Filed 6/22/17 P. v. Hanna CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SAMIR HANNA, Defendant and Appellant.	B271474 (Los Angeles County Super. Ct. No. GA046612)

APPEAL from an order of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Law Offices of E. Thomas Dunn, Jr., and E. Thomas Dunn, Jr., 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.,

Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

In 2002, Samir Hanna (Hanna) was convicted of violating Penal Code section 289, subdivision (d), a felony offense.[1] Hanna has long since served his one-year jail term on that conviction and successfully completed probation in 2004. In 2012, this court handed down *People v. Lyu* (2012) 203 Cal.App.4th 1293 (*Lyu*). Based on *Lyu*, Hanna contended he was factually innocent of the section 289 offense and asked the trial court to set aside his conviction. Specifically, Hanna requested that the trial court dismiss his case in the interest of justice under section 1385. The trial court denied Hanna's motion. As section 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation, we affirm.

BACKGROUND[2]

Hanna was employed by Physical Therapy Rehab Association in Pasadena as a physical therapy aide and office manager. In March 2001, Debra J. began receiving treatments at the clinic from Hanna. She developed a

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

[2] We affirmed Hanna's conviction on May 28, 2003. (*People v. Hanna* (May 28, 2003, B161471) [nonpub. opn.].) The following facts are taken from our opinion in that case.

rapport with Hanna and discussed aspects of her personal life with him.

Ms. J. came to the clinic for treatment on May 25, 2001, complaining of pain in her back. Hanna told Ms. J. that he would give her a massage. He provided her with a gown and instructed her to leave on her underclothes. Ms. J. did so and got onto the massage table, lying facedown. Hanna entered the room and started to massage Ms. J., stating that sometimes back pain goes down into the legs and buttocks. Hanna asked Ms. J. for permission to massage her legs and asked her to spread her legs a little bit. He also had Ms. J. move to the edge of the table closest to him. As the massage progressed, Ms. J. could feel pressure from Hanna's penis against her leg and she began to sense that Hanna should not be as close to her as he was. The massage continued on Ms. J.'s legs and moved to her buttocks. Hanna then put his hand into Ms. J.'s underpants and inserted two of his fingers into her vagina. Ms. J. was shocked and "pushed [her] body up away from the table. Hanna asked if everything was all right, and Ms. J. said, "No." Hanna then said, "Good session," and left the room.

After Ms. J. got dressed and was preparing to leave the clinic, the receptionist asked her to exit through the back door. Although she normally went through the front, Ms. J. complied with this request. In defense, the clinic receptionist testified that Ms. J. did not appear nervous or agitated as she left the clinic that day. The receptionist asked where Ms. J. was parked. When Ms. J. said that she

was parked behind the office, the receptionist suggested that she leave through the back door. Following a bench trial, the trial court convicted Hanna of sexual penetration by a foreign object on an unconscious person (§ 289, subd. (d)), a felony offense. The trial court also convicted Hanna of misdemeanor battery (§ 242).[3] The trial court acquitted Hanna on the remaining counts and sentenced Hanna to one year in county jail followed by three years of formal probation.

On appeal, Hanna claimed the evidence was insufficient to establish the elements that Ms. J. was unconscious of the nature of the act and that he knew Ms. J. was not aware of its nature.[4] We affirmed. We first held

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[3] Our opinion affirming Hanna's conviction mistakenly stated that Hanna was convicted of misdemeanor sexual battery (§ 243.4, subd. (d)(1)). A review of the minute order shows that upon the court's own motion, the information was amended to change the count to misdemeanor battery instead.

[4] Section 289, subdivision (d), provides that "[a]ny person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, 'unconscious of the nature of the act' means incapable of resisting because the victim . . . : [¶] (1) [w]as unconscious or asleep. [¶] (2) [w]as not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (3) [w]as not aware, knowing, perceiving, or cognizant of the essential

that Ms. J. was unconscious of the nature of Hanna's act because she was not aware of the essential characteristics of that act due to Hanna's fraudulent representation that he intended to give her a massage. We further held that Hanna knew full well that from her facedown position that Ms. J. could not see what he was doing and was unaware of the sexual assault he was about to perpetrate. Accordingly, we held, sufficient evidence was presented to convince a rational trier of fact beyond a reasonable doubt that Hanna had violated section 289, subdivision (d).

SUBSEQUNT PROCEDURAL HISTORY

Hanna's probation ended on December 13, 2004. On June 24, 2011, Hanna filed a petition for writ of coram nobis with this court.[5] We denied the petition without prejudice,

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characteristics of the act due to the perpetrator's fraud in fact. [¶] (4) [w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose."

[5] A writ of *coram nobis* permits the court which rendered judgment to reconsider it and give relief from errors of fact. However, the petitioner must establish that: (1) some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) the new evidence does not go to the merits of the issues of fact determined at trial; and (3) he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the

directing Hanna to refile the petition with the trial court. On October 25, 2011, Hanna filed a petition for writ of coram nobis with the trial court. The trial court denied the petition without prejudice on November 29, 2011.

On December 23, 2013, Hanna filed a second petition for writ of coram nobis with this court. We denied the petition because Hanna had failed to state grounds for relief. However, our denial order also stated that: "This denial is without prejudice to petitioner's seeking other relief that is appropriate. Petitioner may wish to address the effect of *People v. Lyu* (2012) 203 Cal.App.4th 1293 on this case, if any."[6]

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writ. (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474.) Moreover, the petition will not lie for the correction of errors at law. (*People v. Kim* (2009) 45 Cal.4th 1078, 1093.)

[6] In *Lyu*, the defendant was convicted of sexual penetration by a foreign object on an unconscious person. The defendant worked as a massage therapist and inserted his fingers inside a female client's vagina while massaging her legs. The woman then hit the defendant, said no, and asked what he was doing. The defendant started to sexually assault the woman, but she resisted and left the room. The defendant later admitted he sexually touched the woman but claimed she wanted sex from him. (*Lyu*, *supra*, 203 Cal.App.4th at pp. 1295–1298.) The prosecution argued that the woman was unconscious because she was on her stomach when the defendant sexually assaulted her, and she was unaware and did not expect him to sexually assault her. (*Id.* at p. 1299.) We rejected the prosecution's unconsciousness argument because the woman was "instantly aware" that the

On November 16, 2015, Hanna filed a motion with the trial court entitled "Motion to Declare Defendant Samir Hanna Factually Innocent of Pen. Code § 289, subd. (d), Offense and to Set Aside His Conviction." Relying on *Lyu*, Hanna argued that he was factually innocent of unlawful penetration of an unconscious person and asked the trial court to set aside his conviction under sections 851.86 and 1385.[7] At the motion hearing, the trial court first asked

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defendant was committing a sexual assault. (*Id.* at p. 1301.) We also rejected the prosecution's argument to construe the statutory definition of unconsciousness to mean that "the victim 'did not see the attack coming and was not aware or cognizant of it until it had occurred.' " (*Ibid.*) We further noted that the facts of that case did not involve unconsciousness based on the statutory definition of "fraud in fact." (*Id.* at p. 1302, fn. 10.) Thus, we reversed the defendant's conviction because of insufficient evidence of unconsciousness. (*Id.* at p. 1299.)

[7] Section 851.86 provides that "[w]henever a person is convicted of a charge, and the conviction is set aside based upon a determination that the person was factually innocent of the charge, the judge shall order that the records in the case be sealed, including any record of arrest or detention." If such an order is made, the defendant may then "state he or she was not arrested for that charge and that he or she was not convicted of that charge, and that he or she was found innocent of that charge by the court." Section 1385, subdivision (a), provides that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." The effect of a dismissal under

Hanna's attorney, "How do I grant a factual innocence finding, counsel?" Hanna's attorney noted that he could not take the usual approach—filing a habeas petition—since Hanna was no longer in custody. Nevertheless, counsel contended, the trial court could dismiss the case in the interest of justice under section 1385 or "at the very least, reduce it and then set it for review down the road where perhaps the court could entertain a 1203.4 motion."[8]

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section 1385 is to wipe the slate clean as if the defendant never suffered the prior conviction in the initial instance. In other words, the defendant stands as if he had never been prosecuted for the charged offense. (*People v. Simpson* (1944) 66 Cal.App.2d 319, 329.)

[8] Section 1203.4, subdivision (a)(1) provides in relevant part that if "a defendant has fulfilled the conditions of probation for the entire period of probation" and "is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense," then the defendant shall "be permitted by the court to withdraw his or her guilty plea or, . . . if [the defendant] has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty." However, the order "does not relieve the defendant of his or her obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, [or] for licensure by any state or local agency." Thus, dismissal under section 1203.4 does not erase a conviction; it "merely frees the convicted felon from certain 'penalties and disabilities' of a criminal or like nature." (*Adams v. County of Sacramento* (1991) 235 Cal.App.3d 872, 877–878.)

"I guess I'm in the same place I have been all along," the trial court observed. "I don't know what the remedy is for the change in the law. I really don't." Nevertheless, the court stated, "I don't think a finding of factual innocence is appropriate." "I don't know that [section] 1385 would be an appropriate vehicle either," the court noted. In the end, the trial court said, "I don't know frankly what the appropriate way to handle this would be. So I'm just going to leave it. It is above my pay grade quite frankly. I don't have an answer." With that, the trial court denied the motion. Hanna timely appealed.

DISCUSSION

I. Hanna Sought Relief Under the Incorrect Statute

At its core, the present appeal poses a seemingly straightforward question—what is the appropriate procedural vehicle for a defendant challenging his conviction after he has completed his probationary sentence? The Third District Court of Appeal recently answered this question, holding that section 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation. (*People v. Chavez* (2016) 5 Cal.App.5th 110, 113, review granted Mar. 1, 2017, S238929 (*Chavez*).)

In *Chavez*, *supra*, 5 Cal.App.5th 110, the defendant pleaded no contest to charges that he offered to sell a controlled substance and failed to appear. The trial court suspended imposition of sentence and placed the defendant on probation for four years. After the defendant successfully

completed his probation in 2009, he filed a motion pursuant to section 1385, asking the trial court to dismiss the action in the interests of justice based on ineffective assistance of counsel and asserted legal errors. The trial court concluded that because the motion was brought pursuant to section 1385 rather than section 1203.4, it did not have authority after probation ended to grant the requested relief and thus denied the motion to dismiss. (*Id.* at p. 113.) On appeal, the People contended that the trial court's denial was not an appealable order. The defendant maintained that the order was appealable and that the trial court erred in ruling it lacked authority to dismiss under section 1385. (*Ibid.*)

The appellate court concluded that while the denial was an appealable order, section 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 114–115, 122.) Accordingly, the trial court was without discretion to dismiss the defendant's conviction under section 1385. (*Id.* at p. 122.) With respect to the threshold issue—whether the denial was an appealable order—the appellate court noted that under section 1237, subdivisions (a) and (b), a defendant may appeal from a final judgment of conviction or from any order made after judgment that affects the substantial rights of the party.[9] (*Id.* at p. 114.) When a

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[9] Under section 1237, subdivision (a), an appeal may be taken by the defendant from a final judgment of conviction, except as provided in sections 1237.1, 1237.2, and 1237.5,

defendant is granted probation and the probationary period expires without revocation, the order granting probation is a final judgment within the meaning of section 1237, subdivision (a), and thus an appealable order.[10] (*Id.* at p. 114.)

Next, the court traced the legislative history of section 1385, noting that section 1203.4 was enacted after section 1385 and is more specific. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 117–118.) While section 1383 is a general statute, relating to the broad scope of dismissal, section 1203.4 relates to the limited power of dismissal for purposes of probation—the very matter at issue. (*Id.* at p. 118.) The 1971 amendment of section 1203.4 supported the court's conclusion that 1203.4 is the exclusive method for a trial court to dismiss the conviction of a defendant who has successfully completed probation. (*Id.* at p. 119.) That year, the Legislature expanded the class of defendants who could obtain section 1203.4 relief to include those who had not

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which are not applicable here. Under section 1237, subdivision (b), an appeal may be taken by the defendant "[f]rom any order made after judgment, affecting the substantial rights of the party."

[10] The court also held that an order denying relief under section 1203.4 is an order made after judgment, affecting the substantial rights of the party under section 1237, subdivision (b), and thus an appealable order. (*Chavez*, *supra*, 5 Cal.App.5th at pp. 114–115.) As noted above, however, the defendant in *Chavez* did not seek relief under section 1203.4.

successfully completed probation but who should be granted relief in the court's discretion and in the interests of justice. "It would not have been necessary for the Legislature to amend section 1203.4 . . . if courts had retained authority to dismiss 'in furtherance of justice' under section 1385 after the Legislature enacted the original section 1203.4." (*Id.* at pp. 119–120.)

The court also noted that California Supreme Court cases supported its conclusion that section 1203.4, and not section 1385, governs dismissal in a case where the defendant is granted probation and seeks dismissal after the expiration of the probationary period. (*Chavez*, *supra*, 5 Cal.App.5th at p. 120.) For example, *In re Herron* (1933) 217 Cal. 400, 405, addressed whether a trial court could set aside a conviction and dismiss an action after expiration of the probation period. There, the Supreme Court held that the power to dismiss an action under that circumstance was found in the original version of section 1203.4. Likewise, in *In re Phillips* (1941) 17 Cal.2d 55, 59 and *People v. Banks* (1959) 53 Cal.2d 370, 384–388, 391, the Supreme Court reiterated that section 1203.4 established the authority of a trial court to set aside the verdict after satisfactory completion of probation. (See *People v. Barraza* (1994) 30 Cal.App.4th 114, 121 ["Section 1203.4 . . . is the only postconviction relief from the consequences of a valid criminal conviction available to a defendant"]; *People v. Picklesimer* (2010) 48 Cal.4th 330, 337, fn. 2 [§ 1203.4 motion is rare exception to rule precluding postjudgment

motions].) Moreover, subsequent amendments to section 1203.4 have only narrowed the applicability of the statute. (*Chavez*, at pp. 120–121.) As noted by the Third District, "it would nullify the restrictions imposed by the Legislature and interpreted by the courts if we were to construe the statutes as preserving a trial court's discretion under section 1385 to completely erase a probationer's conviction." (*Id.* at p. 121.)

The reasoning in *Chavez*, *supra*, 5 Cal.App.5th 110 is persuasive as is the supporting authority cited therein. While section 1385 has potentially broad application, the California Supreme Court has cautioned that a trial court's power "is by no means absolute." (*People v. Orin* (1975) 13 Cal.3d 937, 945.) Indeed, the Legislature can expressly restrict a trial court's discretion to dismiss under the statute. (*People v. Superior Court (Romero*) (1996) 13 Cal.4th 497, 518.) Moreover, "[a]lthough the discretion of a trial judge to dismiss a criminal action under . . . section 1385 in the interests of justice 'may be exercised at any time during the trial, including after a jury verdict of guilty' [citation], this statute has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment." (*Barraza*, *supra*, 30 Cal.App.4th at p. 121, fn. 8.) "Use of section 1385 in that manner would be inconsistent with the Supreme Court's strict focus on the language of the statute." (*People v. Kim* (2012) 212 Cal.App.4th 117, 122.) While section 1203.4 specifically grants the trial court continuing jurisdiction to act after a defendant's conviction has become final, by service of his or her sentence, section

1385 does not grant the trial court this jurisdiction. (See *id.* at p. 125 [once defendant completed sentence, trial court could not dismiss action under § 1385].)

Here, as in *Chavez*, *supra*, 5 Cal.App.5th 110, the defendant sought relief under section 1385, not 1203.4.[11] Although Hanna's counsel alluded to filing a 1203.4 motion at a later date, the motion before the trial court sought a dismissal only under section 1385. Thus, the trial court was without discretion to dismiss Hanna's conviction.[12] (See *id.* at p. 122.)

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[11] Hanna, a native and citizen of Egypt, faces removal from the United States due to his conviction. (See *Hanna v. Mukasey* (9th Cir. 2008) 279 Fed.Appx. 584 [nonpub. opn.].) While an order granting a 1203.4 motion cannot eliminate the immigration consequences of a conviction (*Ramirez-Castro v. Immigration and Naturalization Service* (9th Cir. 2002) 287 F.3d 1172, 1173), a dismissal order under section 1385 can have such an effect as long as the conviction was vacated based on a defect in the underlying criminal proceedings. (*Matter of Pickering* (BIA 2003) 23 I & N Dec. 621, 624; *Cardoso-Tlaseca v. Gonzales* (9th Cir. 2006) 460 F.3d 1102, 1107.)

[12] As noted by Hanna's appellate counsel, the Supreme Court has granted review in *Chavez*, *supra*, 5 Cal.App.5th 110. By order issued March 2, 2017, review is limited to two issues: "(1) Does . . . section 1203.4 eliminate a trial court's discretion under . . . section 1385 to dismiss a matter in the interests of justice? (2) Do trial courts have authority to grant relief under . . . section 1385 after sentence has been imposed, judgment has been rendered, and any probation

II. The People's Alternative Arguments

The People contends that nether section 851.86 nor section 1385 establish a right to seek relief in the trial court. We agree. As discussed above, the trial court was without discretion to dismiss the defendant's conviction under section 1385.[13] Section 851.86 is also an inappropriate vehicle for the relief sought by Hanna. The statute contains no language permitting a defendant to petition the court for a finding of factual innocence. Instead, it simply allows case records to be sealed *after* a conviction is set aside based on a determination of factual innocence. To the contrary, section 851.8 specifies who may petition the court for a finding of factual innocence and when. (§ 851.8, subds. (a)-(e).) However, establishing factual innocence under section 851.8 "entails establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place." (*People*

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has been completed?" (See <http://appellatecases.courtinfo.ca.gov> (as of June 16, 2017).) The opening brief was filed on June 5, 2017. Until the Supreme Court issues its opinion, we will rely upon current and persuasive authority.

[13] The People also contends that because section 1385 must be invoked by a trial court or prosecutor, rather than the defendant, the trial court's denial is not an appealable order. However, we consider the final judgment, rather than the denial, to be the order appealed from. (See *Chavez*, *supra*, 5 Cal.App.5th at p. 114; *People v. Chandler* (1988) 203 Cal.App.3d 782, 787.)

*v. Matthews (*1992) 7 Cal.App.4th 1052, 1056.) Given that Hanna has based his factual innocence claim on a case decided a decade after his arrest and conviction, he cannot possibly satisfy this standard.

Lastly, the People contends, Hanna's present appeal must be dismissed because it is based on the same facts as his direct appeal and seeks to overrule our prior opinion affirming his conviction. The People correctly notes that the central issue raised in the instant appeal—whether sufficient evidence supported Hanna's section 289 conviction—was raised in the prior appeal. However, Hanna has cited new case law in support of the present claim, which means it cannot precisely duplicate the arguments on direct appeal. A habeas petitioner may raise "an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner." (*In re Harris* (1993) 5 Cal.4th 813, 841.) While Hanna is no longer in custody, neither the language of section 1203.4 nor the cases examining the statute prohibit a defendant from arguing that a change in law compels the requested relief. Once again, however, the problem is not with the basis of Hanna's claim but rather the procedural vehicle he employed when before the trial court.[14]

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[14] We note that in addition to section 1203.4, another statute may now provide an avenue of relief for Hanna. Effective January 1, 2017, section 1473.7 provides an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction based on "[n]ewly

The trial court did not have an opportunity to evaluate the merits of Hanna's claim pursuant to section 1203.4 or 1473.7. Although Hanna asks this court to construe this appeal as a writ petition in order to prevent another round of motions and appeals, we decline to do so in the first instance. Nevertheless, our opinion should not be interpreted as precluding Hanna from filing a section 1203.4 or 1473.7 motion with the trial court.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.

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discovered evidence of actual innocence . . . that requires vacation of the conviction . . . as a matter of law or in the interests of justice." (§ 1473.7, subd. (a)(2).) As noted above, as long as a conviction is vacated based on a defect in the underlying criminal proceedings, the immigration consequences of that conviction should be eliminated.