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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JANCINTO RAMOS SALAZAR,

Defendant and Appellant.

G045574

(Super. Ct. No. 02CF2983)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Dismissed.

Kiran K. Nair for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kevin Vienna and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Jacinto Ramos Salazar, a noncitizen resident of the United States, appeals from the denial of a nonstatutory motion to vacate a 2003 guilty plea. In a plea to the court, Salazar pled guilty to felony possession of cocaine for sale and possession of cocaine base for sale, and misdemeanor assault. As he did in the trial court, Salazar contends trial counsel failed to advise him his plea would “result in *absolute* deportation,” which he argues amounts to a violation of his constitutional right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. (Italics added.)

The Attorney General argues the appeal must be dismissed because Salazar failed to obtain a certificate of probable cause. In the alternative, the Attorney General contends Salazar’s nonstatutory motion to vacate is an ineffectual way to skirt the rules for writs of error *coram nobis*, relying on *People v. Kim* (2009) 45 Cal.4th 1078 (*Kim*). Moreover, the Attorney General asserts Salazar’s quiver is empty, i.e., there simply is no procedural vehicle for him to challenge a plea at this late stage on the grounds asserted, which leaves him at the mercy of the federal immigration courts.

We agree with the Attorney General. Salazar’s failure to obtain a certificate of probable cause is cause to dismiss his appeal. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76; see also *People v. Placentia* (2011) 194 Cal.App.4th 489, 494.) However, even assuming this were not the case, Salazar’s arguments on the merits fail to persuade us. As the California Supreme Court held in *Kim*, adding the word “nonstatutory” to the motion fails to change its essential nature. Whether statutory or nonstatutory, a motion to vacate a plea is a writ of error *coram nobis*, and the trial court correctly determined the rules applicable to such writs required a denial of Salazar’s motion. Thus, we dismiss the appeal.

## FACTS

In November 2002, Salazar was charged with felony possession of cocaine for sale (Health & Saf. Code, § 11351, subd. (a)), possession of cocaine base for sale

(Health & Saf. Code, § 11351.5) and misdemeanor assault (Pen. Code, § 240).<sup>1</sup>

According to the preliminary hearing testimony, Salazar assaulted a supermarket security officer when the officer attempted to detain him during an investigation of suspected theft. A Santa Ana police officer arrested Salazar, and during a search incident to this arrest another officer found 2.3 grams of rock cocaine, 5.6 grams of cocaine powder, and several dollar bills of various denominations.

On April 11, 2003, Salazar pled guilty to all charges. Because he also admitted a 1996 prior drug-related felony conviction (Health & Saf. Code, § 11352, subd. (a)), Salazar faced a maximum prison term of nine years. As a result of his plea, he was granted probation on the condition he serve one year in county jail.

The standard plea form reflects Salazar's initials in the appropriate boxes and his signature at the end of the document. From this form, we gather the following pertinent facts: (a) Salazar was represented by Attorney Kenneth Norelli; (b) he initialed the box that states, "I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial naturalization pursuant to the laws of the United States"; (d) he declared by his signature that he understood "each and every one" of his constitutional rights and desired to waive those rights to plead guilty, and that he had "read, understood, and personally initialed each item above and discussed them with my attorney;" and, (e) Norelli declared, "I have explained each of the above rights to the defendant, and having [*sic*] explored the facts with him/her and studied his/her possible defenses to the charge(s)."

To establish a factual basis for the plea, Salazar admitted to willfully and unlawfully possessing cocaine and cocaine base, and assaulting Pedro Gomez on

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

November 10, 2002, and he admitted the prior drug-related felony conviction within the meaning of Health and Safety Code section 11352, subdivision (a).<sup>2</sup>

In February 2007, Salazar filed a motion to dismiss the convictions pursuant to section 1203.4<sup>3</sup> following the successful completion of probation. The court granted the motion in April.<sup>4</sup>

In March 2011, Salazar filed what he called a “non-statutory motion to vacate” (capitalization omitted) the guilty plea on grounds “his defense attorney did not tell him that the convictions will result in absolute deportation.”<sup>5</sup> In his motion, Salazar sought to vacate the plea “because prior to pleading guilty his defense attorney did not tell him that the offense will result in absolute deportation.” Counsel attached a copy of the plea form, Salazar’s declaration, a photocopy of his green card, a copy of a letter to Norelli requesting any files in his possession and his best recollection as to the facts surrounding the guilty plea, copies of four birth certificates for children born in the United States, and his recent tax returns claiming one of these children and two others as dependents.

According to Salazar’s declaration, he first became concerned about his prior drug-related felony convictions in 2010. Although he was not then facing

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<sup>2</sup> As charged, the prior conviction could have made him ineligible for probation under section 1203.07, subdivision (a)(11), with the exception being if the crime involved the transportation, offer to transport or attempt to transport the controlled substance. The court acknowledged what he characterized as a presumption of ineligibility but found Salazar eligible for probation “based on the amount involved and based on the circumstances of the case and [] the age of the prior. The record is inadequate to determine the propriety of the court’s decision and we express no opinion on the issue.

<sup>3</sup> Section 1203.4, subdivision (a) permits a defendant who “has fulfilled the conditions of probation for the entire period of probation” to withdraw his or her guilty plea in certain specified circumstances after which “the the court shall [] dismiss the accusations or information against the defendant and . . . he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted . . . .”

<sup>4</sup> As stated in *People v. Weidersperg* (1975) 44 Cal.App.3d 550, 554, “Although the effect of expungement under section 1203.4 is to relieve the defendant of certain penalties and disabilities resulting from the conviction, it does not ‘affect the fact that his guilt has been finally determined according to law.’ [Citation.]” Apparently, the fact of Salazar’s guilt triggers the possibility of deportation, although neither party addresses the issue.

<sup>5</sup> According to the motion, Salazar’s counsel also filed a separate motion to vacate the judgment entered for the prior conviction on the same grounds as raised in the instant case, i.e., counsel’s failure to advise him of the adverse immigration consequences. Nothing in the record supports this claim and the validity of the prior conviction is not properly before us.

deportation, he decided to consult an immigration attorney. The attorney told him his drug-related offenses would likely result in deportation. The attorney asked Salazar if he remembered his trial counsel explaining the immigration consequences of his plea. Salazar declared, "I recall the defense attorney asking my immigration status. However, I was not told that the conviction will result in absolute deportation. Moreover, the attorney told me to plead guilty so we could finish with the case. I was told to initial and sign [the] court document but the attorney did not explain what I was signing. I pled guilty because that way, I would serve 8 months rather than 3 years had I went to trial.

At the hearing on Salazar's motion, the trial court acknowledged receipt of the parties' moving papers and asked defense Attorney Kiran Nair if she was withdrawing her request for an evidentiary hearing. This started the following colloquy: "Ms. Nair: Yes, your honor. I believe it's necessary in this matter. [¶] The Court: Submitting on the declaration? [¶] Ms. Nair: Well, I wanted to understand. The court indicated ruling on this matter to further enter a question or concern this motion presents. [¶] The Court: I don't have any questions. Unless you have additional evidence to offer, I'm not going to take pot shots at the declaration or ask any additional questions that I have. I don't have any if that's what you are requesting." Nair asked if the court had "any concerns with jurisdiction." The court indicated it did, and Nair launched into an argument about the court's jurisdiction to rule on her motion. The court did not specifically rule on the issue and Nair continued with her argument on the merits. After the parties had presented their arguments, the court ruled, "[t]he [plea] form plainly states your client was advised he initialed the box next to the admonishment. He signed it under penalty of perjury. He read and understood the form. His lawyer signed it and said he had explained it to your client. Mr. Norelli is still available in Orange County if anybody wants to talk to him. He appears here a couple times a week. So I don't think the motion has any validity, and I deny the motion."

Nair “respectfully disagree[d],” continued to argue the merits and procedural viability of her nonstatutory motion, and summed up with “I think we should proceed with an evidentiary hearing in this matter.” The court denied her request and denied the motion.

Nair filed a notice of appeal and request for certificate of probable cause on July 27, 2011.<sup>6</sup> She characterized the appeal as one from an “order made after judgment, affecting the substantial rights of the party.” (§ 1237, subd. (b).)

#### DISCUSSION

As the Attorney General notes, Nair’s brief is not a model of clarity. Under the heading “ISSUE PRESENTED,” she writes, “[w]hether the trial court erred in denying Defendant’s post-conviction non-statutory motion to vacate on grounds that it lacked jurisdiction when the United States Supreme ] [sic] and California Courts case law precedent dictates that trial courts remedy violation of defendant’s Constitutional right to effective legal representation in a criminal proceeding under the Sixth Amendment which is violated when the defense attorney fails to advised or inadequately advises the non-citizen of adverse immigration consequences flowing from plea whereby the defendant pleads in ignorance of immigration consequences?” It is difficult to be confident we have full understanding of the issue based on that question.

But it appears Nair primarily relies on *Padilla v. Kentucky* (2010) \_\_\_ U.S. \_\_\_ [130 S.Ct. 1473] (*Padilla*), *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 291 (*Murgia*), and *People v. Fosselman* (1983) 33 Cal.3d 572, 582 (*Fosselman*), to argue the fact noncitizens often learn deportation is more of a reality than they may have originally believed (notwithstanding advisements to the contrary) and California currently provides no remedy under certain circumstances. She contends state courts *must* recognize the nonstatutory motion to vacate and provide a way to alleviate the immigration

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<sup>6</sup> Although the court failed to check either the grant or deny box on the form request, the parties assume the request was denied and we see no reason to find otherwise.

consequences of those pleas. She then attempts to distinguish the California Supreme Court's latest case on point (*Kim, supra*, 45 Cal.4th 1078) and complains the trial court improperly denied her request for an evidentiary hearing and misapprehended its jurisdiction.

The Attorney General argues the appeal should be dismissed for lack of a certificate of probable cause and that is where we shall begin.

### *Certificate of Probable Cause*

As noted, Nair filed a timely notice of appeal and request for certificate of probable cause. Although she characterized the appeal as one from an "order after judgment, affecting the substantial rights of the party," we conclude this is an appeal from the denial of a motion challenging the validity of a guilty plea and as such it is subject to the certificate of probable cause requirement. (§ 1237.5.)

Section 1237.5 governs a defendant's right to appeal "from a judgment of conviction upon a plea of guilty or nolo contendere" unless the defendant files a sworn written statement "showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" and the trial court "execute[s] and file[s] a certificate of probable cause." (§ 1237.5, subs. (a) & (b).) The exceptions to the general rule are appeals from the denial of a motion to suppress evidence (§ 1538.5) or if it is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B).) However, there is no exception based solely on the fact a motion simply involves a "proceeding that occurs *after* the guilty plea." (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) Regardless of the label attached to a motion, "courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.]" (*People v. Panizzon, supra*, 13 Cal.4th at p. 76.)

Recently, Division Six of the Second District determined an appeal from the denial of a section 1016.5 motion requires a certificate of probable cause to proceed

on appeal. (*People v. Placentia* (2011) 194 Cal.App.4th 489, 494.) If appeals concerning the trial court’s responsibilities to advise noncitizen criminal defendants of deportation, exclusion, or denial of naturalization before accepting a plea of guilty or no contest, require certification, we see no reason any motion, however labeled, should fall outside section 1237.5’s certificate requirement, and Nair fails to cite authority that would undermine our rationale. Furthermore, “When a defendant has failed to comply with the requirements of section 1237.5 and [California Rules of Court,] rule [8.304(b)], the Court of Appeal ‘generally may not proceed to the merits of the appeal, but must order dismissal . . . .’” [Citations.] (*In re Chavez* (2003) 30 Cal.4th 643, 651.) Consequently, Salazar’s appeal is dismissed.

#### *The Merits*

As Salazar seems to acknowledge, absent the creation of a new procedural vehicle to challenge pleas in cases such as his, there is no procedural vehicle to challenge them and undo the immigration consequences the criminal defendant may face or is currently facing.

In *Kim, supra*, 45 Cal.4th at p. 1078, the defendant, a noncitizen for more than two decades, was subject to federal removal proceedings because of state felony convictions. He petitioned the trial court in what he denominated a “motion to vacate judgment (*coram nobis*)” (capitalization omitted and italics added) and a “non-statutory motion and motion to vacate judgment.” (Capitalization omitted.) (*Id.* at p. 1089.) The second motion was, as is the motion here, based on counsel’s alleged failure to adequately investigate or explain the immigration consequences of the defendant’s plea. The California Supreme Court treated both motions as being for a writ of error *coram nobis* and concluded the writ was not available to the defendant.

The court emphasized the writ’s limitations and restated the requirements for the writ as explained in *People v. Shipman* (1965) 62 Cal.2d 226, 230: “(1) Petitioner must ‘show that some fact existed which, without any fault or negligence on his part, was

not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment.’ [Citations.] (2) Petitioner must also show that the ‘newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.’ [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner ‘must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . .’ [Citations.]”

As the *Kim* court noted, the writ of error *coram nobis* is unavailable when a litigant had a remedy by appeal or motion for new trial, and a writ of habeas corpus is unavailable absent the defendant being in “actual or constructive state custody.” (*Kim, supra*, at pp. 1093, 1099.) Furthermore, “the fact “[t]hat a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule. [Citations.]” (*Id.* at p. 1104.) Thus, Salazar’s attempt to skirt a procedural bar by labeling his motion as a nonstatutory motion to vacate judgment does nothing to change the outcome.

Salazar’s reliance on *Murgia, supra*, 15 Cal.3d 286 and *Fosselman, supra*, 33 Cal.3d 572 is misplaced. Neither case presents a situation that is analogous to the one here. Although the *Murgia* court held that the mere absence of statutory authority did not preclude the trial court from entertaining a motion to dismiss based on constitutional violations, it involved a discovery order sought to support a pretrial motion to dismiss. (*Murgia, supra*, 15 Cal.3d at p. 293, fn. 4.) *Fosselman* dealt with a motion for a new trial based upon ineffective representation. Under those circumstances, the court held a trial judge has a duty to consider violations of constitutional rights even though the pertinent statute did not specify ineffective representation as a ground for the motion. (*Fosselman,*

*supra*, 33 Cal.3d at p. 582.) Both cases involve motions made while the trial court still had jurisdiction of the cases, and neither holds the trial court has unfettered discretion to vacate judgments that have long been final.

In *Padilla*, the defendant had been a lawful permanent resident of the United States for over 40 years when he pled guilty to drug offenses. He alleged his counsel told him not to worry about his immigration status because he had been in the country so long. (*Padilla, supra*, \_\_\_ U.S. at p. \_\_\_ [130 S.Ct. at p. 1478].) After reviewing the dramatic changes in federal immigration law over recent years, the Supreme Court held *Padilla* had sufficiently alleged sufficient facts to support the first prong of the *Strickland* test (*Strickland v. Washington* (1984) 466 U.S. 668) in that under the pertinent federal statute his counsel should have “easily determined that his plea would make him eligible for deportation . . . .” (*Padilla, supra*, \_\_\_ U.S. at p. \_\_\_ [130 S.Ct. at p. 1483].) Although the opinion states the issue arose during postconviction proceedings, it does not appear that *Padilla* waited several years to initiate these proceedings. In fact, a fair reading of the Supreme Court’s opinion and the lower court opinion suggests the opposite. (*Id.* at pp. 1477-1478, 1485-1486.) Put simply, the court did not consider issues such as timeliness, pleading, proof requirements, California’s postconviction procedures or writs of error *coram nobis*. Cases are not authority for propositions *not* considered. (*People v. Ceballos* (1974) 12 Cal.3d 470, 481.)

In California at least, there is no special rule to apply when defense counsel’s motion argues a matter from a “purely constitutional” perspective. We must look at the context of the proceedings, the procedures already available, and the public policy considerations underlying those procedures. There is nothing special about raising a constitutional violation here because all ineffective assistance of counsel claims arise from the federal Constitution. In short, regardless of what the court understood about its jurisdiction over this matter, the court properly denied Salazar’s writ of error *coram nobis* masquerading as a nonstatutory motion.

Finally, the court did not abuse its discretion by denying trial counsel's second request for an evidentiary hearing. As the record demonstrates, counsel was afforded an adequate opportunity to request an evidentiary hearing. Instead, she decided to wait until after the court's ruling, and she makes no showing whatever evidence could have been presented would have affected the outcome. Under these facts, we would find no error even if we reached the merits.

#### DISPOSITION

The appeal is dismissed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.