Filed 8/27/18 P. v. Marugg CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KIM MARUGG, Defendant and Appellant.	D072065 (Super. Ct. No. SCD160711)

APPEAL from orders of the Superior Court of San Diego County, Kathleen M. Lewis, Judge. Affirmed in part, reversed in part, and remanded with directions.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

In 2003, defendants Jose Luis Alvarez (Alvarez), and Kim Marugg (Marugg), at the time known as Kim Alvarez, (together Defendants), each pled guilty to one count of conspiracy to misrepresent a fact in violation of Penal Code section 182, subdivision (a)(1).[1] An accused violates section 182, subdivision (a)(1), upon sufficient proof that he or she conspired to commit a crime. The crime here, Insurance Code section 11880, subdivision (a), is the making of a knowingly false or fraudulent statement of any fact material to the determination of the cost of workers' compensation insurance issued or administered by the State Compensation Insurance Fund (SCIF) for the purpose of reducing the cost. Each was sentenced to probation—Marugg in December 2003, and Alvarez in March 2005.

More than 12 years later in 2016, Defendants filed petitions for writs of error *coram nobis* and section 1473.7 motions to vacate their respective convictions. The trial court denied the requested relief, as well as Defendants' later motions for reconsideration. Defendants each appealed from two separate orders: (1) March 2017 orders denying Defendants' petitions for writs of error *coram nobis* and section 1473.7 motions to vacate their convictions (*coram nobis*/1473.7 order); and (2) April 2017 orders denying Defendants' motions for reconsideration of the *coram nobis*/1473.7 order (reconsideration order).[2] Alvarez later abandoned his appeal.

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1 Further undesignated section references are to the Penal Code.

2 Throughout the underlying proceedings, Alvarez and Marugg filed separate documents, and the trial court entered separate orders as to each party's individual

In Marugg's *coram nobis*/1473.7 order, the trial court ruled that Marugg was not entitled to *coram nobis* relief on both procedural and substantive grounds and that Marugg was not entitled to section 1473.7 relief. We agree with the trial court's ruling denying *coram nobis* relief. However, in denying the section 1473.7 motion to vacate the conviction, the trial court erred in failing to hold a hearing and in failing to specify the basis for its ruling—contrary to section 1473.7's express statutory directives. As we explain, the court's failure to provide the basis for its denial of the motion adversely affects our ability to provide appellate review. Accordingly, we will affirm the denial of the *coram nobis* relief and reverse the denial of the section 1473.7 relief; and we will remand the matter with directions that the court hold a hearing on Marugg's section 1473.7 motion and provide the basis for its conclusion.

The trial court denied the Code of Civil Procedure section 1008 motion for reconsideration on the independent bases that section 1008 does not apply to criminal cases and that Defendants did not follow the proper procedure for seeking the requested relief under section 1473.7. Because Marugg does not present any argument on appeal as to the reconsideration order, we deem her to have abandoned her appeal from that order. Accordingly, we will affirm the reconsideration order.

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requests. Defendants' two *coram nobis* petitions are virtually identical; Defendants' two section 1473.7 motions are virtually identical; the court's two orders denying *coram nobis*/1473.7 relief are virtually identical; and the court's two orders denying reconsideration are virtually identical. Thus, unless necessary for context, we will not differentiate between either petition, either motion, either *coram nobis*/1473.7 order, or either reconsideration order.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Because the trial court's orders on appeal are " 'presumed correct,' " we " ' view the record in the light most favorable to the trial court's ruling.' " (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046; accord, *People v. Crawford* (1959) 176 Cal.App.2d 564, 567 [in appeal following *coram nobis* proceedings, "where the evidence before the trial court is conflicting, it is the duty of the appellate court to accept that version of the evidence supporting a denial of his motion"].) " 'The burden is on the appellant in every case affirmatively to show error[.]' " (*People v. Homick* (2012) 55 Cal.4th 816, 861.)

A. *Charges; Plea; Judgment (June 2002 - March 2005)*

In June 2002, at a time when Alvarez and Marugg were husband and wife, Defendants were charged by indictment, along with several others who are not parties to this appeal, with 24 counts, as follows: three counts of conspiracy to commit misrepresentation of a fact (§ 182, subd. (a)(1); counts 1, 10, and 16); 15 counts of misrepresentation of a fact (Ins. Code, § 11880, subd. (a); counts 2-9, 11-15, 23-24); one count of conspiracy to fail to file a return in a timely manner (§ 182, subd. (a)(1); count 20); and five counts of failure to file a tax return in a timely manner (Unemp. Ins. Code, § 2117.5; counts 17-19, 21-22). The indictment further alleged that, in the commission of counts 1, 10, 16, and 20, the loss exceeded $150,000 (§ 12022.6, subd. (a)(2)).

More than a year and a half later, in December 2003, Alvarez and Marugg each pled guilty to count 1—conspiracy to misrepresent a fact material to the determination of

the cost of workers' compensation insurance issued or administered by the SCIF for the purpose of reducing the cost (§ 182, subd. (a)(1); Ins. Code, § 11880, subd. (a)).[3] Alvarez and Marugg testified that the factual bases of their respective pleas were contained in the transcript from the grand jury proceedings that resulted in the indictment and in subsequently provided discovery. Alvarez pled guilty to a felony violation,

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3 Count 1 of the June 2002 indictment provides as follows:

"On or about February 1, 2000, [codefendant 1, Alvarez, Marugg, and codefendant 2] did unlawfully conspire together and with another person and persons whose identity is unknown to commit the crime of Misrepresentation Of A Fact, [Insurance Code section]11880[, subdivision](a), in violation of Penal Code section 182[, subdivision](a)(1).

"The object of the conspiracy, [codefendant 1, Alvarez, Marugg and codefendant 1] agreed that Alvarez would pay [codefendant 1] an amount that would allow [codefendant 8] to pay Alvarez's employees cash wages and, at the same time, [codefendant 1] would make a profit on thos[e] wages for paying Alvarez's employees in cash; thereby allowing Alvarez to save money by filing false reports with State Compensation Insurance Fund indicating Alvarez had no payroll. This was done for the purpose of unlawfully reducing the amount of Alvarez's Workers' Compensation Insurance premium.

"Thereafter, in the County of San Diego, State of California, pursuant to the above conspiracy and in furtherance of the objects thereof:

"Overt Act No. (01): On or about February 1, 2000, [Marugg or Alvarez] wrote bank checks for the amount of Alvarez's payroll being handled by [codefendant 1].

"Overt Act No. (02): The above checks were provided to [codefendant 1] or [codefendant 8] by [Marugg] or [Alvarez].

"Overt Act No. (03): [Codefendant 1] would cash the checks, obtaining cash money.

"Overt Act No. (04): [Codefendant 1] would pay Alvarez's employees cash wages.

"And it is further alleged that in the commission and attempted commission of the above offense, the said defendants, [codefendant 1, Alvarez, Marugg, and codefendant 8] did take, damage and destroy property, with the intent to cause such taking, damage and destruction, and the loss exceeds one hundred fifty thousand dollars ($150,000), within the meaning of Penal Code section 12022.6[, subdivision](a)(2)." (Some capitalization omitted.)

Marugg pled guilty to a misdemeanor violation, and at the request of the prosecutor the court dismissed the remaining 23 counts against each.

Alvarez's written guilty plea form in part discloses Alvarez's understanding of the following negotiated agreement: no jail time, and payment of $314,600 in restitution with an initial payment of $100,000 at the time of sentencing and the balance over the following 33 months. Marugg's written guilty plea form in part discloses Marugg's understanding of the following negotiated agreement: no jail time, "fine and/or restitution to be paid through *People v. Jo[s]e Alvarez*. ([Marugg] understands that Jo[s]e Alvarez's payments will be taken into account in Family Court proceedings for purposes of valuation of community property. However, the People will have no recourse against [Marugg's] community assets in payment of the fines and restitution owed.[)]"

The court sentenced Marugg immediately, requiring one day in custody, three years' probation, payment of certain fines, and "joint[] and several[] responsibil[ity] for restitution . . . which is to be paid by the defendant's husband, co-defendant Jose Alvarez." A little over one year later, in March 2005, the court sentenced Alvarez, requiring five years' probation, payment of certain fines, and $214,600 in restitution[4]—with the fines and restitution payable at a monthly rate of $1,600.

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4 Alvarez's December 2003 plea agreement required payment of $314,600 in restitution, with $100,000 prior to sentencing. The sentencing was delayed, at least in part, to allow Alvarez sufficient time to sell Defendants' home to obtain the initial $100,000.

B. *Petition for Writ of* Coram Nobis*; Section 1473.7 Motion to Vacate Conviction; Motion for Reconsideration (July 2016 - April 2017)*

More than 11 years after Alvarez's 2005 judgment and more than 12 years after Marugg's 2003 judgment, in July 2016 Defendants filed a petition for writ of error *coram nobis*, seeking to withdraw their guilty pleas and to dismiss the charges. In support of the petition, Defendants included a statement of facts, a memorandum of points and authorities, and 14 exhibits,[5] including a declaration from Marugg regarding the underlying facts.[6] Marugg summarized her position as follows: "Due to a series of improper forces beyond Petitioner's control, she was led to plead guilty to an offense she did not commit." Marugg further explained that, "due to the complexity of the issues, including an analysis by a forensic accountant, which was not complete until approximately five months ago," "Petitioner has only recently become aware of the full extent of the facts showing a deprivation of her rights to due process and effective counsel." Marugg expressly asked for a hearing on the petition.

The trial court found that the petition stated a prima case for relief and ordered the People, through the district attorney, to file an informal response. In December 2016, the

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5 The record contains copies of only Marugg's exhibits in support of her petition. According to the People's informal response to the petition (see text, *post*), Alvarez and Marugg submitted 13 of the same exhibits, and Marugg submitted one additional exhibit.

6 In one section of the petition, Defendants also sought postconviction relief under section 1473.6, which allows for a judgment to be vacated where the defendant is no longer unlawfully imprisoned or restrained and there is a sufficient showing of newly discovered evidence of fraud, false testimony, or specified misconduct by "a government official" in the criminal proceedings that resulted in the defendant's conviction.

People filed their informal response, which included a memorandum of points and authorities and 14 exhibits.

Later in December 2016, Defendants filed a "supplement" to their petition. In the supplement, Defendants sought, first, to have their convictions vacated pursuant to section 1473.7, subdivision (a)(2), and, second, to have a finding of factual innocence pursuant to section 851.8, subdivision (d).[7] Defendants relied on the same evidence and arguments that they submitted in support of the petition for writ of error *coram nobis*. In giving notice of the supplement to their petition (which, at times, we will refer to as a motion), Defendants advised that the section 1473.7 motion would be based in part "on such oral and documentary evidence as may be presented at the hearing." In their legal argument, Defendants expressly quoted from those portions of section 1473.7 that require

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[7] Section 1473.7 provides: "(a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons: [¶] . . . [¶] (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice." As Defendants explained in their supplement, section 1473.7 would first become effective weeks later on January 1, 2017. (Stats. 2016, ch. 739, § 1.)

Section 851.8, subdivision (d) provides: "In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading." The principal relief provided in subdivision (b) includes a finding of "factual[] innocen[ce] of the charges for which the arrest was made" and an order to various law enforcement agencies to seal and destroy their records of the arrest and the court order. (§ 851.8, subd. (b).)

both a hearing and a specification of the basis of the court's ruling.[8] (§ 1473.7, subds. (d), (e)(2).)

The People filed a "supplemental informal response," which was in opposition to Defendants' section 1473.7 motion.

Defendants filed an "informal reply" that responded to both the People's informal response to the petition and the People's opposition to the section 1473.7 motion. Defendants included a separately identified one-page argument requesting a hearing and quoting from that portion of the statute, subdivision (d), requiring a hearing on all motions. In support of the reply, Defendants also submitted a declaration from Alvarez, two additional declarations from Marugg, and 42 additional exhibits.

Finally, Defendants submitted a supplement to their informal reply in support of both the *coram nobis* petition and the section 1473.7 motion.

In March 2017, the superior court denied the petition for writ of error *coram nobis* (previously identified as the *coram nobis*/1473.7 order) on two independent bases. First, as a prerequisite to consideration of the merits, Defendants did not establish the required due diligence in discovering the "new" evidence that formed the basis of the petition. Second, on the merits, the court discussed and rejected each of the arguments Defendants proffered in support of *coram nobis* relief.

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[8] Section 1473.7 provides: "(d) All motions shall be entitled to a hearing. . . . [¶] (e) When ruling on the motion: [¶] . . . [¶] (2) In granting or denying the motion, the court shall specify the basis for its conclusion."

Also in the *coram nobis*/1473.7 order, the superior court denied the section 1473.7 motion in one sentence: "Lastly, petitioner fails to establish relief under Penal Code section 1473.7."[9]

Defendants filed a motion for reconsideration, seeking an order for "an evidentiary hearing regarding factual [*sic*] innocence, as required by Penal Code section 1473.7." Defendants pointed out that, as part of the section 1473.7 motion, they specifically requested a hearing pursuant to subdivision (d)'s directive that "All motions shall be entitled to a hearing." In the points and authorities in support of the motion, Defendants also complained that the court failed to identify the grounds upon which the court denied section 1473.7 relief, contrary to subdivision (e)(2)'s requirement that "the court shall specify the basis for its conclusion."

By order filed in April 2017, the superior court denied reconsideration of the *coram nobis*/1473.7 order (previously identified as the reconsideration order).

Defendants timely appealed from both the *coram nobis*/1473.7 order and the reconsideration order.[10] Following briefing on appeal, Alvarez abandoned his appeal,

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9 In the *coram nobis*/1473.7 order, the court also denied relief under section 1473.6. On appeal, Defendants do not present any argument or authority related to this ruling.

10 Because Marugg has not presented on appeal any argument or authority as to potential error in the trial court's denial of reconsideration, Marugg did not meet her burden of establishing reversible error. Accordingly, we affirm the reconsideration order. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief an issue on appeal "constitutes a waiver or abandonment of the issue"].)

and in August 2018 we dismissed his appeal and issued the remittitur. (Cal. Rules of Court, rule 8.316.)

II.

DISCUSSION

On appeal, we are presented with two substantive rulings from the *coram nobis*/1473.7 order: (1) the denial of a petition for writ of error *coram nobis*; and (2) the denial of a motion to vacate a conviction under section 1473.7, subdivision (a)(2), and to have a finding of factual innocence under section 851.8. As we explain, we will affirm the denial of the *coram nobis* petition and reverse the denial of the section 1473.7 motion and remand with directions that the court hold a hearing and specify the basis of the ruling it reaches following the hearing.

A. *The Trial Court Did Not Err in Denying* Coram Nobis *Relief*

Summarizing almost a century of California precedent, our Supreme Court recently discussed the remedy of the writ of error *coram nobis*. (*People v. Kim* (2009) 45 Cal.4th 1078 (*Kim*).)

" ' "The office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment therein; or infancy, where the party was not properly represented by guardian, or coverture, where the common-law disability still exists, or insanity, it seems, at the time of the trial; or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being

such as, if known in season, would have prevented the rendition and entry of the judgment questioned." ' " (*Kim*, *supra*, 45 Cal.4th at p. 1092, quoting *People v. Reid* (1924) 195 Cal. 249, 255, overruled in part on other grounds in *People v. Hutchinson* (1969) 71 Cal.2d 342, 347-348.) "Such facts often go to the legal competence of witnesses or litigants, or the jurisdiction of the court. New facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have *prevented rendition of the judgment*." (*Id.* at p. 1103, italics added.)

Relying on Supreme Court authority established more than a half century ago, the *Kim* opinion sets forth the "modern requirements" for obtaining a writ of error *coram nobis*: " '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[.] " ' " (*Kim, supra,* 45 Cal.4th at pp. 1092, 1093, quoting *People v. Shipman* (1965) 62 Cal.2d 226, 230 (*Shipman*), quoting *People v. Shorts* (1948) 32 Cal.2d 502, 513.)

In this latter regard, and as particularly apt here, " 'a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*' [citations], and the burden falls to defendant 'to explain and justify the delay' [citation]. '[W]here a defendant seeks to vacate a solemn judgment of conviction . . . the showing of diligence essential to the granting of relief by way of *coram nobis* should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud. In such cases it is necessary to aver not only the probative facts upon which the basic claim rests, *but also the time and circumstances under which the facts were discovered,* in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient.' . . . [¶] [W]e require a petitioner to set forth with specificity when 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.' " (*Kim, supra,* 45 Cal.4th at pp. 1096-1097.)

We review the superior court's decision to deny a writ of error *coram nobis* for an abuse of discretion. (*Kim, supra,* 45 Cal.4th at p. 1095.) This standard varies, depending on the specific ruling under review: "The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior*

Court (2008) 43 Cal.4th 706, 711-712, fns. omitted.) Here, the trial court ruled that Marugg "fail[ed] to establish due diligence in seeking *coram nobis* relief." As we explain, that finding is well supported by substantial evidence.

In 2003, Defendants pled guilty to conspiring to misrepresent a fact material to the determination and reduction in the cost of workers' compensation insurance issued or administered by SCIF. Based on the evidence in the grand jury transcripts, the overt acts to which Defendants pled guilty, and the facts in Alvarez's probation report (which relied heavily on the grand jury reports), the conspiracy was as follows: Alvarez Construction[11] had employees; as a result, Alvarez Construction owed both wages to its employees and premiums for related workers' compensation insurance; with regard to the majority of Alvarez Construction employees, rather than pay these wages and premiums, *in 2000*, Alvarez or Marugg wrote checks to codefendant 1, who purported to act as a subcontractor responsible for Alvarez's payroll; codefendant 1 would negotiate the checks, obtain cash, and pay these Alvarez Construction employees in cash; by not including the cash wages paid to its employees through codefendant 1, Alvarez Construction would underreport its true payroll to SCIF, which administered workers' compensation insurance; by underreporting its payroll, Alvarez Construction was underpaying workers' compensation insurance premiums for its employees; and by

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11 In the petition for writ of error *coram nobis*, Defendants alleged that, as of 2001, "J. Alvarez Construction" operated as a framing contractor and previously Defendants operated "a separate company entitled 'Joseph Alvarez Construction[,'] which . . . ceased operations in 1997." The indictment does not identify the business at issue, and the probation report refers only to "Alvarez Construction."

underpaying insurance premiums, Alvarez Construction's overhead was lower, which allowed Alvarez Construction to be more competitive for bids on jobs, while increasing profits.

Marugg's guilty plea *in 2003* "admit[ted] every element of the charged offense."[12] (*In re Chavez* (2003) 30 Cal.4th 643, 649; accord, *People v. De Vaughn* (1977) 18 Cal.3d 889, 895 [a guilty plea "admits all matters essential to the conviction"].) Consistently, in his *February 2004* probation interview, Alvarez admitted that what both he and Marugg did was wrong.

Twelve years later, *in 2016*, Marugg filed a petition for writ of error *coram nobis*. With regard to diligence, she alleged that she "did not discover and appreciate that her guilty plea was improperly and incorrectly obtained until recently."

We now consider the evidence in support of these allegations, keeping in mind that the requisite showing of diligence "should be no less than the similar showing required in civil cases where relief is sought against lately discovered fraud[, including] *the time and circumstances under which the facts were discovered . . . .*"[13] (*Kim, supra*,

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12 A defendant's reason for pleading guilty does not necessarily affect the validity of the plea. (*North Carolina v. Alford* (1970) 400 U.S. 25, 31, italics added [postconviction relief denied where defendant pled guilty to second degree murder, while at the same time claiming innocence, in order to avoid the death penalty if convicted of first degree murder].)

13 The declarations and exhibits are thorough and voluminous and contain evidence on various issues—innocence, conflicts of interest, prejudice, ineffective assistance of counsel, a similar case, and a 2016 forensic accounting, to name a few. Since our decision is based on diligence, our discussion of the evidence is limited accordingly.

45 Cal.4th at pp. 1096-1097.) Marugg submitted three declarations—one in July 2016 in support of her petition, and two in January 2017 in support of her reply to the People's informal response to the petition—and two sets of exhibits.

Marugg first testified that, although she "was *not* guilty of the charges and . . . insistent on moving forward to trial," she nonetheless pled guilty in *December 2003* because the plea agreement "sounded like a sound financial decision." Thus, Marugg's due diligence requirement for *coram nobis* relief was triggered as of December 2003 when she was convicted of a crime she did not believe she committed.

Much of Marugg's *January 2017* testimony attempts to impeach evidence presented to the grand jury in *May 2002*. Marugg denied portions of witnesses' grand jury testimony, presented evidence that she contended contradicted grand jury evidence, and identified facts that she believed discredited grand jury witnesses.

Marugg testified that the sentencing judge did not follow the terms of her plea agreement and that, had she been "[]aware of the [sentencing] judge's order and the consequences it would have on her community property estate," she "would have withdrawn [her guilty] plea" before sentencing *in December 2003.*[14]

Without any date, identification of the defense attorney involved, or description of the communication, Marugg testified she had "since learned" that, at time she pled guilty in 2003, "defense counsel was colluding with [Alvarez's] family law attorney[.]"

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14 We assume that Marugg meant that she would have asked the trial court whether it would allow her to withdraw her plea.

Marugg further testified that she and the prosecutor began a personal relationship on some undisclosed date after December 8, 2003; she and Alvarez separated in February 2003; and she and Alvarez began dissolution of marriage proceedings in January 2004. Evidence in the record confirms that the prosecutor died in October 2013, at which time he and Marugg were married.[15] Again without specifying a date, Marugg testified that, at some point in time *after* she had begun her personal relationship with the prosecuting deputy district attorney in December 2003, she reviewed the grand jury transcripts and certain unidentified documents that she found in the prosecutor's files. Based on what she found, Marugg testified that her defense attorney "completely failed to identify and present evidence that exonerated [her] as well as failed to challenge by way of motions false evidence that was presented to the Grand Jury and challenge the prosecutor's failure to present exonerating evidence to the Grand Jury." That said, Marugg failed to identify what "exonerating evidence" was available but not presented to the grand jury proceedings or what "false evidence" was presented to the grand jury.

In *January 2007*, Marugg filed what she calls a "Petition for Expungement" of the conviction, seeking relief under sections 1203.4 and 1203.4a—both of which, upon the

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15 In the points and authorities in support of his petition, Alvarez argues (without accurate citation to evidence): "In January 2004, following [Alvarez's] plea, he and his then-wife [Marugg] began divorce proceedings. Because [the prosecuting deputy district attorney] was aware the couple was in divorce proceedings, he contacted [Alvarez's] wife periodically, inquiring as to the progress of the divorce. At some point in 2004, [the prosecutor] professed his affection for [Alvarez's] wife, which was no doubt present during the criminal proceedings. [Citation.] [The prosecutor] then engaged in a marital affair with [Alvarez's] wife until 2009, when the two moved in together. Eventually [Marugg] married [the prosecutor] in June 2010."

required showing, allow a defendant to withdraw a guilty plea and the court to dismiss the accusatory pleading. At the *March 2007* hearing, for a reason irrelevant to any issue in this appeal, the court took the matter off calendar without prejudice. What is relevant is that, in early 2007, Marugg believed she had a basis on which to expunge her conviction yet failed to follow through.

In *November 2009*, Marugg returned a call that had been placed to the prosecuting deputy district attorney—a man with whom Marugg had continued a personal relationship since at least 2003—by a woman (1) who previously had been prosecuted by the same deputy district attorney, and (2) with whom the prosecutor later engaged in a romantic relationship. This woman's story was "almost identical" to Marugg's. This woman complained to the district attorney's office, and at some point during the *August - October 2010* time period, the office commenced an internal affairs investigation of the prosecutor. During the investigation, Marugg learned that the prosecutor had engaged in "personal" and "romantic" relationships with other defendants he had prosecuted, as well as one of the principal witnesses, the SCIF investigator, whom the prosecutor had presented to the grand jury in May 2002 in his effort to indict Defendants.[16] Finally, based on these and other facts, the complaining woman filed a petition for writ of error

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16 In fact, on a later undisclosed date *in 2010*, the SCIF witness called the prosecutor's phone, Marugg answered, and the SCIF witness confirmed that she and the prosecutor had been " 'best friend[s] for nine and a half years' "—which would have included when she testified in May 2002 before the grand jury that indicted Defendants.

coram nobis in April 2011, and in *May 2011*, the superior court granted the requested relief, ruling in part as follows:

> "The court concludes that there have been substantial irregularities in the prosecution of this case, of which the court was unaware until this petition, that undermine the lawfulness of defendant's conviction. Petitioner has discovered the assigned prosecutor's undisclosed conflict of interest and established that the prosecutor obtained her conviction as the result of his failure to discharge ethical obligations."

Based on the evidentiary presentation in support of her *coram nobis* petition, in *May 2011* Marugg was aware of this ruling in favor of the woman who complained about the prosecutor's undisclosed conflict of interest—and a related order finding the woman factually innocent under section 851.8, subdivision (d).

Also during the *August - October 2010* time period, the prosecutor authorized his attorney to answer any questions Marugg might have and to provide Marugg with access to any information she might request. In fact, the record contains a copy of a confidential communication from the prosecutor's attorney to Marugg in *November 2010* regarding the evidence against the prosecutor. The communication confirmed the prosecutor's multiple affairs, as well as his strategy to retire and thereby conclude the internal affairs investigation by the district attorney's office.

In *September 2011*, at Marugg's request, the prosecuting deputy district attorney (who, by this time, was Marugg's husband) provided Marugg with a declaration that she submitted to the State Bar of California as part of a complaint she filed against the defense attorney who represented her at the time she pled guilty and was sentenced in

2003. In part, the prosecutor testified that, as early as 2002, he knew that "[Marugg] was not the guilty party."

A year later, in *September 2012*, Marugg (through counsel who represented her in the underlying *coram nobis* proceedings in the trial court) wrote a letter to the district attorney, asking that the People stipulate to allow Marugg to withdraw her plea. The letter set forth a lengthy factual basis in support of the request and included a copy of the 2002 grand jury transcript. The People declined Marugg's request in an October 2012 letter.

After gaining information in *2015* regarding what Marugg considered to be criminal behavior of one of the SCIF investigators who testified before the grand jury in *May 2002*, Marugg requested and obtained copies of all of the state's records from its investigation into the activities of Alvarez Construction that led to the grand jury evidence, the indictment, and the convictions. She received the initial documents in *July 2015* and retained a forensic accounting firm in *November 2015*. Marugg obtained additional documents in *April 2016*, and the forensic accountant provided his analysis and final opinions in *July 2016*. In general, the forensic accountant presented two opinions: (1) the SCIF accounting that was presented to the grand jury that indicted Defendants was inaccurate; and (2) the state incorrectly accounted for a restitution payment Alvarez made in *January 2005*.[17]

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17 At the conclusion of his seven-page declaration, the forensic accountant summarized his opinions as follows: "Based on the foregoing, it appears the [state]

Marugg's position with regard to due diligence is straightforward: She did not have a basis on which to seek *coram nobis* relief until she received the report from the forensic accountant in *July 2016*, and she filed the petition in *July 2016*. Nonetheless, the trial court found that Marugg did not exercise due diligence. Because, as we explain, that finding is supported by substantial evidence, the court did not abuse its discretion in so ruling.

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence . . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citations omitted.) " ' "[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the [challenged findings.]" ' " (*People v. Semaan* (2007) 42 Cal.4th 79, 88.) " '[W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the [trier of fact]. It is of no consequence that the [trier of fact] believing other evidence, or drawing different inferences, might have reached a contrary conclusion.' " (*People v.*

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issued numerous conflicting and inaccurate notices, assessments and payroll tax liens against [J. Alvarez Construction] and Mr. Alvarez which began prior to December 8, 2003 plea agreements and included assessments during periods in which [J. Alvarez Construction] was not operating. Additionally, the [state] assigned multiple account numbers to [J. Alvarez Construction] and deposited funds meant for restitution in an account unrelated to the criminal case."

Ghipriel (2016) 1 Cal.App.5th 828, 832.) Accordingly, "we will look only at the evidence and reasonable inferences supporting the successful party, and disregard the contrary showing." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631 (*Howard*).) The issue on appeal is not whether there is evidence in the record to support a finding the appellant wishes had been made, but whether there is evidence that, if believed, would support the finding actually made. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873 (*Bowers*).)

Although the forensic accountant's expert opinion may be considered "new evidence," it is new only because Marugg did not retain the accounting firm until *November 2015*—which was 12 years after pleading guilty to the charges.[18] The forensic accountant testified that his principal opinion—namely, that the SCIF accounting that was presented to the grand jury was inaccurate (see fn. 16, *ante*)—was based entirely on "case documents" of the audit that formed the basis of the indictment and Defendants' December 2003 guilty pleas. The record contains no evidence that any of the "case documents" were created after the guilty pleas; to the contrary, the reasonable inference is that, once Defendants pled guilty, there would be no need to place any additional documents in the case file. In short, every document on which the forensic accountant's

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18 We note that the standard for granting *coram nobis* relief is " ' "*newly discovered* evidence" ' " (*Kim*, *supra*, 45 Cal.4th at p. 1093, italics added), not *new evidence*. We question how an opinion in a 2016 declaration of an expert retained in 2015 is " ' "newly discovered evidence" ' " of " ' "some fact [that] existed which, without any fault or negligence on [petitioner's] part, was not presented to the court at the [2003 plea], and which if presented would have prevented the rendition of the judgment." (*Ibid.*)

July 2016 testimony as to the inaccuracy of the SCIF accounting is based was available to Marugg in *December 2003*, prior to pleading guilty; and, correspondingly, the principal opinion on which Marugg relies deals only with events that *preceded* her plea.

Likewise, to the extent Marugg is relying on the forensic accountant's opinion that the state incorrectly accounted for a restitution payment Alvarez made two years after his guilty plea, the analysis and result as to Marugg's due diligence are no different. Even if we assume that an error in the accounting related to restitution payments could form the basis of *coram nobis* relief,[19] the alleged error occurred in *January 2005*—which was one year after Marugg pled guilty, one year after Marugg was sentenced, and 11½ years *before* Marugg filed the petition for a writ of error *coram nobis*.

Marugg presented numerous postjudgment discoveries of various facts that she contends raise issues of irregularities—e.g., a prosecutor with a history of improper personal relationships with defendants and witnesses, including Marugg and a SCIF grand jury witness; errors in restitution accounting; grand jury witnesses with biases; grand jury evidence that lacked credibility; and incomplete production of documents from state files. Marugg then suggests that, because she was discovering this new evidence over the course of more than 12 years, she was proceeding diligently until, ultimately in July 2016, the forensic accountant provided her with sufficient evidence to seek *coram nobis* relief. To the extent Marugg is arguing that, based on this evidence,

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19 We question how a 2016 accounting of a 2005 restitution payment based on a 2004 judgment could " ' "have prevented the rendition of the judgment" ' "—a requirement for *coram nobis* relief according to *Kim, supra,* 45 Cal.4th at page 1093.

the record does not contain substantial evidence of a lack of due diligence, we disagree for a number of reasons.

First, Marugg assumes that the court was required to credit her testimony regarding her efforts over the 12 years between the December 2003 guilty plea and the July 2016 petition for writ of error *coram nobis*. However, the trial court is not required to believe all evidence presented (whether on credibility grounds or otherwise), and on appeal even uncontradicted evidence that supports a finding contrary to the trial court's ruling does not establish the fact for which the evidence was submitted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) In any event, the standard on appeal is whether the record contains substantial evidence *in support of the trial court's ruling*, not whether substantial evidence exists to support a contrary ruling, as Marugg argues. (*Bowers, supra*, 150 Cal.App.3d at pp. 872-873.) To this end, we consider only the evidence and reasonable inferences in support of the court's finding of a lack of due diligence, disregarding the evidence—however substantial—that supports a finding of diligence. (*Howard, supra,* 72 Cal.App.4th at p. 631.)

Second, Marugg pled guilty in December 2003 based on the evidence presented to the grand jury in May 2002 and available to her no later than early July 2002.[20] A reasonable inference, if not an undeniable fact, is that Marugg was aware of—or, at a

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20 The indictment is dated June 3, 2002; and former section 938.1, subdivision (a), which was in effect at that time, required the reporter to provide a transcript of the grand jury proceedings "within 10 days after the indictment has been found," unless the court extends the time for good cause shown, not to exceed an additional 20 days. (Stats. 1971, ch. 1533, § 1, p. 3038.)

minimum, had access to—this evidence at the time she pled guilty. Thus, Marugg had 17 months between the availability of the grand jury transcripts and the change of plea (July 2002 - Dec. 2003) in which to investigate the evidence presented to the grand jury and/or to challenge the bias or credibility of, or to otherwise attempt to impeach, the grand jury witnesses. Notably, Marugg did not tell the trial court the date on which she became aware of what she now contends is biased or false grand jury testimony.

Finally, and definitively, although Marugg did not retain the forensic accountant until November 2015, the record does not indicate that the forensic accountant considered any document dated after January 2005. Had Marugg acted with diligence, she could have obtained the documents well before 2015, and the accountant could have completed his work much earlier than July 2016. Indeed, the forensic accountant testified that his opinions regarding *the crime* to which Marugg pled guilty were based principally on his "review of case documents"—i.e., documents based on SCIF's *2001 audit*. Although the forensic accountant's July 2016 testimony may be "new evidence," it is neither newly discovered nor based on any document less than a decade old; and Marugg presented no facts or arguments justifying the lack of diligence in obtaining the documents, and thus the forensic accountant's testimony, at or in a reasonable time after Marugg's December 2003 guilty plea.

For the foregoing reasons, the trial court did not err in finding that Marugg failed to establish the requisite due diligence in seeking *coram nobis* relief. In the language from our Supreme Court, Marugg did not meet her burden of establishing that " ' "the facts upon which [she] relies . . . could not in the exercise of due diligence have been

discovered by [her] at any time substantially earlier than the time of [her] motion for the writ[.]" ' " (*Kim*, *supra*, 45 Cal.4th at pp. 1093, 1097.)

In closing, Marugg argues that the trial court erred in denying the *coram nobis* petition without holding a hearing. She relies on the fact that the trial court requested an informal response from the People and on the requirement that "the court must set the matter for a hearing if there are substantial legal or factual issues presented." (*Ingram v. Justice Court for Lake Valley Judicial Dist. of El Dorado County* (1968) 69 Cal.2d 832, 844; accord, *Shipman, supra,* 62 Cal.2d at p. 230 [where "there are substantial legal or factual issues on which availability of the writ turns, the court must set the matter for hearing"].) We disagree with Marugg's position, because Marugg did not establish the predicate for her argument; i.e., she has not shown that the petition established any "substantial legal or factual issues." (*Shipman*, at p. 230.) In short, the request for an informal response from the People does not, as a matter of law, establish the sufficient substantiality of any legal or factual issue to require a hearing.

Accordingly, Marugg did not meet her burden of showing that the trial court abused its discretion in denying the petition for writ of error *coram nobis*.[21]

B. *The Trial Court Erred in Denying the Section 1473.7 Motion*

Section 1473.7 allows a person no longer imprisoned or restrained to move to vacate a conviction or sentence on two independent bases, including, as applicable here,

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21 Because we uphold the trial court's denial of the petition based on Marugg's failure to comply with the diligence requirement for *coram nobis* relief, we need not address, and we express no opinion on, the merits of the petition.

that "[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice." (§ 1473.7, subd. (a)(2); see fn. 7, *ante*.) As applicable to the issues in the present appeal, the statute provides that the parties are entitled to a hearing on all motions (§ 1473.7, subd. (d)) and requires that the court specify the basis of its ruling on any motion (§ 1473.7, subd. (e)(2)). (See fn. 8, *ante*.)[22]

In support of the section 1473.7 motion, Marugg argued that the facts set forth in the *coram nobis* petition established two statutory requirements: (1) "[n]ewly discovered evidence of actual innocence" (§ 1473.7, subd. (a)(2)); and (2) the filing of the motion "without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence," the newly discovered evidence of actual innocence (§ 1473.7, subd. (c)). The People opposed the motion by arguing that section 1473.7 applies only to defendants dealing with adverse immigration consequences resulting from their guilty pleas.[23] Without either a hearing or a mention

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22 Because the language of section 1473.7 at issue in this appeal—i.e., subdivisions (d) and (e)(2)—is unambiguous, we deny the People's motion to take judicial notice of the legislative history of Assembly Bill No. 813 (2015-2016 Reg. Sess.), which added section 1473.7 (Stats. 2016, ch. 739, § 1). (*People v. Valencia* (2017) 3 Cal.5th 347, 358 [courts consider extrinsic evidence of legislative intent only "where statutory language is ambiguous when considered 'in the context of the statute . . . as a whole' "].)

23 The People have not asserted this argument on appeal. (See § 1473.7, subd. (a)(2).)

of issues related to the section 1473.7 motion, in the *coram nobis*/1473.7 order, the trial court ruled in full: "Lastly, petitioner fails to establish relief under Penal Code section 1473.7."[24]

On appeal, Marugg argues that the trial court erred in denying the section 1473.7 motion on the following grounds: (1) the court failed to hold a hearing, as required by subdivision (d); (2) in ruling, the court failed to specify the basis of its conclusion, as required by subdivision (e)(2); and (3) in support of the motion, Marugg established the requisite showing of "newly discovered evidence of actual innocence" under subdivision (a)(2), and of having brought the motion "without undue delay" from the date she "discovered, or could have discovered with the exercise of due diligence," the newly discovered evidence of innocence under subdivision (c).

In response, the People argue on appeal that Marugg did not meet her burden of establishing reversible error on the following grounds: (1) because section 1473.7 became effective on January 1, 2017, and is to be applied only prospectively, the statute could not help Marugg, who was convicted in 2003;[25] (2) as a matter of law, Marugg did

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24 The only other mention of section 1473.7 in the *coram nobis*/1473.7 order is found in one sentence of the introductory procedural chronology, where the court states that, in December 2016, Defendants filed a supplement to the petition, "claiming relief under Penal Code section 1473.7."

25 The Attorney General has since withdrawn this argument. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 827-828 [§ 1473.7 may be applied retroactively], followed by *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75, fn. 9 [citing *Perez*, "the Attorney General does not dispute the retroactivity of section 1473.7"].)

not state a prima facie case of "timeliness," arguing that she neither demonstrated "due diligence" in discovering the new evidence nor brought the motion "without undue delay" for purposes of subdivisions (a)(2) and (c) of section 1473.7; and (3) the trial court did not err in ruling that "[Marugg] had not established, by a preponderance of the evidence, newly discovered evidence of actual innocence that requires the vacation of the conviction as a matter of law or in the interests of justice."

As we will explain, because the trial court erred in failing to specify the basis for its ruling, as required by section 1473.7, subdivision (e)(2), we will reverse the ruling and remand for compliance with this requirement. We will also direct the court to hold a hearing, as required by subdivision (d), on remand.

As part of the section 1473.7 motion, Marugg brought to the court's attention subdivision (e)(2)'s requirement that the court "specify the basis for its conclusion" in granting or denying the motion. In the brief that accompanied the supplement to the petition for the writ of error *coram nobis*, in a discussion of "the procedure to be followed under [section] 1473.7," Marugg quoted subdivision (e)(2)'s requirement that "In granting or denying the motion, the court shall specify the basis for its conclusion." However, in its one sentence ruling, *ante*, the court failed to comply with this requirement.

In ruling on a section 1473.7 motion based on newly discovered evidence of actual innocence, as here, the trial court was required to consider the evidence presented and, at a minimum, consider the following two questions: (1) Did the moving party file the motion "without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief

under this section"? (§ 1473.7, subd. (c)); and (2) Does the newly discovered evidence establish "actual innocence . . . that requires the vacation of the conviction or sentence as matter of law or in the interests of justice"? (§ 1473.7, subd. (a)(2)). *Both* of these questions involve the determination of multiple issues—e.g., "undue delay" and "due diligence" under subdivision (c); and "actual innocence" and "the interests of justice" under subdivision (a)(2)—that require the weighing of evidence and resolution of disputed facts before applying the facts to the law. Indeed, in their appellate briefs, Marugg and the People each rely on—and suggest that we should review the denial of the section 1473.7 motion based on—selected facts in the record that support their respective positions.

Because the trial court did not specify the basis of its ruling, however, we do not know what findings the court made on which issues; i.e., we do not know whether the court denied the section 1473.7 motion based on undue delay, lack of due diligence, lack of actual innocence, the interests of justice, or some other determination. Absent extraordinary circumstances not present here, we are unable to make such findings; only the trial court has that power. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892 ["[a]ppellate courts do not make factual findings"]; *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1160 ["it is the trial court's function in the first instance to assess witness credibility and resolve conflicts in the evidence"]; *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [" 'it is the province of the trial court to decide questions of fact and of the appellate court to decide questions of law' "].) Without the benefit of factual findings on these (and any related) issues—i.e., without knowing "the basis for [the trial court's]

conclusion" as required by section 1473.7, subdivision (e)(2)—we are unable to review the merits of the the trial court's denial of the motion.

Accordingly, we must reverse that portion of Marugg's *coram nobis*/1473.7 order denying the section 1473.7 motion and remand with directions that the trial court provide the statutorily required basis for its conclusion. Since we are remanding for further proceedings, we further direct the court to hold a hearing—as statutorily required by subdivision (d) and timely requested by Marugg—before ruling on Marugg's section 1473.7 motion.[26]

DISPOSITION

That portion of Marugg's *coram nobis*/1473.7 order in which the superior court ruled that "petitioner fails to establish relief under Penal Code section 1473.7" is reversed and the matter is remanded with directions that the court hold a hearing on Marugg's section 1473.7 motion and specify the basis for its ruling as required by subdivisions (d)

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[26] We express no opinion as to how, on remand, the court should rule on any portion of the motion—either to vacate the conviction under section 1473.7, or to find factual innocence under section 851.8, subdivision (d).

and (e)(2). The remainder of Marugg's *coram nobis*/1473.7 order is affirmed. The reconsideration order is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.