Filed 11/1/16 P. v. Deweese CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RACHEL LAUREN DEWEESE, Defendant and Appellant.	B267753 (Los Angeles County Super. Ct. No. NA068601)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Jerome J. Haig, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Rachel Deweese appeals from the denial of her motion to vacate and withdraw her no contest plea to charges of assault with a deadly weapon and causing injury while driving with a blood alcohol content of at least 0.08 percent. Deweese filed the motion nine years after entering her plea, and the superior court denied it as untimely. Deweese claims the court's ruling was an abuse of discretion. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

I. *Underlying plea*

In July 2006, the Los Angeles County District Attorney filed an information charging Deweese with five felonies: assault with a deadly weapon, an automobile (Pen. Code, § 245, subd. (a)(1)) [1]; causing injury by driving under the influence (DUI) (Veh. Code, § 23153, subd. (a)); causing injury by DUI with a blood alcohol content of at least 0.08 percent (Veh. Code, § 23153, subd. (b)); leaving the scene of an accident (Veh. Code, § 20001, subd. (a)); and resisting an executive officer (§ 69). The information further alleged that assault with a deadly weapon "is a serious felony within the meaning of Penal Code section 1192.7(c)."

Deweese's attorney negotiated a plea deal pursuant to which the prosecution dismissed the charges of causing injury by DUI, leaving the scene of an accident, and resisting an executive officer. The prosecution amended the remaining assault with a deadly weapon charge to allege use of a "large blunt object" rather than an "automobile." Deweese pleaded no contest to that charge and to causing injury by DUI with a blood alcohol content of at least 0.08 percent. During the change of plea hearing, the

---

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

prosecutor advised Deweese that "[t]he count 1 that you are pleading to, assault with a deadly weapon in violation of Penal Code section 245.A(1) [*sic*] is a felony and it's also what's known commonly as a strike because it's a serious felony. Which means in the future if you are convicted of a felony in the future, your future penalty or sentence under that future felony would be doubled based on your plea here today." Deweese acknowledged that she understood. She also stated that she understood a separate advisement that the assault was "a serious felony within the meaning of Penal Code section 1192.7(c)." Deweese denied that anyone "offered [her] anything other than what we've stated here in open court on the record."

The court found that Deweese "expressly, knowingly, understandingly and intelligently waived" her constitutional rights and that her pleas were "freely and voluntarily made with an understanding of the nature and consequences thereof appear and that there is a factual basis for the pleas." It accordingly accepted her pleas of no contest. The court suspended imposition of sentence and placed Deweese on five years of formal felony probation. The court continued, "You should thank your lawyer. . . . Mr. Silver did a very good job in representing you and I also have to compliment the district attorney's office because they worked with Mr. Silver. You're very fortunate where you are and you got a break so don't blow things, okay."

II. *Motion to terminate probation and reduce convictions*

Five years later, Deweese, represented by different counsel, moved to terminate her probation and reduce her convictions to misdemeanors pursuant to section 17, subdivision (b) and section 1203.4. The trial court granted Deweese's motion on August 29, 2011. Section 1203.4, subdivision (a)(1) provides that

notwithstanding the grant of such a motion, "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

III. *Motion to vacate and withdraw plea*

On June 30, 2015, Deweese filed a "Motion to Vacate and Withdraw Plea of Guilty [Writ of Error *Coram Nobis*]" in the trial court. She alleged that the attorney who represented her at the time of her plea told her "the plea would be treated by the Court as a soft strike," which he explained "only serves to double any subsequent felony conviction if that conviction was for a violent felony." She further alleged that the attorney told her he would "re-approach the trial court 'about this case in a few years,' which left [her] under the mistaken impression that her felony plea in this case would be subject to withdrawal once she completed the terms of her formal probation." Deweese also claimed that her counsel failed to advise her "that any subsequent DUI in the next ten years would automatically be treated as a felony DUI pursuant to the plea," such that her "maximum exposure would be (6) six years at 80% time because she was also entering a plea to a strike." Deweese provided her own declaration, as well as declarations from her parents, attesting to the facts she alleged. According to the uncited facts stated in the People's opposition brief, Deweese struck a park ranger with her car as he tried to break up a party that had continued beyond the park's 10:00 p.m. closing time. Deweese also claimed her counsel was "racket ball buddies" with the judge, which led her to believe "he had the abilities he was telling me he had."

Deweese argued that counsel's alleged misrepresentations and omissions constituted ineffective assistance of counsel. She argued that the inaccurate and incomplete information her counsel furnished "made it impossible" for her to make an intelligent, knowing, and informed decision about whether to plead no contest.

The People opposed Deweese's motion. They argued that the motion was untimely "since the alleged basis for this defense motion was discoverable in 2011" and Deweese did not demonstrate due diligence in discovering it. The People also challenged the substantive underpinnings of the motion on numerous additional grounds, including that it was not a proper vehicle by which to allege ineffective assistance of counsel.[2] The

---

[2] Like "any number of constitutional claims," ineffective assistance claims "cannot be vindicated on *coram nobis*." (*People v. Kim* (2009) 45 Cal.4th 1078, 1095 (*Kim*).) On appeal, the Attorney General takes this argument one step further and urges us to construe Deweese's petition as one for a writ of habeas corpus, which may allege ineffective assistance of counsel. Because the denial of a writ of habeas corpus is not an appealable order (*People v. Garrett* (1998) 67 Cal.App.4th 1419, 1421-1423), the Attorney General argues that we should dismiss Deweese's appeal. However, Deweese was not even arguably in custody when she filed the petition. "The key prerequisite to gaining relief on habeas corpus is a petitioner's custody" (*People v. Villa* (2009) 45 Cal.4th 1063, 1069); only one who is "imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus" (§ 1473, subd. (a)). "'[O]nce the sentence imposed for a conviction has completely expired," as Deweese's probation imposed in 2006 has, "'the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.' [Citation.]" (*Villa*, *supra*, 45 Cal.4th at p. 1071.) We

People attached to their opposition various documents, including the information filed against Deweese in 2006, a transcript of Deweese's change of plea hearing, the filings Deweese made pursuant to sections 17, subdivision (b) and 1203.4, various minute orders, and certified copies of Deweese's rap sheet and CLETS report. According to the rap sheet, Deweese sustained convictions for reckless driving in 2006 and 2013. The rap sheet further indicated that, at the time of her motion, Deweese was facing charges for DUI and DUI with a blood alcohol content of 0.08 percent or more, both of which were enhanced by allegations that she had sustained a DUI conviction within the preceding 10 years. (Veh. Code, §§ 23152, subs. (a) & (b), 23550.5.)

The superior court held a hearing on the motion on October 20, 2015. At the hearing, the court asked the parties to address why it took nine years to file the motion and whether the delay precluded granting the motion. Deweese's counsel told the court that the issue first came to light in 2013, when Deweese was charged with a DUI offense in Orange County.[3] According to counsel, "it was raised by my client and her family, and they sought the advice of, I believe, three different attorneys." All of

---

therefore decline to construe Deweese's petition as seeking habeas corpus.

[3] Deweese's rap sheet indicates that the Orange County District Attorney charged Deweese with DUI (Veh. Code, § 23152, subd. (a)), DUI with blood alcohol content of 0.08 percent or greater (Veh. Code, § 23152, subd. (b)), and reckless driving (Veh. Code, § 23103, subd. (a)). It further indicates that Deweese was convicted of the reckless driving charge, and that the two DUI charges were dismissed. The CLETS indicates that Deweese was alleged to have sustained previous DUI convictions such that Vehicle Code section 23550 applied.

those attorneys "said that it was an issue that they didn't think was appropriate to bring before Judge Ferrari. And they didn't - - they turned down the work. But they sought that out." Counsel explained that the issue "became moot for that purpose . . . because the D.U.I. that was filed at the time . . . didn't have much of a foundation." In other words, the possibility of enhanced future punishment as a result of Deweese's 2006 plea arose in 2013. She elected not to pursue relief from the 2006 plea at that time and did not take further action because the DUI charges then pending against her were dismissed.

Counsel explained that he looked at the issue of undoing the 2006 plea "as a whole for the very first time" in connection with Deweese's currently pending DUI charges. He learned from Deweese and her parents that "there were statements made prior to the plea that led to this misunderstanding," at which point he "learned of the true facts of what had really gone on as a larger part." Thus, counsel argued, the "fraud" allegedly perpetrated by Deweese's attorney in 2006 "was not fully discovered" until very recently. The court indicated that it was skeptical the motion was timely, because "[t]he facts already existed" at the time of Deweese's plea, and the legal theory was what was recently discovered.

The People agreed with the court's assessment. They further argued that the motion should have been brought in 2011, when Deweese moved to terminate her probation and reduce her felony convictions to misdemeanors, because section 1203.4 specifically cautions that, in future prosecutions, a prior conviction "shall have the same effect as if probation had not been granted or the accusation or information dismissed."

Deweese's counsel was the same counsel who had handled her 2011 motions. He told the court that he did not look at "the underlying substance of the plea" at that time because he had been retained on a very limited basis, to file motions pursuant to sections 17, subdivision (b) and 1203.4. He did not interview Deweese in connection with that engagement. The court told him, "I'm not going to fault you because it was a limited engagement."

The court nonetheless found that Deweese's motion was untimely. The court explained, "the factual basis that is described to make the motion to withdraw a plea happened in 2006. Ms. Deweese and a third party, that being her father, was a participant in a discussion with a lawyer. . . . And in this particular case, the consequence of whatever that discussion is did not arise until much later. It didn't even - - the consequence didn't even make any difference to them, that being the party in 2011 when they could have brought this motion, didn't arise until [counsel] brings this motion because we need to do something with that strike because there's a pending case. I think that the laches is very apparent."[4]

Deweese timely appealed.

DISCUSSION

A nonstatutory motion to vacate a plea "has long been held to be the legal equivalent of a petition for a writ of error *coram*

---

[4] The trial court appears to have used the term "laches" as a shorthand for unreasonable delay and lack of diligence by Deweese. Laches is an equitable defense. It requires "'unreasonable delay plus either acquiescence in the act about which plaintiff complaints or prejudice to the defendant resulting from the delay.' [Citation.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.)

nobis." (*Kim*, *supra*, 45 Cal.4th at p. 1096.) The purpose of such a petition "'is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court.' [Citation.]" (*Id.* at p. 1091.) We review the superior court's ruling on the petition for an abuse of discretion. (*Id.* at p. 1095.)

To demonstrate entitlement to a writ of error *coram nobis*, a petitioner must make a three-part showing: (1) a fact existed that, through no fault or negligence on his or her part, was not presented to the court and would have prevented the rendition of judgment if it had been; (2) the newly discovered fact does not go to the merits of the case; and (3) the fact was not known to the petitioner and could not in the exercise of due diligence have been discovered by him or her at any time substantially earlier than the time he or she sought the writ. (*Kim*, *supra*, 45 Cal.4th at pp. 1092-1093.) The superior court concluded, without analyzing the first two requirements, that Deweese had not satisfied the third. This was not an abuse of discretion.

"'It is well settled that a showing of diligence is a prerequisite to the availability of relief by motion for *coram nobis*.' [Citations.]" (*Kim*, *supra*, 45 Cal.4th at p. 1096.) The party seeking the writ must demonstrate "'not only the probative facts upon which the basic claim rests, *but also the time and circumstances under which the facts were discovered*, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient.' [Citations.]" (*Id.* at p. 1097, emphasis in original.)

"The diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state's interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated." (*Ibid.*)

Deweese was advised that her pleas could have collateral consequences during her change of plea hearing in 2006. She did not ask any questions or request clarification at that time, and she told the court that she had not been promised anything in exchange for her plea. The statute under which she hired an attorney to pursue relief in 2011—section 1203.4—states that "in any subsequent conviction of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." (§ 1203.4, subd. (a)(1).) According to her counsel, Deweese did not meet with him to seek an explanation of that language. Counsel represented to the court that Deweese and her family consulted with three separate attorneys in 2013 regarding the collateral consequences of and potential relief from her 2006 plea. Deweese did not actually pursue any relief, however, until she filed the present writ petition in 2015—when she was charged with DUI offenses for the third time in 10 years. The court was well within its discretion when it concluded that Deweese did not demonstrate the diligence necessary to warrant writ relief.

Deweese contends that she did not "personally appreciate[ ] the significance of the facts known by her" until "she was charged with a new case in 2015." This contention is belied by counsel's representation to the superior court that three attorneys looked

into the issue at her request in 2013, when she also was charged with DUI offenses. In any event, whether Deweese fully *appreciated* the facts in a timely fashion is not the pertinent question; the important consideration is whether she *knew or should have known* the relevant facts substantially before filing the writ petition.

Moreover, even if Deweese had presented her claims in a more timely fashion, the superior court would have been correct to deny the writ. The writ of error *coram nobis* is "'not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum*.'" (*Kim*, *supra*, 45 Cal.4th at p. 1094.) It is used solely "to correct errors of fact which could not be corrected in any other manner" (*ibid.*); "'the remedy does not lie to enable the court to correct errors of law.' [Citations.]" (*Id.* at p. 1093.) An incorrect belief regarding the consequences of one's plea is a mistake of law, not a mistake of fact. (See *People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352.) Relief under the writ does not lie "'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.]" (*Kim*, *supra*, 45 Cal.4th at p. 1093.) "New facts that merely would have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment." (*Id.* at p. 1103.) Deweese thus failed to satisfy the other requirements necessary to warrant the issuance of a writ of error *coram nobis*.

DISPOSITION

The order of the superior court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.