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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN CONTRERAS SANCHEZ, Defendant and Appellant.	2d Crim. No. B252502 (Super. Ct. No. KA053711) (Los Angeles County)

Juan Contreras Sanchez appeals an August 22, 2013 order denying his non-statutory motion/coram nobis petition to vacate a 13-year-old plea to possession of methamphetamine for sale (Health & Saf. Code § 11351). We affirm. (*People v. Kim* (2009) 45 Cal.4th 1078, 1102-1104. (Kim).)

Procedural History

On October 19, 2001, appellant pled no contest to possession of cocaine for sale after the police executed a search warrant and found drugs (methamphetamine and cocaine) in his room. With the assistance of a court appointed attorney and a Spanish interpreter, appellant admitted the conviction could result in deportation if he was not a United States citizen. Appellant also admitted that no one had made threats against him or anyone close to him. The trial court found the plea was knowingly and voluntarily made and granted three years probation with 210 days county jail.

On January 7, 2004, appellant brought a motion for early termination of probation which was denied.

On September 21, 2004, appellant filed, pursuant to Penal Code sections 17(b) and 1203.32,[1] a motion to reduce the felony conviction to a misdemeanor and terminate probation. The trial court terminated probation, expunged the conviction, and dismissed the case pursuant to section 1203.4. The dismissal did not, however, eliminate the deportation consequences of the conviction. (See *Ramirez-Castro v. I.N.S.* (9th Cir.2002) 287 F.3d 1172, 1175.) The court denied the motion to reduce the felony to a misdemeanor because appellant pled to "a straight felony." (See *People v. Mauch* (2008) 163 Cal.App.4th 669, 674-675 [trial court has no power to reduce a straight felony to a misdemeanor.]

Non-Statutory Motion to Vacate Plea

On January 25, 2005, appellant brought a motion to vacate his plea based on the theory that the 2001 plea was made under duress and with no advisement of the deportation consequences. Appellant claimed the drugs belonged to Daniel Garcia and that Garcia threatened to harm appellant and/or his family if appellant said anything. Denying the motion, the trial court found that appellant was properly advised the conviction would have deportation consequences and that appellant had not met his burden of showing the threats were made before the change of plea.

On April 4, 2013, eight years later, appellant filed a motion to reconsider the motion in the interests of justice. (§ 1385.) Appellant again argued the change of plea was made under duress because he feared Daniel Garcia (aka Armando) would harm him and/or his family.[2] Appellant claimed that the threats were real because

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

[2] In 2001, when appellant was in custody, Garcia allegedly drove by appellant's house and shot at family members. In 2002, after appellant was released from jail, Garcia did a second drive-by shooting but the police were unable to link Garcia to the shooting. The motion stated that Garcia was arrested in 2002 for attempted murder of

Garcia was arrested in 2002 for attempted murder, was released on bail, and fled to Mexico.

Los Angeles County Superior Court Judge Daniel Lopez continued the motion to July 10, 2013, and ordered appellant to brief whether the court had jurisdiction to hear the motion and submit a declaration concerning the duress or coercion that appellant allegedly suffered when the plea was entered. Appellant argued that the motion should be treated as a coram nobis petition and filed a letter stating that Garcia "is a scary dangerous guy" who threatened to harm him if he did not keep his mouth shut. Garcia twice drove by appellant's house and shot at appellant's family after appellant got out of jail in 2001. Police reports were filed but appellant was just now "able to obtain the police reports . . . . [¶] . . . Once I knew that [Garcia] had been arrested but fled to Mexico, I felt more comfortable and safe to go to an attorney to clean my record and say the truth regarding this conviction. Unfortunately, the motion prepared was denied because I did not have proof of the two drive bys done by Armando Garcia. . . [N]ow we do have both police reports filed by my brother . . . ."

The motion to vacate the plea was continued to August 22, 2013 and denied by Judge David Brougham because the case was dismissed in 2004. "Based upon this information, the court lacks jurisdiction to consider defense counsel's motion. [¶] Should the court have jurisdiction, the court has read and considered the merits of defense counsel's motion and does not find the requirements rise to a legal level to grant said motion."

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a deputy sheriff and fled to Mexico. Garcia was extradited, pled guilty to murder on March 2, 2007, and was sentenced to state prison for life without possibility of parole.

Discussion

We review for abuse of discretion. (*Kim, supra,* 45 Cal.4th at p. 1095.) Because a petition for writ of error coram nobis is the same as a non-statutory motion to vacate the judgment, the terms may be used interchangeably. (*People v. Dubon* (2001) 90 Cal.App.4th 944, 950.) Coram nobis is a narrow common-law remedy " '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.]" (*Kim, supra,* 45 Cal.4th at p. 1091.)

Jurisdiction

Appellant asserts that the trial court erred in finding that it lacked jurisdiction to hear the motion. Appellant, however, elected to expunge the conviction in 2004 which resulted in a dismissal of the case. Before the case was dismissed, appellant could have moved to withdraw the plea pursuant to section 1018, appealed the conviction, or filed a habeas petition before probation was terminated. Having failed to avail himself of those remedies, appellant may not seek coram nobis relief 11 years after the conviction. (See *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1406.) The motion/coram nobis petition is a postjudgment motion unrelated to any proceeding pending before the court. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 337-338.) "'[A]fter the judgment has become final, there is nothing pending to which a motion may attached.' [Citation.]" (*Ibid*.)

Citing *People v. Wiedersperg* (1975) 44 Cal.App.3d 550 (*Wiedersperg*), appellant argues the trial court had jurisdiction to grant the coram nobis petition. In *Wiedersperg,* an Austrian national was convicted of marijuana possession and expunged the conviction after completing probation. When deportation proceedings were brought, defendant filed a coram nobis petition to vacate the conviction on the ground that he was not advised of the deportation consequences. (*Id.,* at p. 553.) The trial court found that it had no jurisdiction to consider the petition. (*Ibid*.) The Court

of Appeal reversed and found that coram nobis relief was available even though the conviction had been expunged. (*Id.*, at p. 554-555.)

Wiedersperg has been superseded by the enactment of section 1016.5 which creates a statutory basis for a motion to withdraw the plea. (*Kim, supra,* 45 Cal.4th at p. 1104.)[3] "Because a statutory remedy is now available for the situation posed in *Wiedersperg, coram nobis* cannot lie. [Citation.]" (*Ibid.*) " '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*.' " (*Id.*, at p. 1095.) Under principles of stare decisis, we are bound by *People v. Kim, supra,* 45 Cal.4th 1078. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Duress

Appellant argues that the plea was coerced because Daniel Garcia threatened to harm appellant and/or his family. Coram nobis relief will be granted only where the petition shows that (1) some fact was not presented at the trial, through no fault or negligence of the petitioner, which if presented would have prevented the rendition of judgment, (2) the newly discovered evidence does not go to the merits of the issues tried; and (3) the facts on which petitioner relies were not known and could not, in the exercise of due diligence, have been discovered at any time substantially earlier than the time on the motion for the writ. (*Kim, supra,* 45 Cal.4th at p. 1093.) "New facts that would merely have affected the willingness of a [defendant] to enter a plea, or would have encouraged or convinced him or her to make different strategic

[3] Section 1016.5, subdivision (b) provides in pertinent part: "If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant o deportation, exclusive from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty."

choices or seek a different disposition, are not facts that would have prevented rendition of the judgment." (*Id.*, at p. 1103.)

Appellant makes no showing that the facts upon which he relies were "not known to him" when he entered the change of plea. (*Id.*, at p. 1093.) Before and after the plea was entered, appellant knew the drugs belonged to Garcia and that Garcia was threatening appellant and/or his family. Appellant claims it took years to obtain evidence that Garcia was a murderer and a drug dealer, but that is not good cause for the delay. Appellant has not satisfied the strict pleading requirements for relief or provided a credible excuse for waiting 11 years to file the motion/petition. (See e.g., *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618.) "'It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis.*' [Citation.]" (*Kim, supra*, 45 Cal.4th at p. 1096.)

Appellant argues that the trial court abused its discretion in not conducting an evidentiary hearing. Appellant did not object or make an offer of proof, waiving the alleged error. The August 22, 2013 court minutes state that "counsel confer[ed] side-bar off the record" before the trial court denied the motion. Where the moving papers do not show newly discovered facts and conflict with the court records, the petition for coram nobis fails as a matter of law and may be summarily denied (*People v. Shipman* (1965) 62 Cal.2d 226, 230.)

Appellant also argues that his due process rights were violated because a different judge (Judge Brougham) heard and denied the motion/petition. Judge Lopez ordered supplemental briefing and continued the matter but was unavailable when the motion was argued on August 23, 2013. Appellant waived any irregularity as to which judge would make the ultimate decision by not objecting. (See e.g., *People v. Adams* (1990) 224 Cal.App.3d 1540, 1544 [right to be sentenced by same judge who took plea was waived by not objecting].) Appellant did not have the due process right to test the waters with a different judge (i.e., Judge Brougham) and demand the original judge (Judge Lopez) if the result was unfavorable. Appellant, as a matter of trial tactics, made an election and is bound by it.

The judgment (order denying motion/petition to vacate plea) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

David C. Brougham, Judge

Superior Court County of Los Angeles

Michael S. Cabrera and Kristen M. Hart, for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Steven E. Mercer, Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.