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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Appellant,

v.

JAMES LEONARD LAINO,

Defendant and Respondent.

D037111

(Super. Ct. No. SCD 153637)

APPEAL from a judgment of the Superior Court of San Diego County, Charles E. Jones, Judge. Reversed.

In a court trial, the judge ruled that a plea by James Leonard Laino entered under an Arizona statute providing for deferred entry of judgment and dismissal on completion of probation, which process Laino successfully completed, did not constitute a "strike" under California law. The People, relying on our decision in *People v. Castello* (1998) 65 Cal.App.4th 1242 (*Castello*), appeal, arguing the judge's determination was wrong as a matter of law. Laino argues first, the order below acquitted him and may not now be

challenged, and next, the Arizona diversion statute here in issue differs from the Florida conditional plea process considered in *Castello*, and thus the result below was correct.

We hold that the order in question did not constitute an acquittal, and further, the initial entry of the plea of guilty in Arizona by Laino, notwithstanding later diversion and expungement, constitutes a strike under California law, and thus we reverse.

FACTUAL BACKGROUND¹

Laino and other family members live with his 95-year-old grandmother. After five failed attempts, between March 11 and April 9, 2000, Laino used his grandmother's ATM card without permission to access her Wells Fargo account 31 times, withdrawing over \$5,300. Laino admitted taking the money, stating he had a gambling problem.

PROCEDURAL BACKGROUND

By an information filed September 10, 2000, the District Attorney of San Diego County accused Laino in one count of theft of personal property in excess of \$400 from an elder, in violation of Penal Code² section 368, subdivision (d), and in a second count of grand theft, in violation of section 487, subdivision (a). The information also alleged Laino had suffered a strike prior conviction³ in 1992 (aggravated assault/domestic violence), in Pima County, Arizona, in case number CR39574.

¹ As Laino pleaded guilty and the underlying facts are not in dispute, we abbreviate our recitation thereof, taken from the transcript of the preliminary hearing.

² Subsequent unattributed citations are to the Penal Code.

³ See generally section 667, subdivisions (b) through (i).

Laino entered pleas of not guilty and denied the strike allegation on September 11, 2000. Trial was set for October 31, 2000, and on that day the case was assigned to Judge Charles E. Jones for trial. In the trial department, Laino pleaded guilty to the count 1 charge of theft from an elder, and stipulated the contents of the preliminary hearing would serve as the factual basis for his plea. The District Attorney dismissed the second count, and the parties agreed to a bench trial on the issue of the prior conviction. Trial was first set for December 12, 2000, but was continued to December 21.

TRIAL PROCEEDINGS

A. Evidence

The first issue litigated was identity; that is, was it Laino who had pleaded guilty to the offense in Arizona? Based on fingerprint comparison, identity of personal history and appearance, and an admission made to a probation officer, the court found it true that Laino was the person who had entered the plea in Arizona.

As to the nature of the offense, a certified copy of Arizona court records showed that the Pima County grand jury indicted Laino in October of 1992 for the felony offense of aggravated assault, domestic violence, in that Laino had assaulted his wife, Beverly Laino, with a handgun, in violation of Arizona statutes. A separate allegation was that the felony had involved use of a deadly weapon, a handgun.

On December 9, 1992, Laino entered a plea of guilty pursuant to Arizona Revised Statutes section 13-3601(H).⁴ The court accepted Laino's guilty plea, determined there was a factual basis for it, and deferred entry of judgment. On January 21, 1993, the court granted Laino probation for three years (the duration of probation was later reduced to two years). Laino successfully completed probation, and pursuant to Arizona Revised Statutes section 13-3601(H), proceedings were dismissed.

B. Argument of Counsel

Laino's counsel argued that the Arizona domestic violence diversion statute was most akin to California's drug diversion statutes (§§ 1000-1000.3) under which a guilty plea does not constitute a conviction unless judgment is imposed,⁵ and cited *People v.*

⁴ Since renumbered as subsection (M), subsection (H) provided: "If the defendant is found guilty of an offense included in domestic violence and if probation is otherwise available for such offense, the court may, without entering a judgment of guilt and with the concurrence of the prosecutor and consent of the defendant, defer further proceedings and place the defendant on probation as provided in this subsection. The terms and conditions of probation shall include those necessary to provide for the protection of the alleged victim and other specifically designated persons and additional conditions and requirements which the court deems appropriate, including imposition of a fine, incarceration of the defendant in a county jail, payment of restitution and any counseling or diversionary programs available to the defendant. On violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided for revocation of probation. On fulfillment of the terms and conditions of probation, the court shall discharge the defendant and dismiss the proceedings against the defendant. This subsection does not apply in any case in which the defendant has previously been found guilty under this section, or in which charges under this section have previously been dismissed in accordance with this subsection."

⁵ Section 1000.1, subdivision (d) provides: "A defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to Section 1000.3 [defendant fails to complete program]."

Davis (2000) 79 Cal.App.4th 251, 254-258 (*Davis*) in support of the point that, as the Arizona case was dismissed without imposition of judgment, no "conviction" ever occurred, and the case should not be deemed to constitute a strike.

The prosecutor argued that, for purposes of the three strikes law,⁶ Laino had suffered a conviction at the time he entered his plea of guilty in Arizona, irrespective of whether a judgment or sentence had ever been imposed, and that the proceedings after the guilty plea did not affect the fact of the prior conviction.

C. Ruling

The judge considered our decision in *Castello, supra*, 65 Cal.App.4th 1242, in which we held a Florida plea of guilty to a charge of assault with intent to commit a sexual battery constituted a conviction, notwithstanding that after the defendant completed probation, there had been, as provided by Florida law, no adjudication of guilt by the court. (*Id.* at pp. 1245, 1254-1255.) The judge also considered whether the Florida statute was more closely analogous to section 1203.4, providing for dismissal upon completion of probation, or to sections 1000 through 1000.3, the drug offense diversion statutes, as to which pleas of guilty have been held not to constitute prior convictions for purposes of the three strikes law. (*Davis, supra*, 79 Cal.App.4th at p. 258.)

Noting that while section 1203.4 expressly provides for pleading and proving of a dismissed offense in a later prosecution, while the drug diversion statutes have no such

language, the court found the Arizona statute "doesn't sound like under California law it's a Penal Code section 1203.4 dismissal. It sounds to me like it's a diversion dismissal" The court then found "the allegation of the prior strike . . . has not been proven. I think it's about a 50/50 shot. I think it's that close."

STANDARD OF REVIEW

"The meaning of [a] phrase . . . in [the] Penal Code . . . is a pure question of law. We address it, therefore, under an independent review standard." (*People v. Jones* (2001) 25 Cal.4th 98, 103.) This standard applies to both of the questions before us.

DISCUSSION

I

DOES DOUBLE JEOPARDY APPLY?

Laino argues the court's ruling, finding his Arizona conviction did not constitute a strike, constituted an acquittal, and thus the People may not, by challenging that ruling, seek to place him again in jeopardy of having a true finding made as to the existence of a strike prior conviction. The law is settled to the contrary, however. It is clear that the question litigated below was the validity of a sentencing enhancement, rather than the truth of an offense. In these circumstances, the clause of the Fifth Amendment which provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" simply has no application.

⁶ All parties agreed the question of the effect of the Arizona proceedings was to be analyzed under California law.

The matter before the court below concerned sentencing only, as Laino pleaded guilty to one of the charged offenses. "Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal." (*Monge v. California* (1998) 524 U.S. 721, 729; see also *Bullington v. Missouri* (1981) 451 U.S. 430, 438, and *United States v. DiFrancesco* (1980) 449 U.S. 117, 134, holding generally to the same effect.) In the circumstances of this case, the Fifth Amendment presents no bar to a retrial of the question whether Laino's Arizona conviction constituted a strike under California law.⁷

Laino also argues that our decision in *People v. Mitchell* (2000) 81 Cal.App.4th 132, applying equitable principles to bar retrial of an alleged prior conviction following an earlier appellate finding of evidentiary insufficiency, should control the result here. (*Id.* at pp. 154-157.) As the People correctly point out, however, the question before us is not one of factual sufficiency, but legal error, and thus *Mitchell* is of no relevance herein. The more applicable authority, supporting the People's position, is set out in our decision in *People v. Walker* (2001) 89 Cal.App.4th 380, 383-385, and see also *People v. Kelii* (1999) 21 Cal.4th 452, 454-459.

⁷ On appeal, as in the trial court (see fn. 6, *ante*) the parties agree that the question presented is to be determined under California law. For this reason, Laino's argument that the "full faith and credit" clause of the United States Constitution (Art. IV, § 1) requires upholding the decision below is without substance. The question before us is one of California law alone, and thus the "full faith and credit" we must accord Arizona judicial proceedings is of no relevance herein. (*People v. Shear* (1999) 71 Cal.App.4th 278, 284-289; *Castello, supra*, 65 Cal.App.4th at p. 1251.)

II

DID THE ARIZONA PROCEEDINGS CONSTITUTE A CONVICTION?

As this court observed in *Castello*, "[t]he state has a compelling interest in controlling crime and preventing and punishing recidivism" and "[t]he three strike laws were enacted to promote this compelling interest in the protection of public safety and in punishing recidivism." (*Castello, supra*, 65 Cal.App.4th at pp. 1250-1251.) The determinative factor in application of the three strikes law is whether the defendant has incurred a "conviction." (*Id.* at p. 1252.) While Laino's argument seeks to shift the focus of the debate to the question of the later dismissal and the consequent lack of a judicial finding of guilt, the core issue remains, as noted, whether Laino has suffered a "conviction."

The resolution of the core issue in this case is uncomplicated. Precisely as we held in *Castello, supra*, 65 Cal.App.4th 1242, "[t]he ordinary legal meaning of 'conviction' is a verdict of guilty or the confession of the defendant in open court, and not the sentence or judgment. [Citations.]" (*Id.* at p. 1253.) Further, "this is consistent with the focus of the recidivist sentencing statutes, that the defendant has not in the past obeyed the law."

(*Ibid.*)

Under the controlling California authorities,⁸ Laino was convicted of a strike prior at the time he entered his plea of guilty to a qualifying offense in Arizona. The fact of his completion of probation, and the subsequent dismissal of the charges, does not affect this central, and dispositive, fact. Laino was convicted of a strike offense at the time he entered his plea of guilty to such charge in Arizona, and, for purposes of the three strikes law, nothing in the subsequent history of the case in Arizona may now be interposed to require a contrary conclusion. The ruling below must be reversed.

⁸ While not dispositive, we must also note that, while in *Castello*, we observed that "the issue [of whether the plea constituted a conviction] is unsettled under Florida law" (*Castello, supra*, 65 Cal.App.4th at p. 1254), in this case no such qualification appears to obtain. In *State v. Green* (1993) 852 P.2d 401, the question presented was "[w]hether a defendant who is on probation pursuant to A.R.S. § 13-13601(H) [set out in fn. 4, *ante*] is subject to enhanced punishment . . . when he commits new offenses during his probationary term." (*Id.* at p. 402.) Observing (as we did in *Castello*) that the term "conviction" was undefined and "susceptible of more than one meaning" (*ibid.*), the Arizona Supreme Court held in the case before it, "when the defendant . . . pled guilty . . . and received probation under A.R.S. 13-3601(H), he demonstrated that he posed a danger to society [¶] . . . Treating the guilty plea as anything other than a conviction simply gives the domestic violence offender a sentencing windfall" (*Castello, supra*, 65 Cal.App.4th at p. 403.)

Finally, while in *State v. Green* the question arose while the defendant was still on probation, nothing in that opinion suggests a different result would obtain for a recidivist who had completed his probation, such as Laino. This conclusion seems particularly compelled, in fact, by the language of the Arizona statute itself, which provides that "[t]his subsection does not apply in any case in which . . . charges under this section have previously been dismissed in accordance with this subsection." Because, as the Arizona Supreme Court noted, the statute was intended only to "provide a break to some persons guilty of domestic violence" (*State v. Green, supra*, 401 P.2d at p. 403) providing, as Laino seeks herein, "additional leniency" at sentencing upon recidivism "could not conceivably have been intended" by the Arizona legislature. (*Ibid.*) We see no reason for California to provide Laino a "break" by an interpretation of Arizona law which the Arizona Supreme Court itself would deem "a bizarre result." (*Ibid.*)

DISPOSITION

The ruling Laino's Arizona conviction did not constitute a strike is set aside, and the case is remanded to the trial court for further proceedings in accordance with this opinion.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.