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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SERGIO HERNANDEZ MARTINEZ, Defendant and Appellant.	H052369 (Santa Clara County Super. Ct. No. C1776431)

Defendant Sergio Hernandez Martinez seeks to appeal an order denying his motion for discovery and appointment of counsel under the Racial Justice Act. (Pen. Code, § 745, subd. (d); unspecified statutory references are to this Code.) This court issued an order to show cause why the appeal should not be dismissed as taken from a nonappealable order, and deferred the order to show cause for consideration with the appeal. As we will explain, we conclude the trial court's order is not appealable and will therefore dismiss the appeal.

I. BACKGROUND

Defendant pleaded no contest in 2018 to three counts of forcible lewd acts on a child under 14 years old (§ 288, subd. (b)(1)) and one count of lewd acts on a child under 14 years old (§ 288, subd. (a)). He was sentenced to 27 years in prison. Defendant petitioned for a writ of habeas corpus under the Racial Justice Act in 2024. The trial court denied the petition on March 8, 2024.

On March 29, 2024, defendant moved for discovery and appointment of counsel under the Racial Justice Act. (§ 745, subd. (d).) He requested information including the race of all individuals charged or convicted of sex crimes under section 288, subdivision (a) or section 288, subdivision (b)(1) between 1980 and 2023 in Santa Clara County. He alleged the information would allow him to prove that he "was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins" who engaged in similar conduct (§ 745, subd. (a)(3)), and that he received a "longer or more severe sentence … than was imposed on other similarly situated individuals convicted of the same offense" in cases involving defendants or victims of a different race (§ 745, subd. (a)(4)). The motion also stated that defendant would "need to [] file a section 1473, subdivision (e) habeas petition" once the requested information was disclosed. Defendant stated in a supporting declaration that he is "Hispanic, specifically of Mexican de[s]cent." He did not provide any details in the motion or declaration regarding the circumstances of his offenses or the sentence he received.

The trial court denied defendant's motion by written order, noting that it had "recently denied a similar request from [defendant] in habeas corpus." The court stated in part: "[Defendant] has opted to file a form petition in which he has merely filled in his race and ethnicity and the offenses with which he was charged. The form petition relies on section 745, subdivision (a)(3) and (a)(4), which apply when a [defendant] was charged with or convicted of a crime that is more serious than what other similarly situated defendants were charged with or convicted of, or sentenced more harshly than other similarly situated defendants due to the [defendant]'s race, ethnicity, or national origin[]. However, [defendant] must *allege facts* that would establish a violation of subdivision (a) of Section 745 if proven. [Defendant] has not done so. Instead, he asserts that the facts necessary to make such a showing are in the hands of the District Attorney. But, as an example, [defendant] fails to so much as state the sentence he received." Defendant now seeks to appeal that order.

II. DISCUSSION

Defendant contends the denial of his Racial Justice Act motion is appealable as a postjudgment order affecting his substantial rights (§ 1237, subd. (b)). The Attorney General argues the trial court had no jurisdiction to consider defendant's motion, the order is not appealable, and the motion was properly denied because the court did not have jurisdiction to consider it. As we will explain, we conclude the trial court lacked jurisdiction to consider the motion in the manner now suggested by defendant and, even if the court had limited jurisdiction to rule on defendant's discovery request, the denial of that request is not an appealable order.

A. THE RACIAL JUSTICE ACT

The Legislature enacted the Racial Justice Act in 2020 with the stated aim " 'to eliminate racial bias from California's criminal justice system' and 'to ensure that race plays no role at all in seeking or obtaining convictions or in sentencing.' (Stats. 2020, ch. 317, § 2, subd. (i).) "To that end, the [Racial Justice Act] prohibits the state from seeking or obtaining a criminal conviction, or seeking, obtaining, or imposing a sentence, on the basis of race, ethnicity, or national origin." (*People v. Wilson* (2024) 16 Cal.5th 874, 944–945.)

The Racial Justice Act added section 745 to the Penal Code effective January 1, 2021. (Stats. 2020, ch. 317, § 3.5.) Section 745, subdivision (a) sets forth four categories of conduct which, if proven by a preponderance of the evidence, establish a violation. (§ 745, subd. (a)(1)–(4).) A violation occurs under section 745, subdivision (a)(3) if "[t]he defendant was charged or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, and the evidence establishes that the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the defendant's race, ethnicity, or national origin in the county where the convictions were sought or obtained." A violation occurs under section 745, subdivision (a)(4) if a "longer

or more severe sentence was imposed on the defendant than was imposed on other similarly situated individuals convicted of the same offense" and one of two other conditions is met: either "longer or more severe sentences were more frequently imposed for that offense on people that share the defendant's race, ethnicity, or national origin than on defendants of other races, ethnicities, or national origins in the county where the sentence was imposed" (§ 745, subd. (a)(4)(A)), or "longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins, in the county where the sentence was imposed" (§ 745, subd. (a)(4)(B)). A defendant may move for disclosure of "all evidence relevant to a potential violation of [section 745,] subdivision (a) in the possession or control of the state," and such evidence must be released to the defendant upon a showing of good cause. (§ 745, subd. (d).)

"A defendant may file a motion" under the Racial Justice Act, "or a petition for writ of habeas corpus or a motion under Section 1473.7" alleging a violation of section 745, subdivision (a). (§ 745, subd. (b).) A habeas petition filed under the Racial Justice Act "shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed." (§ 1473, subd. (e).) And effective January 1, 2024, the Racial Justice Act allows defendants to raise claims based on the trial record on direct appeal from the conviction or sentence. (Stats. 2023, ch. 464, § 1.) "The defendant may also move to stay the appeal and request remand to the superior court to file a motion[.]" (§ 745, subd. (b).)

If a court finds after judgment has been entered "that a conviction was sought or obtained in violation of [section 745,] subdivision (a), the court shall vacate the conviction and sentence, find that it is legally invalid, and order new proceedings

consistent with [section 745,] subdivision (a)." (§ 745, subd. (e)(2)(A).) "[I]f the court finds that only the sentence was sought, obtained, or imposed in violation of [section 745,] subdivision (a), the court shall vacate the sentence, find that it is legally invalid, and impose a new sentence. On resentencing, the court shall not impose a new sentence greater than that previously imposed." (§ 745, subd. (e)(2)(B).)

B. THE SCOPE OF THE TRIAL COURT'S JURISDICTION

To determine whether denial of defendant's motion is appealable, we first consider the parties' arguments concerning the scope of the trial court's jurisdiction. Defendant argues the order is an appealable postjudgment order affecting his substantial rights. His characterization is based on the premise that the trial court had jurisdiction not only to rule on his request for discovery, but also to treat his motion as alleging a violation of the Racial Justice Act and appoint counsel to assist in establishing a prima facie case for relief. The Attorney General argues the court lacked jurisdiction to rule on the motion at all, whether it is construed as a request for discovery or as alleging a violation of the Racial Justice Act. The issue turns on the proper interpretation of section 745, a question we review de novo. (*People v. Lashon* (2024) 98 Cal.App.5th 804, 810 (*Lashon*).)

Defendant relies on language in section 745, subdivision (b) providing that "[a] defendant may file a motion … alleging a violation of [section 745,] subdivision (a)." That language makes clear that a Racial Justice Act violation may be alleged via motion, but it does not expressly state whether such a motion may be made at any time or only before judgment becomes final (with postjudgment relief available "on direct appeal from the conviction or sentence" if the claim is based on the trial record and the judgment is not yet final on appeal, or by "petition for writ of habeas corpus or a motion under Section 1473.7." (§ 745, subd. (b).) To the extent " ' "the statutory language is susceptible of more than one reasonable interpretation, we must look to additional canons of statutory construction to determine the Legislature's purpose." ' " (*Lashon*, *supra*,

98 Cal.App.5th at p. 811.) Both the legislative history and the historical circumstances of a statute's enactment may be considered in ascertaining legislative intent. (*Ibid.*)

As defendant notes, section 745, subdivision (b) as originally enacted read: "A defendant may file a motion in the trial court or, if judgment has been imposed, may file a petition for writ of habeas corpus or a motion under Section 1473.7 in a court of competent jurisdiction, alleging a violation of [section 745,] subdivision (a)." (Stats. 2020, ch. 317, § 3.5.) Defendant acknowledges the statute's original language "made clear that the Legislature originally intended for [postconviction] relief to come through the avenue of habeas corpus" rather than through a motion alleging a violation of section 745. But he contends that amendments to the statute effective January 1, 2024—including the removal of the phrase "if judgment has been imposed"—eliminated that restriction.

The bill that contained the relevant amendments, Assembly Bill No. 1118 (2023–2024 Reg. Sess.), was enacted after "the Legislature was asked to consider whether a defendant could pursue a postjudgment section 745 claim by avenues other than a petition for writ of habeas corpus or a section 1473.7 motion." (*Lashon*, *supra*, 98 Cal.App.5th at p. 812.) The Legislature responded by amending section 745 to (as stated in the Legislative Counsel's Digest) "additionally authorize a defendant in specified circumstances to raise a claim alleging a violation … on direct appeal from the conviction or sentence" or "move to stay the appeal and request remand to the superior court to file a motion." (Legis. Counsel's Dig., Assem. Bill No.1118 (2023–2024 Reg. Sess.).) The Legislative Counsel's Digest does not indicate that the bill would allow defendants to pursue postjudgment relief via motion in the trial court under any other circumstances. It is therefore reasonable to assume the Legislature intended to maintain the status quo under which defendant, whose case was final at the time of his motion, would be required to seek relief by petition for writ of habeas corpus.

Our interpretation is consistent with other aspects of the statutory scheme. (See *People v. Hodge* (2024) 107 Cal.App.5th 985, 1000.) On January 1, 2024, section 745, subdivision (j)(3) expanded application of the Racial Justice Act (which when first enacted applied only prospectively) "to all cases in which, at the time of the filing of a petition pursuant to subdivision (e) of Section 1473 raising a claim under [section 745], the petitioner is currently serving a sentence in the state prison[.]" Section 1473, subdivision (e) establishes procedures for the filing of a habeas petition under the Racial Justice Act. It provides in part: "The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment." (§ 1473, subd. (e).) Section 745 does not state that it applies where a defendant serving a prison sentence challenges a final judgment by means other than a habeas petition. Nor does it provide for the appointment of counsel under such circumstances, as defendant urges is necessary to effectuate the purposes of the statute. Had the Legislature intended to establish an alternative mechanism for defendants to pursue postjudgment relief and appointment of counsel, it could have done so expressly as it did with respect to the habeas process. Under our interpretation of section 745, subdivision (b), the trial court here lacked jurisdiction to construe defendant's motion as alleging a violation of the Racial Justice Act (or to appoint counsel to assist in preparing such a motion).

The Attorney General goes further and asserts the trial court lacked jurisdiction even to rule on defendant's request for discovery under section 745, subdivision (d) in connection with a possible second habeas petition. One appellate court has agreed with the Attorney General's position in a published opinion, another court has disagreed, and the issue is currently pending before the California Supreme Court. (Compare *In re Montgomery* (2024) 104 Cal.App.5th 1062, 1071, review granted Dec. 11, 2024,

S287339 ["the [Racial Justice Act] does not authorize a freestanding motion for discovery; it only authorizes discovery in a pending proceeding in which the defendant has alleged a violation of section 745, subdivision (a)"] (*Montgomery*) with *People v. Serrano* (2024) 106 Cal.App.5th 276, 282, review granted Jan. 15, 2025, S288202 ["the [Racial Justice] Act permits a defendant to file a stand-alone postjudgment discovery motion *before* filing a habeas corpus petition"] (*Serrano*).)

We need not consider the Attorney General's argument in detail because, as we will explain, in our view the trial court's order is not appealable even if the court had jurisdiction to rule on defendant's request for discovery request under section 745, subdivision (d).

C. APPEALABILITY OF THE TRIAL COURT'S ORDER

Assuming the trial court had jurisdiction to consider defendant's request for discovery under section 745, subdivision (d), we must determine whether the court's order denying the requested discovery is appealable. Two courts have concluded—each by different reasoning—that such orders are not appealable. In *Montgomery*, *supra*, 104 Cal.App.5th at pp. 1071–1072, the court reasoned that trial courts lack jurisdiction to consider "freestanding" discovery motions under the Racial Justice Act, and orders purporting to deny such motions thus cannot be challenged on appeal. In *Serrano*, *supra*, 106 Cal.App.5th at pp. 292–293, the court reasoned that because a discovery motion "is merely a precursor to a criminal defendant asserting a claim" by way of a petition for writ of habeas corpus, an order denying the motion is "an interlocutory order in connection with the anticipated filing of that habeas corpus petition" that "will not directly affect [a] defendant's custody status, conviction, or sentence." The *Serrano* court noted that a preparatory discovery motion is permissible under section 745, subdivision (d), but concluded that an order denying the motion must be challenged by way of a petition for writ of mandate. (*Id.* at p. 292.)

Defendant asserts that both *Montgomery* and *Serrano* were wrongly decided. The Attorney General urges us to follow *Montgomery*. We reject defendant's argument, but we need not also embrace the Attorney General's position in order to determine appealability: If the trial court lacked jurisdiction to consider the request for discovery, the appeal must be dismissed as correctly stated in *Montgomery*. (*Montgomery*, *supra*, 104 Cal.App.5th at p. 1072.) Alternatively, assuming the court *did* have jurisdiction to consider the request, we agree with the *Serrano* court that the appeal must be dismissed as taken from a nonappealable order.

In addition to arguing that *Serrano* misstates the scope of the trial court's jurisdiction, defendant urges that a mandate petition may not succeed in the typical case where a Racial Justice Act discovery motion is denied. But whether or not mandamus relief will be available as a practical matter, the rule remains that an appeal lies only if the denial of discovery is an "order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b).) Defendant observes that because violation of a substantial right is also a prerequisite for mandamus relief, the availability of such relief cannot be presumed if the challenged order is found not appealable. But that argument does not address whether the challenge is made to an "order made after judgment," as required for appealability under section 1237, subdivision (b). As in *Serrano*, defendant here seeks to appeal not from "an order 'after judgment' (§ 1237, subd. (b)) in the *criminal* action, but from an interlocutory order in a current or future habeas corpus proceeding." (*Serrano*, *supra*, 106 Cal.App.5th at p. 292.) We express no opinion as to whether the trial court had jurisdiction to issue such an interlocutory order. Even assuming the trial court had jurisdiction, this court does not. The appeal must therefore be dismissed.

III. DISPOSITION

The appeal is dismissed.

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Grover, Acting P. J.

WE CONCUR:

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Lie, J.

_____

Kulkarni, J.*

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