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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS M. KINER,

Defendant and Appellant.

D070535

(Super. Ct. No. SCE328814)

APPEAL from a postjudgment order of the Superior Court of San Diego County,  
Daniel B. Goldstein, Laura W. Halgren, Lantz Lewis, John M. Thompson, Judges.  
Affirmed.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and  
Appellant.

No appearance for Plaintiff and Respondent.

## I

### INTRODUCTION

Thomas M. Kiner appeals from a postjudgment order denying a petition for a writ of error *coram nobis*. Kiner's court-appointed counsel filed a brief under *People v. Wende* (1979) 25 Cal.3d 436, 441-442 (*Wende*) requesting we independently review the record for error. Having done so and having identified no reasonably arguable appellate issues, we affirm the order.

## II

### BACKGROUND<sup>1</sup>

#### A

##### 1

Kiner approached a group of men and women at a restaurant and had a friendly exchange with them. At one point, he apologized to one of the men, victim 1, for being too forward with the women, explaining he was "kind of drunk." Later, Kiner approached victim 1 at the restaurant's bar and asked him what his problem was. Victim 1 said he did not have a problem and was not looking for trouble. They had a conversation and, at some point, victim 1 put his finger in front of his mouth and asked Kiner to be quiet. Kiner took offense at victim 1's actions and hit victim 1 in the mouth with a closed fist.

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<sup>1</sup> We derive our background summary from the evidence presented at the preliminary hearing as Kiner stipulated the preliminary hearing transcript provided a factual basis for the guilty plea at issue in this appeal.

The two men starting fighting. A number of people intervened, including some of Kiner's companions, who also threw punches. Victim 1 suffered a busted lip and swelling on the side of his head.

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Restaurant employees pushed Kiner and his companions out of the restaurant and locked the door. Kiner and his companions then surrounded and fought with another man, victim 2. While victim 2 was on the ground, at least one individual kicked him in the head and chest area as others punched him. At least one witness identified Kiner as an active participant in the confrontation with victim 2. Victim 2 suffered facial contusions, abrasions on his hands, and a fractured nose.

B

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Kiner pleaded guilty to assault with force likely to produce great bodily injury against victim 2 (Pen. Code, § 245, subd. (a)(4)) and admitted having a prior strike conviction (Pen. Code, §§ 667, subd. (b)-(i), 1170.12) as well as a prior prison commitment conviction (Pen. Code, § 667.5, subd. (b)). In exchange for his guilty plea, the People agreed to the dismissal of the balance of the charges and allegations against Kiner, which consisted of a charge he battered victim 1 (Pen. Code, § 242) and an allegation he had a second prior strike conviction.

At the sentencing hearing, the trial court dismissed the prior strike conviction finding and sentenced Kiner to five years in prison, consisting of the upper term of four years for the assault conviction and a consecutive one-year term for the prior prison

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commitment conviction finding. The court suspended execution of the sentence conditioned upon Kiner's successful completion of probation.

Several months later, Kiner admitted he violated his probation. The court sentenced him to the previously suspended five-year prison term.

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Representing himself, Kiner subsequently sent the court a series of letters. In the letters, he requested a copy of the preliminary hearing transcript, which the court denied. He also requested the court set aside his guilty plea. As grounds for this relief, he asserted "no factual basis ... ineffective assistance of counsel, inexcusable neglect, failure to make pretrial motions." (Some capitalization omitted.) He further argued that, when he was sentenced to prison after violating probation, he should have been sentenced by the same judge who accepted his guilty plea.

In a series of additional, more formal filings, including petitions for writs of habeas corpus, motions to vacate judgments, and petitions for writs of error *coram nobis*, Kiner argued he pleaded guilty before he knew mere presence at the scene of a crime was not sufficient to support a conviction under an aiding and abetting theory. He asserted, since the evidence presented at the preliminary hearing showed nothing more than his presence at the crime scene, the preliminary hearing transcript did not supply an adequate factual basis for his guilty plea.

The court denied every petition and motion. Initially and in some subsequent denial orders, the court indicated Kiner had waived any arguments regarding the sufficiency of the evidence by pleading guilty. The court based later denials on the

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prohibition against successive petitions and Kiner's failure to raise any new basis for reconsideration. In addition, as to one of the motions to vacate the judgment, the court noted Kiner had not cited any authority indicating the court had jurisdiction to consider the motions. As to the petitions for writ of error *coram nobis*, including the one which is the subject of this appeal, the court found the guilty plea was properly entered and there was sufficient evidence to support the conviction.

### III

#### DISCUSSION

Appointed counsel filed a brief summarizing the facts and proceedings below. Counsel presented no argument for reversal and instead requested we independently review the record for error as mandated by *Wende, supra*, 25 Cal.3d at pages 441-442.

To aid our review, and consistent with *Anders v. California* (1967) 386 U.S. 738, 744, counsel identified two possible appellate issues (*Anders* issues):

1. Whether Kiner is procedurally barred in this case from appealing the trial court's order denying his petition for writ of error *coram nobis*. (Contra, *People v. Gallardo* (2000) 77 Cal.App.4th 971, 982 [denial of a petition for writ of error *coram nobis* is appealable unless the petition failed to state a prima facie case for relief or merely duplicated issues that were or could have been resolved in other proceedings]; *People v. Dubon* (2001) 90 Cal.App.4th 944, 950 [same].)

2. Whether Kiner's sentence was authorized by law. (Contra, Pen. Code, § 1203.2, subd. (c) ["Upon any revocation and termination of probation ... if the judgment has been pronounced and the execution thereof has been suspended, the court

may revoke the suspension and order that the judgment shall be in full force and effect"]; *People v. Howard* (1997) 16 Cal.4th 1081, 1088 ["On revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that exact sentence into effect"]; *People v. Beaudrie* (1983) 147 Cal.App.3d 686, 693-694 [imposition of a suspended sentence upon revocation of probation may be done by a different judge than the judge who originally imposed the sentence after the defendant's guilty plea].)

Additionally, we granted Kiner permission to file a supplemental brief on his own behalf. In his supplemental brief, he requested we take particular notice of three points. First, he asserts his second petition for writ of error *coram nobis* was an amended petition, not a supplemental petition, intended to provide previously omitted information. Second, he asserts he stipulated to have the preliminary hearing transcript serve as the factual basis for his guilty plea because he was satisfied with how the magistrate resolved factual inconsistencies, including deciding to disregard one witness's testimony as unbelievable. He decided not to contest his guilt because the magistrate stated his presence at the restaurant made him criminally liable. However, his subsequent research indicated his presence alone would not make him criminally liable. Finally, he asserts it is trickery to rely on the portions of the preliminary hearing transcript containing testimony the magistrate disbelieved because the magistrate's findings are binding on the prosecution. He believes such trickery overcomes his consent to the stipulation.

All of Kiner's postconviction challenges, including the one at issue in this appeal, rest on the faulty premise the magistrate bound him over on the assault charge against

victim 2 solely because he was present at the crime scene. Instead, the record shows the assault charge involving victim 2 included an allegation Kiner personally inflicted great bodily injury on victim 2 (Pen. Code, § 12022.7, subd. (a)). The magistrate determined the assault charge could proceed under an aiding and abetting theory, but the personal infliction of great bodily injury allegation could not. (*People v. Cole* (1982) 31 Cal.3d 568, 572, 579 [sentencing enhancement for the personal infliction of great bodily injury applies to the person who directly performed the act causing the victim physical injury, not to an aider and abettor]; accord, *People v. Modiri* (2006) 39 Cal.4th 481, 485.) The magistrate bound Kiner over for trial on the assault charge under an aiding and abetting theory because the court found there was credible evidence the same group of people who actively participated in the confrontation with victim 1, including Kiner, also actively participated in the confrontation with victim 2. However, the magistrate did not bind Kiner over for trial on the personal infliction of great bodily injury allegation because the court found there was no credible evidence Kiner delivered a specific blow to victim 2. Thus, contrary to Kiner's assertions, the magistrate did not bind him over for trial on the assault charge solely because he was present at the crime scene and there is a sufficient factual basis to support his plea of guilty to the assault charge under an aiding and abetting theory.

In addition to considering the *Anders* issues identified by appointed appellate counsel and the issues raised in Kiner's supplemental brief, we have conducted the requested independent review of the record. Our review did not disclose any reasonably

arguable appellate issues. Kiner has been competently represented by counsel in this appeal.

IV

DISPOSITION

The postjudgment order is affirmed.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.