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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MERCEDES ALDANA-GOMEZ,

Petitioner,

v.

THE SUPERIOR COURT OF MARIN
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A139955

(Marin County
Super. Ct. No. SC167979)

Petitioner Mercedes Aldana-Gomez filed a petition for writ of habeas corpus in the superior court. That court denied the petition on the basis that it lacked jurisdiction to consider it. Aldana-Gomez then filed this petition, seeking a writ of mandate to compel the superior court to recognize its habeas corpus jurisdiction. We grant the petition for writ of mandate.

I. BACKGROUND

In 2010, Aldana-Gomez was convicted upon his guilty plea to sexual battery by restraint (Pen. Code, § 243.4, subd. (a)). He was sentenced to three years of probation, to expire on April 7, 2013.

On April 5, 2013, two days prior to the expiration of probation, Aldana-Gomez sought habeas corpus relief in the superior court, asserting trial counsel was ineffective in advising him about the immigration consequences of his plea. The habeas petition

affirmatively alleged that habeas corpus jurisdiction existed because Aldana-Gomez was in constructive custody by virtue of felony probation. The People's response to the petition did not contest the existence of habeas corpus jurisdiction and addressed Aldana-Gomez's claim on the merits.

On June 3, 2013, the superior court denied habeas relief, finding it lacked jurisdiction to entertain the petition because Aldana-Gomez was no longer on probation and therefore not in actual or constructive state custody.¹ On June 18, Aldana-Gomez filed a motion for reconsideration, arguing the court possessed jurisdiction to entertain habeas relief because he was on probation and therefore in constructive custody at the time the petition was filed. The court denied the reconsideration motion on July 15.

On October 9, 2013, Aldana-Gomez filed this petition, asking that a writ of mandate issue to compel the superior court to recognize its habeas corpus jurisdiction and thereafter rule on the merits of the habeas corpus petition.² On October 28, we denied the petition for writ of mandate on two grounds: 1) Aldana-Gomez's failure to demonstrate the timeliness of the petition, and 2) his failure to support the petition with an adequate record. Specifically, our explanatory order denying the petition stated: "The petition, which was filed more than sixty (60) days after the superior court rendered its June 3, 2013 order, fails to articulate extraordinary circumstances justifying this delay. (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) While the court does not consider petitioner's motion for reconsideration to have extended the time period for seeking writ relief in this court (see Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2012) ¶ 15:23a, pp. 15-18 to 15-19 and cases cited therein), the petition was not filed within 60 days of the superior court's July 15,

¹ The superior court noted that the fact Aldana-Gomez was then in federal immigration custody was insufficient to establish habeas corpus jurisdiction, since immigration restraints do not amount to actual or constructive *state* custody. (*People v. Villa* (2009) 45 Cal.4th 1063, 1071–1076; *In re Azurin* (2001) 87 Cal.App.4th 20, 26.)

² Aldana-Gomez concedes that he could not seek habeas corpus relief from this court, since he was no longer in custody at that time.

2013 order denying reconsideration. [¶] The court observes that the record is incomplete, as it does not contain petitioner’s declaration lodged on May 31, 2013. (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186–187; Cal. Rules of Court, rule 8.486(b)(1).) Additionally, the exhibits accompanying the petition do not comply with California Rules of Court, rule 8.486(c)(1)(B).”

Aldana-Gomez did not attempt to cure the procedural deficiencies observed in our denial order by refileing his petition in this court. (See *Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 93–94.) Instead, he sought review in the Supreme Court. In describing our October 28, 2013 order in his petition for review, Aldana-Gomez failed to mention the portion of our order finding the record incomplete; he belatedly acknowledged the validity of that ground of decision in his reply brief filed in the Supreme Court, conceding that he did not provide a complete record in this court.

The Supreme Court granted review and transferred the petition to us with directions to vacate our order denying the petition and to issue an order to show cause “why the petition for writ of habeas corpus should not be considered on the merits, given that it was filed before petitioner’s probationary period expired, and why the petition for writ of mandate was not timely filed in the Court of Appeal. (See *Maleng v. Cook* (1989) 490 U.S. 488, 490–491; *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1217; *Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1505, fn. 9.)”

We vacated our prior order denying the petition, issued an order to show cause, and obtained a return and reply thereto.³

³ Aldana-Gomez contends that our order to show cause failed to conform with the Supreme Court’s order simply because our order, in addition to repeating the authorities cited by the Supreme Court, further stated, “see also authorities cited in this court’s October 28, 2013 order denying the petition for writ of mandate.” We find no merit to this contention. Our inclusion of this language was meant to prompt discussion in the return and reply thereto concerning “why the petition for writ of mandate was not timely filed” in this court, and did not add as an additional question to be resolved whether the petition for writ of mandate complied with the California Rules of Court. Consistent with the extraordinary nature of writ review and the burdens on a petitioner seeking such relief, record inadequacy is a well-established basis for denying writ petitions. (See

II. DISCUSSION

A. *Timeliness of the Petition for Writ of Mandate*

Where, as here, a statute does not specify a particular time period for filing a writ petition, we have observed that “[a]s a general rule, a writ petition should be filed within the 60-day period that is applicable to appeals. (*Reynolds v. Superior Court* (1883) 64 Cal. 372, 373; *Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499 [(*Popelka*)].) ‘An appellate court *may* consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and *should* do so absent “extraordinary circumstances” justifying the delay.’ [Citation.]” (*Volkswagen of America, Inc., supra*, 94 Cal.App.4th at p. 701, parallel citations omitted.)

In *Reynolds v. Superior Court, supra*, the Supreme Court denied a writ petition as untimely because “unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of the same length of time that bars an appeal from a final judgment.” (64 Cal. at p. 373, italics omitted & citing *Keys v. Marin County* (1871) 42 Cal. 252, 256.) Similarly, in *Popelka, supra*, Division One of this court affirmed an appellate court’s discretion to deny a writ petition filed after the 60-day period applicable to appeals, suggesting it should deny such petitions absent a demonstration of extraordinary

Sherwood v. Superior Court, supra, 24 Cal.3d at pp. 186–187; *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1847, fn. 8; Cal. Rules of Court, rule 8.486(b)(4).) Although the record deficiency provided a valid basis, on its own, supporting our denial of the petition (*Sherwood v. Superior Court*, at pp. 186–187; Cal. Rules of Court, rule 8.486(b)(1)), the Supreme Court directed us to issue an order to show cause notwithstanding the record inadequacy, and Aldana-Gomez has belatedly furnished this court with the missing record material. We will therefore not further address this issue, even though the People’s return asks us to do so.

Likewise, the bulk of the return is devoted to urging us to insert a new issue in this show cause proceeding concerning the timeliness of Aldana-Gomez’s *habeas corpus petition* in the trial court. However, because the Supreme Court did not direct us to consider that question—a ground not relied upon by the superior court in denying relief—we decline to do so.

circumstances for the delay. (107 Cal.App.3d at p. 499.) The *Popelka* court further observed that “[a] denial on the basis of untimeliness is appropriate even though the opposing party would not be prejudiced by consideration of the petition on the merits. [Citation.]” (*Ibid.*)

This court regularly applies the above authorities, which for simplicity’s sake we will refer to as the “60-day rule.” In our view, the 60-day rule is harmonious with the extraordinary nature of writ review and the desirability of placing a sensible time limit— analogous to the time period applicable to the pursuit of “ordinary” appeals—on petitions seeking writ relief.

Our initial review of the petition revealed that Aldana-Gomez sought relief over four months after the June 3, 2013 order denying habeas relief, and approximately three months after the July 15, 2013 denial of reconsideration. Despite these obvious delays, the petition filed in this court did not acknowledge the delay, much less attempt to demonstrate extraordinary circumstances justifying it. Applying the 60-day rule, we denied the petition based, in part, on Aldana-Gomez’s failure to demonstrate it was timely filed.

In transferring the petition back to this court, the Supreme Court directed our attention to *Good v. Superior Court, supra*, 158 Cal.App.4th at page 1505, footnote 9. There, Division One of this court rejected an argument that the petition before it should be denied as untimely. (*Ibid.*) The court reasoned that even though a 60-day filing period is typically recognized for nonstatutory writ petitions, a petition filed after 60 days would not be denied absent a showing of prejudice to the party opposing the petition, and no such prejudice had been shown. (*Ibid.*) One of the authorities cited in support of that proposition is the Supreme Court’s decision in *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 163 (*Peterson*). In *Peterson*, our high court was not asked to review the wisdom of the 60-day rule for filing nonstatutory writ petitions, but was instead called upon to determine whether a writ petition should be barred by the doctrine of laches because of petitioners’ delay in seeking review. (*Ibid.*) *Peterson* thus does not *mandate* an analysis of laches where a writ petition has been filed more than 60 days after the

challenged order. It is axiomatic that “cases are not authority for propositions not considered.” (*People v. Brown* (2012) 54 Cal.4th 314, 330.) Notwithstanding this principle, some courts have concluded that *Popelka* and its progeny are no longer viable after *Peterson*. (See, e.g., *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 495–497 [Div. Four of this court recognized the *Popelka* line of cases but concluded that *Peterson*’s laches analysis manifests the Supreme Court’s approach to issues of a petition’s timeliness].) Since we read *Peterson* differently than our colleagues, we respectfully disagree with that approach, and will continue to apply the 60-day rule described above absent explicit Supreme Court direction to the contrary.

In any event, our analysis of the petition’s timeliness differs on the record which is now before us. In his Supreme Court petition for review, which Aldana-Gomez incorporates by reference in this proceeding, Aldana-Gomez articulated new circumstances not contained in the mandate petition as originally filed in this court. He informed the Supreme Court that delays in seeking writ relief were engendered as a result of “difficulties with communication caused by his federal custodial status.” The petition for review also emphasized the reasonableness of Aldana-Gomez’s pursuit of a motion for reconsideration in the superior court prior to seeking writ relief in this court, given the superior court’s resolution of the habeas petition on a ground not asserted by the People. Had Aldana-Gomez provided such information in his initial filing in this court, we would have considered the explanations sufficient under the 60-day rule to warrant further consideration of the petition. We thus proceed to discuss the petition’s merits.⁴

⁴ Our conclusion renders it unnecessary to discuss the People’s argument that the doctrine of laches bars the petition since Aldana-Gomez’s delay was unreasonable and has prejudiced the People. Were we to analyze the timeliness of the petition under the laches test, however, we would conclude that Aldana-Gomez’s delay was not unreasonable based on the circumstances articulated in the petition for review, and that the People have not demonstrated prejudice.

B. *Superior Court's Jurisdiction to Consider the Habeas Corpus Petition*

Aldana-Gomez maintains, and the People concede, that the superior court had jurisdiction to consider the habeas corpus petition.

Aldana-Gomez correctly asserts that the critical question for establishing the existence of habeas corpus jurisdiction is whether *at the time the petition was filed* the petitioner was in actual or constructive state custody. “In order to satisfy jurisdictional requirements under California law, an individual must be in actual or constructive state custody at the time he or she files a petition for writ of habeas corpus. ([Pen. Code,] § 1473, subd. (a); *In re Azurin*[,*supra*,] 87 Cal.App.4th [at pp.] 23–25; see *Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 796.)” (*In re Sodersten, supra*, 146 Cal.App.4th at p. 1217, parallel citations omitted; see *People v. Kim* (2009) 45 Cal.4th 1078, 1099 [“defendant could have petitioned for a writ of habeas corpus while he was still in actual or constructive state custody, that is, in prison or on parole”]; see also *In re Azurin*, at p. 25 [“by not meeting his burden to show that when filing his habeas corpus petition he was in actual or constructive state custody . . . , Azurin failed to satisfy the habeas corpus jurisdictional requirements under California law”]; cf. *Maleng v. Cook, supra*, 490 U.S. at pp. 490–492 [under federal habeas corpus statute, petitioner must be in custody at the time the petition is filed, and the custody requirement is met even if petitioner is thereafter released].)

The People’s return “admits that to the extent petitioner was on probation at the time he filed his habeas petition in respondent court, the court had jurisdiction to consider the petition.” The return does not dispute Aldana-Gomez’s allegation that he was on probation and thus in constructive custody when the habeas corpus petition was filed on April 5, 2013. (*People v. Villa, supra*, 45 Cal.4th at p. 1069 [a person on probation is in constructive custody for purposes of habeas corpus], citing *In re Osslo* (1958) 51 Cal.2d 371.)

Therefore, Aldana-Gomez is entitled to relief insofar as the superior court found it lacked jurisdiction to consider the habeas corpus petition. Aldana-Gomez asks that we order the superior court to consider and rule on the *merits* of the habeas petition. Given

our determination that the superior court erroneously denied habeas relief based solely on a misunderstanding about its jurisdiction to decide the petition before it, we find it inappropriate to constrain the court's subsequent review of the habeas petition. Additionally, the People's return contends that we should deny this mandate petition on the basis that the habeas corpus petition was untimely filed (a proposition with which Aldana-Gomez strenuously disagrees, and argues is forfeited and barred by judicial estoppel). As previously explained (see fn. 3, *ante*), the timeliness of the habeas corpus petition is not properly before us in this show cause proceeding, and we therefore leave it to the superior court to resolve in the first instance.

III. DISPOSITION

Let a peremptory writ of mandate issue, commanding respondent superior court to vacate its June 3, 2013 order to the extent it denies the petition for writ of habeas corpus on jurisdictional grounds, and to thereafter issue a new and different order following respondent's further review of the habeas corpus petition.

To prevent further delays, this opinion shall be final as to this court five court days after it is filed. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.