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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY DEWAYNE AUSTIN,

Defendant and Appellant.

B287936

Los Angeles County
Super. Ct. No. KA095784

APPEAL from an order of the Superior Court of Los Angeles County, Thomas Falls, Judge. Affirmed.

Ahrony Graham & Zucker and Orly Ahrony for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jerry Dewayne Austin appeals from an order denying his motion to vacate the judgment under Penal Code¹ section 1473.6.² We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Between 2003 and 2010, defendant was the director and chief of the Fire Academy at Mount San Antonio College (Mt. SAC). The Fire Academy is an instructional program that trains students to become firefighters. As director and chief, defendant oversaw the program and its instructors, and he taught courses on firefighting. In 2005, defendant used a forged signature to open and maintain a Mt. SAC bank account without any authorization from Mt. SAC.

¹ All undesignated statutory references are to the Penal Code.

² Section 1473.6, subdivision (a) provides: “Any person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons: [¶] (1) Newly discovered evidence of fraud by a government official that completely undermines the prosecution’s case, is conclusive, and points unerringly to his or her innocence. [¶] (2) Newly discovered evidence that a government official testified falsely at the trial that resulted in the conviction and that the testimony of the government official was substantially probative on the issue of guilt or punishment. [¶] (3) Newly discovered evidence of misconduct by a government official committed in the underlying case that resulted in fabrication of evidence that was substantially material and probative on the issue of guilt or punishment. Evidence of misconduct in other cases is not sufficient to warrant relief under this paragraph.”

1. The Underlying Proceedings

By information filed in October 2011, defendant was charged with two counts of identity theft (§ 530.5, subd. (a); counts 1–2); two counts of forgery (§ 470, subds. (b), (d); counts 3–4); and 12 counts of grand theft (§ 487, subd. (a); counts 5–16). The information also asserted an “excess value enhancement” because defendant took, damaged and destroyed property of a value exceeding \$150,000 (former § 12022.6, subd. (a)(2); counts 1–16).³ Under a plea bargain, defendant pled no contest to all 16 counts and agreed to a term of imprisonment no less than two years but no greater than five years. As for the excess value enhancement allegation, defendant agreed the court could add two years to his sentence if the court found he owed more than \$200,000 in victim restitution.

At the restitution hearing, the court found the excess value enhancement allegation true and ordered defendant to pay \$442,926 to Mt. SAC in victim restitution. This amount was based on testimony from Mt. SAC’s Vice President of Fiscal Services, Linda Baldwin. In August 2012, the court sentenced defendant to a total term of five years—the high term of three years on count 1, plus an additional two years for the excess value enhancement. The remaining counts were dismissed.

2. The Abandoned Appeal

Defendant filed, and then abandoned, an appeal from the judgment. After the appeal was dismissed, the judgment became final on May 20, 2013.

³ Section 12022.6 was repealed as of January 1, 2018.

3. Habeas Petitions

Defendant, through counsel, filed a habeas petition in the same court and before the same judge that had entered the judgment. Following a 10-day evidentiary hearing, on April 15, 2016, the court denied the petition. The court agreed defendant's trial counsel was ineffective for failing to retain a forensic accountant for the restitution hearing. However, the court found no resulting prejudice because defendant's newly retained accountant confirmed defendant owed at least \$200,000 in restitution.

Defendant filed habeas petitions with this court (No. B278990) and the California Supreme Court (No. S242173) renewing the same claims raised in the trial court. Both petitions were denied.⁴

4. Motion to Vacate the Judgment

On November 20, 2017, defendant challenged the excess value enhancement finding and restitution award by filing a motion to vacate the judgment under section 1473.6. Defendant argued the 2016 habeas proceeding revealed that Mt. SAC's employee, Linda Baldwin, "falsely testified" at the restitution hearing because she did not account for certain expenses. Defendant reiterated that he only owed restitution ranging from \$165,119 to \$276,926—as testified to by his expert accountant during the 2016 habeas evidentiary hearing. Recognizing that he filed the motion outside the one-year statutory period, defendant

⁴ The People's request for judicial notice of the record in case Nos. B244742, B278990, and S242173 is granted. (Evid. Code, §§ 452, subd. (d); 459, subd. (a).)

argued the filing period was tolled while he exhausted his habeas petitions. The People opposed the motion, arguing the motion was untimely, was not based on newly discovered evidence, and the testimony at issue was not from a government official within the meaning of section 1473.6.

At the hearing on defendant's motion, the court questioned whether the motion was timely filed, suggesting "everything [should have been filed] at once" to prevent "serial challenges." Defense counsel conceded he "knew that [the amount of restitution] was inaccurate" when the court concluded the habeas hearing in April 2016. Counsel explained the filing period was tolled because defendant sought to exhaust his habeas petitions. The court responded, "What you did, you took a writ. You said we're going to take our best shot, but I have in my pocket in case this doesn't work out, we'll go at it again. That's not how we do it."

The court also questioned whether a person who testifies on behalf of a victim—even if the victim was a governmental entity—would qualify as a government official under section 1473.6. Defense counsel responded that Mt. SAC was a public school, so its employee was a government official within the meaning of the statute.

The court denied defendant's motion on January 11, 2018. The court found the motion was not timely filed and was not based on false testimony. It also concluded that Baldwin was not a government official within the meaning and spirit of section 1473.6. This appeal followed.

DISCUSSION

Defendant contends the trial court erred in denying his motion to vacate the judgment. Specifically, he contends (1) the motion was timely under a recently amended statute and because he was exhausting his remedies through habeas petitions; (2) Mt. SAC's employee was a "government official" within the meaning of section 1473.6; and (3) the motion was based on "newly discovered evidence" that revealed the "false nature" of the employee's testimony. We conclude defendant's motion was untimely and affirm the order.

1. Governing Legal Principles

Section 1473.6 authorizes a person no longer imprisoned or restrained (and without standing to petition for a writ of habeas corpus) to file a motion to vacate a judgment based on newly discovered evidence "that a government official testified falsely at the trial that resulted in the conviction and that the testimony ... was substantially probative on the issue of guilt or punishment." (§ 1473.6, subd. (a)(2).)

"The legislative history of ... section 1473.6 reflects the belief that at the time of the introduction of the legislation, "[c]urrently, other than a pardon, no remedy exists *for those no longer in the system* to challenge their judgment when they learn that their conviction was obtained in part because of fraud or false evidence by a government official." [Citation.] ... Because the misconduct was discovered many years after it occurred, *those who were no longer in custody at the time of the discovery of the misconduct would not be able to set aside their convictions.* [Citations.]' [Citation.]" (*People v. Villa* (2009) 45 Cal.4th 1063, 1076, fn. 5.)

The procedure for bringing and adjudicating a section 1473.6 motion, “including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus.” (§ 1473.6, subd. (c).) Defendant bears the burden of establishing a factual basis warranting relief. (*In re Bell* (2017) 2 Cal.5th 1300, 1305.) Conclusory allegations made without any explanation do not establish a basis for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

2. Defendant’s motion was untimely.

Section 1473.6 mandates that motions to vacate the judgment “be filed within one year” from “[t]he date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party’s personal knowledge.” (§ 1473.6, subd. (d).)

Accepting as true defendant’s contention that he did not discover the alleged misconduct—Baldwin’s false testimony—until April 15, 2016, defendant was required to file the motion by April 2017. Because defendant did not file the motion until November 20, 2017, it was untimely.

Defendant’s contention that the filing period was tolled during the time his habeas petitions were pending is without merit. The cases he relies upon address a statutorily enumerated tolling provision under a federal statute, the Antiterrorism and Effective Death Penalty Act of 1996. (*Carey v. Saffold* (2002) 536 U.S. 214, 217–218 [28 U.S.C. § 2244(d)(2) provides for tolling while state collateral review is pending in state courts]; *Curriel v. Miller* (9th Cir. 2016) 830 F.3d 864, 871–872 [same].) These cases do not address or harmonize the federal statute with the express filing deadline enumerated in section 1473.6. We also note that

section 1473.6 was intended to provide a remedy for persons who may have been entitled to habeas relief due to newly discovered evidence of false testimony but who could not get that relief because they were no longer in custody. (See *People v. Wagner* (2016) 2 Cal.App.5th 774, 778.)

Equally unavailing is defendant's contention that an amendment to section 1473 restarted the time to file his motion. The amendment cited by defendant created a new burden of proof when prosecuting petitions based on new evidence. (§ 1473, subd. (b)(3)(A) [evidence "would have more likely than not changed the outcome of trial"].) Section 1473.6 utilizes the same procedural standards as those used in habeas proceedings. (§ 1473.6, subd. (c).) In this regard, section 1473 may be material when determining the applicable burden of proof. (See § 1473, subd. (b).) But section 1473 has no bearing on the time limit for filing a motion to vacate the judgment. That requirement is clearly set forth in section 1473.6, subdivision (d).

For these reasons, the court did not err in denying defendant's motion to vacate the judgment.⁵

⁵ Considering our holding, we don't reach defendant's additional arguments.

DISPOSITION

The order denying defendant's motion to vacate the judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.