IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE A. LOZANO,

Petitioner,

v.

BEN CURRY,

Respondent.

_____/

No. 09-01461 CW

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY

On September 3, 2009, Petitioner Jose Lozano, a state prisoner currently incarcerated at California State Prison, Solano, in Vacaville, California, filed this amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his incarceration. Respondent filed an answer. Petitioner filed a traverse. Having considered all the papers submitted by the parties, the Court DENIES the petition for writ of habeas corpus and DENIES a certificate of appealability.

BACKGROUND

In 2006, Petitioner was charged with the following five counts for causing a multi-vehicle car accident while driving under the influence of alcohol and phencylidine (PCP): (1) violation of California Vehicle Code §§ 23153(a) and 23558, driving under the influence of alcohol and drugs proximately causing injury to more than one person; (2) violation of Vehicle Code §§ 23152 and 23550.5(a), driving under the influence of a drug with a felony

prior within the last ten years;[1] (3) violation of Vehicle Code §§ 20001(a) and (b)(1), causing a hit and run accident resulting in injury or death; (4) violation of Vehicle Code § 20002(a)(1)-(2), causing a vehicle accident involving property damage; and (5) violation of California Health and Safety Code § 11550(a), being under the influence of a controlled substance. Counts four and five were misdemeanors. Resp.'s Ex. 6 at 1-2.

On March 12, 2007, Petitioner plead no contest to all five counts. Resp.'s Ex. 2 at 19. He admitted that a prior conviction for driving under the influence and inflicting bodily injury, for which he was convicted in 1991, was both a prior strike and prior serious felony conviction. Id.; Resp.'s Ex. 1, at 304-06. The sentencing court informed Petitioner that the maximum sentence he faced under his plea agreement was eighteen years and four months; the maximum term he faced if he did not accept the agreement was sixty-years to life. Resp.'s Ex. 2, at 10-11. Petitioner agreed to waive his right to bring a Romero motion "in exchange for this offer." Resp.'s Ex. 2, at 16. On May 10, 2007, Petitioner was sentenced to a term of sixteen years and four months on counts one, two and three, which included a five year enhancement for the 1991 prior serious felony conviction. Resp.'s Ex. 6, at 2. Additionally, the court sentenced Petitioner to ninety days on counts four and five to run concurrent, which was deemed satisfied at the time of sentencing. Id. at 3.

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[1] The felony prior was Petitioner's conviction in 1997 for driving under the influence. Resp.'s Ex. 2 at 18. This prior conviction was not charged as a strike. Id. at 19.

On October, 2007, Petitioner timely appealed to the California court of appeal, alleging that the trial court committed error when it imposed a $117.50 penalty assessment in addition to a $50 criminal laboratory analysis fee. Resp.'s Ex. 3 at 10. On May 16, 2008, the court of appeal filed an unpublished opinion rejecting Petitioner's claim and affirming the judgment. Resp.'s Ex. 6.

Subsequently, Petitioner timely filed a petition for a writ of habeas corpus in California superior court, alleging that his sentence was unconstitutional and the result of ineffective assistance of counsel, prosecutorial misconduct and judicial bias. Resp.'s Ex. 7. On September 4, 2008, in an one-page order, the court denied the petition, finding that, under the circumstances, "Petitioner received a very favorable plea bargain" and his claims were baseless. Id. On September 23, 2008, the California court of appeal summarily denied the same petition. Resp.'s Ex. 8.

On April 3, 2009, Petitioner filed a petition for a writ of habeas corpus in federal court, alleging ineffective assistance of counsel. On June 23, 2009, this Court issued an order staying habeas proceedings pending Petitioner's exhaustion of his state judicial remedies. On August 26, 2009, the California Supreme Court denied Petitioner's petition. Resp.'s Ex. 10. On September 3, 2009, Petitioner filed a motion in federal court for leave to lift the stay on his habeas proceedings and simultaneously filed an amended petition for writ of habeas corpus, alleging the same claim of ineffective assistance of counsel as before. On February 12, 2010, the Court issued an order lifting the stay.

DISCUSSION

I. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal writ of habeas corpus may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claims: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." William v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the [Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings of the Supreme Court as of the time of the relevant state court decision. Id. at 412.

When a state court reaches a decision on the merits, but provides no reasoning to support its conclusion, the habeas court

must conduct an independent review of the record to determine whether the state court clearly erred in its application of Supreme Court law. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000). This review is not de novo; although the court independently reviews the record, it still defers to the state court's ultimate conclusion. Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

In determining whether the state court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest state court to address the merits of a petitioner's claim in a reasoned decision. Lajoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). Here, the highest state court to issue an opinion addressing Petitioner's claim is the Santa Clara County superior court. Because the state court opinion offered very little analysis other than to note that Petitioner's sentence pursuant to the plea agreement was very favorable, the Court conducts an independent review of the record.

II. Ineffective Assistance of Counsel

Petitioner's claim that trial counsel was ineffective rests primarily on his argument that his 1991 conviction under Vehicle Code § 23153(b), for driving under the influence and causing bodily injury to another, was not a serious felony. Resp.'s Ex. 1, at 304-306. Petitioner claims his counsel (1) erroneously advised him to admit that his prior conviction was a serious felony; (2) improperly stipulated that there was a factual basis for Petitioner's admission to the truth of the prior strike, when there was insufficient proof; and (3) failed properly to investigate

Petitioner's prior conviction before advising him to admit to it.

A claim of ineffective assistance of counsel is cognizable as a claim of the denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id. Strickland also applies to challenges to guilty pleas. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

To prevail under Strickland, a petitioner must pass a two-prong test. First, the petitioner must show that counsel's performance was deficient in a way that falls below an objectively reasonable standard. Strickland, 466 U.S. at 687-88. Second, the petitioner must show that the deficiency prejudiced him. Id. at 687. The first prong of Strickland requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689; Wildman v. Johnson, 261 F.3d 832, 838 (9th Cir. 2001).

In the context of guilty pleas, Strickland's "prejudice" requirement focuses on whether counsel's ineffective assistance affected the outcome of the plea process; that is, the petitioner must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going

to trial." Hill, 474 U.S. at 59. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. It is unnecessary for a federal court considering an ineffective assistance of counsel claim to address the prejudice prong of the Strickland test if the petitioner cannot establish incompetence under the first prong. Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998).

Under California law, any person convicted of a serious felony who has also previously been convicted of a serious felony receives a five-year enhancement for the prior conviction. Cal. Pen. Code § 667. Any felony in which the defendant personally inflicts "great bodily injury" on another person, other than an accomplice, is considered a serious felony. Cal. Pen. Code § 1192.7(c)(8).

Plaintiff does not dispute that his 2006 offense involved infliction of great bodily injury. However, Petitioner contends that there was insufficient evidence to support a finding that his 1991 conviction for driving under the influence and causing bodily injury was a serious felony. He maintains that the only evidence available to the prosecution was the probation officer's report stating that one of the victims, Frankie Martinez, suffered fractured ribs, a broken clavicle and closed head injuries. He argues that this report was insufficient to prove great bodily injury because it was inadmissible hearsay. In support of his argument, Petitioner cites People v. Trujillo, 40 Cal. 4th 165 (2006), and People v. Thoma, 150 Cal. App. 4th 1096 (2007).

Trujillo is inapposite. There, the prosecution argued that Trujillo's prior conviction for inflicting corporal injury was a

serious felony based on Trujillo's statement to the probation officer, included in the probation report, that he had used a knife. Trujillo, 40 Cal. 4th at 171. The California Supreme Court held that this could not be used as a strike because, in the plea bargain for the prior offense, the prosecution agreed to dismiss the allegation that Trujillo had used a deadly or dangerous weapon. Id. at 175. Thus, Trujillo's post-conviction admission to his probation officer that he had used a knife could not be used to prove that the prior conviction involved use of a deadly or dangerous weapon. Id. at 179. The facts here are not analogous.

Thoma does stand for the proposition that a statement in a probation report, by itself, may be insufficient to prove great bodily injury. There, the defendant contested the allegation that a prior conviction for driving under the influence causing bodily injury, Vehicle Code § 23153(a), constituted a strike, arguing that the record of the conviction did not show that he inflicted great bodily injury. Id. at 1098. The defendant did not admit to the strike. Id. at 1099. The evidence used to prove great bodily injury included a pre-conviction probation report in which the victim recounted her injuries to the probation officer, and a police officer's testimony at the preliminary hearing describing his conversation with the nurse who treated the victim. Id. at 1100-01. Although both the probation report and the officer's testimony indicated that the victim had suffered fractured arms and legs, as well as a fractured clavicle, the court of appeal held that only transcripts of the preliminary hearing, the defendant's guilty plea and the sentencing hearing could be considered in

determining the facts of a prior conviction allegation. Id. The court further held that the officer's testimony in the preliminary hearing was inadmissible because it involved multiple hearsay and that, as a result, the evidence was insufficient to prove the bodily injury in the prior strike. Id. at 1103. The court remanded the matter to trial court for re-sentencing or, at the prosecutor's election, retrial of the strike allegation. Id. at 1104-05.

Petitioner is correct that the probation report from the 1991 conviction, by itself, would not have been sufficient to prove great bodily injury. However, the probation report indicates that all three of the victims testified at a preliminary hearing. Resp.'s Ex. 1, at 308. Petitioner does not dispute this. The testimony by Martinez regarding her injuries would be admissible to prove the great bodily injury involved in Petitioner's prior strike and would not be hearsay. At the time Petitioner entered his plea, his trial counsel had access to the 1991 probation report which described Martinez' devastating injuries in detail and stated that she, as well as the other victims, had testified at the preliminary hearing. Although the probation report does not indicate exactly what she said, it was not unreasonable for trial counsel to conclude, based on the probation report, that the prosecution would be able to present sufficient admissible evidence to prove great bodily injury in the form of the transcript of her testimony. There is no evidence suggesting that trial counsel failed properly to investigate Petitioner's prior conviction or that counsel was mistaken in stipulating that there was a factual basis for it.

Petitioner provides no reason to believe that, if he had not admitted to the prior serious felony conviction, the prosecution could not have obtained a transcript of Martinez' testimony at the preliminary hearing. Given the gravity of Martinez' injury, it is reasonable to assume that she would have described it sufficiently to amount to great bodily injury. Nor is there any indication that any of the victims were Petitioner's accomplices. Therefore, it was reasonable for counsel to advise Petitioner to admit to the enhancement.

Petitioner's counsel's performance was not deficient and does not fall below an objectively reasonable standard.

Nor does Petitioner show that, "but for" trial counsel's ineffectiveness, he would not have plead guilty and would have gone to trial. Petitioner merely argues that his sentence should have been reduced by five years due to the enhancement for the prior strike. As the Santa Clara superior court noted when evaluating his ineffective assistance of counsel claim, Petitioner was facing a maximum sentence of sixty-six years to life had he gone to trial, and the court rejected Petitioner's ineffective assistance of counsel claim, in part, because Petitioner received a "very favorable plea bargain." Resp.'s Ex. 7 at 1. Although Petitioner disputes the sixty-six year maximum sentence, the court informed him of the maximum sentence he faced when he entered his plea. Resp.'s Ex. 2 at 11. Because Petitioner plead guilty and admitted the prior strike, he was sentenced to sixteen years and four months, fifty years less than the maximum sentence he could have received. Thus, although Petitioner argues that, had he contested

his prior serious felony conviction, his sentence would have been eleven years and four months, he overlooks that, had he not admitted to the prior serious felony, he would not have received the benefit he did. Therefore, Petitioner fails to satisfy the prejudice prong of the Strickland test.

Accordingly, Petitioner's claim for ineffective assistance of counsel fails.

CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is DENIED. The Court must rule on a certificate of appealability. See Rule 11(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate of appealability in same order that denies petition). A certificate of appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court finds that Petitioner has not made a sufficient showing of the denial of a constitutional right to justify a certificate of appealability. The Clerk of the Court shall enter judgment, terminate all pending motions, and close the file.

IT IS SO ORDERED.

Dated: 11/24/2010

CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSE A. LOZANO,

Plaintiff,

v.

BEN CURRY et al,

Defendant.
_____/

Case Number: CV09-01461 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 24, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jose A. Lozano F-75812
California State Prison - Solano
P.O. Box 4000
Vacaville, CA 95696-4000

Dated: November 24, 2010

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk