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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GRANVILLE WILLIAM SMITH, IV,
Petitioner,
v.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

No. 2:18-cv-2212 JAM AC P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I. Procedural History

By order filed October 15, 2018, the undersigned screened the petition and dismissed it with leave to amend. ECF No. 10. Petitioner has now filed an amended petition for writ of habeas corpus that challenges his 1996 conviction for robbery, which was used to enhance his current sentence. ECF No. 14.

In dismissing the original petition with leave to amend, the court found that it was unclear “whether petitioner is contesting the validity of the 1996 conviction itself, or whether he is alleging that there was insufficient evidence presented in the second case to prove that the 1996 conviction existed and thus could support an enhancement.” ECF No. 10 at 2. The court then

1 explained the two exceptions that would allow petitioner to challenge the validity of his 1996
2 conviction. Id. at 2-3. Petitioner was further advised that if he was attempting to challenge the
3 enhancement of his current sentence based on the 1996 conviction, then he would need to provide
4 information about the subsequent conviction and enhanced sentence.

5 II. Amended Petition

6 In the amended petition, petitioner asserts four grounds for relief. Ground One claims that
7 there was insufficient proof of his 1996 conviction to support a sentencing enhancement. ECF
8 No. 14 at 4, 8. In Ground Two, he claims that his 1996 conviction was unconstitutional. Id. at 4.
9 Ground Three alleges ineffective assistance of counsel related to the 1996 guilty plea. Id. at 5.
10 Finally, Ground Four claims that plaintiff did not have advisement of counsel for his 1996 plea
11 and the conviction was therefore improperly used to enhance his current sentence. Id.

12 Rule 4 of the Habeas Rules Governing Section 2254 Cases requires the court to
13 summarily dismiss a habeas petition “[i]f it plainly appears from the petition and any attached
14 exhibits that the petitioner is not entitled to relief in the district court.” As set forth below, the
15 amended petition fails to state a cognizable claim for relief and the undersigned will recommend
16 that it be dismissed.

17 As with the original petition, petitioner is attempting to challenge his 1996 conviction for
18 robbery, for which he is clearly no longer in custody.¹ ECF No. 14 at 1, 58. Under 28 U.S.C.
19 § 2254(a), a federal court “shall entertain an application for a writ of habeas corpus in behalf of a
20 person in custody pursuant to the judgment of a State court only on the ground that he is in
21 custody in violation of the Constitution or the laws or treaties of the United States.” The Supreme
22 Court has interpreted § 2254 as requiring that the habeas petitioner be “‘in custody’ under the
23 conviction or sentence under attack at the time his petition is filed.” Maleng v. Cook, 490 U.S.
24 488, 490-91 (1989) (per curiam) (citation omitted). The custody requirement of § 2254 is
25 jurisdictional. Williamson v. Gregoire, 151 F.3d 1180, 1182 (9th Cir. 1998) (citation omitted).

26
27 ¹ Petitioner was given a suspended sentence and five years of formal probation. ECF No. 14 at
28 58.

1 Accordingly, to the extent any of petitioner's claims are attempts to directly challenge his 1996
2 conviction, they fail to state a claim for relief because petitioner is no longer in custody for that
3 sentence.

4 Additionally, as petitioner was previously advised, the Supreme Court has held that "once
5 a state conviction is no longer open to direct or collateral attack in its own right because the
6 defendant failed to pursue those remedies while they were available (or because the defendant did
7 so unsuccessfully), the conviction may be regarded as conclusively valid." Lackawanna Cty.
8 Dist. Attorney v. Coss, 532 U.S. 394, 403 (2001) (citation omitted). This means that, in general,
9 a sentence enhanced because of a prior conviction cannot be challenged on grounds that the prior
10 conviction was unconstitutional. The only exception recognized by the Supreme Court applies
11 when "the prior conviction used to enhance the sentence was obtained where there was a failure
12 to appoint counsel in violation of the Sixth Amendment, as set forth in Gideon v. Wainwright,
13 372 U.S. 335 (1963)." Lackawanna, 532 U.S. at 404. Contrary to petitioner's assertion in
14 Ground Four, the record in this case establishes that petitioner was represented by counsel in
15 relation to his 1996 plea (ECF No. 14 at 58), so this exception does not apply.

16 The Court of Appeals for the Ninth Circuit has recognized one other exception, based on
17 the reasoning of the Lackawanna Court:

18 when a defendant cannot be faulted for failing to obtain timely
19 review of a constitutional challenge to an expired prior conviction,
20 and that conviction is used to enhance his sentence for a later
21 offense, he may challenge the enhanced sentence under § 2254 on
the ground that the prior conviction was unconstitutionally
obtained.

22 Durbin v. People of California, 720 F.3d 1095, 1099 (9th Cir. 2013). Petitioner was advised that
23 in order to state a claim under this exception, he "must allege facts that show he was prevented
24 from presenting his claims to the state court." ECF No. 10 at 3. There are no facts to show that
25 petitioner was unable to file a timely challenge to his 1996 conviction. ECF No. 14.

26 For these reasons, Grounds Two, Three, and Four, which challenge the validity of the
27 1996 conviction, must be dismissed.

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1 With respect to Ground One, petitioner argues that his current sentence was
2 unconstitutionally enhanced by his 1996 conviction because he does not have a prior strike
3 conviction for robbery,² that his robbery conviction is not a strikable offense, and that there are no
4 records of his prior strike conviction. ECF No. 14 at 4. As an initial matter, despite the court’s
5 explicit instruction that petitioner needed to provide information about the subsequent conviction
6 and enhanced sentence, he has failed to do so. However, he does reference a transcript from Case
7 No. 11F00125 (*id.* at 4, 9-10), an excerpt of which is attached (*id.* at 63-74), that appears to be the
8 case in which he received an enhanced sentence based in part on the 1996 conviction.

9 The basis of Ground One appears to be that the court’s transcripts from petitioner’s 1996
10 conviction have been purged, leaving the court to rely upon insufficient “non-judicial” records as
11 proof of his conviction for robbery. *Id.* at 4, 8-9. Although the transcript from Case No.
12 11F00125 does indicate that the transcripts from his 1996 criminal case were unable to be located
13 (*id.* at 72), it also states that a certified copy of petitioner’s prior robbery conviction was
14 available, as well as a plea agreement from another case in which petitioner admitted to the 1996
15 conviction (*id.* at 67, 70-71). The certified conviction package included a copy of a minute order
16 that stated the plea was for a violation of § 211 and indicated that petitioner had been given the
17 appropriate advisements. *Id.* at 70. Accordingly, petitioner’s claim that there was insufficient
18 evidence of his prior conviction fails.

19 To the extent petitioner argues that a conviction for robbery is not a “strikable offense”
20 that can be used to enhance a subsequent conviction, not only is robbery explicitly defined as a
21 “serious felony” under California’s sentence enhancement provisions, Cal. Penal Code §§
22 1192.7(c)(1), 667(a)(4); 1170.12(b)(1), but that is a question of state law and not cognizable in
23 federal habeas, Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a

24
25 ² Although petitioner identifies his prior conviction as one for “burglary (PC 211)” (ECF No. 14
26 at 8), California Penal Code § 211 defines robbery, not burglary, and the attachments provided
27 establish that he was convicted of violating § 211 (*id.* at 14, 23, 58, 82). The distinction is
28 important because robbery of any degree is defined as a “serious felony” for purposes of the
sentencing enhancement laws, while burglary is only a serious felony if it is of the first degree.
Cal. Penal Code §§ 1192.7(c)(1), 667(a)(4); 1170.12(b)(1).

1 federal habeas court to reexamine state-court determinations on state-law questions.”); Miller v.
2 Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (“Whether assault with a deadly weapon
3 qualifies as a ‘serious felony’ under California’s sentence enhancement provisions is a question of
4 state sentencing law.”).

5 For these reasons, Ground One of the petition should be dismissed.

6 III. Certificate of Appealability

7 Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must
8 issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A
9 certificate of appealability may issue only “if the applicant has made a substantial showing of the
10 denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

11 For the reasons set forth in these findings and recommendations, a substantial showing of
12 the denial of a constitutional right has not been made in this case. Therefore, no certificate of
13 appealability should issue.

14 Accordingly, IT IS HEREBY RECOMMENDED that:

- 15 1. The amended application for writ of habeas corpus be dismissed.
- 16 2. This court decline to issue the certificate of appealability referenced in 28 U.S.C.
17 § 2253.

18 These findings and recommendations are submitted to the United States District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
20 after being served with these findings and recommendations, petitioner may file written
21 objections with the court. Such a document should be captioned “Objections to Magistrate
22 Judge’s Findings and Recommendations.” Petitioner is advised that failure to file objections
23 within the specified time may waive the right to appeal the District Court’s order. Martinez v.
24 Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 DATED: April 15, 2019

26 
27 ALLISON CLAIRE
28 UNITED STATES MAGISTRATE JUDGE