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

In re

ROLANDO JESUS GUDINO,

On Habeas Corpus.

F068405

(Super. Ct. No. VCF232385A)

OPINION

THE COURT*

ORIGINAL PROCEEDING; petition for writ of mandate.

Rolando Jesus Gudino, in pro. per.; Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Respondent.

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* Before Gomes, Acting P. J., Kane, J. and Smith, J.

Rolando Jesus Gudino filed a petition for a writ of habeas corpus alleging he had been incarcerated illegally. His petition alleges he was illegally incarcerated because this court's decision in *People v. Lopez* (2012) 208 Cal.App.4th 1049 (*Lopez*), which was decided after he was sentenced, established the trial court improperly relied on Penal Code section 186.22, subdivision (b)(4)(C)¹ to sentence him to a term of seven years to life. As we shall explain, we agree with Gudino and will remand the matter to the trial court for further proceedings.

DISCUSSION

On July 22, 2010, Gudino accepted a plea bargain and pled no contest to violation of section 136.1(b)(1), attempting to dissuade a witness from testifying or reporting a crime. Gudino also pled no contest (admitted) he committed the crime for the benefit of a criminal street gang within the meaning of section 186.22(b)(4). In exchange, a second count was dismissed, and the trial court agreed to impose a sentence of seven years to life pursuant to the provisions of section 186.22(b)(4)(C). Gudino also was facing several petitions for violating probation on different matters, apparently because he had been accused of committing this crime. The trial court agreed to impose concurrent sentences on each of the violations of probation found to be true.

Since Gudino was facing sentencing pursuant to section 186.22(b)(4)(C), we begin with a short review of section 186.22(b). Generally, this section provides for increased punishment when the defendant has been convicted of (or has pled guilty to) committing a felony, and the finder of fact has concluded the crime was committed for the benefit of

¹All further statutory references are to the Penal Code unless otherwise stated. We generally refer to subdivisions of sections 186.22 and 136.1 in abbreviated form, e.g., section 186.22(b), or simply by subdivision when the statutory reference is obvious.

a criminal street gang.² Generally, the enhancement is a specific term of years that is added to the sentence for the underlying felony.

However, section 186.22(b)(4) and (5) enhance the sentence in a different manner. Subdivision (b)(5) applies when the crime is committed for the benefit of a criminal street gang and the sentence for the underlying felony is life with the possibility of parole. In this circumstance, subdivision (b)(5) requires a defendant to serve 15 calendar years before being considered for parole.

Section 186.22(b)(4) requires the trial court to impose a sentence of life in prison for specifically identified felonies that are committed for the benefit of a criminal street gang. The minimum term that must be served before an inmate is eligible for parole under this section depends on the crime committed. For example, if the defendant is convicted of a home invasion robbery or carjacking, he or she must serve 15 years in prison before being eligible for parole. (§ 186.22(b)(4)(B).) As relevant here, if the defendant is convicted of making “threats to victims and witnesses, as defined in Section 136.1,” the minimum term he or she must serve before being eligible for parole is seven years (§ 186.22(b)(4)(C)), the sentence indicated by the trial court in this case.

Prior to sentencing, Gudino moved to withdraw his plea, essentially arguing that on further consideration he was unwilling to accept a term of seven years to life. The trial court denied the motion and sentenced Gudino to the agreed-upon prison term. Gudino appealed, but appointed appellate counsel filed a brief pursuant to *People v.*

²We use the phrase “for the benefit of a criminal street gang” as a shorthand description of the enhancement, which states, “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of the felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows” (§ 186.22, subd. (b)(1).)

Wende (1979) 25 Cal.3d 436. After reviewing the file, we affirmed the judgment in our unpublished opinion, *People v. Gudino* (June 29, 2011, F061128).

In 2012 we issued our opinion in *Lopez*, which addressed the interaction of sections 136.1 and 186.22(b)(4)(C). We held that for a defendant to be sentenced pursuant to section 186.22(b)(4)(C) for attempting to dissuade a witness from testifying, the prosecution must plead and prove, or the defendant must admit, that he or she violated section 136.1(c)(1). We reasoned that since section 186.22(b)(4)(C) applied only to an attempt to dissuade a witness from testifying through the use of “threats to victims and witnesses, as defined in Section 136.1,” and section 136.1(a) and (b) could be violated without the use of threats of force or violence, then the only way to reconcile the two subdivisions was to permit imposition of the enhancement only when the prosecution had pled and proven the defendant violated section 136.1(c)(1) because this was the only subdivision that addressed the use of threats to victims or witnesses. Section 136.1(c)(1) increases the punishment when the act of attempting to dissuade a witness “is accompanied by force or by an express or implied threat of force or violence”

Gudino initially filed a petition for writ of habeas corpus in Tulare County Superior Court on July 22, 2013. The trial court denied the petition on August 30, 2013.

Gudino filed his petition for writ of habeas corpus in this court on November 22, 2013. The petition seeks relief on three grounds. The first two grounds allege he received ineffective assistance of counsel because appointed trial counsel (argument two) and appointed appellate counsel (argument one) failed to argue to the trial court that he could not be sentenced pursuant to section 186.22(b)(4)(C) because he was not charged with attempting to dissuade a witness by an express or implied threat of force or violence, i.e., he was not convicted of violating section 136.1(c)(1). The third ground alleged in the petition is that the sentence imposed by the trial court was “involuntary” because the trial court imposed a sentence pursuant to section 186.22(b)(4)(C) when the section was inapplicable.

Since *Lopez* was decided after Gudino’s appeal was decided, his claims of ineffective assistance of counsel appear to lack merit. We need not decide this issue, however, because we conclude the dispositive issue is the third issue identified by Gudino—whether the trial court erred in sentencing him pursuant to section 186.22(b)(4)(C).

Timeliness

The Attorney General agrees that *Lopez* establishes that Gudino should not have been sentenced to a life term. However, she argues we must deny Gudino’s petition for writ of habeas corpus for two reasons.

First, the Attorney General argues the petition is untimely. She notes the petition was filed in this court 40 months after Gudino entered his plea, 38 months after he was sentenced, 27 months after the judgment was affirmed on direct appeal, and 15 months after we issued our decision in *Lopez*. Gudino points out that he filed a petition for a writ of habeas corpus in the superior court 12 months after *Lopez* was filed, but only nine months after *Lopez* became final.³ His petition in this court was filed three months after the superior court denied his petition, and nearly 12 months after *Lopez* became final.

The Attorney General cites to the three-part test in *In re Robbins* (1998) 18 Cal.4th 770 (*Robbins*) to support her argument. In *Robbins* and its companion case, *In re Gallego* (1998) 18 Cal.4th 825, the Supreme Court addressed procedural issues related to habeas petitions in capital cases. (*Robbins*, at p. 779.) “Under the applicable policies and case law governing the filing of habeas corpus petitions in capital cases in a California court, whenever a habeas corpus petition is filed more than 90 days after the filing of the reply brief in the direct appeal, the petitioner has the burden of establishing the timeliness of the claims raised in the petition.” (*Ibid.*) To “avoid the bar of untimeliness,” which

³The remittitur was issued on November 26, 2012, after the Supreme Court denied review on November 20, 2012 (S205695).

occurs when a habeas corpus petition in a capital case is not filed within this 90-day period, “with respect to each claim, the *petitioner* has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness.” (*Id.* at p. 780.)

While *Robbins* specifically addresses habeas corpus petitions in capital cases, Gudino does not contest the analytic framework set forth by the Supreme Court. Indeed, it has long been the law that “[o]ne seeking relief by way of habeas corpus must do so ‘without substantial delay.’” (*In re Lucero* (2011) 200 Cal.App.4th 38, 44 (*Lucero*)). However, Gudino argues there was not a substantial delay in filing the petition for writ of habeas corpus, and there was good cause for any delay that occurred. We agree with Gudino.

“Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time.” (*Robbins, supra*, 18 Cal.4th at p. 780.)

The question of substantial delay begins with our decision in *Lopez*. The remittitur was issued in *Lopez* on November 26, 2012. Gudino explains in his “Reply to Respondent’s Informal Response to Petition for Writ of Habeas Corpus” that he was incarcerated when *Lopez* became final; he is not a lawyer and has only limited knowledge of the law, and he filed his petition for a writ of habeas corpus in the superior court “[a]s soon as” *Lopez* was discovered to apply to his case. Before his petition was filed, Gudino had limited access to legal research facilities and was proceeding without the aid of counsel. Gudino’s statements, while far from a model of clarity, adequately explain that he filed his petition in the superior court shortly after learning of *Lopez*. Thus, we

conclude there was not a substantial delay from the time Gudino learned of *Lopez* until he began to pursue relief.

Even if we were to conclude there was a substantial delay, Gudino has established good cause for the delay. *Robbins* did not define “good cause” in this context, instead providing an example of what might constitute good cause. The People cite *In re Clark* (1993) 5 Cal.4th 750 (*Clark*) for the definition of “good cause.”

“Before considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner’s claims. This requirement is reasonable in view of the interest of the state in carrying out its judgments, the interest of the respondent in having the ability to respond to the petition and to retry the case should the judgment be invalidated, and the burden on the judicial system.

“In assessing a petitioner’s explanation and justification for delayed presentations of claims in the future, the court will also consider whether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier. A petitioner will be expected to demonstrate due diligence in pursuing potential claims. If a petitioner had reason to suspect that a basis for habeas corpus relief was available, but did nothing to promptly confirm those suspicions, that failure must be justified.

“However, where the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible. And, as in the past, claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial.” (*Clark, supra*, 5 Cal.4th at pp. 774-775.)

Gudino is not pursuing a successive petition in the same court, as was the case in *Clark* and *Lucero*. Instead, he is pursuing a petition for writ of habeas corpus in this court after the superior court summarily denied the petition. The grounds in each petition

are essentially the same. The circumstances explained in the petition establish good cause for any delay in filing the petition. Specifically, Gudino explains he is an indigent, incarcerated petitioner with little knowledge of the law; he has no access to legal periodicals; and he has little ability to conduct legal research. If the nine-month delay between the finality of *Lopez* and the filing of his petition in the superior court was a substantial delay, then Gudino's allegations establish good cause for that delay.

We find support for our conclusion in *Lucero*. Lucero was convicted of second degree murder based, in part, on application of the felony-murder rule to the facts of his case. The murder occurred in 1995. The appellate court affirmed the conviction on direct appeal. (*People v. Tabios* (1998) 67 Cal.App.4th 1.) Ten years later, in *People v. Chun* (2009) 45 Cal.4th 1172, the Supreme Court overruled the felony-murder theory on which the prosecution relied in convicting Lucero. Lucero filed a petition for a writ of habeas corpus in 2009 after *Chun* was decided, but failed to address *Chun*. The appellate court denied the petition, and the Supreme Court denied defendant's petition for review on March 10, 2010 (S179236).

In April 2010 Lucero filed a second petition for a writ of habeas corpus alleging error based on the effect of *Chun*. The Attorney General argued the petition was untimely. The appellate court disagreed. "The present petition was filed in the trial court on April 23, 2010, some 10 months after *Chun* became final for all purposes. In light of Lucero's explanation that he is a layperson with limited access to a prison law library that does not receive newly published cases for several months, and the importance of the issue he now raises to a case that resulted in a life sentence, we do not consider the delay so unreasonable as to warrant denial of the petition on the ground of tardiness." (*Lucero, supra*, 200 Cal.App.4th at pp. 44-45.) We find ourselves in the same position and agree with the conclusion reached in *Lucero*.

Plea Bargain

The second ground argued by the Attorney General to support her position that the petition should be denied relates to the plea bargain itself. She argues Gudino is not entitled to any relief because he bargained for the sentence he received, and he cannot now be heard to complain the sentence is too severe. There is ample support in the case law for this argument, with the Attorney General placing primary reliance on *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*).

Hester broke into the residence of his former girlfriend, battered her, and stabbed her new boyfriend. Hester was charged with numerous crimes and entered into a plea agreement whereby he pled no contest to five counts, admitted an enhancement, and was sentenced to an agreed-upon term of four years in prison, which was calculated as a four-year term for burglary, and a concurrent three-year term for felony assault. In his appeal, Hester argued the three-year felony assault term should have been stayed pursuant to section 654, not imposed concurrently. The People disagreed, noting that California Rules of Court, former rule 412(b)⁴ precluded a defendant who had entered into a plea agreement for a specified term from claiming a component of the sentence violated section 654. Hester argued that former rule 412(b) could not be enforced because it conflicted with section 654. The Supreme Court found no conflict.

“The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception: Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.] While failure to object is not an implicit

⁴This rule has been renumbered without substantive change. See now rule 4.412(b).

waiver of section 654 rights, acceptance of the plea bargain here was. ‘When a defendant maintains that the trial court’s sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.’ [Citation.] [California Rules of Court, former] [r]ule 412(b) and section 654 are, therefore, not in conflict. In adopting the rule, the Judicial Council merely codified one of the applications of the case law rule that defendants are estopped from complaining of sentences to which they agreed.” (*Hester, supra*, 22 Cal.4th at p. 295.)

The above quote adopts terms more commonly found in contract actions, e.g., benefit of the bargain. This is understandable because the Supreme Court has likened plea bargains to contracts and has applied contract principles in interpreting such agreements.

In *People v. Segura* (2008) 44 Cal.4th 921 (*Segura*), Segura entered into a plea agreement that resulted in a sentence of five years’ probation, which included a condition that he serve one year in jail. When taking his plea, Segura was advised that he could be deported if he was not a citizen of the United States.

When released from jail, Segura was detained by immigration authorities. Segura’s attorney promptly filed a motion to reduce Segura’s sentence and to modify the sentence to reflect Segura was sentenced to a term of 360 days in jail, which apparently would avoid adverse immigration consequences. The trial court denied the motion, agreeing with the prosecution’s argument that the jail term was an integral part of the plea agreement and as such was not subject to modification by the trial court. The Court of Appeal reversed, and the Supreme Court granted review.

The Supreme Court began its analysis by explaining the nature and purpose of plea agreements.

“Plea negotiations and agreements are an accepted and ‘integral component of the criminal justice system and essential to the expeditious and fair administration of our courts.’ [Citations.] Plea agreements benefit that system by promoting speed, economy, and the finality of judgments.

[Citations.] [¶] As we previously have explained, the process of plea negotiation ‘contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty [or no contest] in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People’s acceptance of a plea to a lesser offense than that charged, either in degree [citations] or kind [citation], or by the prosecutor’s dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the “bargain” worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of “bargaining” between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them.’” (*Segura, supra*, 44 Cal.4th at pp. 929-930.)

The Supreme Court next observed that the prosecutor is the only party authorized to negotiate on behalf of the state, and the trial court cannot substitute itself in place of the prosecutor. (*Segura, supra*, 44 Cal.4th at p. 930.) ““Such judicial activity would contravene express statutory provisions requiring the prosecutor’s consent to the proposed disposition, would detract from the judge’s ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge’s participation in the matter.’” (*Ibid.*)

The next topic addressed was the contract aspects of a plea agreement.

“Because a ‘negotiated plea agreement is a form of contract,’ it is interpreted according to general contract principles. [Citation.] Acceptance of the agreement binds the court and the parties to the agreement. [Citations.] ““When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.’” [Citations.]

“For its part, of course, the trial court may decide not to approve the terms of a plea agreement negotiated by the parties. [Citation.] If the court does not believe the agreed-upon disposition is fair, the court ‘need not approve a bargain reached between the prosecution and the defendant, [but] it cannot change that bargain or agreement without the consent of both parties.’ [Citations.]

“Although a plea agreement does not divest the court of its inherent sentencing discretion, ‘a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] ‘A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound.’ [Citation.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, [either] directly or indirectly. [Citation.] Once the court has accepted the terms of the negotiated plea, “[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree.”” (*Segura, supra*, 44 Cal.4th at pp. 930-931.)

The application of general contract principles convinces us we must grant Gudino’s petition for writ of habeas corpus, despite the fact he received the benefit of his bargain in that one count was dismissed and he was sentenced to an agreed-upon term of seven years to life. When the plea agreement in this case was negotiated, both parties and the trial court believed that if Gudino was convicted of the charged crimes, and the gang enhancements were found true, he would be subject to sentencing pursuant to section 186.22(b)(4)(C). *Lopez* established, however, that the parties misperceived the law, i.e., the parties made a mutual mistake of law. (Civ. Code, § 1578.) Witkin states that “Relief is proper and commonly given, where a mutual mistake relates to a *specific private right*; i.e., ignorance as to legal rights or obligations under a contract (mistake of law) is treated in much the same way as a mistake of fact.” (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 273, p. 304.) Accordingly, under general contract principles, Gudino is entitled to relief occasioned by the mutual mistake of law.

Having concluded Gudino is entitled to relief, the question then becomes to what relief is he entitled? In his petition for writ of habeas corpus, the only relevant request is for a writ “relieving petitioner from the judgment and sentence imposed” that resulted from his plea. In her informal response to the petition and her reply to the order to show cause, the Attorney General asserts the proper remedy is to remand the matter to the trial court to provide both parties the opportunity to withdraw from the plea agreement. In his response to the Attorney General’s informal response, Gudino agrees the proper remedy would be to remand the matter to the trial court and allow both parties the opportunity to withdraw from the plea agreement.

We think the proper remedy is identified by Gudino in his traverse. If the trial court had imposed a lawful sentence for the section 136.1(b)(1) conviction, Gudino would have been sentenced to a term ranging from 16 months to three years. The sentence for the gang enhancement would have been five years (§ 186.22(b)(1)(B)) because “intimidation of victims or witnesses, in violation of Section 136.1” is a serious felony (§ 1192.7(c)(37)). The total sentence that could be imposed would be a determinate sentence in the range of six years four months to eight years, as opposed to the indeterminate sentence of life with a minimum sentence of seven years, which Gudino is now serving. At resentencing, Gudino would retain the benefit of his bargain since he will face less severe punishment.

The People, on the other hand, would not retain the benefit of their bargain since Gudino would be serving less time than that to which the People had agreed. We agree with the appellate court in *In re Blessing* (1982) 129 Cal.App.3d 1026 that in order to safeguard the rights of the People, since external events have fundamentally altered the character of the negotiated disposition, the People must be given an opportunity to withdraw from the plea agreement, if they so desire. (*Id.* at p. 1031.) Accordingly, we will not vacate the judgment but will order the sentence vacated and remand to the trial

court for resentencing. We also will order that the People be given 30 days from the date this opinion becomes final to move to withdraw from the plea agreement. If the People do not so move, the trial court must resentence Gudino for the crime and enhancement to which he pled.

DISPOSITION

Let a writ of habeas corpus issue directing the respondent court to vacate the sentence imposed on Gudino on September 22, 2010, in case No. VCF232385A and resentence him consistent with this opinion and *Lopez, supra*, 208 Cal.App.4th 1049, unless the People, within 30 days from the date this opinion becomes final, file a motion to withdraw the plea, in which case the trial court is directed to grant the motion and recommence trial proceedings.