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

THE PEOPLE,

Plaintiff and Respondent,

v.

YOLANDA ULLOA,

Defendant and Appellant.

H037701

(Santa Clara County

Super. Ct. No. 137963)

Defendant Yolanda Ulloa appeals from an order denying both her petition for writ of error *coram nobis* and her motion to vacate judgment pursuant to Penal Code section 1016.5.¹ We conclude that the trial court did not abuse its discretion and affirm.

I. Factual and Procedural Background

A jury found defendant guilty of arson of property (§ 451, subd. (d)) and dissuading a witness by force or violence (§ 136.1, subd. (c)(1)). The jury also found that defendant had committed the latter offense while on bail (§ 12022.1). Defendant appealed, and this court reversed the judgment on August 30, 1993.

A minute order, dated September 14, 1994, reflected that defendant pleaded no contest to dissuading a witness (§ 136.1, subd. (c)(1)) and vandalism (§ 594, subd. (b)(2))

¹ All further statutory references are to the Penal Code unless otherwise stated.

pursuant to a plea agreement. A second minute order stated that defendant was convicted of dissuading a witness and vandalism. It also stated, among other things, that: “[m]ay reduce to misdemeanor purs PC17 after succ compl of prob. (Misd traffic offenses as of this date not to be counted) This conviction does not count as strike.”

On July 18, 2008, defendant brought a motion for an order “reducing the felony[ies] in this case to misdemeanor[s].” On August 14, 2008, the trial court granted the motion as to the vandalism charge, noting that the conviction under section “136.1 (c)(1) is a non alternative felony.”

On March 4, 2011, defendant filed a petition for writ of error *coram nobis* in which she requested that the trial court correct its judgment “to reflect that the conviction under [section 136.1] in this matter was for misdemeanor battery, not a felony charge of dissuading a witness.” On June 17, 2011, defendant filed a motion to vacate the judgment and withdraw her plea under section 1016.5.

On October 11, 2011, the trial court denied both the petition for writ of error *coram nobis* and the motion to vacate judgment. Defendant then obtained a certificate of probable cause and filed a timely notice of appeal.

II. Discussion

A. Motion to Vacate Judgment

Defendant contends that the trial court erred in denying her motion to vacate judgment under section 1016.5.

Section 1016.5 requires that, before accepting a guilty or no contest plea, the trial court must advise the defendant that the plea “may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (§ 1016.5, subd. (a).) “To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly

advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised. [Citation.]” (*People v. Totari* (2002) 28 Cal.4th 876, 884.) With respect to the first element, there is a rebuttable presumption that the trial court did not give the advisement when there is no record of it. (§ 1016.5, subd. (b).)²

We review the trial court’s ruling under the abuse of discretion standard. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) “An exercise of a court’s discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. [Citation.]” (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.) “Moreover, a reviewing court must adopt the trial court’s factual findings if substantial evidence supports them. [Citation.]” (*People v. Fairbanks* (1997) 16 Cal.4th 1223, 1254.) In deciding whether the defendant has made an adequate showing under section 1016.5, the trial court “is the trier of fact and . . . judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences. [Citation.]” (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533, superseded by statute as stated in *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206, fn. 5.)

People v. Dubon (2001) 90 Cal.App.4th 944 (*Dubon*) is instructive. In *Dubon*, the defendant argued that the trial court had failed to advise him of the immigration consequences of his plea. (*Id.* at pp. 947-948.) *Dubon* stated that the presumption in section 1016.5 places on the prosecution “the burden of proving by a preponderance of

² Section 1016.5, subdivision (b) provides in relevant part: “Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.”

the evidence the nonexistence of the presumed fact, i.e., that the required advisements were given. [Citations.]” (*Dubon*, at p. 954.) *Dubon* held that a minute order which failed to state that the defendant had been “given the required advisement in full, or accurately” was insufficient to rebut the presumption that the defendant had been properly advised. (*Id.* at p. 955.) However, *Dubon* also held that a motion to withdraw a plea was properly denied when the trial judge, who had no independent recollection of the hearing, testified that his habit and custom in every case was to inform the defendant of the immigration consequences pursuant to section 1061.5. (*Dubon*, at pp. 949-950.)

Here, as in *Dubon*, there was no reporter’s transcript of the change of plea hearing. To rebut the presumption that defendant had not been properly advised of the immigration consequences of her plea, the prosecutor submitted the declaration by Judge Ball who presided at the hearing at which defendant entered her plea. His declaration stated: “I have no independent recollection regarding this case. ¶ . . . It is my practice, and always has been my practice since I was appointed to the Bench in 1986, to follow the same procedure each time a defendant wants to change his or her plea to guilty or no contest. ¶ . . . First, I make inquiry of each person who intends to plead guilty or no contest to determine whether they are under the influence of any medicine, drug or alcohol to ensure that each person is making the decision with a sound mind and free from any threats or promises. Immediately thereafter, I advise each defendant of the potential immigration consequences of his or her plea consistent with Penal Code § 1016.5, prior to the acceptance of a guilty plea or no contest plea. Specifically, I advise a defendant that if he/she was not a citizen of the United States, conviction of the offense for which he/she had been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Then I proceed with the remainder of the voir dire and taking of the plea. ¶ . . . I never assume that a defendant is a citizen and forego the admonishment

regarding immigration consequences of a guilty or no contest plea. There are times that I will preface the immigration warning with a comment acknowledging that likely the person is a United States citizen but that law still demands that I tell them the following information just in case it is applicable to him or her.” In addition, the court’s minutes indicated that the trial court generally advised defendant of immigration consequences of her plea.

Defendant submitted her own declaration in which she stated: “I do not recall ever being told that there would be any effect on my immigration status of any kind.” She also submitted her trial counsel’s declaration in which he stated that he did not advise her that her pleas carried immigration consequences and he did not recall the trial court advising defendant of immigration consequences during either the change of plea or sentencing hearings.

As in *Dubon*, here, the trial court was required to weigh the evidence presented by the prosecution against that presented by the defense. The trial court properly considered the minute order and Judge Ball’s declaration to determine whether the prosecution had met its burden of establishing that the proper advisement was given. In our view, this evidence was sufficient to rebut the statutory presumption. Thus, the trial court did not abuse its discretion in denying defendant’s motion to vacate judgment.

Relying on *Merrit v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, defendant argues that the trial court’s reliance on Judge Ball’s declaration was improper. In *Merrit*, a judge who had presided over the trial of the first action, which resulted in a judgment in favor of the plaintiff, testified as an expert witness for the plaintiff in the second trial. (*Id.* at p. 882.) The judge’s testimony included his expert opinion that a defense witness in the first trial had not been persuasive. (*Ibid.*) *Merrit* concluded: “We think it prejudicial to one party for a judge to testify as an expert witness on behalf of the other party with respect to matters that took place before him in his judicial capacity. In such

instance the judge appears to be throwing the weight of his position and authority behind one of two opposing litigants.” (*Id.* at p. 883.) *Merrit* is distinguishable from the present case. Here, Judge Ball was not testifying as an expert witness on behalf of the prosecution. Judge Ball’s declaration stated his practice to follow the same procedure in giving criminal advisements, particularly those relating to immigration consequences. Accordingly, we reject defendant’s argument.

Defendant next argues that “Judge Ball’s declaration is simply not as convincing” as the judge’s testimony in *Dubon*. She points out that in *Dubon* “not only was the judge’s testimony subject to cross-examination, but he testified that he took special care with his pleas, did not rush through the process, but attempted to ensure each defendant understood what was transpiring, and his written notes reflected that he was aware defendant was not a United States citizen.” We are not persuaded by this argument. Though the evidence may have been stronger in *Dubon*, here, the trial court could have reasonably concluded that defendant was advised of the immigration consequences based on the minute order and Judge Ball’s declaration in which he stated that his practice was to always outline the specific advisement required by section 1016.5.³

Defendant also focuses on language in *People v. Ramirez* (1999) 71 Cal.App.4th 519 that when “the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, [and thus] the legislative purpose of section 1016.5 is met. [Citation.]” (*Id.* at p. 522.) She contends that Judge Ball’s declaration failed to state that he had assured himself that she understood the advisements. We disagree. Judge Ball’s declaration stated that he inquired of “each person who intends to plead guilty or no

³ Since we conclude that the trial court did not err by finding that defendant was properly advised, we need not reach the issue of whether defendant established prejudice.

contest to determine whether they are under the influence of any medicine, drug or alcohol to ensure that each person is making the decision with a sound mind and free from any threats or promises” before he advised him or her of the potential immigration consequences. Based on this language, the trial court could have reasonably inferred that Judge Ball determined that defendant understood the advisements and could have conferred with her counsel had she chosen to do so.

B. Petition for Writ of Error *Coram Nobis*

Defendant also contends that the trial court erred in denying her petition for a writ of error *coram nobis*. She contends that the minute order indicating that she pleaded no contest to dissuading a witness (§ 136.1, subd. (c)(1)) and vandalism (§ 594, subd. (b)(2)) is incorrect. She claims that she pleaded no contest to misdemeanor battery (§ 242) and felony vandalism (§ 594, subd. (b)(2)) with the agreement that the felony conviction would be reduced to a misdemeanor upon successful completion of probation.

To support her claim, defendant submitted her own declaration in which she stated: “[I]t was explained to me that I would be pleading guilty to only one felony, a vandalism charge, and a second lesser charge of misdemeanor battery. I was told the District Attorney had agreed to dismiss the arson and dissuading a witness charges, and most importantly, he agreed to reduce the felony vandalism to a misdemeanor after one year. . . . [¶] . . . The agreement to get rid of the dissuading and arson charges, and the ability to reduce the vandalism charge to a misdemeanor after one year, were crucial facts that got me to change my pleas of not guilty to guilty. . . . [¶] . . . I believed that I did not need to do anything for the vandalism charge to be reduced to a misdemeanor, and I understood that this had occurred on its own in 1995. I certainly never believed that something had to be done with the dissuading a witness charge, as I fully understood that charge to have been dismissed and that I was only convicted of a misdemeanor battery. It

was not until I was recently charged with a DUI that I learned in 2008 that this case had never been reduced to a misdemeanor.”

Defendant also submitted a declaration by Steve Defilippis, who represented her at trial and after the judgment was reversed on appeal. According to Defilippis, the “agreement that the dissuading count would be amended to a misdemeanor [battery], and the ability to reduce the vandalism charge after one year, were material inducements for the change of pleas. Absent both of those agreements by the court and prosecutor, [defendant] would never have changed her pleas, and [he] never would have recommended that she do so.” Daniel Costello, who represented codefendant Alicia Pacheco at the time of the plea, stated that the dissuading the witness charge was dropped and both defendants agreed to plead guilty to misdemeanor battery and felony vandalism, which would be reduced after one year.

The prosecutor submitted various exhibits to counter defendant’s claim. The minute order for the change of plea hearing on September 14, 1994 stated that defendant was charged with: section 451, subdivision (d) (count 1) [arson of property], section 136.1, subdivision (c) (count two) [dissuading a witness], section 451, subdivision (c) (count 3, which was “previously resolved by acquittal” [arson of a structure]), section 594, subdivision (b)(2) (count 4, which was “added today,” “same date, time, place as ct 1” [vandalism]). The minute order also stated that defendant entered no contest pleas to counts 2 and 4, and count 1 and the enhancement to count 2 were dismissed. The minute order for the codefendant contained the same information. In her reduction application in 2008, defendant listed the charges as violations of section 136.1 and section 594, subdivision (b)(2).

The prosecutor also submitted her own declaration in which she stated that the prosecution’s file did not contain the change of plea checklist and other documents that reflected the resolution of the case. She stated that she had spoken with various

individuals associated with the case, but they could not remember how it was resolved. She also found a letter, dated May 15, 2001, in the court file. It was addressed to the clerk of the court from Wayne H. Price, assistant district counsel for the Immigration and Naturalization Service (INS). Price informed the reader that he was enclosing a conviction document that his office had received from the clerk of the court and he requested a certified copy of the conviction for a hearing before an immigration judge. Attached to the letter was a fax referring to defendant's convictions. The prosecutor also stated that she had contacted the Immigration Court Information System and learned that defendant was ordered deported after a hearing on October 22, 2001.

Defendant filed a motion to strike all hearsay from the prosecutor's declaration, including her statement that defendant was deported in 2001. Defendant also objected to the letter from INS on the ground that it was not a certified document.

In denying the petition, the trial court found: (1) defense counsel's failure to ensure the plea was properly entered may have constituted ineffective assistance, which was not grounds for relief; and (2) defendant failed to show diligence in bringing the petition. Regarding delay, the trial court found: (1) defendant failed to file an application for a reduction to a misdemeanor in 1995, and, had she done so, she would have learned of the convictions; (2) following a hearing, defendant was ordered deported in 2001 based on her 1994 plea; and (3) defendant was aware of the alleged plea problem in 2008 when she filed for a reduction to a misdemeanor and listed the convictions listed in the abstract of judgment, yet she gave no reason for a three-year delay in bringing the petition and the motion. The trial court concluded that the delay prevented it from "reviewing the now-destroyed transcripts and has eroded relevant witnesses' memories."

"The writ of [error] *coram nobis* is granted only when three requirements are met. (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.]” (*People v. Kim* (2009) 45 Cal.4th 1078, 1093.) We review the trial court’s ruling on a petition for writ of error *coram nobis* under the abuse of discretion standard. (*Id.* at pp. 1095-1096.)

In the present case, defendant failed to show that she exercised due diligence in discovering any alleged error in the court records.⁴ Defendant would have learned of the convictions for vandalism and dissuading a witness if she had filed an application for a reduction in 1995 when her probation terminated. However, it was not until July 2008 that she filed her application. She then waited until March 2011 to file her writ petition. We find no merit in her claims that it was a “complicated process,” that the record was lengthy, and that the issues in her two motions were numerous and complex. In our view, defendant failed to provide a satisfactory explanation for the delay of two years and seven months. (See *People v. Fritz* (1956) 140 Cal.App.2d 618, 620 [trial court properly denied writ of error *coram nobis* where the defendant offered no explanation for the two-year delay in filing the writ].)

⁴ We do not consider the hearsay in the prosecutor’s declaration (Evid. Code, § 1220). Nor do we consider the document from the INS. Though the document is admissible under the public employee record exception to the hearsay rule (Evid. Code, § 1280), it does not establish that a deportation hearing was held or that defendant was present at such hearing.

Defendant argues that the prosecution failed to show prejudice resulting from the delay. Citing Defilippis' declaration, she claims that the record establishes that the transcripts had already been destroyed by 2008. His declaration does not support her claim, because he does not indicate when the court reporter's notes had been destroyed.

In sum, we conclude that the trial court did not abuse its discretion in denying the petition for writ of error *coram nobis*.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Grover, J.