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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID MARTINEZ, Defendant and Appellant.	B230901 (Los Angeles County Super. Ct. No. VA100767)

APPEAL from an order of the Superior Court of the County of Los Angeles, Roger Ito, Judge. Affirmed.

Law Offices of Elsa Martinez, Lucrecia A. Boado, Elsa I. Martinez, and Xavier Rosas for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant David Martinez (defendant) pleaded guilty to two counts of perjury pursuant to a plea agreement. While on probation, he filed an unsuccessful habeas corpus petition seeking to vacate his conviction on the ground that he was not advised of the adverse immigration consequences of his plea. Thereafter, he filed a nonstatutory motion in the trial court to vacate his conviction on the same ground. The trial court ruled that it lacked jurisdiction to hear that motion and therefore denied it.

On appeal, defendant contends that the trial court had inherent jurisdiction to remedy the violation of his constitutional right to be advised of the immigration consequences of his plea. We hold that the trial court properly denied defendant's nonstatutory motion to vacate his conviction. We therefore affirm the order from which defendant appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County District Attorney filed a felony complaint for an arrest warrant alleging in count 1 that defendant had committed perjury in an application for an identification card in violation of Penal Code section 118, subdivision (a);[1] in count 2 with second degree commercial burglary in violation of section 459; in count 3 with perjury in an application for a driver's license in violation of section 118, subdivision (a); and in count 4 with second degree commercial burglary in violation of section 459. On August 15, 2007, at an early disposition hearing, defendant entered a plea of no contest to the two perjury counts pursuant to a written plea agreement.[2] Based on the plea

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] In the plea agreement and in the trial court, defendant acknowledged that his guilty plea could result in deportation.

agreement, the trial court placed defendant on formal probation for three years. Defendant did not appeal from the judgment of conviction.

Almost two years later, defendant filed a petition for writ of habeas corpus in the Court of Appeal (Case No. B217762).[3] Defendant argued that he had received ineffective assistance of counsel with respect to the plea agreement because his trial counsel had misadvised him about the immigration consequences of his plea. On August 26, 2009, this court denied the petition on the grounds that defendant had failed to demonstrate that he had presented his claims to the trial court in the first instance.

Over a year later, on October 28, 2010, defendant filed in the trial court a nonstatutory motion to vacate the judgment of conviction on the perjury counts, again arguing that he had been misadvised concerning the immigration consequences of his plea. Following additional briefing on whether the trial court had jurisdiction to hear and determine that motion, the trial court denied the motion on the ground that the court lacked jurisdiction to determine it. Defendant then requested and the trial court issued a certificate of probable cause. This appeal followed.

DISCUSSION

Relying on the United States Supreme Court decision in *Padilla v. Kentucky* (2010) __ U.S. __, 130 S.Ct. 1473 (*Padilla*) and the California Supreme Court decision in *People v. Fosselman* (1983) 33 Cal.3d 572 (*Fosselman*), defendant contends that the trial court had jurisdiction to hear and determine his nonstatutory motion to vacate his conviction. According to defendant, because he had a Sixth Amendment right to be adequately advised by his trial counsel of the immigration consequences of his plea, the trial court had inherent jurisdiction to determine whether that right had been violated.

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[3] The Attorney General filed a request for judicial notice asking us to take judicial notice of the records on file in Case No. B217762. That request is granted.

Defendant concludes that without such inherent jurisdiction, he would have no procedural means of vindicating the violation of his constitutional right as recognized in *Padilla.*

Defendant's reliance on *Padilla, supra,* 130 S.Ct. 1473 and *Fosselman, supra,* 33 Cal.3d 572 is misplaced. *Padilla* involved an issue of substantive federal constitutional law—whether an alien criminal defendant in a state court proceeding had a Sixth Amendment right to be advised by counsel of the immigration consequences of a plea. In ruling that an alien criminal defendant had such a constitutional right, the court in *Padilla* did not state or imply that a state trial court had inherent authority to hear and determine a nonstatutory motion to vacate a conviction based on ineffective assistance of counsel. Here, there is no dispute about whether defendant had a right under the Sixth Amendment to accurate advice about the immigration consequences of his plea; the issue is whether the trial court can at this juncture vacate defendant's conviction based on ineffective assistance of counsel in connection with the explanation of that right. *Padilla* therefore has no application to the jurisdictional issue at bar.

Moreover, although it involved a procedural issue concerning a trial court's authority to hear a nonstatutory motion, our Supreme Court's decision in *Fosselman, supra,* 33 Cal.3d 572 is not, as defendant contends, analogous to this case. In *Fosselman,* the issue was whether a trial court had inherent authority to hear a nonstatutory motion for new trial based on ineffective assistance of counsel that allegedly occurred during trial. In this case, defendant did not move for a new trial; he moved over three years after he pleaded guilty to perjury to vacate that conviction. Thus, the holding in *Fosselman* that recognized a trial court's inherent power to determine a motion for new trial based on ineffective assistance of counsel does not address the jurisdictional issue presented in this case.

This case is controlled by our Supreme Court's decision in *People v. Kim* (2009) 45 Cal.4th 1078 (*Kim*). In that case, the defendant filed, inter alia, a nonstatutory motion to vacate his conviction based on his plea to felony petty theft. (*Id.* at p. 1089.) The nonstatutory motion was based on a claim of ineffective assistance of counsel—specifically the failure of defendant's trial counsel to inform him of the immigration

consequences of his plea. (*Ibid.*) In ruling that the trial court erred in granting that nonstatutory motion, the court in *Kim* explained that "a nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for a writ of error coram nobis . . . ." (*Id.* at p. 1096.) The court in *Kim* then held, however, that "a claim of ineffective assistance of counsel, which relates more to a mistake of law than a mistake of fact, is an inappropriate ground for relief on *coram nobis* . . . ." (*Id.* at p. 1104.) According to the court in *Kim*, the alleged violation of the defendant's constitutional right to effective assistance of counsel should have been "raised in a motion for a new trial or in a petition for a writ of habeas corpus." (*Ibid.*) But, because the defendant had served his sentence and completed his probation or parole period, the court in *Kim* held that he could no longer challenge his conviction by a writ of habeas corpus. (*Id.* at p. 1108.)

In reaching the foregoing conclusions about the unavailability of either coram nobis or habeas corpus relief, the court in *Kim, supra,* 45 Cal.4th 1078 expressly rejected a contention, similar to the one defendant makes here, that the defendant was not provided a reasonable opportunity to vindicate his constitutional rights. According to the court in *Kim,* "criminal defendants have ample opportunities to challenge the correctness of the judgments against them. They are of course provided attorneys to defend them and are guaranteed the right to a jury trial. (*Kim, supra,* 45 Cal.4th at p. 1105.)

"Following a plea or conviction, a defendant can move to withdraw a plea, (fn. omitted) or can appeal a judgment of conviction and then if necessary seek discretionary review in this court. Having exhausted those avenues of potential relief, the defendant during the time of actual or constructive custody can file a petition for a writ of habeas corpus in an appropriate court. (Fn. omitted.) Following completion of probation, an offender may in some circumstances petition the trial court to withdraw a guilty plea and enter a not guilty plea or set aside a verdict of guilty and have the matter dismissed. (§ 1203.4.) One convicted of a crime can also seek a pardon from the Governor. (*Mendez v. Superior Court* [(2001)] 87 Cal.App.4th [791,] 803.) In short, criminal defendants do not lack reasonable opportunities to vindicate their constitutional rights or otherwise

correct legal errors infecting their judgments." (*Kim, supra*, 45 Cal.4th at pp. 1105-1106.)

Applying the principles of *Kim, supra,* 45 Cal.4th 1078 to the facts of this case, we conclude that defendant's nonstatutory motion was, in effect, a petition for a writ of error coram nobis[4] that was properly denied because it was based on a claim of ineffective assistance of counsel that raised a legal issue that could not be determined on such a petition. We also conclude that defendant's motion cannot be treated as a petition for habeas corpus because defendant is no longer in actual or constructive custody. Because it appears that defendant had a reasonable opportunity to vindicate his constitutional right to effective assistance of counsel, the trial court correctly denied his motion to vacate as unauthorized by either statute or under the common law. Therefore, the order denying the motion must be affirmed.

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4 "The granting or denying of a petition for writ of error coram nobis is an appealable order, governed by the same procedural rules that applyto appeals from a judgment of conviction. (*People* v. *Griggs*, 67 Cal.2d 314, 316 [61 Cal.Rptr. 641, 431 P.2d 225]; *In re Horowitz*, 33 Cal.2d 534, 537 [203 P.2d 513].)" (*In re Dapper* (1969) 71 Cal.2d. 184, 187.)

DISPOSITION

The trial court's order denying defendant's motion to vacate his conviction is affirmed.

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MOSK, J.

I concur:

KRIEGLER, J.

I disagree with my colleagues' decision to discuss the merits of the case. I thus dissent from the majority opinion.

I agree with the Attorney General that the order under review, a challenge to the effectiveness of trial counsel improperly raised in a coram nobis petition, is not appealable. (People v. Miranda (2004) 123 Cal.App.4th 1124, 1132, fn. 6; People v. Gallardo (2000) 77 Cal.App.4th 971, 982-983; see People v. Chien (2008) 159 Cal.App.4th 1283, 1290-1291.) I would dismiss the appeal.

TURNER, P. J.