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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ORTIZ,

Defendant and Appellant.

B233323

(Los Angeles County
Super. Ct. No. BA169365)

THE COURT:*

Appellant Jesus Ortiz appeals from the order denying without prejudice his petition for writ of error coram nobis and motions to vacate a judgment under Penal Code section 1016.5¹ and for appointment of counsel. We appointed counsel to represent him on this appeal. After examination of the record, counsel filed an “Opening Brief” containing an acknowledgment that she had been unable to find any arguable issues.

On September 12, 2011, we advised appellant that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. On October 11, 2011, appellant filed a supplemental brief in which he argued three instances

* BOREN, P. J., ASHMANN-GERST, J., CHAVEZ, J.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

of ineffective assistance of counsel in connection with the federal immigration consequences of his 1998 guilty plea to robbery.

The record shows that on July 6, 1998, appellant was charged with second degree robbery in violation of section 211. It was alleged under sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) (the three strikes law) that he had suffered a 1997 conviction for burglary in violation of section 459. On November 18, 1998, appellant changed his plea to nolo contendere on the robbery charge. The trial court sentenced appellant to the low term of two years in prison, and the prior conviction allegation was dismissed.

Appellant was deported to El Salvador on July 16, 1999. Upon being deported, he was given a warning that he was prohibited from entering, attempting to enter, or being in the United States at any time because he was found “inadmissible or excludable under Section 212 of the Act, or deportable under Section 241 or 237 of the Act, and ordered deported or removed from the United States, and you have been convicted of a crime designated an aggravated felony.” On October 2, 2008, he was detained upon entering the United States on foot. He was placed in Department of Homeland Security custody in San Diego on the same day. He was given a notice to appear (form I-862). Appellant declares that he has been in detention at the CCA detention center since that date.

On December 13, 2010, appellant filed a petition for writ of error coram nobis, a statutory motion to vacate judgment in the November 1998 conviction under section 1016.5, and a motion for appointment of counsel. Appellant alleged that his counsel failed to investigate and advise him of the immigration consequences of his plea, that the court failed to advise him of his rights under section 1016.5, and that he did not understand the consequences of his plea.

On February 18, 2011, the superior court denied appellant’s petition to withdraw and vacate his plea, stating, “The appellant’s petition is respectfully denied without prejudice. Before this court can rule on appellant’s petition, appellant must be present in court to submit to examination by either the court or the People. This court cannot

compel the federal government of the United States to transport the defendant so he may avail himself of the jurisdiction of this court.”

We determined that appellant’s supplemental brief in large part reiterated the arguments he made below in his motions, the merits of which the trial court did not address. Therefore, on February 7, 2012, we requested supplemental briefing from counsel for appellant and the People on the following issues: (1) Did the trial court have jurisdiction to decide appellant’s petition and motions? (2) Assuming the trial court had jurisdiction, what is the effect of the trial court’s denying without prejudice the petition and motions, and what is appellant’s remedy?

Appellant’s reply brief asserts that the trial court had both subject matter and personal jurisdiction over appellant to consider appellant’s motion under section 1016.5. Appellant argues that the appropriate remedy is to reverse and remand the matter to the superior court with an order to examine reasonably available means to hear appellant’s motion and to refrain from dismissing the motion unless reasonable attempts to hear it prove futile.²

Respondent agrees that the trial court had jurisdiction to consider appellant’s motion. According to respondent, the record before the trial court was such that the motion should have been denied with prejudice. Respondent cites *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183 (*Zamudio*) for the proposition that a court is not

² According to appellant, among the alternatives available to the superior court are: (1) to ascertain whether appellant was willing to waive his right to be present at the hearing and submit the matter upon declarations and a reporter’s transcript of the plea hearing, a settled statement, or the clerk’s transcript; (2) to determine whether Immigration and Customs Enforcement (ICE) would honor a writ of habeas corpus ad testificandum issued by the trial court to procure appellant’s presence to testify; (3) to grant appellant a continuance and advise appellant to pursue other means of procuring his presence in court, such as by filing on his own behalf a petition for habeas corpus ad testificandum in federal court; (4) to appoint counsel for appellant, who could advise the court and appellant about available options and assist appellant in pursuing all available means of procuring his presence in court.

obligated to entertain live testimony regarding a section 1016.5 motion to vacate, but may resolve the motion instead on the basis of affidavits.

We agree with appellant and respondent that the trial court had jurisdiction to decide appellant's motion under section 1016.5. We also agree with respondent that the trial court did not necessarily require appellant's presence in order to decide the motion. "There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony. [Citation.]" (*Zamudio, supra*, 23 Cal.4th at p. 201.) *Zamudio* "decline[d] to burden trial courts with a requirement that they conduct live evidentiary hearings on all section 1016.5 motions."³ (*Ibid.*)

We therefore reverse the trial court's denial without prejudice of appellant's motions and petition and remand to the trial court to consider and rule on appellant's matters.

The order under review is reversed.

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³ We also agree with respondent that appellant was precluded from seeking relief for his ineffective assistance of counsel claims by means of a petition for writ of error coram nobis. (*People v. Kim* (2009) 45 Cal.4th 1078, 1104; see also *People v. Barton* (1978) 21 Cal.3d 513, 518-519, fn. 3 [counsel must be appointed for indigent who mounts collateral attack on conviction if he sets out factual allegations that state a prima facie case]; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1285 [ineffective assistance of counsel claims not properly raised in statutory motion under section 1016.5].)