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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAUDIA MARRON,

Defendant and Appellant.

2d Crim. No. B237192
(Super. Ct. No. 2010037261)
(Ventura County)

Claudia Marron was sentenced to two years state prison after she entered into a negotiated plea to grand theft (Pen. Code, § 487, subd. (a))¹ and taking more than \$65,000 from her employer (§ 12022.6, sud. (a)). Appellant appeals on the ground that she was denied effective assistance of counsel because her trial attorney refused to file a motion to withdraw the plea after judgment was entered. We dismiss the appeal without prejudice to appellant filing a petition for writ of habeas corpus in the trial court. (*People v. Miranda* (2004) 123 Cal.App.4th 1124, 1134.)

Procedural History

In 2009 appellant and Laura Munoz admitted stealing more than \$200,000 from their employer, Dole Berry Company, LLC. The embezzlement involved an elaborate payroll scam in which appellant and Munoz issued paychecks to 31 fictitious employees.

¹ All statutory references are to the Penal Code.

Appellant retained Attorney Steve Pell, waived preliminary hearing, and entered into a negotiated plea on August 24, 2011, to one count of grand theft with a \$65,000 taking enhancement in exchange for an indicated sentence of three years. The plea agreement provided that if appellant was not sentenced by October 1, 2011, the prosecution would file an amended information alleging seven counts of grand theft with special allegations that the taking was in excess of \$65,000 (§ 12022.6, subd. (a)(1) and involved a pattern of related felony conduct resulting in a taking of more than \$100,000 (§ 186.11, subd. (a)(1)).²

The written plea agreement stated that the maximum possible sentence was four years and that "no commitments have been made to me or my attorney other than those that appear on this form." Appellant confirmed that the plea was knowingly and voluntarily made and that she had discussed the plea agreement with her attorney. Attorney Pell acknowledged that he had "explained the direct and indirect consequences of this plea to the defendant and am satisfied [s]he understands them."

At the September 23, 2011 sentencing hearing, Attorney Pell argued for probation. The trial court found that the amount taken was an aggravating factor and showed premeditation, planning, and sophistication. "The People's commitment here was to a three-year top. I am going to give [appellant] credit for having no prior criminal record. She will be denied probation [and] committed to the Department of Corrections, . . . but it will be for the middle term of two years, and I'm striking the additional one-year punishment under [section] 12022.6." Appellant was ordered to pay \$227,215.57 victim restitution and remanded to state prison.

² At the August 24, 2011 change of plea hearing, appellant signed a Felony Disposition Statement and a "Waiver of Objection to Amendment of Information" which stated in pertinent part: "If I am not sentenced before October 1, 2011 (even if is no fault on my own) I agree to allow the complaint to be amended to include a special allegation of taking or more than \$100,000 under PC 186.11(a)(3), even if I have already pleaded guilty. If these are the only amendments, I understand that I will not be able to withdraw my plea due to these amendments. **By this agreement I am in no way agreeing to a state prison sentence, I am only allowing the District Attorney's Office and the Court to retain state prison as a sentencing option.**"

Certificate of Probable Cause

A month later, appellant filed a request for certificate of probable cause stating that "I communicated to my trial counsel Steve Pell my request to withdraw my plea and proceed to trial. Steve Pell refused to act upon my request, denying me an opportunity to bring a motion to withdraw plea." Appellant alleged: "The reason why I changed my plea from not guilty to guilty was that my trial counsel Steve Pell represented to me that I WOULD be granted probation and would NOT be sentenced to any term with the Department of Corrections and Rehabilitation"

Missing here is a critical date: when did appellant ask Pell to file a motion to withdraw the plea? The request to withdraw the plea was presumably made after the trial court denied probation and imposed the state prison sentence. Appellant did not object at the sentencing hearing, ask any questions of the court, or ask to withdraw her plea before the proceedings concluded.

It is settled that a motion to withdraw a plea must be made before judgment is entered. (§ 1018; 4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings § 325, p. 605; *People v. Wade* (1959) 53 Cal.2d 322, 339 [trial court lacks jurisdiction to entertain motion to withdraw plea after judgment entered], overruled on other grounds in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) "Were we to come to appellant's aid at this late hour, we would be doing little to foster the concept of finality of judgment. . . . Before a trial court grants [a motion to withdraw the plea], it must consider the fact that there is both a comprehensive written plea of guilty and waiver of constitutional rights in addition to a plea colloquy between the defendant and the trial court. These documents and proceedings should not be 'cheapened' by a simply change of mind by the defendant, i.e., 'buyer's remorse.' [Citation.]" (*People v. Lyons* (2009) 178 Cal.App.4th 1355, 1363.)

Appellant argues that the request for certificate of probable cause makes a prima facie showing that she was denied effective assistance of trial counsel. Not so.³ "The

³ "[W]hen defendants claim they received ineffective assistance of counsel at the plea bargain stage, they must show that had they received effective representation, they would

terms of a plea bargain must be gathered from what was said and done at the time the bargain was made, and not by a declaration filed by the defendant two months later." (*People v. Castro* (1974) 42 Cal.App.3d 960, 965.) The appeal is predicated on the theory that trial counsel was deficient in not filing a motion to withdraw the plea after judgment was entered, but such a motion is equivalent to a petition for writ of error coram nobis. Coram nobis does not lie for a claim of ineffective assistance of counsel. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983; *People v. Miranda*, *supra*, 123 Cal.App.4th at pp. 1132-1133, fn.6.) Nor will coram nobis "issue to vacate a plea of guilty solely on the ground that it was induced by the misstatements of counsel [citation]" (*People v. Gallardo*, *supra*, 77 Cal.App.4th at pp. 982-983.)

Conclusion

Where, as here, if it cannot be determined from the record whether counsel had a reasonable strategic basis for acting or failing to act in the manner challenged, a claim of ineffective assistance 'is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Johnson* (2009) 47 Cal.4th 668, 684.) We dismiss the appeal without prejudice to appellant filing a petition for writ of habeas corpus in the trial court. (*People v. Miranda*, *supra*, 123 Cal.App.4th at p. 1134.)

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

not have accepted the offer. [Citations.] A defendant's statement to that that effect is not sufficient. Rather, there must be some objective showing. [Citation.]" (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1140.) If the rule were otherwise, it would lead to an unchecked flow of easily fabricated claims. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Kevin McGee, Judge
Superior Court County of Ventura

Peter Chang, for Defendant and Appellant

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.