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

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL RAYMOND BRAY,

Defendant and Appellant.

F063303

(Super. Ct. No. MF009212A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Cory J. Woodward, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J. and Franson, J.

This appeal challenges a final judgment of conviction after denial of a motion to withdraw a plea of no contest.

FACTS AND PROCEDURAL HISTORY¹

On July 9, 2010, defendant Daniel Raymond Bray, his wife, Kathleen Bray, and 12-year-old son, Gary Bray, were eating dinner with some family members at their home in Kern County. When defendant was pouring salt on his food, it spilled all over his plate. Defendant accused Kathleen² of playing a trick on him. When Kathleen denied the accusation, he accused Gary of altering the salt shaker in order to ruin his dinner. Because Kathleen was afraid that defendant would assault Gary, she got between them while he was yelling at Gary. When defendant pushed Kathleen and tried to grab Gary, she blocked him. Kathleen then tried to leave the house, but defendant placed her in a wristlock and began to crush her fingers and nails. Kathleen stated that defendant bent her fingers back to break them so she would drop her keys. She tried to leave the house again, but defendant grabbed her arm once more and placed it in a rear wristlock, crushing her fingers. Defendant punched her in the face, causing her lip to bleed. Kathleen stated once she left the house, defendant picked Gary up by his head, scratched his face and pushed his fingers in Gary's eyes.

Deputies were dispatched to the house and saw Kathleen and Gary running from the front door of the house to a car in the front yard. Kathleen had blood on her lower lip and finger and Gary had dark purple and blue marks under his right eye. When interviewed, defendant denied assaulting Kathleen and Gary. He stated that Kathleen had broken her nail when she tried to reach in his pocket to get his cell phone and she got

¹ The facts are taken from the probation officer's report.

² For clarity, we refer to Kathleen and Gary Bray by their first names. We intend no disrespect by this informality. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 263, fn. 1.)

blood on her face from sucking on her finger. Defendant was escorted from the house into a patrol vehicle, arrested and booked into Kern County jail.

On July 13, 2010, defendant was charged with causing a child to suffer physical pain, mental suffering or injury (Pen. Code,³ § 273a, subd. (a)), inflicting corporal injury on his spouse (§ 273.5, subd. (a)), threatening to commit a crime that would cause death or serious bodily injury to another person (§ 422) and false imprisonment (§ 236). Defendant was arraigned the following day and the court entered protective pleas of not guilty to all charges. On July 21, 2010, defendant entered a plea of no contest to the charges of causing a child to suffer physical pain, mental suffering or injury (count 1) and inflicting corporal injury on his spouse (count 2). The remaining charges were dismissed upon a motion by the district attorney.

On August 19, 2010, the sentencing proceeding took place. The trial court inquired of defendant whether he wished to proceed to sentencing or, instead, make a motion to withdraw his plea. Defendant chose to be sentenced. The trial court suspended the imposition of sentence and placed defendant on formal probation for four years. The first year of his probation was to be served in local custody.

On July 8, 2011, defendant filed a motion to set aside his no contest plea. At the hearing on August 3, 2011, defendant argued that the motion should be granted because he had discovered new evidence about Kathleen's criminal record, the trial court had failed to fully determine that defendant entered his plea voluntarily and knowingly, and trial counsel had misadvised defendant as to his possible maximum sentence. The trial court denied the motion because it was untimely. Defendant filed a notice of appeal and requested a certificate of probable cause on September 8, 2011, asserting ineffective assistance of counsel. The trial court granted the certificate of probable cause.

³ All further section references are to the Penal Code.

DISCUSSION

The trial court was correct in denying defendant's motion to withdraw his plea; the six-month requirement of section 1018 had passed. Section 1018 states 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.”

On August 19, 2010, judgment was suspended and defendant was placed on probation. He did not make a motion to withdraw his plea of no contest until almost a year later, on July 8, 2011. The six-month time limitation of section 1018 is mandatory. (*People v. Miranda* (2004) 123 Cal.App.4th 1124, 1133-1134.) The 1991 amendment to section 1018 that added the six-month time limitation “was plainly enacted to protect the People's ability to prosecute cases by limiting the ability of a defendant to obtain withdrawal of his guilty plea long after entry of that plea.” (*People v. Miranda, supra*, 123 Cal.App.4th at p. 1133.) Here, the six-month time period had elapsed when defendant made a motion to withdraw his plea. The trial court was correct in finding that it lacked jurisdiction to consider defendant's motion.

Defendant acknowledges that the six-month time limitation had passed before he filed his motion to withdraw his plea. He contends, however, that the trial court should have treated his motion to withdraw his plea as a motion to vacate the judgment or as a petition for writ of error *coram nobis* and in failing to do so, the court erroneously failed to exercise its discretion. In particular, defendant contends he would have been able to show that his trial counsel was constitutionally ineffective if the court had permitted the recharacterized section 1018 motion to be heard on the merits.

Treating the motion to withdraw the plea as a motion to vacate the judgment or as a petition for writ of error *coram nobis*, in the circumstances of this case, would be

contrary to the law. Defendant's sole contention on appeal is that he should have been allowed to establish ineffective assistance of counsel. Our Supreme Court has stated "any number of constitutional claims," including ineffective assistance of counsel, "cannot be vindicated on *coram nobis*." (*People v. Kim* (2009) 45 Cal.4th 1078, 1095.) A claim that a defendant has been "deprived of effective assistance of counsel in making his guilty plea ... is not an appropriate basis for relief by writ of *coram nobis*." (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1477.) "The appropriate means of raising a claim of ineffective assistance of counsel is either by direct appeal or by petition for a writ of habeas corpus." (*Ibid.*)

More generally, the authorities cited by defendant do not state that a trial court has a sua sponte duty to consider an untimely motion to withdraw a guilty plea as a motion to vacate a judgment or as a petition for writ of error *coram nobis*. (See *People v. Wadkins* (1965) 63 Cal.2d 110, 112 [defendant filed, in propria persona, a document entitled writ of *coram nobis*, on appeal his appointed counsel treated it as a motion to set aside plea]; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1204, 1207 [§ 1016.5 motions to vacate convictions]; *People v. Gontiz* (1997) 58 Cal.App.4th 1309 [motions to vacate judgment]; *People v. Lockridge* (1965) 233 Cal.App.2d 743, 744-745 [“Motion for Stay of Execution of Sentence” accepted as writ of error *coram nobis*]; *People v. Young* (1956) 138 Cal.App.2d 425, 426-427 [timely motion to withdraw plea under § 1018].) We find no basis for imposing upon the trial court a sua sponte duty to recharacterize an untimely section 1018 motion as a petition for writ of error *coram nobis*.

DISPOSITION

The judgment is affirmed.