Filed 7/29/19 Angeles v. Superior Court CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIFTH APPELLATE DISTRICT**

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| MANUEL SILVA ANGELES,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF TULARE COUNTY,<br><br>Respondent;<br><br>THE PEOPLE,<br><br>Real Party in Interest. | F078794<br><br>(Tulare Super. Ct. No. TCM074428-01)<br><br>**ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]** |

Due to clerical error, on this Court's own motion it is ordered that the opinion filed herein on July 25, 2019, be modified as follows:

1. At the top of page 1, "Filed 4/17/19," is deleted.

Except for the modification set forth, the opinion previously filed remains unchanged.

This modification does not effect a change in the judgment.

LEVY, A.P.J.

WE CONCUR:

FRANSON, J.

SNAUFER, J.

Filed 4/17/19 Angeles v. Superior Court CA5
Opinion following order recalling remittitur and reissuing opinion on 7/25/19; See 7/29/19 modification order regarding the 4/17/19 date on this opinion

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**THE COURT***

ORIGINAL PROCEEDINGS; petition for writ of mandate. Melinda Myrle Reed, John P. Bianco, and Nathan G. Leedy, Judges.

Lisa Bertolino, County Public Defender, Thomas McGuire, Assistant Public Defender, Judyanne E. Rogado, Deputy Public Defender, for Petitioner.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Max Feinstat, Deputy Attorney General, for Respondent.

No appearance for Real Party in Interest.

-ooOoo-

* Before Levy, Acting P.J., Franson, J., and Snauffer, J.

Petitioner seeks permission to file a belated notice of appeal. The Attorney General was given an opportunity to file opposition to the request and told that its failure to do so would be treated as consent to the requested relief being granted without further proceedings.

Because petitioner is not in actual or constructive custody, the "Petition for Writ of Habeas Corpus" is deemed to be a "Petition for Writ of Mandate." (See *Owens v. Superior Court* (1959) 52 Cal.2d 822; *Neal v. State* (1960) 55 Cal.2d 11, 16.)

The Attorney General opposes the petition on grounds the underlying order is not appealable. The question of appealability is not relevant to whether petitioner should be granted leave to file a belated appeal.

We conclude petitioner is entitled to relief under the doctrine of constructive filing. (See *In re Benoit* (1973) 10 Cal.3d 72; *People v. Griggs* (1967) 67 Cal.2d 314.) Petitioner relied on the express assurances of counsel that the notice of appeal would be timely filed. Petitioner's counsel filed the notice of appeal within 60 days of the rendition of judgment as required by California Rules of Court, rule 8.308(a). However, counsel mistakenly filed the notice of appeal in the appellate district of the superior court. But for the error, the notice of appeal would have been timely filed.

**DISPOSITION**

Petitioner is granted leave to file a notice of appeal on or before 30 days from the date of this opinion in Tulare County Superior Court action No. TCM074428-01.

Let a writ of mandate issue directing the Clerk of the Superior Court for Tulare County to file said request in its action number TCM074428-01, 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 as to this court.