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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ELI KENNETH MELLOR,

Defendant and Appellant.

E064699

(Super.Ct.No. SCR38529)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Eli Kenneth Mellor, in pro. per.; and Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Eli Kenneth Mellor, filed a petition for resentencing pursuant to Penal Code section 1170.18,¹ which three separate judges denied on three separate dates. After defendant filed a notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and identifying two potentially arguable issues: whether the court erred in denying defendant's petition and whether this court should treat defendant's petition as a petition for writ of error *coram vobis*.

Defendant was offered the opportunity to file a personal supplemental brief, which he has done. In his brief, defendant raises four issues: (1) whether the court had authority to grant defendant's request; (2) whether the court erred in setting two hearings without giving defendant an opportunity to appear; (3) whether the court was correct that it lacked jurisdiction to rule on his petition; and (4) whether the People erred in failing to respond to his petition.² We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Defendant additionally argues appellate counsel should not have filed a *Wende* brief. Our resolution of the other issues raised renders moot the issue of whether his appellate counsel erred in filing a *Wende* brief.

I. FACTUAL AND PROCEDURAL HISTORY³

“AKOP, Inc. (AKOP), a Panama corporation, invested \$150,000 in a limited partnership called Devore Ranches, whose purpose was to develop real property. Defendant, the developer and sole general partner of Devore Ranches, used about \$119,000 of AKOP’s funds for political purposes. Defendant told AKOP’s attorney that he, defendant, had taken the money, and said he would do anything he could to repay it. Defendant and his wife signed a promissory note in favor of AKOP and Devore Ranches for about \$123,000. The note was secured by a deed of trust which named AKOP as beneficiary. Defendant also signed a letter of understanding drafted by AKOP’s attorney. The letter of understanding provided that defendant had ‘diverted approximately \$119,000 from the partnership for [his] own use,’ and proposed various real estate projects, which defendant could develop as a means of repaying the funds owed to AKOP. None of the projects was successful, and AKOP did not recover any of its original investment.” (*Mellor I, supra*, 161 Cal.App.3d at pp. 34-35.)

On March 16, 1982, a jury in the San Bernardino County Superior Court convicted defendant of grand theft (former § 487, subd. 1) and found true an allegation defendant took property which exceeded a value of \$100,000. (*Mellor I, supra*, 161 Cal.App.3d at p. 34.) The court later sentenced defendant to four years’ imprisonment.

³ Defendant appealed his underlying conviction, which was the subject of our published opinion filed on October 22, 1984, in *People v. Mellor* (1984) 161 Cal.App.3d 32, 34-35 (*Mellor I*), which defendant attached to his petition. We take our recitation of the facts of defendant’s underlying conviction from that opinion.

Defendant appealed the conviction contending, in part, that insufficient evidence supported the jury's true finding on the allegation that he had taken property valued at more than \$100,000 because "he transferred his interest in various items of real and personal property to AKOP, thus reducing the debt of approximately \$119,000 to less than \$100,000." (*Mellor I, supra*, 161 Cal.App.3d at p. 38.) Nonetheless, AKOP's agent testified at trial that although defendant attempted to assign property to AKOP, he was unable to do so and that AKOP was never able to recoup any money. (*Id.* at p. 39.)

We affirmed, noting: "[T]he word 'loss,' as used in section 12022.6 in the context of the *taking* of property, . . . includes any dispossession which constitutes theft of the victim's property." [Citation.] 'The statute does not on its face require the intent to permanently deprive the owner of property, but rather that the property be intentionally rather than accidentally taken.' [Citation.]" (*Mellor I, supra*, 161 Cal.App.3d at pp. 38-39.)

AKOP's ability to recover funds pursuant to defendant's attempt to assign property to AKOP was at least part of the subject of an opinion issued on June 12, 1984, in the Ninth Circuit Court of Appeals, which defendant also attached to his petition. (*In re Mellor* (1984) 734 F.2d 1396 (*Mellor II*)). In that case, on April 11, 1980, AKOP had recorded a second trust deed in the amount of \$123,278 against a residence purchased by defendant's wife. Defendant and his wife filed for bankruptcy on September 23, 1980. (*Id.* at p. 1398.) Several other parties with interests in the residence filed suits. (*Id.* at pp. 1398-1399.) The bankruptcy court determined that the total amount of encumbrances on

the property amounted to \$199,801.05, but that as the then current value of the property amounted to only \$105,000, neither the debtors nor the estate had any realizable equity in their claimed interest in the property. (*Id.* at p. 1399.)

On appeal, the court found that the bankruptcy court erred in considering AKOP's interest as a junior lienholder when determining whether the other creditors, as senior lienholders, were adequately protected. (*Mellor II, supra*, 734 F.2d at pp. 1400-1401.) Thus, the court reversed a stay issued by the bankruptcy court, thereby allowing the senior lienholders to potentially recover their interest first, and AKOP the ability to potentially recover the difference between the value of the residence and the amount owed to the senior creditors. (*Id.* at p. 1401.)

On June 2, 2015, defendant filed a petition for resentencing in the Superior Court of San Bernardino County pursuant to section 1170.18, requesting reduction of his offense to a misdemeanor. Defendant contended that his assignment of an interest in the residential property to AKOP, particularly after the Ninth Circuit Court of Appeals reversed the bankruptcy court's stay of creditor action against the residence, effectively made AKOP whole. Thus, he argued he technically could not be held to have committed a theft of \$950 or more, if held to have committed a theft at all.

A response to the petition by the People dated July 2, 2015,⁴ reflects the People's contention that defendant was not entitled to relief because the jury found defendant guilty of the theft of in excess of \$100,000, which exceeds the \$950 threshold for relief

⁴ The response is not file stamped.

under section 1170.18. Nevertheless, the People also indicated the court should hold a hearing to determine whether defendant's payment of the amount owed entitled him to relief. In a second response dated July 8, 2015,⁵ the People simply asserted, again, that defendant was not entitled to relief because the jury found him guilty of the theft of in excess of \$100,000 which exceeds the \$950 threshold for relief in section 1170.18.

On either July 16 or 17, 2015, the first judge set the matter for hearing on August 10, 2015. On July 24, 2015, a second judge held a hearing on defendant's petition, outside of defendant's presence, during which he found defendant ineligible for the relief requested and denied the petition without prejudice.

On July 31, 2015, a third judge held a hearing on defendant's petition outside of defendant's presence. The judge denied defendant's petition finding defendant ineligible for the relief requested because the amount of the theft exceeded \$100,000. The judge further noted: "To the extent that I would interpret the rest of the filing to be a Motion for a Writ of Coram Nobis or to set aside the conviction, it is denied as this court does not have jurisdiction to handle that. The conviction was confirmed on appeal, so any Writ of Coram Nobis must be filed in the court of appeal."

On August 11, 2015, the People filed formal opposition to defendant's petition, again contending defendant was ineligible for the relief requested because the jury had found true an enhancement that defendant had stolen over \$100,000. On August 21, 2015, a fourth judge held a hearing on defendant's petition, this time in defendant's

⁵ This response is not file stamped either.

presence. The judge allowed defendant the opportunity to argue the merits of his petition.

Defendant argued: “I would encourage the Court to look at the evidence that the petitioner’s produced here, particularly, the 9th Circuit Court of Appeals that ruled that two years before the conviction [*sic*],⁶ the victim had been paid and received 100 percent surety [*sic*]. That evidence was not available to, or introduced at the time of trial.” The judge denied the petition, observing that: “While I found it fascinating reading, quite frankly, I don’t believe I have the legal authority to grant your request.”

II. DISCUSSION

Defendant contends the court had authority to grant his request, was incorrect when it determined it lacked jurisdiction to rule on his petition, erred in setting two hearings without giving him an opportunity to appear, and that the People erred in failing to respond to his petition. We disagree.

“On November 4, 2014, the voters enacted Proposition 47, “the Safe Neighborhoods and Schools Act” (hereafter Proposition 47), which went into effect the next day. [Citation.]’ [Citation.] Section 1170.18 ‘was enacted as part of Proposition 47.’ [Citation.] Section 1170.18 provides a mechanism by which a person currently serving a felony sentence for an offense that is now a misdemeanor, may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as

⁶ The Ninth Circuit Court of Appeals’s decision was actually issued more than two years *after* defendant’s conviction.

added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in subdivision (a) of section 1170.18, shall have his or her sentence recalled and be ‘resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ [Citation.]” (*T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.) Any individual convicted of the theft of money, labor, or property which does not exceed \$950 may have his conviction reduced to a misdemeanor except when certain other factors exist. (§§ 1170.18, subd. (b), 490.2, subd. (a).)

Here, all three judges who denied defendant’s petition acted correctly because defendant had been convicted of a theft of over \$100,000, which exceeds the \$950 threshold for reduction to a misdemeanor. It is irrelevant whether defendant later compensated the victim of his theft because such repayment does not negate the initial theft or the amount of that theft. As we noted in our opinion on defendant’s appeal from his conviction, “[t]he word “loss,” as used in section 12022.6 in the context of the *taking* of property, . . . includes any dispossession which constitutes theft of the victim’s property.’ [Citation.] ‘The statute does not on its face require the intent to permanently deprive the owner of property, but rather that the property be intentionally rather than accidentally taken.’ [Citation.]” (*Mellor I, supra*, 161 Cal.App.3d at pp. 38-39.) Thus, defendant’s theft of over \$100,000 rendered him ineligible for resentencing pursuant to section 1170.18, regardless of whether the victim was later compensated.

Defendant appears to contend, as suggested by at least one of the judge's below and appellate counsel, that the trial court could have treated his petition for resentencing as a petition for writ of error *coram nobis*. A petition for writ of error *coram nobis* is properly presented to the court which rendered the judgment. (*People v. Kim* (2009) 45 Cal.4th 1078, 1091 (*Kim*)). The San Bernardino County Superior Court rendered defendant's judgment and defendant filed his petition for resentencing in that court. Thus, the court had jurisdiction over the petition.

Nonetheless, the court would have been unable to grant any relief pursuant to the narrow proscriptions applicable to petitions for writ of error *coram nobis*. First, *coram nobis* does not lie to correct errors of law. (*Kim, supra*, 45 Cal.4th at p. 1093.) Defendant's assertion that AKOP could have recouped the amount of theft from its assigned interest in the residential property after the Ninth Circuit Court of Appeals's decision is not a newly discovered fact, but is an interpretation of law for which *coram nobis* cannot grant a remedy.

Second, even if we characterized the Ninth Circuit Court of Appeals's decision as a newly discovered fact, *coram nobis* grants a remedy only where such facts "would have bolstered the defense already presented at trial [citation]" (*Kim, supra*, 45 Cal.4th at p. 1095.) As noted above, the fact that AKOP could have sought remuneration from its assigned interest in the residential property would not have changed the result at trial because "[t]he word "loss," as used in section 12022.6 in the context of the *taking* of property, . . . includes any dispossession which constitutes theft of the victim's property.'

[Citation.] ‘The statute does not on its face require the intent to permanently deprive the owner of property, but rather that the property be intentionally rather than accidentally taken.’ [Citation.]” (*Mellor I, supra*, 161 Cal.App.3d at pp. 38-39.) Thus, had evidence been presented at trial that AKOP received repayment of the stolen funds, it does not establish a basic fact that would have prevented rendition of judgment. (*Kim, supra*, at p. 1102.)

Third, *coram nobis* does not lie where the litigant had some other remedy of law. (*Kim, supra*, 45 Cal.4th at pp. 1093, 1099, 1101.) Here, the Ninth Circuit Court of Appeals’s decision was issued prior to the finality of defendant’s appeal of his conviction. Thus, defendant could have moved for vacation of submission and supplemental briefing on the issue. Defendant could have filed a petition for rehearing or review. Additionally, defendant could have filed a petition for writ of habeas corpus. Thus, defendant had other legal avenues to raise the issue.

Fourth, a remedy sought by petition for writ of *coram nobis* must be exercised in due diligence. (*Kim, supra*, 45 Cal.4th at p. 1093.) Here, the “newly discovered evidence” provided by the Ninth Circuit Court of Appeals’s decision occurred on June 12, 1984. Defendant did not file the instant petition until June 2, 2015, nearly 31 years later. Thus, defendant cannot be said to have acted in due diligence.

Fifth, contrary to defendant's contention, the Ninth Circuit Court of Appeals's decision fails to indicate that AKOP actually received remuneration. All it did was open a legal avenue of recourse for AKOP to potentially receive compensation. Thus, defendant has failed to show AKOP was actually made whole.

Sixth, and finally, even were we to assume that AKOP had successfully availed itself of the potential remedy afforded by the Ninth Circuit Court of Appeals's decision, insufficient funds would have existed to render AKOP "whole." The home's then current value was \$105,000. The senior lienholders had a priority of interest in the residence over AKOP's in the amount of \$84,710.06. (*Mellor II, supra*, 734 F.2d at pp. 1400-1401.) Thus, if the property were sold and the senior lienholders paid, only \$20,289.94 would have been left to satisfy AKOP's second deed of trust in the amount of \$123,278. (*Id.* at p. 1398.) This would hardly render AKOP whole and would still place the theft at more than \$100,000 and certainly more than \$950. For the same reasons, this court cannot grant defendant relief by treating the instant appeal as a petition for writ of error *coram vobis*. (*People v. Welch* (1964) 61 Cal.2d 786, 790 [“The writ of *coram vobis* is essentially identical to the writ of *coram nobis* except that the latter is addressed to the court in which the petitioner was convicted. [Citation.]”].)

Defendant's contention that the court erred by failing to grant him the right to be present during the first two hearings, if error, was remedied by his presence and ability to argue the merits of his petition at the third hearing. Defendant's complaint about the People's "failure" to file a response to his petition fails because the People submitted

three responses to his petition and because the People are not legally required to file a response to the petition.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.