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

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY TYRONE FOSTER,

Defendant and Appellant.

F065550

(Super. Ct. No. CF3499134)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

John F. Schuck, 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, Eric L. Christoffersen and Catherine Chatman, Deputy Attorneys General, for Plaintiff and Respondent.

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Ricky Tyrone Foster appeals from the July 26, 2012, order denying his propria persona¹ petition for writ of error *coram nobis*, challenging his 1994 convictions for

¹ Foster is represented by appointed counsel on appeal.

carjacking, assault with a firearm, kidnapping during the commission of a carjacking, kidnapping for robbery, and robbery. He contends the trial court erred in summarily denying his petition since his allegations as to the prosecution's failure to disclose impeachment evidence concerning two key prosecution witnesses—Darnell Packard and Kevin Coleman—were sufficient to state a prima facie case for relief. We disagree with Foster's contention and dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts Presented at Foster's 1994 Jury Trial²

“About 10:00 or 10:30 p.m. on October 19, 1993, Darnell Packard arrived at his home at 2112 East Church. He was driving his brother's white Jeep. When he arrived, he pulled into the driveway, then got out of the vehicle to move a trash can. He left the keys in the ignition and the motor running, as he intended to open the garage door and pull the Jeep into the garage.

“Packard had just moved the trash can when he was accosted by a man who was wearing a ski mask and had a cocked gun. The man grabbed Packard by the shoulder, then told him to get down and get in the Jeep. Packard opened the driver's door and the man pushed him into the vehicle. The man had the gun to the back of Packard's head and got into the vehicle with Packard. He continued to hold onto Packard and told Packard not to look at him.

“Still holding the gun to Packard's head, the man backed the Jeep out of the driveway and drove off with Packard. The man said he would shoot Packard if Packard tried to jump. The man drove to an alley and stopped. He instructed Packard to climb over the seat into the backseat. Packard did as he was told. In the backseat was a plastic

² The facts are taken from our opinion in *People v. Foster* (1995) 34 Cal.App.4th 766. We grant the People's unopposed motion to take judicial notice of the records in the underlying appeal.

bag which the man placed over Packard's head. When Packard pleaded with him, the man told Packard to shut up or Packard was going to die that way.

"Packard managed to bite a hole in the bag so he could breathe. A few seconds later, some headlights turned into the alley. Packard was instructed to get on the floor and face the back passenger side door. The man, who kept the gun right to Packard's head, told Packard to stay down, keep the bag over his head, and not try to get out.

"Packard got down as he was told and they began to move again. Packard pulled up on the front of the bag so he could see where they were going. After they turned onto Elm Street, the vehicle was 'going kind of fast' and the man again told Packard not to try to jump out or he would shoot. At this point, the man still had hold of the back of Packard's shirt and the gun to the back of Packard's head.

"As they proceeded up Elm Street, the man removed the ski mask. They turned onto California and proceeded toward Martin Luther King Boulevard. As they crossed that street, Packard sat up, looked in the rear view mirror, and recognized the man as Ricky Foster. Packard had grown up with Foster's cousin and had known Foster for several years. He had last seen Foster a week or two before the incident.

"Foster also looked in the mirror; when he saw Packard, he said he was going to take Packard out into the country and blow his head off. Fearing for his life, Packard grabbed Foster's arm and they wrestled for the gun. Packard was reaching between the seats; the top part of his body was in the front seat. At this point, the Jeep was traveling 50 to 55 miles an hour and swerving as the men struggled.

"The Jeep crashed into a tree by Edison High School. Packard remembered being thrown forward and then backward. He found himself in the backseat; the driver's seat had fallen all the way back and Foster was beside him. They continued to struggle for the gun. Packard pulled on the gun to try to get it away from Foster; the gun discharged once, the Jeep door opened, and Packard fell out. Foster said something which sounded like Packard's name.

“Packard got up, but could only see the shadow of a person because his head had hit the windshield and his vision was hindered by blood running in his eyes. He could not tell if the person was coming toward him or not, so he pointed the gun and fired at the shadow. He believed the gun went off two or three times, after which it would no longer fire. Packard did not yell anything to Foster while he was shooting, nor, as far as he could recall, did he chase Foster.³

“Packard ran to the nearby home of Amalia Robles, at 720 East California. When Robles answered the door, Packard asked her to call the police, then he laid the gun down on the porch. When a police officer arrived, Packard reported that he had been carjacked and the vehicle had wrecked. The officer then proceeded to the location of the accident, while Packard waited at the house for an ambulance. A friend, Kevin Coleman, came over to help. Packard described himself as being excited and almost ‘knocked out in a sense.’ According to Coleman, Packard appeared to be in shock and said he had been ‘jacked.’ Packard said he took the gun from the person who did it, and he pointed to the apartment at which he had left the gun. Coleman assisted him in reaching the paramedics, who were at the accident site.

“Fresno Police Officer Amey responded to the scene. She found Foster in a fenced area at 415 Kern Street, just east of California. He was wearing dark sweat clothes. Officer Ellis also responded. When he contacted Packard, Packard was covered with blood and appeared to be in some pain. He was very distraught. Packard told Ellis that he had been at his residence earlier in the evening and that he had parked his car in the driveway. When he returned to the vehicle from the front of the house, he was accosted by a Black male who had him enter the vehicle, tried to put a plastic bag over his head, took him westbound on California, and intimated that he was going to take

³ Trina Myers was returning home from a student union meeting at Fresno City College when she saw the Jeep and two men fighting nearby. The one man chased the other person into the street and shot at him three times. While he was shooting, he yelled, ‘Motherfucker.’ The police subsequently took Myers to an ambulance, where she identified Foster.

Packard out in the country and kill him. Packard said the Black male stated he had a gun, and that a struggle ensued over the weapon, after which they had the accident. Packard reported that he was able to fight with the suspect, take the gun from him, and fire shots at the assailant.

“The police found that the Jeep’s windshield was broken outward on the passenger side, consistent with a person’s face hitting it during a traffic accident. There was some blood in the vehicle, near the windshield and on the right front passenger side. A ski mask was recovered from the front floorboard on the driver’s side. A .45-caliber automatic handgun was located on the porch of the residence at 720 East California. The slide was in a locked back position; this occurs after the last round is fired from the magazine. There were spots of blood on the porch and wall, directly above the gun.

“Packard was eventually transported to the hospital. He had received cuts on his forehead and the left side of his face; a fractured left shoulder; a sore nose; and a black eye. In addition, he had lost two teeth and a third was broken. At the hospital, he was questioned regarding the description of the suspect. He was not asked for, nor did he give, Foster’s name at that time. At trial, Packard explained that he had heard Foster’s voice before the incident; when he saw the person with the ski mask, he thought he knew the voice, but he was not sure.

“Foster was treated at the same hospital. He had suffered a bullet wound to the chest and another to the leg. According to Dr. Nejat-Bina, the treating physician, Foster had none of the injuries which are commonly seen in victims of motor vehicle accidents.

“Packard saw Foster again at the hospital. Foster was wearing the black pants he had worn during the incident, although his shirt was now off.” (*Foster, supra*, 34 Cal.App.4th at pp. 769–776.)

2. Foster’s Petition for Writ of Error Coram Nobis

On July 20, 2012, Foster filed his propria persona petition for writ of error *coram nobis*. In the petition, he claimed that newly discovered evidence revealed the

prosecution had violated its obligation to disclose impeachment evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by “suppressing Packard’s and his codefendant Coleman’s prior felony arrest record of sales of crack-cocaine to a Fresno Undercover Police Officer.”

On July 26, 2012, the trial court summarily denied defendant’s petition for writ of error *coram nobis*. In its written ruling, the court explained:

“The essence of defendant’s claim is that the prosecution violated its obligation under *Brady*[, *supra*,] 373 U.S. 83, when it failed to disclose that the victim, Darnell Packard and the witness Kenneth [*sic*] Coleman had been arrested for possession of crack cocaine. Defendant is mistaken as to the People’s obligation under *Brady*, as it does not extend to disclosure of a witness’s record of an arrest. The fact a person may have been arrested does not constitute impeachment evidence that People are obligated to provide under *Brady*. [Citations.] [¶] Defendant has failed to raise any claim properly cognizable in a petition for writ of error *coram nobis*....”

On August 8, 2012, Foster filed a notice of appeal. He subsequently filed a second notice of appeal and request for certificate of probable cause, which was granted by the trial court.⁴

DISCUSSION

A petition for writ of error *coram nobis* is a type of motion to vacate the judgment, and “[f]or better or worse, the terms ... are often used interchangeably and the two procedures are similar in scope and effect.” (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982.) A petition for writ of error *coram nobis* is generally used to bring factual errors or omissions to the court’s attention. “The writ will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could not have, with

⁴ As Foster correctly observes in his opening brief, he was not required to obtain a certificate of probable cause as a prerequisite to bringing this appeal.

due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]” (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1474.)

A denial of a petition for writ of error *coram nobis* is not appealable unless the petition states a prima facie case for relief. (*People v. Totari* (2002) 28 Cal.4th 876, 885, fn. 4 [“[i]n an appeal from a trial court’s denial of an application for the writ of error *coram nobis*, a reviewing court initially determines whether defendant has made a prima facie showing of merit; if not, the court may summarily dismiss the appeal”]; *People v. Dubon* (2001) 90 Cal.App.4th 944, 950 [“trial court’s denial of a *coram nobis* petition is an appealable order, unless the *coram nobis* petition failed to state a prima facie case for relief”].)

Foster failed to make a prima facie showing for *coram nobis* relief.⁵ As the trial court correctly observed, Foster’s claim of *Brady* error rested on the prosecution’s alleged failure to disclose Packard’s and Coleman’s arrest records. Throughout his petition, Foster repeatedly referred to the alleged suppression of the witnesses’ arrest records as the conduct constituting a *Brady* violation. But evidence of prior arrests is inadmissible to prove guilt or to impeach a witness. (*People v. Anderson* (1978) 20 Cal.3d 647, 650; see also *People v. Medina* (1995) 11 Cal.4th 694, 769 [“mere arrests are usually inadmissible, whether as proof of guilt or impeachment”]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1523 [“it is established that evidence of mere arrests is inadmissible because it is more prejudicial than probative”].)

⁵ The People raise additional procedural defects they say require dismissal of the appeal. Specifically, they contend Foster should have presented his *Brady* claim in a petition for writ of habeas corpus, and his petition for writ of error *coram nobis* was untimely and successive. Because the trial court based its ruling denying Foster’s *coram nobis* petition on the failure to state a cognizable claim, and this is an issue we can easily resolve on the merits, we do not reach the People’s other arguments.

On appeal, Foster suggests the trial court's ruling improperly ignored evidence he presented in support of his *coram nobis* petition showing Packard and Coleman were not merely arrested for, but were also charged with, unlawfully possessing cocaine base for sale. It is true evidence of charges pending against a prosecution witness *at the time of trial* is relevant for impeachment purposes. (See *People v. Coyer* (1983) 142 Cal.App.3d 839, 842–843 [pending charges may tend to show a witness is seeking leniency through testifying, regardless of any express promises of leniency or immunity].) Thus, in his petition, Foster asserted:

“Petitioner contends that, both Packard and his witness/co-defendant Coleman ... are drug dealer's who both were out of jail on bail and being prosecuted by the Fresno District Attorney's Office prior to June 16, 1993, and subsequent to petitioners false arrest on October 19, 1993, and both had motive and intent to lie on the petitioner.”

The problem here is that the exhibits Foster referenced in support of his assertions fail to show whether any charges against Packard and Coleman were pending at the time of his trial, let alone on the dates he alleged.

The record on appeal contains copies of Foster's petition for writ of error *coram nobis* and his supporting declaration. However, the exhibits Foster referenced to support his claim for relief were not attached. Consequently, Foster filed a motion to augment the record which this court granted. The superior court, however, was unable to locate his *coram nobis* petition and the supporting documents. Thus, it is unclear what exhibits the trial court considered when ruling on the petition.

Foster addresses this problem by asserting the exhibits he mentioned in his *coram nobis* petition were the same as those he attached to an earlier motion to vacate sentence, and which are contained in the supplemental clerk's transcript. However, even assuming the trial court had these exhibits before it when ruling on the petition for writ of error *coram nobis*, it could still have properly concluded that Foster failed to state a *prima facie* case for relief because the exhibits do not show that criminal charges were still pending

against Packard and Coleman at the time of Foster’s trial in January 1994, or on any of the dates he alleged in his petition in June 1993 and October 1993.

Specifically, exhibit “F” is a criminal complaint filed on April 1, 1991, charging Packard and Coleman with possession of cocaine base for sale. And exhibit “G” is an order of the Fresno County Municipal Court, dated May 7, 1991, holding Packard and Coleman to answer on the charge and indicating they had been released on bail. The record contains no information as to the disposition of the charges or whether they were still pending at the time of Foster’s trial.

Troublingly, documents Foster filed in support of an earlier petition for writ of habeas corpus in United States District Court—but which he failed to present to the trial court here—show the same charges against Packard and Coleman reflected in exhibits “F” and “G” were *dismissed* prior to his January 1994 trial.⁶ Consequently, the district court rejected Foster’s claim that his trial counsel was ineffective for failing to impeach Packard with “pending” drug charges. After taking judicial notice of and describing court documents filed by Packard in support of this claim, the district court explained:

“Petitioner has not, and likely cannot, demonstrate that counsel was ineffective for failing to discover or present this evidence, as there is not a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Petitioner has submitted evidence that both Mr. Coleman and Mr. Packard were charged with possession of cocaine base for sale in 1991. However, *the evidence submitted by Petitioner does not demonstrate that Mr. Packard engaged in any misconduct, as the charge against him was dismissed eight months after the complaint was filed, on December 5, 1991, on the prosecution’s motion.*

“Although the charges against Mr. Coleman were not dismissed, Petitioner’s documents demonstrate th[at] he successfully completed a diversion program pursuant to Penal Code section 1000 et seq.... Pursuant

⁶ We grant the People’s unopposed motion to take judicial notice of court records in Foster’s federal habeas corpus case filed in the United States District Court, Eastern District of California (*Foster v. Garcia*, case No. CV-F-99-05748), which are set forth in attachments 1 and 2 of the People’s motion.

to California law, at that time, the arrest was deemed not have occurred... Accordingly, as Respondent submits, this evidence would not have had great impeachment value. Moreover, Mr. Coleman's trial testimony was brief and somewhat cumulative of Mr. Packard's testimony Thus, even if Mr. Coleman's entire testimony had been discounted, it was immaterial to the verdict and would have made no difference.

“To the extent Petitioner contends that the arrests resulted in bias in favor of the prosecution, his claim is without merit. As Respondent points out, in his state bar complaint, Petitioner suggests that Mr. Packard and Mr. Coleman were ‘placed into a drug diversion program pursuant to a hidden plea bargain...’ ...However, *both Mr. Packard's and Mr. Coleman's cases were resolved with dismissal of the charges prior to Petitioner committing his criminal offenses on October 19, 1993.*” (Italics added.)

The federal court records indicate that, when Foster subsequently filed the petition for writ of error *coram nobis*, which is at issue in this appeal, he possessed information directly contradicting the assertions in his petition that the arrests of Packard and Coleman resulted in charges that were still pending and thus gave them a motive to lie at the time of his trial.

On the record before us, we have no difficulty concluding the trial court properly found Foster failed to raise any cognizable claim in his petition for writ of error *coram nobis*. Because defendant failed to state a prima facie case for relief, his appeal must be dismissed.

DISPOSITION

The appeal is dismissed. The People's request for judicial notice, filed April 5, 2013, is granted.

HILL, P. J.

WE CONCUR:

LEVY, J.

CORNELL, J.