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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CLAYTON JAY COLLINS,

Defendant and Appellant.

A132034

(Alameda County Super. Ct.
Nos. 135299, 136321 & 364442)

On same-day appeals by Clayton Jay Collins, we examine and uphold trial court rulings of March 15 and May 4, 2011. Twin written rulings of March 15 denied motions to vacate convictions and sex offender registration requirements, which Judge Vernon Nakahara treated as petitions for writ of *coram nobis*. The third ruling, by Judge Carrie Panetta, denied Collins's petition under Penal Code section 851.8¹ to find factual innocence and destroy records. We reject Collins's claims of error and abuse of discretion in denying the statutory relief as untimely, and in denying *coram nobis* without an evidentiary hearing.

BACKGROUND

We recount the background for each ruling later, but note initially that Collins has counsel on appeal but represented himself below, where his showings consisted mainly of copies of newspaper articles, commentary, correspondence, letters he wrote, reports, and other documents, without sworn statements to authenticate them or precisely frame the

¹ All section references are to the Penal Code unless designated otherwise.

issues. This left the court to intuit his positions from letters that furnished scant legal analysis. A broad theme in his account, however, was his view that he surmounted a criminal past (including time served for federal bank robbery) to become a lauded employee for the City of Oakland (city), first in parks and recreation work and then as a crime prevention counselor for at-risk youth, until corrupt city and county officials used criminal charges to discredit him and drive him from city employment.

We refer to three criminal cases underlying this appeal as number 364442 (*People v. Collins* (Super. Ct. Alameda County, 1992, No. 364442)), number 135229 (*People v. Collins* (Super. Ct. Alameda County, 1999, No. 135229)), and number 136321 (*People v. Collins* (Super. Ct. Alameda County, 1999, No. 136321)).

DISCUSSION

I. Section 851.8

Collins's section 851.8 petition concerned the second and third cases. He had been convicted in the first case of annoying or molesting a child (§ 647.6), and ordered to register as a sex offender (§ 290). In March 1999, an information in case number 135229 charged felony failure to comply with that requirement (former § 290, subd. (g)(2)) plus allegations of the prior federal bank robbery and a state conviction for narcotics possession. That August, he was charged in case number 136321 with six counts of unlawful sexual intercourse with a child under age 16 (§ 261.5, subd. (d)) and two of oral copulation (§ 288a, subd. (b)(2)), all based on relations with a 15-year-old girl in his youth program.

At a trial of case number 135229, a jury convicted Collins of the registration offense, and he admitted the priors. Then in a negotiated disposition on October 5, 2000, Collins received four years in prison for that case (a two-year midterm doubled for the priors) and waived his right to appeal, in return for dismissal of the sex-offenses case (No. 136321).

In December 2010, over a decade after those dismissals in case number 136321, Collins filed under section 851.8 for a finding of factual innocence and destruction of records. The matter came before Judge Panetta, who noted that the filing came far

beyond the two-year period allowed by the statute (§ 851.8, subd. (l)) and was unserved. She found no jurisdiction to hear the merits but denied without prejudice to refile with authority that the petition could be entertained so late.

Collins refiled in April 2011, days later filing a companion “MOTION TO COMPEL RELEASE OF DISCOVERY AND EXCULP[A]TORY EVIDENCE FOR 851.8 PET[I]TION HEARING.” He had also filed section 851.8 petitions with the Alameda County Sheriff’s Office. Those were denied in March, with an explanatory letter advising Collins that he did not show factual innocence, that a negotiated dismissal of the charges did not establish it, and that the statute authorized filing with the court.

Collins’s explanations to the court, made via his motion to compel evidence from various city and county law enforcement agencies, was essentially that the charges followed a conflict with the Oakland City Attorney’s Office about his job, a claimed effort by the city attorney to have the park director “find a way to terminate” him, and an assertedly false report of sexual misconduct made by a woman he had fired from his youth program. He claimed that people lied to get rid of him, and persisted in “false charges” despite investigations that had “cleared” him. Acknowledging a lack of supporting records, he wrote: “Many requests have been made for all records from these parties but have been blocked or ignored in clear violation of The Public Records Act and the rights of the defendant. The defendant has been frustrated by these agencies[’] complete refusal to follow the law; the case file/court file in this matter is listed as ‘DESTROYED’ but in fact is in the possession of the Alameda county clerk’s office. Who instructed the clerk to list this court file as DESTROYED? Was this a blatant act of covering up criminal civil rights violations?”

In a letter filed on May 4, the ultimate hearing date before Judge Panetta on his refiled petition and his motion to compel, Collins reiterated his claims of corruption and lies, but again, not under oath. He explained at the hearing, in essence, that he sought a finding of factual innocence of “bogus charges” but needed discovery through his motion to compel in order to meet his burden. The court explained, however, that it had no jurisdiction to compel discovery by agencies and people not before the court through

ongoing litigation with formal discovery in progress, and the court ultimately denied the motion to compel on that basis.

On the petition for factual innocence, the court entertained argument from both sides on the potential merits and indicated that a police report discussed by the parties did appear to furnish probable cause for Collins’s arrest. But in the end, the court found itself without jurisdiction, given Collins’s filing way beyond a two-year time limit prescribed by section 851.8, subdivision (*l*). The People apparently did not file a formal response, but Deputy District Attorney Ursula Jones Dickson noted the delay of more than a decade and that her office no longer had a file on the case. After discussion about whether Collins had shown good cause for the delay (recounted *post*), the court ruled that he had not.

“ “[S]ection 851.8 is for the benefit of those defendants who have not committed a crime. It permits those . . . who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action. . . . [Citation.]” . . . [S]ection 851.8, subdivision (b), specifically permits the court to receive all relevant evidence on the subject of factual innocence [Citation.] . . . [¶] In determining at a court hearing whether factual innocence exists, the arrestee bears the preliminary burden of establishing that “no reasonable cause exists to believe that [he] committed the offense.” ([§ 851.8, subd. (b).) The arrestee thus must establish that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested is guilty of the crimes charged. [Citation.] [¶] Establishing factual innocence . . . entails establishing as a *prima facie* matter not necessarily just that the arrestee had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place.’ [Citation.]” (*People v. Chagoyan* (2003) 107 Cal.App.4th 810, 816-817.)

Section 851.8, subdivision (*l*), provides, as to arrests occurring and accusatory pleadings filed after January 1, 1981: “[P]etitions for relief under this section may be

filed up to two years from the date of the arrest or filing of the accusatory pleading, whichever is later. . . . Any time restrictions for filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice.”

One of the many newspaper articles Collins submitted states that he was arrested on a warrant in April 1999, and the information was filed on August 4, 1999. His petition for section 851.8 relief, whether counted from his misguided first effort on December 21, 2010, or from his refiling on April 5, 2011, was over 11 years after the information—over nine years late.

The court focused on whether there was “a showing of good cause” and an “absence of prejudice” that might waive the two-year restriction (§ 851.8, subd. (l)). Collins revealed that he had served prison time on his nonregistration conviction until 2003 and had recently worked on his case with an organization called Clean Slate. His full explanation was: “2003 I get out, and I had no idea that this was still on my record, and I tried to find out how to get it out. I went to Clean Slate. I’ve been dealing with them for the last two or three years. I went to other people, and I just recently discovered this 851.8 a few months ago on my own, and that’s when I first came to the court, I had no idea it would be there. I had no idea that this option for relief was even there. . . . I know . . . the Court can deny me because of time, but the only good cause I could show is lack of knowledge or ignorance of the law. And if that’s not good enough to help me get this off my record when I know I’m factually innocent, I don’t know what is. I don’t have any other good cause showing or whatever Ms. Dickson said I had to have.” Dickson submitted upon an observation that Collins could have gone to the public defender’s office to represent him.

The court ruled: “I don’t find just not knowing to be good cause or everyone could come in here 20 years after the fact, many years after the fact seek[ing] to have the [P]eople or the law enforcement agency justify certain decisions when they don’t even have their record any more. Here, there is prejudice by waiting so long, and as Ms. Dickson has stated, the People don’t even have their file anymore, she doesn’t have

anything to look at. [¶] So I don't find good cause . . . that this can go forward when it's violat[ive] of the statutory time period, so [the petition] is denied on those grounds."

We need not reach the arguments about the potential merits of the showing, for the denial is supported on the stated grounds—neither good cause nor absence of prejudice. Collins argues that his mere ignorance of the law was enough, at least where the record does not show (in his view) a lack of diligence in pursuing the relief, and that the court misunderstood its discretion in that regard and thus must be allowed, on a remand, to properly exercise discretion. He cites no authority for his diligent-ignorance-is-enough proposition, only an *arguendo assumption* in one case that, since there was a completely unexplained delay of four years, denial of a petition was supported “[e]ven assuming” the efforts of a self-represented petitioner to “informally” resolve his case during a further 12 years of delay might be excusable. (*People v. Bermudez* (1989) 215 Cal.App.3d 1226, 1230.)

But there is no need to decide that question either. There can be no waiver of the two-year time restriction unless there is both good cause *and lack of prejudice* (§ 851.8, subd. (l)), and the court’s finding of prejudice is supported. The various agencies no longer had records available for the case, and Collins’s effort on appeal to fault opposing counsel below for not declaring *when* the records were destroyed fails. His own showing included these responses to record requests he had made: a July 2010 superior court clerk verification that, “pursuant to Section 68152 of the Government Code of California, all of our criminal records that were filed and concluded prior to the year **2009**, have been destroyed”; and a December 2009 letter from the city attorney’s office that personnel office records “are only maintain[ed] for seven (7) years pursuant to the City of Oakland Records Retention Schedule.” Collins also did not challenge at the hearing Deputy District Attorney Dickson’s oral representation that her office no longer had the file and thus could not respond properly, and Collins represented to Judge Panetta at the February 22, 2011, hearing that the county sheriff’s office had informed him that their case file had been destroyed and that “East Bay Community Law [was] working with me on this.” The judge evidently accepted all of that information, reasoning in part, as to

Oakland Police Department records that would be in the custody of the city attorney's office: "They don't have the records anymore either. It's been so long. . . . [C]ertainly records are going to be destroyed and many cases before they were computerized anyway in terms of having these hearings heard later." In his motion to compel, Collins conceded that he had made "[m]any requests" for records, only to be informed that they were not available. He wrote, "[T]he case file/court file in this matter is listed as 'DESTROYED,' " albeit insisting that the file was actually "in the possession of the Alameda county clerk's office." He offered nothing in that unsworn statement to explain further or to support his notion of a cover-up. He simply asked rhetorically: "Who instructed the clerk to list this court file as DESTROYED? Was this a blatant act of covering up criminal civil rights violations?"

We also reject Collins's argument that there was no prejudice shown because opposing counsel never identified *which records or witnesses* would have been necessary to oppose his petition for factual innocence. His logic would place an impossible burden on the opposition—of somehow discerning, from a missing file, which contents were probative on a particular issue over a decade earlier. Surely the Legislature had the statutorily prescribed times for the destruction of public records in mind when it imposed the two-year restriction on bringing a petition and specified that there could be no waiver of the restriction without "the absence of prejudice." (§ 851.8, subd. (I).) Collins's appellate briefing contains no challenge to the code provisions cited in the record about records having been destroyed, and the record simply does not support an "absence of prejudice."

No error, abuse of discretion, or due process violation is shown.

II. *Coram Nobis*

Collins's motions to vacate pertained to his molest conviction and registration requirement in case number 364442, and his later registration violation in case number 135229. Judge Nakahara, faced with "motions" unrelated to pending cases, treated them as petitions (albeit unsworn) for writ of *coram nobis*, and Collins accepts that decision. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982 ["For better or worse,

the terms ‘motion to vacate’ and petition for writ of error *coram nobis*’ are often used interchangeably”].) We too refer to the motions as petitions, and separately consider the twin written rulings issued by the judge—one as to each case. In these petitions, as in his section 851.8 petition, a dearth of legal analysis made it difficult to determine precisely what Collins claimed, but the essence of it was once more a broad claim of political conspiracy, a claim which his own filings show he seemed to raise against virtually every legal problem he encountered.²

A. Case number 364442

For case number 364442, the asserted conspirators were then-Mayor of Oakland, Elihu Harris, then-Vice Mayor and defense counsel, Leo Bazile, then-District Attorney Tom Orloff, and the superior court. The petition states: “The defendant suffered from serious political interference, the incompetence and corruption of trial coun[se]; and the corruption of the court. [Bazile] set defendant up to be convicted, as a condition of an illegal deal made between the DA, [Mayor Harris], the trial judge (who was appointed by the mayor) and the complainant. . . . [They] agreed to have the defendant convicted in exchange for the promise from his accusers not to go to the press with the story before or after the elections were held. This was done to protect [Mayor Harris’s] re-elections

² Collins may well consider this more “evidence” of conspiracies against him, but, for example, an October 2000 probation officer’s report in case number 135229 says of a statement by him: “He believes that he is the victim of a conspiracy to remove him from his position on the Underground Railroad [youth program]. He believes that he is the victim of a personal vendetta by a judge(s), deputy district attorney(s) and Oakland City officials who wanted him out of his official duties with the City of Oakland and the Alameda County Superior Court. He feels he was wrongfully charged and unjustly convicted, and he intends to appeal this conviction to the ‘Supreme Court’ if necessary.” An attached sentencing letter from the district attorney’s office in that case urges: “Defendant has repeatedly and continuously refused to take responsibility for his criminal behavior[,] choosing instead to accuse or blame others for his conduct. On numerous occasions, he has acted with blatant and arrogant disregard of the law and is as a result certainly a likely candidate to recidivate.”

Collins’s filings also show that the city was sued several times by women who charged that he assaulted, sexually assaulted, and/or sexually harassed them. The city paid out \$825,000 and \$80,000 to settle two of those cases.

efforts, these parties in addition to this removed the master court file from the court building in order to cover up what was done. [¶] Former Mayor [] Harris stated to the defendant that [Orloff] cleared this deal as a favor to him. The Statement was confirmed by [Bazile and another council member], Bazile stated[:] ‘we have the DA Tom Orloff with us; we have the Judge who Elihu appointed, you can’t beat us’[:] this conversation took place in 1996 at city hall[:] the defendant confronted the vice mayor about his part in the erroneous conviction[:] Bazile then held up the master court file and told defendant that the judge and the DA had allowed him to remove the court file to ensure that I could not appeal or get access to it and its contents. These acts are clear violations of the law and the defendant[’]s federally protected due process rights.”

More specifically, the petition claims that Bazile: “repeatedly made excuses” for not challenge witnesses or moving “to dismiss the case”; said nothing when Orloff “told the court that not one but all [witnesses who had given statements to an investigating officer] had in fact lied at the request of the accuser”; deliberately neglected his duties as counsel; and prevented a notice of appeal from being filed by lying to him that he could not file one since he did not “ ‘have any money and appeals cost money.’ ” Further, the petition claims the judge did not inform Collins of his appeal rights and, in ordering sex offender registration, neither conducted “a hearing on whether or not the facts supported registration nor . . . state[d] what his reasons were for making the order.” This latter claim was articulated as a failure to follow section 290.006. While that section actually would not be added to the Penal Code until 15 years after the 1992 judgment in the case, Collins evidently meant that the court failed to find he “committed the offense as a result of sexual compulsion or for purposes of sexual gratification” and did not “state on the record the reasons for its findings and the reasons for requiring registration.” (§ 290.006, added by Stats. 2007, ch. 579, § 14, eff. Oct. 13, 2007.)

The contours of *coram nobis* relief are settled. “ ‘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.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [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.]” (*People v. Kim* (2009) 45 Cal.4th 1078, 1093 (*Kim*), quoting from *People v. Shipman* (1965) 62 Cal.2d 226, 230.)

The court, in ruling as to this case, denied relief based on (1) failure to state a prima facie case for relief and (2) lack of diligence in seeking relief. We review the ruling under the abuse of discretion standard (*Kim, supra*, 45 Cal.4th at pp. 1095-1096), and find no abuse of discretion.

As to the prima facie case, Collins’s claims of what amounted to instances of inadequate representation, ineffective assistance of counsel, and the court failing to state statutory reasons in support of sex-offender registration raised, at best, *legal errors*, not any new *fact* which, if presented to the court, would have prevented the rendition of his conviction or sentence. “The grounds on which a litigant may obtain relief via a writ of error *coram nobis* are narrower than on habeas corpus [citation]; the writ’s purpose ‘is 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.) Historically, the remedy developed before modern modes of correcting trial error were available. “With the advent of statutory new trial motions, the availability of direct appeal, and the expansion of the scope of the writ of habeas corpus, writs of error *coram nobis* had, by the 1930’s, become a remedy ‘practically obsolete . . . except in the most rare of instances’ [citation] and applicable to only a ‘very limited class of cases’ [citation].” (*Id.* at p. 1092.) Because the

writ “applies where *a fact* unknown to the parties and the court existed at the time of judgment that, if known, would have prevented rendition of the judgment, ‘[t]he remedy does not lie to enable the court to correct errors of law.’ [Citations.]” (*Id.* at p. 1093.) For a newly discovered fact to qualify as the basis for the writ, “we look to the fact itself and not its legal effect. . . . [¶] Finally, the writ . . . is unavailable when a litigant has some other remedy at law. ‘A writ of [error] *coram nobis* is not available where the defendant had a remedy by (a) appeal or (b) motion for a new trial and failed to avail himself of such remedies.’ [Citations.]” (*Id.* at pp. 1093-1094.) “Likewise, any number of constitutional claims cannot be vindicated by *coram nobis*,” including an unconstitutional sentence, or inadequate representation or ineffective assistance of counsel. (*Id.* at p. 1095.)

Collins nevertheless claims that he made out a *prima facie* case based on *extrinsic fraud* depriving him of a meaningful opportunity to defend against the charge. This view, resting in part on misrepresentation by his trial counsel having kept him from pursuing an appeal, is in tension with a limitation that *coram nobis* does not afford “a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even though such failure accrued without fault or negligence on his part.’ [Citations.]” (*Kim, supra*, 45 Cal.4th at p. 1099, italics added, fn. omitted.) On the other hand, case law calls this procedural requirement “analogous to the general rule applicable to writs of habeas corpus ‘that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction’ ” (*ibid.*), and Collins stresses that the writ may lie in instances where a plea was entered through extrinsic fraud (*id.* at p. 1094). He characterizes the actions of his trial counsel here—in seeking “to ‘sell out’ [his interests] to protect the political interests of [counsel] and his political allies,” and to prevent an appeal—as extrinsic fraud.

But even if Collins’s unsworn statements were enough to show extrinsic fraud, an insurmountable problem is that he waited far too long. “ ‘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. . . .” (Kim, supra, 45 Cal.4th at p. 1093), and Collins waited over 18 years between his misdemeanor conviction of November 1992 and petition of January 2011. There was some arguable “diligence” by him over those decades in seeking relief from the conviction. He evidently obtained a post-probation dismissal in 1996, under former section 1203.4, although this did not relieve him of his sex-offender registration requirement. Then, raising some issues that in essence challenged his original conviction, he attacked the ensuing failure-to-registration conviction in case number 135229 by, among other things, filing unsuccessful pro se petitions for habeas corpus in federal district court, the Alameda County Superior Court, and our own division (*In re Collins on Habeas Corpus* (A094217, summarily den. Mar. 13, 2001)). But whatever brief temporal interludes those efforts might arguably excuse, it appears from his petition that he knew of the claimed witness perjury, “conspiracy,” and trial counsel’s purported conflict of interest from the time of his conviction or, at the latest, when he spoke with former Mayor Harris in 1996.

To the extent that Collins’s petition is vague about precisely when he learned of the asserted *facts* showing wrongs against him, that vagueness is a failure to carry his burden of establishing a prima facie case for relief. “ ‘It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*’ [citations] and the burden falls to defendant ‘to explain and justify the delay’ [citation]. ‘[W]here a defendant seeks to vacate a solemn judgment of conviction . . . the showing of diligence essential to the granting of relief by way of *coram nobis* should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, *but also 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; a mere allegation of the ultimate facts, or of the legal

conclusion of diligence, is insufficient.’ [Citations.]” (*Kim, supra*, 45 Cal.4th at pp. 1096-1097.)

Collins failed to carry that burden. His petition stated that he learned of the claimed 290.006 violation and “the grounds on which he [brought] this motion” “after retaining the services of the East Bay Community Law Center in the last half of 2010 For over twenty years no attorney that the defendant attempted to retain has understood the complicated issues involved and thus could not advise the defendant as to his rights.” The 2010 date of discovery conflicts with his earlier statement about learning of the “conspiracy” by 1996, and if witnesses had in fact perjured themselves, he obviously must have known that from the start. Beyond that, his claimed 2010 discovery of “the complicated issues involved” only showed, at best, that he did not know the *legal* bases for claims. His burden was to show diligence in learning the predicate *facts*.

B. Case number 135229

For case number 135229, his 1999 jury-tried conviction for failing to register, Collins raised a host of legal errors and ineffective assistance claims, all undergirded by claimed corruption and conspiracy between the trial judge and a succession of six defense counsel, a succession evidently fueled in whole or part by his own *Marsden* motions to discharge them (*People v. Marsden* (1970) 2 Cal.3d 118). He also slipped in a challenge to his original 1992 conviction.

Judge Nakahara issued a separate written opinion on that petition, and Collins’s appellate briefing, while challenging the ruling in case number 364442, does not challenge the separate ruling in case number 135229.

DISPOSITION

The order of May 4, 2011 denying the petition for factual innocence is affirmed. The orders of March 15, 2011, being summary denials of petitions for *coram nobis* that we have determined did not state a *prima facie* case for relief, are not appealable, and the purported appeal from those orders is therefore dismissed. (*People v. Gallardo, supra*, 77 Cal.App.4th at pp. 982-983; *People v. Kraus* (1975) 47 Cal.App.3d 568, 575, fn. 4.)

Kline, P.J.

We concur:

Haerle, J.

Richman, J.