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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PATRICK JONES,

Defendant and Appellant.

F062094

(Super. Ct. No. 10W0032B)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Woodrow Edgar Nichols, Jr. for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Michael Patrick Jones was convicted of crimes related to defrauding his employer, the California Highway Patrol (CHP), and the State Compensation Insurance Fund out of monetary benefits by filing false and fraudulent claims that he was physically unable to work due to work-related back injuries. On appeal, he contends the trial court erred by denying his motion to vacate the judgment. We will affirm the judgment.

PROCEDURAL SUMMARY

Conviction

On December 13, 2005, defendant, a CHP officer, was found guilty by a jury in Kings County Superior Court of six counts of workers' compensation insurance fraud (Pen. Code, §§ 550, subds. (a)(1) & (b)(3), 72, subd. (a);¹ Ins. Code, § 1871.4, subd. (a)(1)). The jury also found true six excessive taking allegations (§ 12022.6, subd. (a)(1)). The trial court granted defendant five years' probation.

Appeal

Defendant appealed to this court, contending the prosecutor committed misconduct by arguing that defendant failed to present Dr. Haider, one of the physicians who examined defendant, as a witness. On September 5, 2007, we affirmed the judgment, concluding the defense failed to prove Dr. Haider was unavailable, and thus the prosecutor did not commit misconduct by commenting on Dr. Haider's absence. For the same reason, we concluded defense counsel was not ineffective for failing to object to the alleged misconduct. (*People v. Jones* (Sept. 5, 2007, F049837) [nonpub. opn.])

Petition for Review

On November 14, 2007, the California Supreme Court denied defendant's petition for review. (*People v. Jones*, review den. Nov. 14, 2007, S156605.)

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

First Petition for Writ of Habeas Corpus

On February 26, 2010, defendant filed a petition for writ of habeas corpus in Kings County Superior Court. (Super. Ct. Kings County, 2010, No. 10W0032A.) Defendant claimed newly discovered evidence established that the CHP and/or the prosecution had suppressed exculpatory evidence. Defendant stated he learned in 2009 that Officer Palmer, his CHP partner, was interviewed by fraud investigators before trial and the interview was not made available to defense counsel. In 2009, Officer Palmer told defendant she provided exculpatory statements in the interview. Defendant believed evidence of the interview was suppressed by the CHP and/or the prosecution. Defendant explained this evidence would have created a reasonable doubt as to his guilt.

Defendant also claimed defense counsel was ineffective for failing to investigate the case and subpoena material witnesses, such as Dr. Haider, who had diagnosed defendant with a back injury, and for failing to call family and friends as character witnesses.

On June 25, 2010, the prosecutor executed a declaration, stating that he provided defense counsel with discovery, including a report of Officer Palmer's interview on a particular page, and that defense counsel acknowledged receipt of that discovery. On June 28, 2010, the People filed an informal response to defendant's petition.

On July 28, 2010, defendant filed an informal reply, arguing that the prosecutor's declaration constituted a "veiled admission" that he had not given defense counsel a *recording* of Officer Palmer's interview and thus that he had deliberately suppressed exculpatory evidence. According to defendant, the "fact of government fraud" was established by Officer Palmer's declaration that her interview had been recorded and the prosecutor's admission that he had not provided a recording of the interview. Defendant argued that Officer Palmer's testimony completely undermines the prosecution's case, is conclusive, and points unerringly to defendant's innocence because the CHP and/or the prosecution would not have suppressed it otherwise. Defendant argued that

Officer Palmer's testimony would have raised a reasonable doubt as to his guilt.

Defendant explained defense counsel never told him he had received a report of Officer Palmer's interview from the prosecutor, and thus there was no untimely delay because neither the fraud nor the ineffective assistance of counsel were discovered until defendant spoke to Officer Palmer in 2009. Defendant claimed the result of his trial would have been different because he would have received due process.

On August 27, 2010, the trial court denied the petition. On the newly discovered evidence claim, the court determined that defendant failed to present a prima facie case of suppression of exculpatory evidence sufficient for issuance of an order to show cause because the evidence could have been discovered with reasonable diligence prior to judgment. The court found that defendant's declarations admitted his knowledge and belief, before the 2005 trial, that Officer Palmer and Dr. Haider were essential witnesses for his defense. According to defendant's declarations, when he asked defense counsel to investigate Officer Palmer, defense counsel assured him that he had investigated her and subpoenaed her for trial. Defendant was "shocked and demoralized" a few days into trial to learn that defense counsel had subpoenaed no one. Considering the petition, the trial court stated: "This fact situation does not support a claim that Officer Palmer's existence and potential[ly] favorable testimony was somehow suppressed by the CHP or the prosecution and/or that it could not have been discovered with reasonable diligence prior to judgment."

The trial court further found that even if the evidence could be construed as newly discovered, it would not find that Officer Palmer's favorable testimony completely undermines the prosecution's case. "As a lay witness, her testimony as to the existence of a back injury [would not have been] nearly as compelling as the testimony of the doctors. Moreover, the jury was shown numerous videos of [defendant] and were able to form lay opinions of their own whether [defendant's] actions were consistent with the

work related claims of injury and disability.” Thus, even if the evidence had been suppressed, it did not establish a prima facie case for relief.

On the ineffective assistance of counsel claim, the trial court determined the petition was not timely because defendant knew before the 2005 trial that Officer Palmer and Dr. Haider were favorable witnesses, and defendant knew during the trial that defense counsel had failed to subpoena witnesses. The delay until February 2010 in filing the petition was unreasonable and unexplained. The court explained that untimely petitions will be considered only where a fundamental miscarriage of justice is found, and the court was “unable to find that, even if all the evidence sought by [defendant] had been introduced at trial, no reasonable judge or jury would have convicted [him], or that [he] is actually innocent of the crime for which he was convicted. The officers and family members [defendant] sought to call could be impeached for lacking objectivity due to their friendship and family relationship with [defendant]. The testimony of the doctors [defendant] sought to call would have been weighed against the testimony of the doctors the prosecution presented. It cannot be stated with any certainty that no reasonable judge or jury would have convicted [defendant], or that such testimony would have established that [defendant] was actually innocent of the charges.” The court concluded defendant failed to show good cause for the substantial delay from the discovery of the facts to support the claim, and the court could not find that a miscarriage of justice would occur if the judgment was not reversed.

Second Petition for Writ of Habeas Corpus/Motion to Vacate Judgment

On March 2, 2011, defendant filed a second petition for writ of habeas corpus or, in the alternative, a motion to vacate the judgment. Defendant explained that his delay in filing the first petition was caused by the ineffective assistance of his appellate counsel, who incorrectly told him he could file the petition as long as he was still in custody. The petition claimed that the prosecutor’s declaration, which amounted to a “silent admission” that the recording of Officer Palmer’s interview was suppressed, constituted

newly discovered evidence. The petition also repeated the previous claim that defense counsel was ineffective for failing to investigate and subpoena critical witnesses. Defendant argued that defense counsel colluded with the prosecutor to deny defendant a fair trial.

On March 10, 2011, the trial court summarily denied the petition for writ of habeas corpus due to a lack of jurisdiction because defendant was no longer in custody (his five-year probation period ended on February 9, 2011), but the court explained that even if defendant were still in custody, the court nevertheless would deny the petition on the ground that it raised substantially the same claims the court already had denied in the first petition, and defendant should not be allowed to bring the same claims by way of a motion to vacate the judgment under section 1473.6.

The trial court also denied the motion to vacate the judgment, explaining it previously had found that defendant failed to state a prima facie case for relief on the suppression of evidence claim. Defendant had not produced newly discovered evidence of fraud by a government official. The court stated it already had found that even if the existence of a tape or transcript of Officer Palmer's interview constituted newly discovered evidence, the new evidence did not completely undermine the prosecution's case. Moreover, evidence of the existence of a conspiracy to keep Officer Palmer from testifying did not constitute newly discovered evidence, and it did not completely undermine the prosecution's case or point unerringly to defendant's innocence for the reasons explained in the court's first order.

Appeal

On March 17, 2011, defendant appealed from the order denying the motion to vacate the judgment.

DISCUSSION

On appeal, defendant contends the trial court erred when it found his petitions and motion to vacate the judgment to be untimely. Defendant explains that the prosecutor's

“silent admission” that Officer Palmer’s recording had been suppressed constituted newly discovered evidence because defendant was not aware of it until the prosecutor’s June 25, 2010 declaration, and defendant filed his petition well within one year from that date. Defendant further argues that he was excepted from the requirement of making all claims in a single, timely petition because his petitions alleged facts that would establish a fundamental miscarriage of justice.

In addition to claiming newly discovered evidence of suppression by the prosecutor, defendant again asserts that defense counsel was ineffective for failing to investigate and subpoena Officer Palmer and Dr. Haider.

The People point out that we have determined that only the order denying the motion to vacate the judgment, and not the order denying the writ of habeas corpus, is appealable. (*People v. Jones* (Apr. 6, 2011, F062094) order filed changing caption of case.)

Defendant responds that all of his arguments were incorporated into his motion to vacate the judgment and are now before this court. He also reiterates the fundamental miscarriage of justice exception. He implores us to address the suppression of evidence by the prosecution and the failure of defense counsel to investigate and subpoena expert physicians to prove an actual back injury.

Newly Discovered Evidence of Fraud by the Prosecutor

A person who is no longer in custody may bring a motion to vacate a judgment under section 1473.6, which provides in part:

“(a) Any person no longer unlawfully imprisoned or restrained may prosecute a motion to vacate a judgment for any of the following reasons: [¶] (1) *Newly discovered evidence of fraud by a government official that completely undermines the prosecution’s case, is conclusive, and points unerringly to his or her innocence.* [¶] ... [¶]

“(b) For purposes of this section, ‘*newly discovered evidence*’ is *evidence that could not have been discovered with reasonable diligence prior to judgment.*

“(c) The procedure for bringing and adjudicating a motion under this section, including the burden of producing evidence and the burden of proof, shall be the same as for prosecuting a writ of habeas corpus.

“(d) A motion pursuant to this section must be filed within one year of the later of ... [¶] (1) The date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence of the misconduct or fraud by a government official beyond the moving party’s personal knowledge....”² (Italics added.)

“Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent. A criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts ‘fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [Citations.] [Citation.] ‘[N]ewly discovered evidence does not warrant relief unless it is of such character “as will completely undermine the entire structure of the case upon which the prosecution was based.”’ [Citation.] An example of such evidence is a confession of guilt by a third

² “The legislative history of section 1473.6 reflects the belief that at the time of the introduction of the legislation, ‘Currently, other than a pardon, no remedy exists for those no longer in the system to challenge their judgment when they learn that their conviction was obtained in part because of fraud or false evidence by a government official.’ [Citation.] The legislation was originally introduced to address a problem illustrated by the so-called Rampart scandal [citation] in which it was discovered that certain Los Angeles Police Department officers had engaged in misconduct, including planting evidence, filing false police reports, committing perjury, and creating nonexistent confessions. [Citations.] Because the misconduct was discovered many years after it occurred, those who were no longer in custody at the time of the discovery of the misconduct would not be able to set aside their convictions. [Citations.] [¶] The original proposed legislation provided relief to those not in custody similar to the relief available to those in custody who could seek a writ of habeas corpus. [Citation.] The bill was amended to restrict the right to vacate a judgment so that the circumstances authorizing such relief were substantially narrower than for habeas corpus relief and was enacted with those limitations. [Citation.]” (*People v. Germany* (2005) 133 Cal.App.4th 784, 791-792, fns. omitted.)

party. [Citation.]” (*In re Hardy* (2007) 41 Cal.4th 977, 1016 (*Hardy*)). ““Depriving” an accused of facts that “strongly” raise issues of reasonable doubt is not the standard. Where newly discovered evidence is the basis for a habeas corpus petition, as alleged by defendant, the newly discovered evidence must “undermine[] the prosecution’s entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. [Citations.]” [Citation.]’ [Citation.]” (*Id.* at p. 1017.)

Here, even assuming the evidence to which defendant refers does amount to evidence of fraud by the prosecutor, and assuming the evidence is newly discovered, we agree with the trial court that the evidence does not completely undermine the prosecution’s case, is not conclusive, and does not point unerringly to defendant’s innocence, as required by section 1473.6, subdivision. (a). At trial, the prosecution presented evidence that defendant appeared to be injured and experiencing pain while he was at work or in the presence of fellow employees, but otherwise he appeared to function normally and was observed engaging in various physical activities—many of which were videotaped and shown to the jurors. Witnesses opined that those activities were inconsistent with defendant’s claimed injuries. In his defense, defendant presented evidence that he was injured and experienced pain.

Evidence that Officer Palmer strongly defended defendant in her interview and witnessed him experiencing back pain on the job would have been more evidence for the jurors to weigh against evidence that defendant was not injured and was capable of engaging in various activities, but “such evidence does not fatally undermine the prosecution’s entire case against [defendant]. The most that can be said is that this evidence would have presented a more difficult decision for the jury and may well have created in the minds of the jurors a reasonable doubt as to [defendant’s] guilt. As explained *ante*, this is not the standard. [Citations.]” (*Hardy, supra*, 41 Cal.4th at

pp. 1017-1018.) Defendant is not entitled to have his judgment vacated under section 1473.6.

Ineffective Assistance of Counsel Causing a Fundamental Miscarriage of Justice

As for defendant's claim that defense counsel was ineffective for not investigating and subpoenaing critical defense witnesses, including Officer Palmer and Dr. Haider, we agree with the trial court that this claim was not raised in a timely manner. The evidence established that during the 2005 trial, defendant was aware, and devastated to learn, that defense counsel had failed to subpoena the witnesses defendant considered most critical to his defense (or any witnesses at all). Defendant, however, did not file the petition until February 2010. The excuse he presents for this delay is ineffective assistance by appellate counsel, based on counsel's advice that defendant could file anytime provided he was still in custody.

Defendant recognizes that "[a] petition for writ of habeas corpus that is substantially delayed without good cause is considered untimely and will not be considered on the merits unless the defects alleged by the petitioner constitute a 'fundamental miscarriage of justice' [citation], which has previously been defined as one of the following: '(1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; [or] (2) that the petitioner is actually innocent of the crime or crimes of which he was convicted' [Citation.]" (*In re Douglas* (2011) 200 Cal.App.4th 236, 244-245, citing *In re Clark* (1993) 5 Cal.4th 750, 759.) The type of evidence a petitioner must show to prove a fundamental miscarriage of justice is evidence that "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability.'" (*In re Clark, supra*, at p. 797, fn. 32.) "Evidence relevant only to an issue already disputed at trial, which does no more than conflict with trial evidence, does not constitute "new evidence" that fundamentally undermines the judgment.' [Citation.] ... The requirement that a petitioner demonstrate his or her innocence

requires more than a showing that the evidence might have raised a reasonable doubt as to the guilt of the petitioner. The petitioner must establish actual innocence, a standard that cannot be met with evidence that a reasonable jury could have rejected.” (*Id.* at p. 798, fn. 33.)

Although Dr. Haider’s findings were introduced at trial by another physician, Dr. Haider’s presence and testimony that he identified a back injury when he examined defendant might have raised a reasonable doubt as to defendant’s guilt. But the testimony would have been weighed against the other doctors’ opinions, the lay witnesses’ testimony, and the videos showing defendant engaging in activities. While we agree with defendant that Dr. Haider’s testimony was important to his defense, and that defense counsel’s failure to investigate and subpoena Dr. Haider may have constituted deficient representation, we (like the trial court) cannot say that no reasonable judge or jury would have convicted defendant had they heard Dr. Haider’s testimony, or that Dr. Haider’s testimony establishes defendant is actually innocent of the crimes of which he was convicted. Accordingly, we conclude the trial court properly determined no fundamental miscarriage of justice occurred, and defendant’s claim of ineffective assistance of counsel was untimely.

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Dawson, Acting P.J.

Franson, J.