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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAVID GORDON MOUNTFORD, Defendant and Appellant.	B292326 (Los Angeles County Super. Ct. No. VA077136)

ORIGINAL PROCEEDING; petition for writ of error *coram vobis*. Yvonne Sanchez, Judge. Petition denied.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

This matter is the fifth in a series of challenges brought by defendant David Gordon Mountford to his prior convictions. Mountford's prior appeals sought resentencing and/or reclassification under Proposition 47 (Pen. Code, § 1170.18)[1] for his 2006, 2010, and 2015 convictions for identity theft (§ 530.5, subds. (a) and (c)(2)), his 2006 conviction for driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)), his 2011 convictions for possession of a forged driver's license (§ 470b) and forgery (§ 470, subd. (a)), and his 2015 conviction for offering a false or forged instrument (§ 115, subd. (a)).[2]

Mountford now seeks to challenge his 2003 guilty plea to petty theft with a prior (§ 666) and false personation of another (§ 529). The trial court denied Mountford's motion to withdraw his guilty plea, and did not issue a certificate of probable cause. We accordingly lack jurisdiction to hear an appeal from the trial court's denial of Mountford's motion. We instead treat Mountford's appeal as a petition for writ of error *coram vobis* filed initially in this court, and for the reasons set forth below, deny it.

BACKGROUND

On June 16, 2003, Mountford took $327 worth of merchandise from a store without paying for it, and was apprehended by a security guard in the parking lot. When

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[1] All unspecified statutory references are to the Penal Code.

[2] *People v. Mountford* (Mar. 28, 2019, B286803, B287202) [nonpub. opn.]; *People v. Mountford* (May 28, 2019, B287245) [nonpub. opn.]; *People v. Mountford* (Oct. 31, 2019, B286655) [nonpub. opn.].

apprehended, he gave authorities a false name. Following his plea of guilty, which included the admission he had served prior prison terms for purposes of sentencing enhancements under section 667.5, subdivision (b), Mountford was sentenced to an upper term of three years on the petty theft with a prior offense, and a concurrent term of two years for the false personation offense. The trial court dismissed the findings of separate prior prison terms pursuant to section 1385. We affirmed Mountford's conviction on appeal. (*People v. Mountford* (Sep. 8, 2005, B172092) [nonpub. opn.] [2005 WL 2158817].)

In 2018, Mountford filed a request for a certificate of probable cause along with a motion to withdraw his 2003 guilty plea. Mountford asserted the 15-year delay in seeking to withdraw his plea "was caused by not being advised of the adverse consequences that accepting the plea would expose me to future sentencing enhancements, both in California and under the laws of other states," and that he was now exposed to a life sentence in a Nevada state case as a habitual criminal.

Mountford acknowledged the minute order of the 2003 hearing at which his plea was taken stated that he was advised of "[t]he possible consequences of a plea of guilty or nolo contendere, including the maximum penalty and administrative sanctions and the possible legal effects and maximum penalties incident to subsequent convictions for the same or similar offenses." He claimed error, however, because he was not advised of the adverse legal consequences from future convictions not related to section 529, nor was he advised of potential adverse sentencing consequences he could suffer under the laws of different states.

On August 21, 2018, the trial court issued a minute order stating that it had read and considered Mountford's request/motion, and that "Defendant's request to withdraw his September 11, 2003 guilty plea is denied." The court's minute order did not expressly address the request for a certificate of probable cause. Mountford timely appealed.

DISCUSSION

A. Mountford Cannot Appeal the Trial Court's Order

Mountford contends we must remand for further proceedings because the court did not rule on his request for a certificate of probable cause. He further contends the trial court erred in denying his motion to withdraw his guilty plea by failing to state reasons for the denial. Neither of these claims can be raised by way of direct appeal.

Section 1237.5 provides that a defendant cannot appeal from a judgment of conviction upon a plea of guilty unless the defendant obtains a certificate of probable cause for the appeal from the trial court. (§ 1237.5, subd. (b); see also *People v. Johnson* (2009) 47 Cal.4th 668, 676.) Our Supreme Court has directed that section 1237.5 is to be "applied in a strict manner." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099.) Section 1237.5 thus bars Mountford's appeal of issues related to his guilty plea.

To the extent Mountford sought to challenge the trial court's refusal to issue a certificate of probable cause, he was required to do so by writ of mandate. (*People v. Johnson*, *supra*, 47 Cal.4th at p. 676 ["If the trial court wrongfully refuses to issue a certificate, the defendant may seek a writ of mandate from the appellate court"].) He failed to do so. We accordingly lack jurisdiction to address Mountford's claims on direct appeal.

B. Mountford's Alternative Request for a Writ of Error *Coram Vobis* Is Denied

We have the option to treat Mountford's appeal as an original proceeding in this court for a writ of error *coram vobis*. (*People v. Forest* (2017) 16 Cal.App.5th 1099, 1108.) The basis for the issuance of a writ of error *coram vobis* is substantially the same as for a writ of error *coram nobis*, the difference being *coram vobis* is addressed to the appellate court that affirmed the judgment, while *coram nobis* is addressed to the trial court that issued the judgment.[3] To avoid subsequent and duplicative briefing, and conserve scarce judicial resources, "we elect to treat the appeal as a petition for writ of error *coram vobis* in this court and the record in the inoperative appeal as the record in this original proceeding." (*Ibid.*)

A writ of the type sought by Mountford "may be granted when three requirements are met: (1) the petitioner has shown that some fact existed which, without fault of his own, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of judgment; (2) the petitioner has shown that the newly discovered evidence

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[3] Given the procedural posture, Mountford could not seek a writ of error *coram nobis* in the trial court. Motions to set aside the judgment, "and petitions in the nature of *coram nobis* may be addressed to the trial court after judgment, if there has been no affirmance on appeal (. . . § 1265)." (*People v. Wadkins* (1965) 63 Cal.2d 110, 113.) Here, Mountford appealed to this court following his guilty plea, and the judgment was affirmed. Any petition for a writ of error is therefore required to be brought "in the court which affirmed the judgment on appeal." (§ 1265, subd. (a).)

does not go to the merits of the issues tried; and (3) the petitioner has shown 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. [Citations.]" (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618-1619.) We "independently evaluate[] whether the newly discovered fact presented in the petition warrants relief. [Citations.] . . . [T]his is a mixed question of law and fact which we review de novo, much like the question whether a habeas corpus petitioner has proven by a preponderance of the evidence facts that establish a basis for relief. [Citation.] As in such proceedings, where the evidentiary record consists of exhibits attached to the petition, we independently review the record. [Citations.]" (*People v. Forest*, *supra*, 16 Cal.App.5th at p. 1109.)

We note first that Mountford's petition is untimely. "A postjudgment motion to change a plea must be 'seasonably made.' [Citation.] Thus, the [appellate] court may properly consider the defendant's delay in making his application, and if 'considerable time' has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay. [Citation.]" (*People v. Castaneda*, *supra*, 37 Cal.App.4th at p. 1618.) Mountford's proffered reason for his lengthy delay—that he did not realize a guilty plea would expose him to future sentencing enhancements—is not credible. One of Mountford's 2003 convictions—petty theft with a prior—was after all enhanced for charging purposes because of a prior conviction. Additionally, as part of his 2003 guilty plea Mountford admitted prior prison terms pursuant to section 667.5, subdivision (b), understanding that they would increase his sentence, before the

trial court ultimately dismissed them pursuant to section 1385. Mountford was convicted again in 2006, 2010, 2011, and 2015, and does not contend his extensive prior criminal history played no role in the discussion of what sentence he should receive in one or more of those proceedings. Nor does Mountford provide any details regarding when he became aware of the Nevada statute as compared to when he filed his motion. Mountford therefore has not justified the lengthy delay in challenging his 2003 plea.

Even if we considered the petition timely, it would still fail. The allegedly newly discovered "fact" is the possibility of an enhanced sentence if Mountford was convicted of a crime in another jurisdiction. Mountford acknowledges that the trial court had no duty to warn him of possible collateral consequences before accepting his plea, and that such collateral consequences include the possibility of enhanced punishment in the event of a future conviction.[4] (E.g., *People v. Moore* (1998) 69 Cal.App.4th 626, 629-630; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355-1356.) ~(AOB 17-18)~ Mountford's ignorance or mistake about

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[4] Mountford requests that we take judicial notice of a hearing transcript for his 2003 guilty plea in the trial court file, which his counsel has transcribed in his opening brief. Because of the passage of time, the court reporter destroyed the original notes and could not prepare a copy of the transcript. While we decline to take judicial notice given Mountford's failure to comply with California Rules of Court, rule 8.252(a), we assume for purposes of deciding this petition that Mountford was not in fact advised of the "maximum penalties incident to subsequent convictions for the same or similar offenses" as set forth in the minute order for his guilty plea, which is the underlying reason for the judicial notice request.

the potential future legal effect of his guilty plea is not a newly discovered fact, because ignorance of a future legal consequence of a guilty plea "is a legal, not a factual, question." (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 546, fn. omitted.) The writ of error *coram vobis* " 'is not available where a defendant voluntarily and with knowledge of the facts pleaded guilty or admitted alleged prior convictions because of ignorance or mistake as to the legal effect of those facts.' [Citation.]" (*People v. Kim* (2009) 45 Cal.4th 1078, 1093.)

Mountford argues that our Supreme Court nevertheless has permitted challenges to guilty pleas even where proper advisements were made, citing *People v. Patterson* (2017) 2 Cal.5th 885 (*Patterson*). In *Patterson*, the defendant pled guilty to a charge that rendered him subject to mandatory deportation. (*Id*. at p. 889.) The defendant filed a timely motion to withdraw his plea under section 1018 on the grounds of mistake or ignorance. The Supreme Court held the standard section 1016.5 "advisement that a criminal conviction 'may' have adverse immigration consequences" (*ibid*.) did not bar the defendant, as a matter of law, from showing good cause under section 1018 to withdraw his plea. The court accordingly remanded the matter to the trial court, "so that the trial court may exercise its discretion to determine whether [the defendant] has shown good cause to withdraw his guilty plea on grounds of mistake or ignorance." (*Id*. at p. 899, fn. omitted.)

Relying on *Patterson*, Mountford argues he too should not be barred from showing good cause to withdraw his guilty plea. Mountford, however, is ineligible for relief under section 1018 (which requires on its face the motion to withdraw be made before judgment), and *Patterson* is thus of limited guidance.

Second, the required section 1016.5 advisement in *Patterson* arguably misled the defendant about the immigration consequences of his plea—suggesting the plea might not have immigration consequences when those consequences were mandatory. Here, Mountford was not misadvised of anything. Finally, *Patterson* holds that the defendant was not barred as a matter of law from seeking to show good cause for withdrawal of his guilty plea. Here, we do not hold Mountford is legally barred from seeking to show good cause—indeed, we have treated his ineffective appeal as a petition for a writ of error *coram vobis*. We hold instead that Mountford has not in fact shown good cause for withdrawal of his plea because he raises a legal, and not a factual question, about the potential future consequences of his 2003 guilty plea.

DISPOSITION

The petition for a writ of error *coram vobis* is denied.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J. JOHNSON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.