Filed 11/27/12 P. v. Flemings CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>KEVIN FLEMINGS,<br><br>Defendant and Appellant. | B240415<br><br>(Los Angeles County<br>Super. Ct. No. NA034011) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, and Kevin Flemings, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Kevin Flemings appeals from the trial court's denial of his petition for writ of error *coram nobis* challenging his convictions of multiple crimes. Appointed counsel found no arguable issues for appeal. Flemings filed a supplemental brief claiming discovery violations, insufficiency of the evidence supporting one count, violation of his right to confront witnesses, sentencing error, and ineffective assistance of counsel.

Flemings has failed to satisfy the requirements for relief on *coram nobis* and we affirm.

## FACTUAL AND PROCEDURAL SUMMARY

Flemings was convicted of attempted murder, assault with a firearm, carjacking and four counts of second degree robbery in 1986. The jury found true allegations that he personally used a firearm in the commission of the offenses. The trial court found true allegations that Flemings had suffered four prior serious felony convictions for robbery within the meaning of the Three Strikes law (Pen. Code, § 667, subds, (b) – (i); § 1170.12, subds. (a) – (d); and § 667, subd. (a)(1)). He was sentenced to an aggregate term of 183 years, 8 months to life in prison.

Flemings appealed from these convictions, arguing that the trial court erred in instructing the jury in terms of CALJIC No. 17.41.1. That instruction informs the jurors that they must conduct themselves as instructed, and if a juror refuses to deliberate or expresses an intent to disregard the law or to decide the case based on punishment or any other improper basis, the jurors are obligated to immediately advise the court of the situation. Flemings argued that this instruction impermissibly infringed on the power of jury nullification, chilled the jury's deliberative process, and deprived him of his right to jury unanimity and due process. We filed our nonpublished opinion in *People v. Flemings* on January 25, 2001 (Case No. B139363). We indicated that CALJIC No. 17.41.1 was not erroneous, but even assuming that it was, concluded that its use in this case was not structural error requiring reversal per se. We based that conclusion on the fact that giving CALJIC No. 17.41.1 caused no harm to Flemings since there was no

jury deadlock, no holdout juror, and no report of any juror misconduct. Under these circumstances, we concluded that the instruction had no effect on the jury's verdict.

Subsequently, Flemings filed, and we denied, several petitions for writ of habeas corpus from this matter. In February 2012, Flemings filed a motion to set aside or vacate the judgment of conviction (petition for writ of error *coram nobis*). He raised six claims: (1) the trial court erred in finding true his 1995 robbery conviction, which was treated as a second strike; (2) the trial court violated section 654 by sentencing him to consecutive life terms; (3) defense counsel was ineffective; (4) his constitutional right to confront witnesses was violated; (5) the evidence is insufficient to support the conviction of second degree robbery in count 6; and (6) his right to discovery under Penal Code sections 1054.3, 1054.5, subdivision (a), and 1054.5, subdivision (b) was violated by the prosecution.

The trial court denied the motion and petition on the ground that it is "unverified, unsigned, and lacks evidentiary support." This timely appeal followed.

## DISCUSSION

We appointed counsel to represent Flemings on appeal. Appointed counsel filed an appellate brief raising no issues, but asking this court to independently review the record on appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441–442. We advised Flemings that he had 30 days within which to submit by brief or letter any contentions or arguments he wished this court to consider. In response, he filed a supplemental brief in pro. per. We have reviewed his brief and have independently reviewed the record in accordance with *People v. Wende*, *supra* 25 Cal.3d at pp. 441–442.

In his supplemental brief, Flemings limited his argument to the treatment of his 1995 robbery conviction as a serious felony, imposition of multiple consecutive 25-years-to-life sentences in violation of Penal Code section 654, and a claimed discovery violation.

A writ of error *coram nobis* applies "'where *a fact* unknown to the parties and the court existed at the time of the judgment that, if known, would have prevented rendition of the judgment.' (*People v Kim* (2009) 45 Cal.4th 1078, 1093.)" (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 453.) An error of law is not cognizable in a *coram nobis* proceeding. (*Ibid.*) "*In People v. Kim*[, *supra*,] 45 Cal.4th [at pp.] 1092–1093 (*Kim*), the California Supreme Court stated: 'The seminal case setting forth the modern requirements for obtaining a writ of error *coram nobis* is *People v. Shipman* (1965) 62 Cal.2d 226. There we stated: "The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must 'show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment.' [Citations.] (2) Petitioner must also show that the 'newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.' [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . .'" [Citation.] These factors set forth in *Shipman* continue to outline the modern limits of the writ.'" (*People v. Gari* (2011) 199 Cal.App.4th 510, 519, fn. omitted.)

Flemings does not satisfy these requirements. Some of the issues he now raises are legal issues outside the scope of *coram nobis* relief, e.g. the claims of sentencing error. He has not demonstrated either newly discovered evidence or diligence as to any of his claims. We affirmed his underlying conviction in an opinion filed January 25, 2001. He does not explain why he waited so long to raise these issues. For example, Flemings contends that the prosecution failed to disclose that its witness, Martin Rubio Rodriguez, was a gang member with a criminal record. In his argument, not supported by a declaration, Flemings asserts that he noticed that Rodriguez appeared to be hiding

tattoos with his clothing during this trial testimony. Fleming states: "sometime after appellant's direct appeal, he [Flemings] hired a private investigator to obtain any criminal arrest/conviction record that Mr. Rodriguez may had [*sic*] obtained. [¶] The prosecution left out the fact that Mr. Rodriguez was a gang member and had a criminal conviction from the discovery that was given to appellant's attorney." He fails to demonstrate diligence in pursuing this claim and does not offer an explanation for the delay.

We find no basis for reversal and affirm the judgment of conviction.

## DISPOSITION

The judgment of conviction is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.