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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAAD GILLANOIA ZAIA,

Defendant and Appellant.

D059312

(Super. Ct. No. SCD119525)

APPEAL from an order of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

In April 1996, Raad Gillanoia Zaia and codefendants were charged with various counts of selling, furnishing, possessing and transporting a controlled substance. In June 1996, Zaia pleaded guilty to one count of possession of methamphetamine for sale (Health & Saf. Code, § 11378), and in exchange the other counts against him were dismissed.

In August 1996, Zaia withdrew his plea, but in September 1996, he again pleaded guilty on the same terms as before. In October 1996, the court sentenced Zaia to two years in prison.

In January 2011, Zaia moved to withdraw his plea under Penal Code<sup>1</sup> section 1018. In the alternative, he petitioned for writ of error *coram nobis* on grounds he had received ineffective assistance of counsel, who had failed to properly advise him regarding the immigration consequences of his plea. The court denied both the section 1018 petition and the writ petition.

Zaia contends the trial court erroneously failed to hold a hearing on his section 1018 motion and writ petition. He further contends the court erroneously failed to toll the time limit to file the section 1018 motion, and abused its discretion in denying his writ petition. The People have requested that we dismiss this appeal as frivolous. We affirm the order.

#### BACKGROUND

Twice when he pleaded guilty in 1996, Zaia initialed boxes on plea forms next to the statement: "I understand that if I am not a citizen of the United States a plea of Guilty or No Contest could result in deportation, exclusion from admission to this country, and/or denial of naturalization." He also declared under penalty of perjury that he had read and understood the plea forms he had initialed.

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<sup>1</sup> All further statutory references are to the Penal Code.

Zaia was aware of the probable immigration consequences of his 1996 plea; his counsel argued in a sentencing memorandum: "Mr. Zaia is a resident alien with his status presently revoked. He is a citizen of Iraq. I have been informed by [him that] several members of his family have been executed by the current Iraqi regime and that he believes his life is in danger if he is deported back to Iraq." Attached to counsel's memorandum was Zaia's wife's letter to the court, explaining, "I know that because [Zaia] pled guilty that he forfeits all his rights. Well what about the right to live, and not die. You see there was a big mix up with all of the thing [*sic*] that we didn't know about. There were papers that needed to be filed and filed [*sic*] by Immigration, and from what they were telling [Zaia] and our attorney in the [Immigration and Naturalization Service] was that we neglected to verify them when we moved, but you see we had sent them a change of address form, but they say that they don't want them or even look at them it was our responsibility to go down there and show them proof. So you see your honor if Immigration sends [Zaia] back to his home Country Baghdad, Iraq he will be killed and made an example to his people." She also states in the letter, "So you see your Honor that's why I'm so scared of what Immigration might do to him. So you see that's why I'm asking for your help in this problem."

In moving papers supporting Zaia's section 1018 motion and his writ petition, he argued that in 1996, he had received ineffective assistance of counsel, who had advised him he "*might*" be deported, but not that he was subject to "*certain*" removal from the country because of his criminal conviction. Further, his counsel never reviewed the change of plea form in detail with him, and he could not read English at the time.

Despite expiration of the six-month period for filing a section 1018 motion, Zaia sought retroactive application of *Padilla v. Kentucky* (2010) 130 S.Ct. 1473 (*Padilla*), which held "counsel must inform her client whether his plea carries a risk of deportation" (*id.* at p. 1486) and "when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear." (*Id.* at p. 1477.)

The trial court noted, "There is no indication that [Zaia] ever filed a notice of appeal or that he did not successfully complete this term or the parole requirements thereafter." The court denied the section 1018 motion on grounds it was untimely filed. It denied the writ petition because under California Supreme Court precedent in *People v. Kim* (2009) 45 Cal.4th 1078 (*Kim*), Zaia did not present any factual error arising from his change of plea proceedings; further, even if the court construed the petition as one for a writ of habeas corpus, it would be denied because Zaia was not in custody and that remedy is only available to persons in actual or constructive custody.

## DISCUSSION

### A.

The California Supreme Court has held that a claim that an attorney failed to advise a defendant accurately about the immigration consequences of entering a plea did not entitle a defendant to a writ of *coram nobis*: "To qualify for issuance of the writ, the alleged facts must be such that ' "if presented [they] would have prevented the rendition of the judgment." ' . . . [¶] Defendant's allegations that he would not have pleaded guilty had he been armed with these additional facts [about the immigration consequences of his plea], or that counsel would have been successful in arranging a plea to a nondeportable

offense had these facts been known, fundamentally misapprehends the pertinent inquiry. To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. [Citations.] Such facts often go to the legal competence of witnesses or litigants, or the jurisdiction of the court. New 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. 1102-1103; see *People v. Trantow* (1986) 178 Cal.App.3d 842, 845-846.)

The California Supreme Court also held: "[W]ith regard to defendant's claims that his counsel was constitutionally ineffective for failing to investigate and for failing to negotiate a different plea, we conclude neither allegation states a case for relief on *coram nobis*. That a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule. [Citations.] Although an attorney has a constitutional duty at least not to affirmatively *misadvise* his or her client as to the immigration consequences of a plea [citation], any violation in this regard should be raised in a motion for a new trial or in a petition for a writ of habeas corpus." (*Kim, supra*, 45 Cal.4th at p. 1104.)

Here, in light of evidence, including from Zaia's change of plea forms and contemporaneous representations made by his counsel and wife that Zaia knew of the probable immigration consequences of his plea, the holding in *Padilla* does not change the outcome of this appeal. As the United States Supreme Court noted in *Padilla*: "It

seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. [Citation.] We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty." (*Padilla, supra*, 130 S.Ct. at p. 1485.)

B.

Although Zaia contends the trial court erred by not tolling the statute of limitation on his section 1018 motion because he exhibited diligence in seeking relief upon learning about the *Padilla* decision, we conclude his motion, filed approximately 14 years after his guilty plea, was untimely. Section 1018 provides in pertinent part: "On application of the defendant at any time before judgment *or within six months* after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice." (Italics added.) It has been held, "In view of the stated purpose of the amendment to section 1018 limiting such motions to a period of six months following a grant of probation—that is, to prevent prejudice to the People—we do not believe that the six-month period should be deemed subject to waiver by the parties or the trial court under the liberal construction clause." (*People v. Miranda* (2004) 123 Cal.App.4th 1124,

1133-1134.) Accordingly, we conclude the trial court did not have the discretion to toll the statutory six-month time limit.

DISPOSITION

The order is affirmed.

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O'ROURKE, J.

WE CONCUR:

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BENKE, Acting P. J.

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McINTYRE, J.