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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. BYRON ROBERT BROWN, Defendant and Appellant.	B278430 (Los Angeles County Super. Ct. No. BA354613)

APPEAL from an order denying a petition for a writ of error *coram nobis* of the Superior Court of Los Angeles County, Kristi Lousteau, Commissioner. Affirmed.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Byron Robert Brown appeals from an order denying a petition for a writ of error *coram nobis*, following a judgment entered upon his negotiated pleas of no contest to count 1 – identity theft (Pen. Code, § 530.5, subd. (a)[1]), count 3 – multiple identity information theft (§ 530.5, subd. (c)(3)), and count 4 – unlawful accessing and copying data (§ 502, subd. (c)(2)). We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Underlying Offenses.

Brown, a disgruntled former employee of Fox Filming Entertainment (Fox), engaged in criminal conduct against Fox employees after his termination. A fully executed eight-page "Disposition Agreement" discusses his conduct.

The agreement stated, "Lynn Franzoi, Vice President of Fox Human Resources, was a victim of a harassing fax and at least one harassing email sent by Mr. Brown. The fax was sent by Mr. Brown on January 23, 2009 (hereinafter 'the fax'). Mr. Brown sent the fax from the [FedEx]/Kinko's location at 12101 Ventura Blvd., Studio City, California. Law [e]nforcement traced the sending location from the phone number printed on top.

"On January 29, 2009 and January 30, 2009, one email each day was sent to Franzoi and [Fox] executives from lynn[email address]. One email contained Franzoi's true [s]ocial [s]ecurity number and each email contained inappropriate, embarrassing comments and a fictitious request for Franzoi's resignation.

"Defendant was identified in [FedEx] Kinko's surveillance video from January 23, 2009 and January 30, 2009 as being at the Studio City location when the fax and email, respectively,

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1 Subsequent section references are to the Penal Code.

were sent. The January 29th and 30th emails were traced back [through] embedded Internet Protocol addresses in the email 'headers' to a [FedEx] Kinko's computer.

"A series of other emails were sent in March 2009. These emails were directed at various Fox executives, including Fox Human Resources Department executives who had worked with [d]efendant. Some of these emails were sent to Fox executives and others were sent to purported employees of the Los Angeles Times newspaper.

"Maria Gray, the Director of Benefits Systems for Fox, was a victim on March 20, 2009. Two phony emails were sent from Maria.gray[email address]. One was sent at 8:02 a.m. to Greg Gelfan, Executive Vice President of [Fox] at Greg[email address], et al., and another at 7:32 a.m. to Irene Truong, Senior Financial Analyst at Irene[email address], et al. Each email appeared to be written and sent by Maria Gray. Other emails, defamatory in nature and containing social security numbers with the last digit deleted, were sent to Pam Saraceno, Fox Vice President of Payroll, and Jim Gianopoulos, Chairman of Fox. Nine [Fox] executives and employees received harassing emails and nine victims were targeted in the emails.

"On March 26th, a warrant was served at the defendant's home. A computer, a thumb drive and several CD-ROMs of data were recovered. The thumb drive and two CD-ROM[s] each contained separate downloads from Fox's PeopleSoft database. One CD contained several thousand individual names, home addresses, social security numbers and other personal identifying information. The other CD contained several thousand individuals' names and personal information. The home computer contained personal identifying information and

privileged material of Fox and Fox employees. That information included social security numbers of the several victims named above, as well as [s]ocial [s]ecurity numbers and other confidential information of other Fox executives, entertainment and news personnel."

2. Procedural History.

A felony complaint filed March 30, 2009, alleged as count 1 that between January 22 and 30, 2009, Brown committed identity theft; as count 2 that on or about March 20, 2009, he committed false personation (§ 529); and as count 3 that on or about March 26, 2009, Brown committed multiple identity information theft. The complaint also alleged as counts 4 through 7 that between (1) March 27, 2008 and March 26, 2009, (2) June 27, 2008 and March 26, 2009, (3) June 29, 2008 and March 26, 2009, and (4) July 2, 2008 and March 26, 2009, respectively, Brown committed unlawful computer accessing and copying (§ 502, subd. (c)(2)). The complaint further alleged as count 8 that on or between January 22 and 30, 2009, Brown made annoying telephone calls (§ 653m, subd. (b)).

On July 27, 2009, pursuant to the Disposition Agreement, Brown pled no contest to counts 1, 3, and 4,[2] and, the following day, the court suspended imposition of sentence and placed Brown on formal felony probation for five years on the conditions,

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[2] In the case of *People v. Byron Brown* (B256937), Brown, on November 26, 2014, filed in this court a request that we take judicial notice of the written plea form filed in the trial court on July 27, 2009. We granted the request on December 23, 2014, and we again take judicial notice of the form. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

inter alia, that he serve 182 days in local custody with credit for time served, and pay $88,007.77 in restitution. The court dismissed the remaining counts and allegations, contingent upon the "continuing validity of the plea agreement."

3. The Petition and the Court's Ruling.

Almost seven years later, on July 18, 2016, Brown filed his instant petition for a writ of error *coram nobis* (hereafter, petition). In it, Brown argued (1) new facts existed prior to the judgment that were concealed from Brown and the court, and would have prevented rendition of judgment, (2) the new evidence did not go to the merits of the issues of fact determined at trial, and (3) there were valid reasons Brown could not make an earlier challenge. He also argued Los Angeles County Sheriff's Detective Duane Decker (the investigating officer), the prosecutor, and Brown's defense counsel engaged in fraudulent misconduct; asked that his convictions be vacated; argued he continued to suffer adverse consequences from his convictions; and sought expungement of his convictions.

On September 12, 2016, the trial court filed its "Findings and Order Re Petition for Writ of Error *Coram Nobis*" (hereafter, order) denying the petition.[3] On September 21, 2016, Brown filed a notice of appeal.

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[3] Noting Brown's no contest pleas, the order stated, "Petitioner now raises claims in the Petition that essentially challenge the plea and the agreed-upon disposition and sentencing. It is this Court's finding that by virtue of Petitioner's negotiated plea, there is no basis upon which to vacate the conviction and judgment. [¶] The 'newly' discovered evidence that Petitioner cites in support of the Petition was necessarily available to the parties at the time the [Disposition Agreement] was entered into on July 27, 2009. [¶] The allegations and

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed May 22, 2017, the clerk of this court advised Brown to submit within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider.

On June 16, 2017, Brown filed with this court a 12-page letter (with 14 exhibits) containing his contentions. Brown's letter (like his petition) conflates a petition for a writ of error *coram nobis* with a section 1473.6 motion to vacate judgment; however, as discussed *post*, these are distinct pleadings and remedies. His letter contains eight enumerated sections ("I. Contentions," "II. *Coram Nobis* Requirements," "III. Relief Entitlement," "IV. [Ineffective] Assistance of Counsel," "V. Fraud on the Court," "VI. Plea [Procured] Through Extrinsic Fraud," "VII. LASD Retribution," and "VIII. [Continuing] Collateral Consequences"). The only issue with respect to which he clearly argues he is entitled to section 1473.6 relief is the issue (raised in "III. Relief Entitlement") of alleged misconduct by the investigating officer and the prosecutor in this case. We will first discuss below Brown's arguments relating to the petition, then his section 1473.6 argument as to the alleged misconduct.

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arguments raised by Petitioner, even if true, do not warrant the relief sought in the Petition."

1. The Trial Court Did Not Err or Abuse Its Discretion by Denying Brown's Petition.

a. Applicable Law.

A writ of error *coram nobis* is a nonstatutory, common law remedy. (*People v. Kim* (2009) 45 Cal.4th 1078, 1091 (*Kim*).) " 'The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." [Citations.] (2) Petitioner must also show that the "newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] . . . (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . ." ' [Citation.]" (*Id.* at p. 1093.)

" 'A petition for writ of error *coram nobis* places the burden of proof to overcome the strong presumption in favor of the validity of the judgment on the petitioner. This burden requires the production of strong and convincing evidence.' " (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 548-549 (*Ibanez*).) Neither a trial court nor an appellate court is required to accept at face value the allegations of the petition even if uncontradicted. (*People v. Burroughs* (1961) 197 Cal.App.2d 229, 234.) We review a lower court's ruling on a petition for abuse of discretion. (*Kim*, *supra*, 45 Cal.4th at p. 1095.)

b. Application of the Law.

(1) *The IP Report and LASD Receipt.*

Sections I and III of Brown's letter are entitled "Contentions" and "Relief Entitlement," respectively. In those sections, Brown argues that a Yahoo Internet Protocol (IP) Report[4] and a Los Angeles County Sheriff's Department Receipt for Seized Property (LASD receipt) were newly discovered evidence that undermined his convictions. With respect to count 1, he claimed the IP Report demonstrated that no emails originated from FedEx Kinko's. As to counts 3 and 4, he contends the LASD receipt invalidates Detective Decker's sworn statement that he recovered a thumb drive containing identifying information from Brown's home when executing a search warrant.

These contentions are barred for at least several reasons. First, the petition was based upon representations unsupported by a declaration or affidavit.[5] (Cf. *Ibanez*, *supra*, 76 Cal.App.4th at p. 547, fn. 14; *People v. Crouch* (1968) 267 Cal.App.2d 64, 67.) Indeed, on this procedural ground alone, all of Brown's arguments are barred. Second, Brown failed to satisfy his burden to show " ' "the facts upon which he relies . . . *could not in the exercise of due diligence have been discovered* by him at any time substantially earlier than the time of his motion for the writ." ' " (*Kim*, *supra*, 45 Cal.4th at p. 1093, italics added.) He failed " 'to

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[4] Unless otherwise indicated, references to exhibits are to exhibits attached to Brown's letter.

[5] The petition contains a declaration from Brown, but the declaration does not expressly refer to the various facts upon which his arguments in his petition are based.

aver . . . *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.' " (*Id.* at pp. 1096-1097.) Third, to the extent Brown had the IP report and LASD receipt during his probationary term, which expired in July 2014, his arguments are procedurally barred because he could have made them in a petition for a writ of habeas corpus. (*Id.* at p. 1099.)

Given these procedural bars, we need not reach the merits of Brown's contentions. We merely note that the purported new evidence goes to the factual issues that formed the basis for the charges and Brown's no contest pleas, and thus it is not a proper basis for a writ of error *coram nobis*. (*Kim*, *supra*, 45 Cal.4th at p. 1093; *People v. Welch* (1964) 61 Cal.2d 786, 794.) And in any event, an examination of the evidence reveals that it does not "establish a basic flaw that would have prevented rendition of the judgment" had it been presented at trial. (*Kim*, at p. 1103.)

(2) *Ineffective Assistance of Counsel.*

Section IV of Brown's letter is entitled, "[Ineffective] Assistance of Counsel." In that section, Brown asserts his trial counsel failed to make reasonable investigations, violating his right to effective assistance of counsel, and he cites 10 instances in which his trial counsel allegedly misstated factual information. However, "ineffective assistance of counsel . . . is an inappropriate ground for relief on *coram nobis*." (*Kim*, *supra*, 45 Cal.4th at p. 1104.) Thus, this claim was properly rejected by the trial court.

(3) *Fraud on the Court.*

Section V of Brown's letter, entitled "Fraud on the Court," asserts that a "fictitious invoice" was used to determine the

victim restitution amount of $88.007.77. However, Brown concedes that on July 27, 2009, the exhibit containing this invoice was attached to the agreement filed in court, before being removed; further, exhibit O to Brown's petition provides evidence he was told in December 2013 that a copy of the declaration was in the court file. Because he reasonably could have discovered the allegedly fictitious invoice long before he filed his petition in 2016, he has not shown due diligence with respect to this claim.

(4) *Plea Procured Through Fraud.*

Section VI of Brown's letter is entitled, "Plea [Procured] Through Extrinsic Fraud." In it, Brown cites 13 alleged facts, presumably constituting the extrinsic fraud.[6] We have carefully

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[6] The 13 alleged facts were: (1) "Kevin Poole (20th Century [Fox]) contacted Mr. Decker on two separate occasions and filed false police reports pertaining to me," (2) "[Fox] uses law enforcement as a deterrent (See Attached Exhibit – I)," (3) "Mr. Decker realized [Fox]'s claims were false and feverishly pursued me anyway," (4) "Under penalty of perjury, Mr. Decker lied to Judge Melvin Sandvig in order to obtain a Search & Arrest Warrant for me," (5) "Mr. Decker arrested me twice causing me to lose the bail money that was posted," (6) "Under penalty of perjury, Mr. Decker stated finding [*sic*] a thumb drive containing identifying information from my residence which is false," (7) "Under penalty of perjury, Mr. Decker and [the prosecutor] conspired and filed a false seven felony criminal complaint (against me) without any evidence to support," (8) "My two retained defense attorneys did nothing such as: (request a bail reduction, argue, file any motions on my behalf, request discovery)," (9) "During my four month incarceration defense counsel informed me that a court order denied me from viewing discovery (which is false)," (10) "Defense counsel never advised me of any exculpatory evidence," (11) "Prior to conviction defense counsel informed me all emails came from Kinko's [c]opies in

reviewed Brown's assertions regarding the alleged facts, the exhibits he cites in support, and the petition. The assertions in his letter are conclusory, factually unsubstantiated, and do not " ' "show that some *fact* existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." ' " (*Kim, supra*, 45 Cal.4th at p. 1093, italics added.) Nor, for reasons similar to those we previously have discussed, has Brown demonstrated due diligence regarding his assertions.

(5) *LASD Retribution.*

Section VII of Brown's letter is entitled, "LASD Retribution." In it, Brown cites various alleged events occurring on and after September 24, 2016, as evidence that Decker, in retribution for Brown's filing of his petition, began wrongfully investigating Brown. However, in order for the remedy of a writ of error *coram nobis* to apply, "the allegedly new fact must have been . . . in existence at the time of the judgment." (*Kim*, *supra*, 45 Cal.4th at p. 1093.) In this case, the time of the judgment was July 28, 2009, when the court orally granted probation. (§ 1237,

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Studio City, California (the time I was present) and a plea was necessary before the preliminary hearing," (12) "Prior to conviction defense counsel met with members of my family to discuss my case and view discovery (without my permission). During the meeting counsel stated all emails originated from Kinko's [c]opies in Studio City, California (the time I was present) and that a plea was necessary prior to preliminary hearing," and (13) "On the advice of counsel I pled no contest to three of the eight counts without the ability to view any discovery."

subd. (a); see *People v. Zelinski* (1979) 24 Cal.3d 357, 368; cf. *People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.) Even if Brown's allegations were true, they pertain to events occurring after that date, therefore, a writ of error *coram nobis* relief is unavailable. The trial court did not err or abuse its discretion by denying Brown's petition.[7]

2. The Trial Court Did Not Err or Abuse Its Discretion by Denying Brown's Section 1473.6 Motion.

Section 1473.6 provides a statutory motion to vacate a judgment. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 337, fn. 2.) The section states, in relevant part, "(a) 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. [¶] . . . [¶] (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."

A section 1473.6 motion to vacate judgment is similar to a habeas corpus petition in some respects (§ 1473.6, subd. (c)) but, unlike a habeas petition, the section 1473.6 motion is brought when a person is not unlawfully imprisoned or restrained. The burden of proof on a person making a section 1473.6 motion is the

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[7] Section VIII of Brown's letter discusses alleged collateral consequences of his convictions. Since we conclude the trial court otherwise properly denied his petition, those allegations afford no basis for relief.

same as the burden of proof for prosecuting a writ of habeas corpus (§ 1473.6, subd. (c)), and thus, a petitioner must prove the facts establishing a basis for relief by a preponderance of the evidence (cf. *In re Bell* (2017) 2 Cal.5th 1300, 1305). Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief. (Cf. *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

In section III ("Relief Entitlement"), Brown argues the granting of a section 1473.6, subdivisions (a)(1) and (3) motion to vacate judgment was proper based on alleged misconduct by Decker and the prosecutor in this case. To summarize, Brown asserts Decker committed misconduct by (1) "committ[ing] perjury to obtain a felony Search and Arrest Warrant," (2) arresting Brown "under false pretense," (3) manufacturing evidence used to convict Brown, (4) filing a false police report, (5) knowingly filing a false criminal complaint, and (6) withholding exculpatory evidence.

Again, we have carefully reviewed Brown's assertions on the above points in his letter, the exhibits he cites in support, and the petition. Simply put, the assertions in his letter are conclusory, they are not factually supported, they do not demonstrate misconduct on the part of Decker and/or the prosecutor in this case, and they do not satisfy the requirements of section 1473.6, subdivision (a)(1) or (3). Brown has also failed to demonstrate he filed his section 1473.6 motion within one year of "[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)(1).) The trial court did not err or abuse its discretion to the extent it

denied Brown's section 1473.6 motion. None of the arguments in Brown's letter, and none of the issues in his July 18, 2016 filing, whether it is designated a petition or section 1473.6 motion, entitle him to relief. We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The order denying Brown's petition for a writ of error *coram nobis* is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.