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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY ALBERT JIMENEZ, Defendant and Appellant.	B234335 (Los Angeles County Super. Ct. No. BA109882)
In re ANTHONY ALBERT JIMENEZ, on Habeas Corpus.	B235360

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert Perry, Judge. Order affirmed and petition for habeas corpus denied.

Fay Arfa, A Law Corporation and Fay Arfa for Defendant, Appellant and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

In December 1999, appellant Anthony Albert Jimenez pled guilty to one count of assault by means of force likely to produce great bodily injury upon a peace officer (Pen. Code, § 245, subd. (c)),[1] and one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).[2] Prior to appellant's acceptance of the plea agreement, the court stated that if he pled guilty to those charges, he would be sentenced to two years and four months, to be served consecutively to the sentence he was already serving.[3] During in-court discussions of the plea agreement, appellant was repeatedly assured by the prosecutor and the court that neither of the charges was a "strike" within the meaning of the three-strikes laws, section 667, subdivisions (b) through (i), and section 1170.12, subdivisions (a) through (d).[4]

In March 2000, California voters passed Proposition 21, which became effective on March 8, 2000 and enacted changes to the list of "'violent'" felonies in section 667.5, subdivision (c) and the list of "'serious'" felonies in section 1192.7, subdivision (c).[5] (See *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 824.) As a result of its passage, "assault on a peace officer in

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1 Undesignated statutory references are to the Penal Code.

2 Six other counts of battery and assault were dismissed as part of the plea agreement.

3 The offenses were committed while appellant was in state prison serving a sentence for burglary.

4 At the time, appellant had two strikes based on convictions for residential burglary and attempted robbery based on a single incident in June 1998. (See *People v. Benson* (1998) 18 Cal.4th 24, 36 [three-strikes statute permits qualifying prior to be treated as a strike even if sentence on conviction stayed pursuant to section 654].)

5 Section 667, subdivision (d)(1) and section 1170.12, subdivision (b) define a strike as "[a]ny offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony."

violation of section 245" became a strike. (See § 1192.7, subd. (c)(31); *People v. Semien* (2008) 162 Cal.App.4th 701, 709-710; *People v. Winters* (2001) 93 Cal.App.4th 273, 276-277.)

By an information filed in 2003 and amended in 2004, appellant, still in prison, was charged with assault with a deadly weapon and by means of force likely to produce great bodily injury (§ 4501), possession of a weapon (§ 4502, subd. (a)) and being an accessory to a felony (§ 32). The information further alleged that appellant had suffered three prior strikes, including the 1999 assault on a peace officer to which he had pled guilty. Appellant was tried and found guilty in 2004.

After the jury rendered its verdict, there was a hearing to determine appellant's priors. The court noted that under *People v. Benson*, *supra*, 18 Cal.4th 24, both convictions arising out of the June 1998 incident could be counted as strikes. With regard to the 1999 assault on a peace officer, the court stated: "[T]hat particular crime is . . . at the present time a strike. . . . [¶] . . . [Appellant's] testimony that at the time he entered the plea to that offense in 1999 he was assured that it was not a strike is corroborated by the transcript of his entry of plea. And the explanation for that is that at the time he entered his plea in 1999 . . . it was not then a strike. . . . [¶] . . . [¶] . . .[A]ny . . . felony assault on a peace officer became a strike as a result of Proposition [21], which was enacted by the People of the State of California at [the] election in the year 2000. . . . [¶] . . . [I]t was in effect in November . . . of 2001 when [appellant] committed the present crimes. [¶] If [appellant] had been improperly advised by his lawyer and the judge and the district attorney that the crime he was pleading guilty to was at the time not a strike, he might very well have some very good arguments to move to withdraw his plea in Los Angeles court for that misinformation, but he was not misadvised. He

was given [the] correct advice and no one . . . can expect that the [L]egislature or the People of the State of California will never change the law."

At the sentencing hearing that followed, the court sentenced appellant as a third strike offender. The court considered and denied a defense request to strike or dismiss one or more of the prior strikes: "Based on [appellant's] prior record and his conduct in this case, he's clearly a violent and dangerous criminal. His acts in this case were a brazen, unprovoked, cold-blooded attack on the victim here. It was brazen because . . . he knew he was doing it right under the eyes of the correctional officers; he knew he was doing it on camera; he knew he was doing it in front of many witnesses. He didn't care. [¶] The video shows it was completely unprovoked, cold-blooded. It went on and on, seemingly for an eternity when one sits here and watches that video of [appellant] attacking, punching, slashing the victim while the correctional officers are standing by saying, 'Get down, get down, stop.' It didn't deter him at all. He just kept on and on and on with his vicious attack. [¶] [Appellant] is a person from whom the community needs to be protected for the rest of his life."

In 2011, appellant filed a combined "motion to vacate" the 1999 guilty plea under section 1018 and "petition for writ of [*coram nobis*]."[6] Appellant contended the 1999 guilty plea was based on mistake, ignorance or misstatement, because he had been assured by the court and the prosecutor that he would not suffer any strikes if he pled guilty. The court denied the motion/petition. This appeal

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[6] Section 1018 authorizes a trial court to allow a defendant to withdraw a guilty plea "'for good cause shown'" before judgment is entered or within six months after an order of probation is made if entry of judgment is suspended. (§ 1018; *People v. Gari* (2011) 199 Cal.App.4th 510, 521.) Once those time limits have expired, a defendant may file a petition for writ of error *coram nobis*, which is regarded as equivalent in many respects to a motion to vacate the judgment. (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1616-1618; *People v. Shipman* (1965) 62 Cal.2d 226, 229; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206; *People v. Lockridge* (1965) 233 Cal.App.2d 743, 745.)

followed. While the appeal was pending, appellant filed a petition for habeas corpus, contending his trial counsel rendered ineffective assistance by failing to advise appellant that his 1999 guilty plea could result in a strike.

DISCUSSION

A. *The Trial Court Properly Denied Appellant's Petition for Writ of Error Coram Nobis*

The grounds on which a litigant may obtain relief via a writ of error *coram nobis* are narrow: "[T]he writ's purpose '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." (*People v. Kim* (2009) 45 Cal.4th 1078, 1091, quoting *People v. Adamson* (1949) 34 Cal.2d 320, 326-327.) The new fact "must have been unknown and must have been in existence at the time of the judgment." (*People v. Kim*, *supra*, at p. 1093.) In order to determine whether "a newly discovered fact" qualifies as the basis for *coram nobis* relief, "we look to the fact itself and not its legal effect." (*Ibid*.) The remedy does not apply where the mistake was one of law. (*Ibid*.)

In *People v. Kim*, the defendant, an immigrant who had a lengthy criminal record for petty theft and burglary, pled guilty in 1997 to a number of offenses, including petty theft with a prior theft-related conviction. (*People v. Kim*, *supra*, 45 Cal.4th at p. 1086.) He acknowledged in writing at the time that "'a plea of "Guilty"/"No Contest" could result in deportation . . . and/or denial of naturalization.'" (*Ibid*.) The Immigration and Naturalization Service (INS) initiated proceedings for mandatory deportation. The ultimate basis asserted for deportation was the fact that the defendant had two prior convictions of crimes involving moral turpitude. (*Id*. at pp. 1087-1088.) The defendant sought to vacate

the 1997 plea -- one of the two convictions -- on the ground of mistake of fact, contending he had been unaware (1) that he might face incarceration in South Korea for his religious beliefs; and (2) that with minor changes, the plea could have been framed in a way to avoid the threatened deportation. (*Id*. at p. 1089.) In a supporting affidavit, the defendant's 1997 trial counsel conceded that he had been "'unaware . . . that a conviction of petty theft with a prior conviction would be considered a "crime of moral turpitude" by the immigration authorities, and trigger deportation for [the defendant].'" Counsel stated: "'If I had been aware that an alternative plea to burglary, in the language of the statute, entry with intent to commit "theft or any felony," would have avoided deportation on account of a crime of moral turpitude conviction, I believe there is a reasonable probability the prosecution and [trial] court would have been willing to agree to this plea.'" (*Ibid*.) The trial court granted the motion to vacate.

On review, the Supreme Court concluded the defendant had not "demonstrated that facts existed at the time of his plea that satisfy the strict requirements for this extraordinary type of collateral relief from a final judgment." (*People v. Kim*, *supra*, 45 Cal.4th at pp. 1101-1102.) "Defendant's alleged new facts . . . speak merely to the *legal effect* of his guilty plea and thus are not grounds for relief on *coram nobis*." (*Id*. at p. 1102.) "Defendant was in fact warned about the *possibility* of deportation prior to entering his plea, and knowledge that the INS would *actually* seek to remove him from the country as a result of his conviction is not a 'new' fact for purposes of *coram nobis* review. The INS's decision to deport him speaks only to the relative risk of deportation, not the fact of deportation itself." (*Id*. at p. 1102, fn. 14.)

Appellant's contention that he was unaware of a crucial fact when accepting the plea bargain fails for the reasons discussed in *People v. Kim*. At the time appellant entered his plea, the charge of assaulting a peace officer under section

245, subdivision (c), was not a strike, as he was correctly informed. No fact concerning the then-existing nature of the offense was unknown to appellant or those who advised him in 1999. Neither the court nor the prosecutor was required to apprise appellant of upcoming ballot initiatives or any other pending legislation. Defendant's claimed ignorance that the law might change and the offense become a strike was not a mistake of an existing fact, but was at most, a mistake concerning the potential future legal effect of his plea.

Our conclusion is supported by a recent appellate authority involving a similar attempt to vacate a guilty plea. In *People v. Gari*, *supra*, 199 Cal.App.4th 510, the defendant, a naturalized citizen, pled guilty to 10 counts of child molestation, admitting the offenses occurred between January 1989 and July 1991. However, in a 1989 document filed in support of his petition for citizenship, the defendant asserted that he had not "'knowingly committed any crime or offense, for which [he had] not been arrested.'" When federal authorities learned of the plea agreement, they sought to revoke his citizenship on the ground that two of the offenses occurred in 1989, before he submitted the document. In a motion to vacate the plea, the defendant essentially contended he had not committed any acts of molestation in 1989 and that he had not focused on the dates of the charges to which he had pled, as he had not been advised that the guilty plea might result in revocation of his citizenship. The appellate court concluded the defendant had not met the requirements for issuance of a writ of error *coram nobis*: "[D]efendant failed to satisfy the first requirement by showing the existence of a newly discovered fact which, had it been known, would have prevented rendition of the judgment of conviction. . . . [¶] . . . [¶] Defendant does not identify any new facts that were unknown to him at the time he pleaded guilty to the charged offenses. Instead, defendant asserts he pleaded guilty to the charged offenses without paying heed to the dates the prosecution alleged he had committed them because he lacked

knowledge of the legal effect of pleading guilty to those offenses might have on his citizenship status. . . . Whether and when defendant committed those offenses are facts of which defendant had knowledge when he pleaded guilty to the charged offenses. These facts, therefore, do not qualify as newly discovered facts unknown to defendant at the time he pleaded guilty, which would support error *coram nobis* relief." (*People v. Gari*, *supra*, at pp. 519-520.)

Appellant also contends, in effect, that the statements of the court and the district attorney in 1999, were bargained-for material terms of the plea agreement and that refusal to vacate the plea will result in a miscarriage of justice. (See *In re Moser* (1993) 6 Cal.4th 342, 353-358.) A similar contention was rejected in *People v. Paredes* (2008) 160 Cal.App.4th 496, where the defendant, a legal permanent resident, pled guilty to voluntary manslaughter in 1987. The plea agreement included the court's promise to issue a judicial recommendation against deportation (JRAD). (*Id*. at p. 498.) At the time, the JRAD issued by the trial court prevented federal authorities from deporting the defendant. Federal law subsequently changed, and in 2005, a federal immigration judge ordered the defendant removed from the United States. (*Id*. at p. 501.) The defendant sought to vacate the 1987 plea and the trial court granted the relief sought. The Court of Appeal reversed, concluding that "given Congress's authority to change federal immigration law retroactively [citation]" and the prosecutor's lack of legal authority to promise the defendant that he would never be deported on the basis of his conviction in the 1987 case, "the trial court erred in its determination that the postconviction changes in federal law that rendered [the defendant] potentially removable resulted in a violation of the plea agreement." (*Id*. at pp. 511-512.)

Similarly here, the fact that intervening changes in the law rendered the 1999 plea agreement less favorable to appellant than the parties may have anticipated at the time did not require the court to vacate the agreement. When appellant agreed

to plead guilty to the crime of assault on a peace officer by means of force likely to produce great bodily injury, neither the trial court nor the prosecutor promised appellant that the law concerning the definition of a strike would not change or that if it did, the sentence for any future crime he committed would not be affected by the 1999 conviction. They simply informed him of the existing state of the law. There was no violation of the plea agreement.

Moreover, even were we to conclude that the plea agreement was violated or that the alleged mistake was the type to support granting *coram nobis* relief, appellant's petition was properly denied for another reason. "'[A] showing of diligence is prerequisite to the availability of [*coram nobis*] relief.'" (*People v. Kim*, *supra*, 45 Cal.4th at p. 1096, quoting *People v. Shorts* (1948) 32 Cal.2d 502, 512.) "'[W]here a defendant seeks to vacate a solemn judgment of conviction . . . the showing of diligence essential to the granting of relief by way of *coram nobis* should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver 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.'" (*People v. Kim*, *supra*, at p. 1096, quoting *People v. Shorts*, *supra*, at p. 513.) "[T]he trial 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.] The reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after a long delay." (*People v. Castaneda*, *supra*, 37 Cal.App.4th at p. 1618; accord, *People v. Totari*, *supra*, 111 Cal.App.4th at p. 1207.)

Appellant filed a declaration in support of his motion to vacate/petition for writ of error *coram nobis*, but did not state when he learned that the nature of the section 245, subdivision (c) offense had changed in 2000 as the result of Proposition 21's passage. Although the law changed within months of appellant's entering his plea, he contends he "did not have sufficient facts to support his petition" until review of his 2004 conviction concluded in November 2005. Even assuming there was a basis for him to wait final determination of the 2004 conviction to seek to withdraw his 1999 plea, this does not excuse his failure to file the underlying motion/petition until 2011. Appellant states that he was "embroiled in a federal civil lawsuit that lasted from April 1, 1999 until June 30, 2010," but does not describe the nature of this lawsuit or explain how it precluded him from seeking relief in the superior court until it ended. Accordingly, the petition was properly denied on the alternate ground that appellant failed to establish that he proceeded with due diligence.

B. *Trial Counsel Was Not Ineffective for Failing to Advise that the Plea Could Be Used to Enhance a Future Sentence*.

In a separate petition for writ of habeas corpus, appellant contends he was denied the effective assistance of counsel because trial counsel failed to advise him that if he entered a plea to the charges, "he would likely incur a 'strike' in the immediate future."[7]

"It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) Recently, in *Padilla v. Kentucky* (2010) 559 U.S. ___

[7] By order dated August 25, 2011, we invited the parties to submit additional briefing on the petition for writ of habeas corpus. We received none.

[130 S.Ct 1473, 1483-1484], the United States Supreme Court held that where a defense attorney failed to advise a non-citizen client that deportation was a possible consequence of a guilty plea, such failure could represent ineffective assistance of counsel and could invalidate the plea.

A claim of ineffective assistance of counsel requires the defendant to show both that trial counsel's performance was deficient and that the defendant suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 693.) In the context of a guilty plea, a defendant must demonstrate: (1) his or her counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) he or she suffered prejudice from counsel's deficient performance in that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart* (1985) 474 U.S. 52, 59.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Ledesma* (1987) 43 Cal.3d 171, 218, quoting *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.)

Preliminarily, we note that appellant did not present evidence to support that his defense counsel failed to advise him in 1999 when he entered a guilty plea to the charges, that the law might change to re-define the offenses as strikes. There is no declaration from trial counsel. Appellant's declaration says nothing about advice received from counsel. Appellant does provide the record of the discussions held in open court concerning the plea agreement, but that does not reflect what counsel may have told appellant privately. Moreover, defense counsel's failure to advise appellant that the law could change in the future and

lead to enhanced punishment is not a basis to invalidate a plea agreement.[8] "When entering a guilty plea, the defendant must be advised of the direct consequences of the conviction. [Citation.] . . . [P]ossible future use of a current conviction is not a direct consequence of the conviction." (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457; accord, *People v. Gurule* (2002) 28 Cal.4th 557, 634; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.)[9]

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[8] We note that the change in law did not lead to enhanced punishment in this case. Appellant had suffered two prior strikes apart from the section 245, subdivision (c) conviction, and the trial court refused to strike any of appellant's prior strikes due to the heinousness of his latest offense.

[9] While this case was pending, the United States Supreme Court held in *Lafler v. Cooper* (March 21, 2012, No. 10-209) 566 U.S. __ [2012 US Lexis 2322] and *Missouri v. Frye* (March 21, 2012, No. 10-444) 566 U.S. __ [2012 US Lexis 2321] that the Sixth Amendment's requirement of effective assistance of counsel applies during the plea negotiation process, and that a defendant who establishes that counsel's deficient performance prejudicially influenced the outcome of the plea process is entitled to habeas relief. In *Frye*, defense counsel failed to communicate a formal offer from the prosecutor. In *Lafler*, defense counsel misadvised his client about the current state of the law. Neither case affects our view that that effective assistance of counsel does not require at attorney to know or communicate every potential future change in the law.

DISPOSITION

The order denying the petition for writ of error *coram nobis* is affirmed. The petition for writ of habeas corpus is denied.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.