

COURT OF APPEAL
DIVISION THREE
12-13-07
S245307
Court of Appeal, First Appellate District, Division Three - No. A150539

S245307

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MICHAEL LEE WEIBLE, Defendant and Appellant.

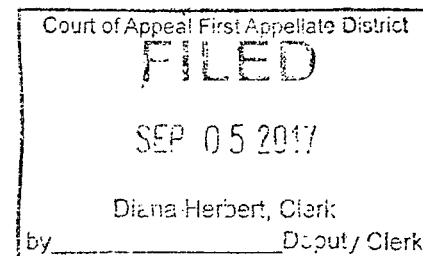
The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
 FIRST APPELLATE DISTRICT
 DIVISION THREE



THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEE WEIBLE,

Defendant and Appellant.

A150539

(City & County of San Francisco
 Super. Ct. No. 186560)

Defendant Michael Lee Weible was convicted in 2003 of first degree burglary and other offenses, and sentenced to 13 years in state prison. In 2005, his conviction was reversed and, in 2006, he pleaded guilty and was sentenced to eight years in state prison. In 2008, the California Department of Corrections and Rehabilitation notified the trial court of an error in the sentence. The trial court held a hearing in response to this notification and resentenced defendant to seven years eight months. On November 4, 2016, defendant having been released after serving this sentence, filed a petition for writ of error *coram nobis* in superior court challenging the proceedings at the 2008 hearing in response to the department's notification. He claimed his attorney improperly waived his personal appearance at the 2008 hearing and that because the sentence initially imposed based on his plea agreement was illegal, his plea should have been set aside, and that he did not waive his right to a trial based on an agreement to impose the corrected sentence. The trial court summarily denied the *coram nobis* petition with the following explanation: "[Defendant] was resentenced in this matter on January 23, 2008. The instant petition seeking relief from that judgment was filed nearly nine years later, on November 4, 2016. The petition fails to include any facts demonstrating the time and circumstances in which

[defendant] learned of the alleged ‘new facts’ supporting his challenge. Without further explanation of the near nine-year filing delay, [defendant] fails to demonstrate the requisite due diligence in pursuing his claims. Thus, the petition must be summarily denied.” Defendant timely filed a notice of appeal.

Counsel for defendant has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, noting that this procedure may not be available on an appeal from postconviction proceedings (*People v. Serrano* (2012) 211 Cal.App.4th 496), in which case counsel requests that we review the matter under the procedure outlined in *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, as adopted in *Serrano*. In all events, counsel having advised defendant of his right to file a supplemental brief and defendant having failed to do so, we have reviewed the record, from which it readily appears there are no issues that warrant further briefing.

Initially, although defendant did not appeal from the corrected 2008 judgment, defendant’s petition for *coram nobis* relief may have been incorrectly filed in the superior court, and should have been filed as a petition for *coram nobis* in this court. (Pen. Code, § 1265, subd. (a) [“if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of *coram nobis* shall be brought to procure the vacation of that judgment, except in the court which affirmed the judgment on appeal”]; 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Writs, § 120, pp. 739-741.) But whether we review the trial court’s decision or treat the appeal as a petition for relief in this court, we conclude the petition must be denied for the reason articulated by the trial court. Defendant’s statement in his points and authorities in support of his petition, that he “did not learn about the representations until after judgment and sentence had been imposed,” fails to explain when he did learn the facts on which the petition is based or why the petition could not reasonably have been brought well before nine years after the judgment was entered, nor does he negate the apparent prejudice to the People of setting aside his conviction for a trial at this late date. The petition is properly dismissed on the ground of laches. (Cf., e.g., *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68-69.)

The order denying defendant's petition is affirmed.

Pollak, J.

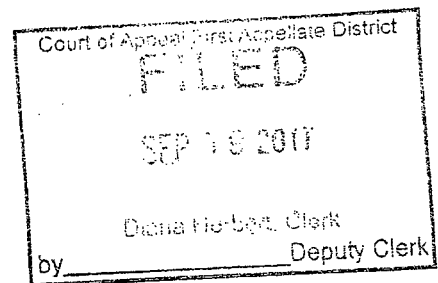
We concur:

McGuinness, P. J.

Siggins, J.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE



THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL LEE WEIBLE,

Defendant and Appellant.

A150539

(City & County of San Francisco
Super. Ct. No. 186560)

ORDER GRANTING REHEARING

THE COURT:

Appellant's petition for rehearing is granted.

Date:

SEP 19 2017

McGuinness, P.J.

P.J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

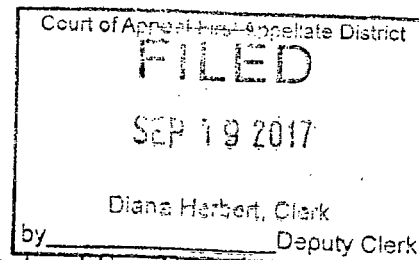
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aside his conviction for a trial at this late date. To the extent we are reviewing the trial court's decision, the explanation before the trial court was plainly insufficient to establish defendant's reasonable diligence, so that the petition in the trial court was properly dismissed on the ground of laches. (Cf., e.g., *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68-69.)

To the extent we treat the petition before us as an original petition seeking relief in this court, we may consider defendant's further explanation for the delay. However, defendant's supplemental brief is neither verified nor accompanied by a declaration under penalty of perjury attesting to the truth of the facts stated in the supplemental brief, which itself would justify disregarding the explanation. Even if defendant's explanation is considered, it is not sufficient to excuse the delay in bringing the matter before the court. Defendant asserts that he was not told of the "resentencing hearing" at which his sentence was reduced until August 6, 2012 (some four years after the hearing and four years before he filed his petition in the trial court). He does not state that he was unaware that his sentence had been reduced, which on its face seems rather unlikely, as is the premise that he objected to the reduction. Defendant explains additional delay on having been transferred to another prison and denied access to a law library "for months." He asserts that on November 5, 2013 he filed a petition for a writ of habeas corpus in "superior court" but then indicates that the petition was dismissed in "federal court." In all events, this hardly provides a satisfactory explanation as to why the petition in this matter was not filed in the trial court until November 4, 2016. Defendant's explanation does not suffice to overcome application of the equitable doctrine of laches.

The trial court order denying defendant's petition is affirmed; treating the petition as an original application is this court, the petition is denied.

Pollak, J.

We concur:

McGuiness, P. J.
Siggins, J.

**Additional material
from this filing is
available in the
Clerk's Office.**