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

In re

JERMALE KEETON,

On Habeas Corpus.

F069871

(Kern Super. Ct. No. BF136484A)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus.

Jermale Keeton, in pro. per., for Petitioner.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Larenda R. Delaini, Deputy Attorneys General, for Respondent.

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BACKGROUND¹

A Kern County jury convicted petitioner of active participation in a criminal street gang (Pen. Code § 186.22 subd. (a)) but was unable to reach a verdict on a solicitation to commit murder charge (Pen. Code § 653f, subd. (b)). The trial court declared a mistrial

* Before Hill, Presiding Justice, Levy, J., and Peña, J.

¹ The request by the Attorney General to take judicial notice of this court's opinion in *People v. Keeton*, F064723, is granted.

on the latter charge and went on to find all of the enhancements associated with the active participation offense true. The court sentenced petitioner to a total term of 11 years in state prison.

Petitioner later pleaded no contest to the solicitation charge and admitted the associated gang enhancement. He also admitted the truth of the prior conviction as defined in Penal Code section 667, subdivisions (a) and (e). The prison prior enhancements were dismissed. The trial court re-sentenced petitioner to a total term of 13 years, calculated as follows: the lower term of three years on the solicitation count, doubled under the Three Strikes law, plus two years for the gang enhancement, plus five years under Penal Code section 667, subdivision (a). The court sentenced petitioner to a six-year term on the active participation offense but stayed imposition of the sentence under Penal Code 654.

On appeal, this court found the trial court committed prejudicial error with respect to the active participation offense. It reversed the conviction and remanded the matter for a possible retrial. (*People v. Keeton* (Jan. 30, 2014, F064723), [nonpub. opn.].)

On April 28, 2014, over defense counsel's objection, the trial court granted the District Attorney's motion to dismiss the active participation count without prejudice to petitioner filing a motion to withdraw his plea to the solicitation charge. But the court left petitioner's 13-year sentence intact. Petitioner was not at the hearing and trial counsel did not file a notice of appeal.

The following day defense counsel wrote petitioner, advised him of what had transpired at the hearing, and asked for petitioner's "thoughts and input on this matter to determine where we go from here, if anywhere." (Defense counsel Evers Apr. 29, 2014, letter.)

On May 2, 2014, petitioner asked Central California Appellate Program (CCAP) for an update regarding his appeal as he had not heard from his appellate attorney.

CCAP's response shows the address petitioner had for his counsel was incorrect and the address CCAP had for petitioner was also incorrect.

On June 13, 2014, appellate counsel responded to petitioner's "recent letters" concerning his desire to withdraw his plea to the solicitation charge. Appellate counsel informed petitioner that she no longer represented him but had contacted petitioner's trial attorney and asked him to file the notice of appeal on petitioner's behalf.

A few weeks later, appellate counsel wrote petitioner and told him that his trial attorney thought filing a notice of appeal on petitioner's behalf was not a matter which fell within his appointment to represent petitioner during the resentencing proceedings. Appellate counsel told petitioner she disagreed as there was case law that required trial counsel to timely file the notice of appeal upon a client's request.

Appellate counsel went on to explain that perhaps there was a misunderstanding whether petitioner wanted to withdraw his plea or simply challenge the resentencing decision. Appellate counsel told petitioner that two attorneys at CCAP recommended he write them and ask for their help in belatedly filing a notice of appeal.

On August 19, 2014, this petition seeking permission to file a notice of appeal under the constructive filing doctrine was filed.

The Attorney General does not oppose granting relief.

DISPOSITION

Accordingly, petitioner is entitled to relief and his petition for writ of habeas corpus is granted.

Petitioner Jermale Keeton is granted leave to cause a notice of appeal to be filed on or before 30 days from the date of this opinion in the above-referenced Kern County Superior Court action.

Let a writ of habeas corpus issue directing the Clerk of the Superior Court for Kern County to file the notice of appeal in its action number BF136484A, to treat it as

timely filed, and to proceed with the preparation of the record on appeal in accordance with the applicable rules of the California Rules of Court if the clerk of that court receives said request on or before 30 days of the date of this opinion.

This opinion is final forthwith.