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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE W. SCOTT, SR., et al.,

Defendants and Appellants.

C066123

(Super. Ct. Nos. CM027747,
CM029819, SCR67072)

After being charged with a series of environmental crimes, defendants George W. Scott, Sr.; George W. Scott, Sr., Revocable Inter Vivos Trust; and Chico Scrap Metal, Inc., entered into a settlement with the Butte County District Attorney's Office. In 2008 defendants pleaded no contest to 11 misdemeanor violations of the Health and Safety Code, Labor Code, and Penal Code, and the prosecution dismissed 16 other counts.¹ Defendants also agreed to pay restitution.

¹ All further statutory references are to the Health and Safety Code unless otherwise designated.

Subsequently, defendants moved to withdraw the pleas, arguing counsel performed ineffectively. The trial court denied the motion as untimely. Upon denial of their request for a certificate of probable cause, defendants filed a petition in this court for a writ of mandamus to compel the trial court to file their notice of appeal. We denied the petition as untimely. (*Scott v. Superior Court* (Mar. 19, 2010, C064290) [petn. den. by order].)

Ultimately, defendants filed in the trial court another petition for a writ of habeas corpus or, in the alternative, for a writ of error *coram nobis*. The court denied the petition. Defendants filed a petition for a writ of habeas corpus in this court, which we also denied. (*In re Scott* (Dec. 9, 2010, C066254) [petn. den. by order].)

Defendants then filed this appeal, challenging the trial court's denial of their requested alternative relief of a writ of error *coram nobis*. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the charging documents and plea agreements in this case.

In January 2007 defendant Scott disposed of hazardous waste containing dangerous levels of lead and polychlorinated biphenyl compounds (PCBs) from his scrap yards in Oroville and Chico.

In May 2007 defendant Scott directed employees of defendant Chico Scrap Metal, Inc. (Chico Scrap) to cut lead coated steel girders with a torch without providing the employees with adequate respiratory protection or approved safety gear. Chico Scrap engaged in these activities on three other occasions.

On four days in October 2007 Chico Scrap failed to control dust during the removal of hazardous substances at its facility, resulting in emission of air contaminants.

In August 2007 Chico Scrap discharged hazardous waste into storm sewers. Later that same month, Chico Scrap failed to contain and remove hazardous metals and PCBs in violation of a prior enforcement order.

In September 2007 Chico Scrap failed to report the release of hazardous substances at its Oroville recycling plant.

In August 2008 the charges against defendants were filed. In October 2008 defendants entered into a “global settlement” in which they pleaded no contest to 11 misdemeanor violations. The charges included disposing of hazardous waste without a permit (count 1 -- Health & Saf. Code, § 25189.5, subd. (a)), failing to provide employees with proper protective equipment for handling lead (counts 4, 5 & 6 -- Lab. Code, § 6423), negligent emission of air contaminants (counts 9, 10, 11 & 17 -- Health & Saf. Code, § 42400.1, subd. (a)), failure to abate a public nuisance in the form of hazardous waste (count 18 -- Pen. Code, § 373, subd. (a)), failure to report the release of hazardous substances (count 23 -- Health & Saf. Code, § 25507), and depositing hazardous materials in storm sewers (count 26 -- Pen. Code, § 374.8).

In return, the People agreed to dismiss 16 other counts, including three felonies. Defendants agreed to pay a total of \$700,000 in fines, with a \$500,000 fine suspended pending successful completion of a cleanup program. In addition, defendants would pay restitution costs of \$181,000. Defendants were placed on informal probation for five years.

What followed is a veritable ping-pong game of procedural maneuvers. In April 2009 defendants moved to withdraw their no contest pleas, arguing ineffective assistance of counsel. The trial court denied the motion as untimely. In November 2009 defendants filed a notice of appeal and a request for a certificate of probable cause. The trial court denied the request as untimely.

In March 2010 defendants filed a petition for a writ of mandamus to compel the trial court to file the notice of appeal. We denied the petition as untimely. (*Scott v. Superior Court, supra*, C064290.) Later that month, defendants filed in the Supreme Court a petition for review of our denial of the petition for a writ of mandate. The court

denied the petition. (*Scott v. Superior Court* (June 9, 2010, S181399) [petn. den. by order].)

In April 2010 defendants filed a petition for a writ of habeas corpus and/or petition for a writ of error *coram nobis*. The trial court denied the petition based on a lack of jurisdiction, noting defendants' writ of mandate was then pending in the Supreme Court.

In May 2010 defendants filed in this court a petition for a writ of habeas corpus or, in the alternative, a petition for a writ of error *coram nobis*. (*In re Scott* (June 24, 2010, C064885) [petn. den. by order].) We denied the petition without prejudice to litigating in the trial court in the first instance.²

Defendants filed another petition for a writ of habeas corpus or, in the alternative, for a writ of error *coram nobis* in July 2010. The trial court denied the petition. Defendants then filed this appeal, challenging the trial court's denial of their requested alternative relief for a writ of error *coram nobis*.³

DISCUSSION

I.

The writ of error *coram nobis* is a common law remedy designed “ ‘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].” (*People v. Kim* (2009) 45 Cal.4th 1078, 1091 (*Kim*).) However, a writ of error *coram nobis* “ ‘does not lie to correct any error in the judgment of the court nor to

² The Attorney General's motion for judicial notice of this court's records in *In re Scott*, *supra*, C064885 and *In re Scott*, *supra*, C066254 is granted.

³ In October 2010 defendants filed a petition for a writ of habeas corpus in this court, which we denied. (*In re Scott*, *supra*, C066254.) Defendants filed a petition for review in the Supreme Court. (*In re Scott* (Mar. 16, 2011, S189125) [petn. den. by order].)

contradict or put in issue any fact directly passed upon and affirmed by the judgment itself.” ’ [Citation.]” (*Id.* at p. 1092.) A trial court’s denial of a petition for a writ of error *coram nobis* is an appealable order, which we review for an abuse of discretion. (*People v. Dubon* (2001) 90 Cal.App.4th 944, 950-951; *People v. Goodspeed* (1963) 223 Cal.App.2d 146, 156.)

A petition for a writ of error *coram nobis* must establish three elements: (1) the petitioner must show some fact existed that, without any fault or negligence on the petitioner’s part, was not presented to the court at trial, and which if presented would have prevented the rendition of the judgment; (2) the petitioner must show that the newly discovered evidence does not go to the merits of the issues at trial; and (3) the 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.)

II.

At the outset, the People argue we should dismiss this appeal because it raises the same issues as defendants’ petition for a writ of habeas corpus, which we denied. (*In re Scott, supra*, C066254.) Defendants dispute this, contending their petition is not a duplicative, successive appeal.

A trial court’s denial of an error *coram nobis* petition may be appealed unless it fails to state a prima facie case for relief or the petition merely duplicates issues “which had or could have been resolved in other proceedings.” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982.) Reviewing on appeal successive petitions runs afoul of the general rule that delayed and repetitious presentation of claims is an abuse of the writ process. (*In re Clark* (1993) 5 Cal.4th 750, 769.) As with petitions for a writ of habeas corpus, petitions for a writ of error *coram nobis* may not attack a final judgment in piecemeal fashion, in proceedings filed seriatim, in the hope of finally convincing a court to issue the writ. (*Kim, supra*, 45 Cal.4th at p. 1101.)

Here, defendants appeal the Butte County Superior Court's denial of a petition for a writ of habeas corpus or, in the alternative, for a writ of error *coram nobis*. In their petition, defendants sought relief on two grounds: newly discovered evidence, and ineffective performance by counsel in failing to investigate and discover this evidence before advising defendants to enter a no contest plea.

The court denied the petition and defendants filed a petition for a writ of habeas corpus in this court. (*In re Scott, supra*, C066254.) The petition sought relief on the same grounds as in the superior court. The petition also requested that, in the alternative, we consider it a petition for a writ of error *coram nobis*. We denied the petition.

Here, defendants raise claims similar to those presented in the earlier petition for a writ of habeas corpus: newly discovered scientific evidence establishes their innocence, and counsel's ineffective performance prevented them from learning of this evidence prior to entering their pleas. Defendants acknowledge that the facts argued in the petitions for writs of error *coram nobis* and habeas corpus overlap but contend that "the *only time either* writ was considered *on the merits* was [in] the Butte County Superior Court."

According to defendants, "the [petitions for] writ[s] of *coram nobis* and habeas corpus were filed together, not in *seriatim*. [Citation.] Appellants are permitted, after being denied by the court of first instance, to appeal the ruling of that court."

We agree and shall consider defendants' appeal.

III.

The Butte County Superior Court denied defendants' petition for a writ of habeas corpus and/or a writ of error *coram nobis* on a variety of grounds. The court found defendants failed to timely appeal issues that could have been raised on direct appeal and failed to show good cause for their delay in bringing the petition. In addition, the court found the same claims were previously decided, both in the trial court and by this court.

Finally, the court determined the petition “on its face fails to show a prima facie case of a fundamental miscarriage of justice which would justify the relief sought.”

Among the elements defendants must establish to invoke *coram nobis* is that the newly discovered evidence does not go to the merit of issues decided at trial. (*Kim, supra*, 45 Cal.4th at p. 1093.) Defendants argue scientific analysis conducted following the entry of plea reveals that none of the material disposed of was hazardous. According to defendants, these scientific errors do not go to the merits of the case since “[n]othing about the presence of hazardous waste was adjudicated at trial. It was presumed based on the test data provided by the prosecuting agencies. There was [no] examination of the scientific data, the testing methodology employed, or the validity of the test results prior -- or any other aspect of the forensic evidence -- prior to [defendants’] acceptance of the plea bargain.”

In determining whether a newly discovered fact qualifies as a basis for relief by *coram nobis*, we consider the fact itself and not its legal effect. In the context of a guilty plea, the newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. In contrast, “[n]ew facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment.” (*Kim, supra*, 45 Cal.4th at pp. 1103; see *id.* at p. 1093; see also *People v. Gari* (2011) 199 Cal.App.4th 510, 519-520.)

Defendants bear the burden of overcoming the presumption in favor of the validity of the trial court’s judgment by establishing through a preponderance of strong and convincing evidence that they were deprived of substantial legal rights by extrinsic causes. (*People v. Burroughs* (1961) 197 Cal.App.2d 229, 234.) We reverse only if the trial court abused its discretion in denying the petition for a writ of error *coram nobis*. (*Kim, supra*, 45 Cal.4th at p. 1095.)

Here, defendants entered a plea of no contest to 11 misdemeanor violations stemming from allegations that they violated several statutes in disposing of hazardous waste. Defendants claimed newly discovered evidence relates directly to the central issue in the underlying litigation: whether the substances disposed of constituted hazardous waste.

The newly discovered evidence defendants cite consists of expert opinion questioning the results of government tests. Defendants argue the analysis of their expert, Dr. Simmons, is based on “volumes of test data constituting the factual basis of his opinion.” Regardless of the basis for Simmons’s opinion, it is basically expert testimony challenging the government’s results. Defendants argue this newly discovered evidence fundamentally undermines their no contest plea. We disagree.

Defendants analogize their case to the facts found sufficient to grant petitions for writs of error *coram nobis* in *People v. Wiedersperg* (1975) 44 Cal.App.3d 550 (*Wiedersperg*) and *People v. Welch* (1964) 61 Cal.2d 786 (*Welch*). These cases bear no resemblance to the present matter.

In *Wiedersperg*, the defendant was found guilty of marijuana possession after defense counsel submitted the matter on the preliminary hearing transcript. The defendant, a noncitizen born in Austria, was ordered deported. (*Wiedersperg, supra*, 44 Cal.App.3d at pp. 552-553.) In a petition for a writ of error *coram nobis*, defense counsel argued that at the time of the proceedings, he was unaware the defendant was an alien. Had defense counsel known of the defendant’s immigration status, he could have attempted to negotiate a plea that would not have resulted in the defendant’s deportation. (*Ibid.*)

The appellate court held that since the defendant’s citizenship status and the concomitant threat of deportation did not go to the merits of the case, the trial court should grant the petition for a writ of error *coram nobis*. (*Wiedersperg, supra*, 44 Cal.App.3d at pp. 554-555.) However, in a subsequent case, the court noted its

decision was “extremely limited.” (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1475.)

In *Welch*, the defendant pleaded guilty to murder and robbery. Subsequently, defense counsel discovered that when the defendant was five years old he suffered encephalitis resulting in brain damage. (*Welch, supra*, 61 Cal.2d at pp. 788-789.) The Supreme Court determined this new evidence bore on the issue of the defendant’s sanity at the time of his crime. (*Id.* at p. 794.) The defendant’s sanity was not an issue in the case, since under Penal Code section 1016 a defendant accused of a crime is deemed to admit his legal sanity unless he pleads not guilty by reason of insanity. (*Welch*, at p. 794.) Therefore, the defendant in *Welch* had met the requirements for obtaining a writ of error *coram nobis*. (*Id.* at p. 795.)

Here, unlike the evidence in *Wiedersperg* and *Welch*, which was sufficient to support granting a petition for a writ of error *coram nobis*, defendants’ newly discovered evidence does not concern their legal status or the unexpected effects of their no contest pleas. Defendants cite a declaration by an expert who had been contacted by the defense prior to defendants’ entering their pleas and who had been listed as a potential trial witness. The evidence defendants provide goes directly to matters that had been put in issue by the accusatory pleading and defendants’ general plea of no contest. (*Welch, supra*, 61 Cal.2d at p. 794.)

Nor are we convinced by defendants’ argument that under *Welch* we should grant their petition because it would be fair and just to hear their new evidence. According to defendants, the new evidence they cite “not only makes a difference, it completely undermines the evidence on which the charges against [defendants] are premised upon [*sic*].” Defendants entered a plea of no contest to a variety of charges stemming from their handling of hazardous waste. Their petition centers on scientific analysis conducted after their plea, which they allege revealed faulty testing methodology and erroneous test results. This new evidence pertains to the central issue to which defendants pleaded no

contest; it does not raise issues of unfairness or injustice to support granting defendants' petition.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

MURRAY, J.