. No. LA042668)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Petition granted.

Brad Kaiserman, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Louis W. Karlin and Jonathan J. Kline, Deputy Attorneys General, for Respondent.

I. INTRODUCTION

In 2004, petitioner received a third-strike sentence after the trial court concluded his two prior convictions for robbery in Colorado qualified as strikes under California law. At the time, in determining whether a defendant suffered a prior serious or violent felony conviction, a trial court was permitted to independently review the record of a defendant's prior conviction to determine whether the defendant's prior offense involved conduct that satisfied all the elements of a comparable California serious or violent felony offense. In *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), our Supreme Court overruled this law. Petitioner requests to apply *Gallardo* retroactively to his conviction or, in the alternative, to find his appellate counsel ineffective in failing to challenge the sufficiency of the evidence supporting the trial court's finding that his Colorado convictions were serious felonies under California law. We conclude appellate counsel was ineffective in failing to argue the matter under the law as it existed in 2004 and therefore, we do not reach the question of *Gallardo's* retroactivity to final judgments of conviction.

II. BACKGROUND

After a 2004 jury convicted petitioner Christopher Ewing of robbery (Pen. Code, § 211)[1], the trial court conducted a bench trial on the People's allegation that he had suffered two prior

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[1] Statutory references are to the Penal Code unless otherwise indicated.

convictions for serious or violent felonies within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). During the bench trial, the People introduced certified documents from Colorado showing petitioner pled guilty to aggravated robbery (Colo. Rev. Stat. § 18-4-302) on March 25, 1987, in Arapahoe County and again on March 30, 1987, in Adams County. Petitioner, who represented himself at trial, argued the Colorado convictions did not qualify as serious or violent felonies under California law. In particular, he argued robbery in California, unlike aggravated robbery in Colorado, requires intent to permanently deprive the owner of property.

The trial court rejected petitioner's argument. It inferred petitioner had the intent to permanently deprive the owners of property in the Colorado cases, based on a certified copy of the judgments of conviction. In the Adams County case, the court ordered "costs of $75.00/Victim Comp." In the Arapahoe County case, the court "recommend[ed] restitution as a condition of parole amount is $2850.00." Based on the order of restitution, the trial court inferred petitioner intended to permanently deprive his victims of property. Therefore, the trial court found petitioner had suffered two prior serious felony convictions, and sentenced him to 25 years to life in prison under the Three Strikes law.

On appeal, petitioner was represented by appointed counsel, who did not challenge the sufficiency of the evidence in support of the trial court's finding that petitioner's prior Colorado robbery convictions qualified as serious felonies, even though petitioner specifically asked her to raise the issue. This court affirmed the conviction and sentence on appeal, and the Supreme

Court denied review. (*People v. Ewing* (June 8, 2005, B175757) [nonpub. opin.], review denied, S135599.) In the subsequent years, petitioner filed multiple (unsuccessful) habeas petitions arguing, among other things, that his prior Colorado convictions were not serious felonies under California law and that his appellate counsel was ineffective in failing to raise the argument.

On December 1, 2017, petitioner filed yet another petition for writ of habeas corpus with the Supreme Court, again arguing that his Colorado convictions did not qualify as strikes under California law because the Colorado crime does not contain all the elements of robbery in California. Shortly thereafter, the Supreme Court decided *Gallardo, supra,* 4 Cal.5th 120. *Gallardo* holds that, in determining whether a prior conviction constitutes a strike, a trial court may not make findings about the conduct that realistically led to the defendant's prior conviction. (*Id.* at p. 124.) Rather, it is limited to "identify[ing] 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." (*Ibid.*)

On May 1, 2019, the Supreme Court issued an order to show cause returnable in this court as to "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, or in the alternative, why appellate counsel did not render ineffective assistance in failing to challenge on appeal the sufficiency of the evidence to support a finding that petitioner's prior Colorado robbery convictions qualified as serious felonies. (See *People v. McGee* (2006) 38 Cal.4th 682; *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262.)"

In accordance with the Supreme Court's instructions, we consider petitioner's arguments on their merits. (See *In re Orosco* (1978) 82 Cal.App.3d 924, 927 ["when the Supreme Court, in response to a habeas corpus petition, issues an order to show cause returnable before a lower court, the lower court must decide the issues before it on their merits"]; *cf. City of Oakland v. Superior Court* (1983) 150 Cal.App.3d 267, 272.) We conclude appellate counsel rendered ineffective assistance when she failed to challenge the sufficiency of the evidence in support of the trial court's finding that petitioner's prior Colorado robbery convictions qualified as serious felonies under California law. Because counsel was ineffective in failing to challenge the prior strike finding under law existing at the time of sentencing, we do not reach the question of *Gallardo*'s retroactivity on habeas corpus to final judgments of conviction.

III. DISCUSSION

Habeas corpus relief is available for a claim of ineffective assistance of appellate counsel. (See *In re Robbins* (1998) 18 Cal.4th 770, 810.) The standard applied to review of a claim of ineffective assistance of appellate counsel is the same as that applied to trial counsel. (*People v. Osband* (1996) 13 Cal.4th 622, 664; *In re Banks* (1971) 4 Cal.3d 337, 343; *In re Smith* (1970) 3 Cal.3d 192.) A defendant must establish that his "'counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, [he would have obtained] a more favorable outcome.'"

(*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.)

Under the Three Strikes law, a defendant convicted of a felony who has sustained one or more "strikes"—*i.e.*, prior convictions for serious or violent felonies within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d)—may be sentenced to an increased term. To qualify as a strike, a conviction in another jurisdiction must "include[] all of the elements of the particular violent [or serious] felony" in California. (§ 1170.12, subd. (b)(2); see also *People v. Avery* (2002) 27 Cal.4th 49, 53 ["To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California"].) A California conviction for robbery qualifies as a strike. (§ 667, subd. (b)-(i), 667.5, subd. (c)(9), § 1192.7, subd. (c)(1)(19).)

In 2004, when petitioner was sentenced, a trier of fact was permitted to "'consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously convicted involved conduct which satisfies all the elements of the comparable California serious felony offense.' [Citation.]" (*People v. Zangari* (2001) 89 Cal.App.4th 1436, 1440; see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 ["the prosecution was entitled to go beyond the least adjudicated elements of the [prior] conviction and use the entire record to prove that defendant had in fact" engaged in conduct qualifying the conviction as a prior strike]; *People v. Guerrero* (1988) 44 Cal.3d 343, 345 ["We conclude that in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction"].)

Even in 2004, however, the People were required to proffer sufficient evidence "'from which the court [could] reasonably presume that an element of the crime was adjudicated in the prior conviction. [Citations.]'" (*People v. Zangari, supra,* 89 Cal.App.4th at p. 1440.) In this case, the trial court concluded petitioner intended to permanently deprive his victims of property based on the judgments of conviction in the two Colorado cases. In one case, the court ordered "costs of $75.00/Victim Comp." In the other case, it "recommend[ed] restitution as a condition of parole amount is $2850.00."

As the People conceded at oral argument, however, restitution and victim compensation are not limited to amounts taken from the victim during the crime itself. In Colorado, "'[r]estitution' means *any* pecuniary loss suffered by a victim." (Colo. Rev. Stat., § 18-1.3-602, subd. (3)(a) [emph. added].) It includes "all out-of-pocket expenses, interest, loss of use of money, anticipated future expenses, rewards paid by victims, . . . and other losses or injuries proximately caused by an offender's conduct and that can be reasonably calculated and recompensed in money." (*Ibid*.) Thus, Colorado courts have authorized restitution for $2,925 in lost wages, where a theft victim took six and one-half days off work to investigate the theft. (*People v. Henson* (2013) 307 P.3d 1135, 1138-1139.) The Colorado Court of Appeals has also approved restitution for an extortion victim's moving expenses, where the move was occasioned by defendant and his at-large accomplice's extortion threat. (*People v. Bryant* (2005) 122 P.3d 1026, 1027-1028.)

The judgments of conviction proffered by the People in this case do not indicate why petitioner was ordered to pay restitution. Because the documents do not identify the nature or

source of the loss to be compensated, and because the People did not offer any other evidence in support of the prior strike allegations, the trial court could not reasonably assume the amounts represented monies or property taken during the robberies themselves. (See *People v. Rodriguez*, *supra*, 17 Cal.4th at pp. 261-262 [although prosecution was entitled to use the entire record of the defendant's prior conviction to establish his conduct qualified his crime as a serious felony, it did not do so and instead relied solely on the abstract of judgment, which proved nothing more than the least adjudicated elements of the offense, which was insufficient to establish the prior conviction was a serious felony].)

At oral argument, the People relied upon *People v. Zangari, supra*, 89 Cal.App.4th 1436 to argue that the trial court reasonably inferred, from an order of restitution, that petitioner intended to permanently deprive his victims of property. In *People v. Zangari*, the trial court inferred from an out-of-state restitution order that defendant "carried away [personal property] from the burglarized premises." (*Id*. at p. 1448.) Unlike the restitution order in this case, however, the restitution order in *People v. Zangari* specified that the amount of restitution "'shall be reduced if additional property is recovered in satisfactory condition,'" which the court cited as supporting a reasonable inference that the restitution was for property taken away from the premises. (*Ibid*.) The judgments of conviction in this case do not contain a similar condition or any other condition that supports an inference that the restitution ordered was for property taken during the robberies. Absent such a condition, the trial court could not reasonably conclude the restitution was

for property taken by the petitioner in the commission of his Colorado crimes.

As there was insufficient evidence to support the trial court's finding that petitioner's Colorado convictions qualified as prior strikes, an appellate challenge would have been successful. Although appellate counsel need not raise all nonfrivolous arguments on appeal, she *is* required to raise "those arguments most likely to succeed." (*Davila v. Davis* (2017) 582 U.S. ___, 137 S.Ct. 2058, 2067.) Accordingly, we conclude counsel's failure to argue the insufficiency of the evidence in support of the sentencing court's prior strike findings "'fell below an objective standard of reasonableness'" and that but for counsel's error, petitioner would have obtained a more favorable outcome on appeal. (*In re Cudjo, supra,* 20 Cal.4th at p. 687; see also *In re Smith* (1970) 3 Cal.3d 192, 202-203 ["the inexcusable failure of petitioner's appellate counsel to raise crucial assignments of error, which arguably might have resulted in a reversal, deprived petitioner of the effective assistance of appellate counsel to which he was entitled under the Constitution"].)

IV. DISPOSITION

The petition for writ of habeas corpus is granted. The matter is remanded to the trial court with directions to vacate its finding that petitioner had suffered two prior convictions for serious or violent felonies within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) and resentence petitioner accordingly.

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KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.