Filed 6/06/03 P. v. Nash CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LAMONT NASH, Defendant and Appellant.	B156922 (Los Angeles County Super. Ct. No. TA019505)

APPEAL from an order of the Superior Court of Los Angeles County, denying a petition for a writ of error *coram nobis*. John J. Cheroske, Judge. Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.

Christopher Lamont Nash appeals from the order denying his petition for a writ of error *coram nobis* filed after a judgment entered following his conviction by jury of aggravated mayhem (Pen. Code, § 205) with personal use of a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)). He was sentenced to prison for life with the possibility of parole for aggravated mayhem, plus one year for the weapon enhancement.[1]

In this case, we hold the trial court properly denied appellant's petition for a writ of error *coram nobis*.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence[2] established that on June 28, 1992, appellant and Dwayne Blackburn got into an argument over some cans. Blackburn had been drinking. Appellant punched Blackburn, knocking him out. Blackburn later left, returned for revenge, and appellant hit him in the back of the head with a shovel. After appellant's brother intervened, appellant and Blackburn went in different directions.

About fifteen minutes later, Blackburn and appellant were arguing again, appellant's brother intervened, and Blackburn and appellant went in different directions. Shortly thereafter, appellant, carrying a shovel, approached Blackburn in the street and stood a few feet from him. Appellant struck twice at Blackburn with what appeared to be

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[1] This is appellant's second appeal. He was originally convicted of aggravated mayhem, and assault with a deadly weapon (a shovel) (Pen. Code, § 245, subd. (a)(1)) with personal infliction of great bodily injury (Pen. Code, § 12022.7). In appellant's first appeal (*People v. Nash* (B075435) Feb. 24, 1995 [nonpub. opn.]), we reversed said felonious assault conviction on the ground it was a lesser included offense of aggravated mayhem. On October 7, 2002, appellant filed a petition for a writ of habeas corpus (B161916) and, on October 23, 2002, this court ordered that the present appeal and the petition be concurrently considered. The petition will be the subject of a separate order.

[2] The facts below are taken from the factual summary in the opinion issued in appellant's previous appeal (see fn. 1, *ante*).

a nail. Appellant then swung the shovel like a baseball bat at Blackburn, hitting him in the head. The blow severely injured Blackburn.[3]

CONTENTION

Appellant contends "[t]he trial court erred in denying appellant's petition for writ of error of coram nobis."

DISCUSSION

The Trial Court Properly Denied Appellant's Petition For A Writ Of Error Coram Nobis.

a. *Pertinent Facts.*

Appellant was originally convicted of aggravated mayhem (count two), and assault with a deadly weapon with personal infliction of great bodily injury (count three). (See fn. 1, *ante*.) Later, on November 28, 2001, appellant filed his petition for a writ of error *coram nobis* (hereafter, petition). The petition alleged that appellant's continued confinement was unlawful because "the sentencing judge, the District Attorney, defense counsel, and Mr. Nash erroneously believed at the time sentence was pronounced that the petitioner would be released from state prison after having served seven years of confinement." The petition, along with its exhibits, reflect the following facts, which we will discuss in chronological order.

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[3] The opinion in appellant's previous appeal (see fn. 1, *ante*), states, "'As a result of the injury, Blackburn suffered a compound depressed skull fracture and an extensive laceration over two inches deep into his brain. Bone fragments from the skull penetrated inside the brain causing additional damage. The dura, a protective membrane of the brain, had been torn off. Before surgeries, Blackburn was seventy percent paralyzed on his right side with a complete loss of the ability to talk. At the time of trial, almost six months after the attack, Blackburn still had problems with memory and communicating and also had difficulty coordinating his right hand and fingers. . . . the neurosurgeon who operated on Blackburn, opined that Blackburn may continue to improve, however, he suffers from permanent brain damage and won't be a normal person in that he will have some deficit for the rest of his life. He has a high chance of developing epilepsy and suffering convulsions and, therefore, must always be cautious about driving and operating dangerous machines. In addition, he has a defect on the left side of the frontal area which will require cranioplasty in order to protect his brain.'"

A transcript of appellant's February 22, 1993 sentencing hearing reflects that the court stated, "As I understand it, I have to impose the indeterminant sentence of life with possibility of parole and then an additional one year enhancement and stay the imposition of sentence as to count three." The court did not then discuss granting probation.

Appellant asked that the court impose, but stay execution of, a prison sentence on count three, and asked that the court grant him probation on conditions that he serve a term in local custody and participate in a residential program. The following then occurred: "The Court: Let me just stop you for a second, [defense counsel]. You are saying that the sentence in the count two is a state prison sentence is not mandatory?" (*Sic*.) Appellant indicated he did not believe it was mandatory and he was eligible for probation on count three.

The court later heard from the prosecutor and inquired if she agreed that appellant was eligible for probation on count two. The prosecutor replied that she thought appellant might be eligible for probation. However, the prosecutor urged the court to sentence appellant to prison on count two to life with the possibility of parole plus one year, and stated "if the defendant lives up to what he claims he can do, he will certainly be paroled at that time."

The court later stated, "All right, this is not an easy sentence, and I agree. Mr. Nash is not a bad person per se. But I also agree with [the prosecutor]. The circumstances of the crime and the fact Mr. Nash has had a prior criminal history, although not as serious as others . . . . [¶] This is a kind of crime that requires life with possibility of parole and the defendant would become eligible for parole at seven years. And I'm going to include in the transcript or as part of the record that unless there are circumstances that require otherwise, that he do become eligible for parole and is paroled after seven years."

As to count two, the court denied appellant probation and sentenced him to prison for life with the possibility of parole, plus one year for the weapon enhancement.[4] As to count three, the court imposed a concurrent four-year upper term, "given the defendant's prior criminal record," plus three years for the great bodily injury enhancement, then stayed execution of sentence on count three pursuant to Penal Code section 654. Appellant protested he could not do seven years in prison. The prosecutor commented, "[appellant] will have his freedom in several years. Mr. Blackburn will suffer with his handicap for the rest of his life."

On March 5, 1993, appellant was committed to prison in the present case. While in prison, in June 1993, he had a "CDC 128" for being away from his cell during lock-up. On February 5, 1995, he had a "CDC 115," an administrative rule violation, for falsifying records. These facts are recited in the transcript of the February 10, 1999 parole hearing; the transcript is an exhibit to the petition.

The petition alleged that on February 24, 1995, appellant's conviction in the present case for felonious assault was reversed on appeal on the ground that the offense was a lesser included offense of aggravated mayhem.[5]

In February 1996, appellant had a "CDC 128" for being involved in a three-way call, contrary to prison rules. In June 1998, he had a "CDC 128" for being disrespectful. In December 1998, appellant had a "CDC 128" for being verbally aggressive and disrespectful towards a female prison staff member. During the incident, appellant called her a pussy. A "CDC 128A" form dated December 7, 1998, reflects the staff member's account of what happened. These facts are recited in the transcript of the February 10, 1999 parole hearing, and in another exhibit to the petition.

A December 16, 1998 psychological evaluation report, an exhibit to the petition, reflects a staff psychologist's assessment that "If released to the community, [appellant's]

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[4] The impact, if any, of that weapon enhancement on appellant's potential release on parole was not discussed by the court and parties.

[5] See footnote one, *ante*.

violence potential is considered to be slightly above average relative to the average citizen in the community. [¶] . . . The most significant risk factors for this inmate as a precursor to violence would be continued abuse of alcohol and drugs. Should he return to using those substances, his violence potential would be higher than the average citizen in the community."

A life prisoner evaluation report prepared for a February 1999 parole hearing (said report is an exhibit to the petition) reflects aggravating circumstances that the present offense involved the use of a weapon and the nature of the crime exhibited vicious cruelty or callousness.[6] The report reflects mitigating circumstances that appellant had a minimal criminal history, and the attack could have continued, resulting in Blackburn's death. The report concluded appellant was not suitable for release on parole.[7]

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[6] As to the present offense, the report reflects, "Inmate Nash discussed the circumstances surrounding his commitment offense. Inmate Nash felt that the victim's injury occurred while inmate Nash was defending himself. He showed minimal amounts of remorse and empathy for the victim. He stated that at that time he was not intoxicated. However, in his first BPT psychological evaluation, the writer believed that his substance abuse was a contributing factor to his crime. He stated that the victim had threatened to kill him, stating, 'You're going to die today.' Eventually, he said the victim made stabbing motions toward him with an ice pick. Inmate Nash stated that he tried to block the ice pick with a shovel and the victim was eventually hit over the head, sustaining injuries. His description of the crime was somewhat unconvincing and improbable, as it does seem rather unlikely that an action to block someone's stabbing motion would result in such a severe head wound. Asked for his thoughts and feelings regarding the crime, he stated that he has "extremely big remorse."

[7] As to this conclusion, the report states, "[c]onsidering the commitment offense, prior record and prison adjustment, it is the opinion of this writer that the prisoner would pose a high degree of threat to the public if released. This writer believes the prisoner is unsuitable for parole at this time. This assessment is based upon the fact that the commitment offense was the by product of an extremely volatile, angry and openly hostile young man. Considered is the fact that the prisoner's high degree of violence was over a small bag of cans. The prisoner is in denial regarding the totality of his involvement and culpability in the commitment offense. He currently demonstrates an inability or unwillingness to accept responsibility for the actions that cause his incarceration. The prisoner states that he feels remorse for the victim and the victim's family. However, it is this writer's belief that the only remorse the prisoner feels is for

At the February 10, 1999 parole hearing (the transcript of which is an exhibit to the petition), the presiding commissioner noted that, in arriving at a decision, the panel would consider the commitment offenses, appellant's prior criminality and social history, and his "behavior and overall programming since [appellant's] commitment." These issues were discussed and, as to the third issue, a commissioner noted, inter alia, appellant's "CDC 115" in February 1995, and his "three 128's" in June 1993, February 1996, and December 1998, respectively.[8] As to the December 1998 incident, the commissioner asked if appellant called the female staff member a pussy and noted "[i]t's in the 128." Appellant "den[ied] it ever happened, . . ."

A deputy district attorney present at the hearing argued that appellant was not suitable for release on parole. Appellant urged that he be released on parole, and his counsel noted "the Judge who heard the case, heard every fact involved, did state . . . [at sentencing], . . . that he thought that Mr. Nash should receive parole at the earliest available opportunity."[9]

At the conclusion of the hearing, the panel decided that appellant was "not yet suitable for parole and would pose an unreasonable risk of danger to society and a threat

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himself. The prisoner is currently exhibiting some difficulty in functioning within the institutional setting. He shows open disrespect and contempt for authority as revealed in a CDC 128-A dated 12/7/98. If the prisoner were released today, in addition to the aforementioned, he would certainly be a liability to society as he has no viable plan for employment, no viable work skills and no resources from which to support himself. Inmate Nash has a long journey of introspection ahead. A journey in which he needs to come to terms with a denial of his responsibility towards the devastation he caused the victim. It is also a necessity that he takes the steps to come to terms with his explosive temper and problems with anger. Unless he resolves to firmly make a life style change, he will remain unsuitable for parole and a dangerous risk to society."

[8] The commissioner did not expressly comment on appellant's June 1998 "CDC 128" for being disrespectful.

[9] Appellant urged that the life prisoner evaluation report contained contradictions and was unreliable in various respects. However, he did not expressly claim the report was inaccurate to the extent it recorded appellant's "CDC 115" and three "CDC 128's," but argued that the "CDC 128's" were of minimal significance.

to public safety if released from prison." The panel noted that the present offense was carried out in an especially cruel and callous manner. The panel also noted that appellant had an escalating pattern of criminal conduct and an unstable social history. The panel further noted that appellant "had some misconduct while incarcerated including one 115, couple 128s, one of them relatively recently having [to] do with disrespect to a female officer, . . ." The panel observed that the psychological report reflected that appellant's violence potential if released in the community was above average. The panel concluded appellant needed therapy and, until progress was made, he continued to be unpredictable and a threat to others. The panel denied appellant release on parole for two years, and concluded it was not reasonable to expect parole would be granted during that period.[10]

The petition also contained as an exhibit a document which purported to be a copy of an article in the Los Angeles Times dated October 3, 1999. The article indicated that few persons are released on parole.[11]

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[10] Based on appellant's arguments concerning factual inaccuracies and erroneous conclusions in the life prisoner evaluation report, two panel members elected not to rely on it. However, they did not expressly state that, on the issue of appellant's performance while in prison, they disbelieved that appellant had a "CDC 115" in February 1995, and three "CDC 128's" in June 1993, February 1996, and December 1998, respectively. Some of these disciplinary matters were documented outside the report.

[11] The article, discussing the nine-member Board of Prison Terms (hereafter, Board), noted that the Board evaluated inmates sentenced to prison for life with the possibility of parole, and decided whether they were suitable for release on parole. Under the heading that "few win parole" (capitalization omitted), the article noted, "Parole for eligible inmates evaluated by the [Board] . . . has become all but extinct in California. A 1988 voter initiative gave the governor the power to block the parole of murderers. In cases involving other crimes, the governor can ask the board to reconsider a grant of parole. In those cases, the board usually reverses its earlier finding. The article then indicated that in 1979 there were 515 parole hearings, and 19% of the prisoners were granted parole. No information was given as to whether the governor reversed the grant or returned the matter to the Board for reconsideration. In 1989, there were 1,266 hearings, 4% of the prisoners were granted parole, and none of the grants were reversed or returned to the Board for reconsideration. In 1999, there were 1,489 hearings, .9% of the prisoners were granted parole, and all of the grants were reversed or returned to the Board for

Attached to the petition was a declaration dated February 16, 2000, from retired Judge Enrique Romero, the judge who tried and, on February 22, 1993, sentenced appellant. The declaration stated: "This was a very difficult sentence. At the time of sentencing, I was seriously disturbed by the lack of sentencing alternatives in Mr. Nash's case for the following reasons[.]" The judge then discussed appellant's criminal history and facts pertaining to the present offense.[12]

The judge later stated, "At the time sentence was imposed, it was my intent that Mr. Nash serve a seven year term in state prison. I specifically stated on the record that Mr. Nash be paroled after seven years unless circumstances required otherwise. . . . At the time of sentencing, it was my understanding that the parole board was giving great weight to judicial recommendations. It was my belief that Mr. Nash would be paroled in seven years, unless there was a serious incident or incidents occurring during his confinement indicating otherwise. I also note, after reviewing the sentencing transcript, that [the] . . . Deputy District Attorney, also believed that if Mr. Nash lived up to what he claimed he could do, he *certainly* would be paroled in seven years. . . .

"I have been informed that Mr. Nash was denied parole on February 10, 1999 and that he will not be eligible for another hearing until two years have elapsed. I have also

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reconsideration. The article's information was purportedly based on information from the Board.

[12] The judge stated, "1. Mr. Nash had a minimal record consisting of two convictions, one for possession of a dangerous weapon, and the other for defrauding an innkeeper. Mr. Nash has spent a total incarceration time of 97 days on these two matters. [¶] 2. Although the victim in this case, Mr. Duane Blackburn, was seriously injured, it was the result of a single blow to his head with a shovel, by Mr. Nash. It was not a premeditated act, as I stated on the record at the time of sentencing. [¶] 3. Mr. Blackburn is not without blame. He was intoxicated at the time. Medical records indicated that his blood alcohol level was .18. [¶] 4. It was Mr. Blackburn's act of going onto Mr. Nash's property and taking cans that precipitated the initial confrontation, wherein Mr. Blackburn was punched in the face by Mr. Nash and told to leave the premises. [¶] 5. Upon leaving, Mr. Blackburn threatened Mr. Nash and told him that he would return. [¶] 6. Mr. Nash did not seek out Mr. Blackburn. It was Mr. Blackburn who returned to the defendant's residence, at which time Mr. Nash struck him in the head with a shovel."

been provided and reviewed the following documents: a copy of the Parole Hearing, conducted on February 10, 1999, . . . ; Mr. Nash's prison psychiatric report dated 12/10/98, . . . ; an incident report dated 12/7/98, . . . ; an undated letter from Mr. Nash's teacher, . . . ; and [a] parole report dated 2/99, . . .

"I have also reviewed [defense counsel's] letter to the parole board dated February 5, 1999, . . . which points out, . . . numerous inaccuracies in the parole board report dated 2/99. As the trial judge in this case, his statements accurately reflect the evidence that was received during the trial. After reviewing the above exhibits, it appears to me that Mr. Nash has performed quite satisfactorily, except for a minor incident involving an unfavorable comment about one female counselor.

"It was my feeling that a grant of probation in this case was inappropriate because of the nature of the injury to Mr. Blackburn, although this alternative was seriously considered because Mr. Nash lacked a serious criminal record. I also considered sentencing Mr. Nash on count three, 245(a)(1), with the enhancement for 12022.7, intentional infliction of great bodily injury and 12022(b) use of a dangerous weapon, which would have resulted in a determinate sentence of 8 years, and staying sentence on Count 1, the 205, aggravated mayhem charge. This was rejected because the sentence would be greater than that imposed on the 205."

At the December 13, 2001 hearing on the petition for a writ of error *coram nobis*, appellant's counsel represented that he had spoken with a person who did appellate work concerning parole board matters, and the person had told appellant's counsel that it would be 18 years before appellant was released on parole. The court denied appellant's petition for a writ of error *coram nobis*.

b. Analysis.

In *People v. Shipman* (1965) 62 Cal.2d 226, our Supreme Court observed, "The writ of *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; . . .' . . . (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. Shipman*, *supra*, 62 Cal.2d at p. 230.)

According to Penal Code section 3040, "The Board of Prison Terms shall have the power to allow prisoners imprisoned in the state prisons pursuant to subdivision (b) of Section 1168 to go upon parole outside the prison walls and enclosures." Penal Code sections, and regulations contained in Title 15 of the California Code of Regulations, permit the Board to consider a variety of factors in its determination of whether a defendant such as appellant should be released on parole. These factors include not only consideration of present and past offenses, but whether a prisoner will pose an unreasonable risk of danger to society if released from prison; the prisoner's past and present mental state; the prisoner's past and present attitude toward the crime; and any other information which bears on the prisoner's suitability for release. These factors also include the prisoner's institutional behavior, that is, whether the prisoner has engaged in serious misconduct in prison or jail. (*In re Ramirez* (2001) 94 Cal.App.4th 549, 564-568 [specifying statutes and regulations].)

Moreover, Penal Code section 3046, contemplates Board review of any recommendations by a sentencing court. Penal Code section 3046, subdivision (c), provides that "The Board of Prison Terms shall, in considering a parole for a prisoner, consider all statements and recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Section 3042, and recommendations of other persons interested in the granting or denying of the parole."

In the present case, the alleged "fact [which] existed" (*People v. Shipman*, *supra*, 62 Cal.2d at p. 230) was the sentencing court's alleged erroneous belief that appellant

would be released on parole after he had served seven years in prison.[13] However, first, the petition fails to demonstrate the alleged erroneous belief. At time of sentencing, the sentencing court stated its intent that appellant be released on parole after seven years. But that statement was not unqualified. It was subject to the condition, "unless there are circumstances that require otherwise, . . ."

The sentencing court is presumed to have known the law (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; Evid. Code , § 664), including the above Penal Code sections granting to the Board the power to release prisoners on parole. We believe that the sentencing court's condition, "unless there are circumstances that require otherwise, . . ." was an acknowledgment by the court that the Board, in the lawful exercise of its authority, could require appellant to remain in prison for *some* period even after he had served seven years in prison. To that extent, no erroneous belief or mistake by the sentencing court was demonstrated by the petition. We note appellant does not claim that the trial court did not know at time of sentencing that the Board would make its parole decision based on information such as that which was, according to appellant's petition and its exhibits, before the Board at the parole hearing, including information pertaining to appellant's misconduct in prison.

Second, the court had jurisdiction to sentence appellant to prison for life with the possibility of parole. The alleged error of the sentencing court was its allegedly erroneous understanding of what the *Board* would do in the lawful exercise of *its* power to release appellant on parole. This was a mistake of law, not of fact (see *People v. Ibanez* (1999) 76 Cal.App.4th 537, 546) and, "[t]he writ lies to correct only errors of fact as distinguished from errors of law. [Citation.]' [Citation.]" (*People v. Ibanez*, *supra*, 76 Cal.App.4th at p. 545.)

Third, even if the sentencing court made a mistake of fact, appellant or his counsel should have informed the court as to the alleged unlikelihood that appellant would be

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[13] There is no dispute that appellant was required to serve seven years in prison. (Pen. Code, §3046.)

released on parole after serving only seven years in prison. The remedy of a writ of error *coram nobis* was not available because it was through appellant's negligence or fault that the facts were not known to the court.[14] (Cf. *People v. Banks* (1959) 53 Cal.2d 370, 378-379.)

Fourth, although appellant originally suffered aggravated mayhem and felonious assault convictions, his felonious assault conviction was reversed on appeal on the ground that that conviction was a lesser included offense of aggravated mayhem. Our holding that appellant was impermissibly convicted of felonious assault was, and is, the law of the case. (See *People v. Shuey* (1975) 13 Cal.3d 835, 841-842.) Accordingly, appellant never properly stood convicted of, and never properly could have been sentenced for, felonious assault.[15] Assuming that probation was a lawful dispositional alternative as to appellant's conviction for aggravated mayhem, the sentencing court had two such alternatives: it could grant probation, or sentence appellant to prison for life with the possibility of parole. At time of sentencing, on February 22, 1993, the court stated that it was the court's understanding that it had to impose sentence on count two and stay imposition of sentence on count three. The court never suggested on that date that it had considered probation as a viable option.

Indeed, even in the former judge's February 16, 2000 supporting declaration, the judge stated, "*It was my feeling that a grant of probation in this case was inappropriate* because of the nature of the injury to Mr. Blackburn, although this alternative was

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[14] We note appellant's petition contained a purported article from the Los Angeles Times purportedly based on public information, discussing how few persons won parole.

[15] Notwithstanding appellant's suggestions to the contrary, the fact that the sentencing court may have thought it could have sentenced appellant to eight years in prison but failed to do so because the court believed he would receive a lesser term (seven years) by sentencing him for aggravated mayhem does not compel a contrary conclusion. The fact that appellant, because of postconviction commitment credits, may have served less than eight years in prison had he been sentenced for felonious assault is also irrelevant; the sentencing court could not properly have sentenced him for felonious assault.

seriously considered because Mr. Nash lacked a serious criminal record."[16] (Italics added.) Nothing in the record demonstrates that if, at the time of appellant's February 22, 1993 sentencing, the trial court had known that appellant would be in prison during the period after sentencing but before the November 28, 2001 filing of the petition, the court, at time of sentencing for appellant's aggravated mayhem conviction, would have granted probation instead of sentencing appellant to life with the possibility of parole.[17] We also note that, although punishment was stayed on count three pursuant to Penal Code section 654, the court imposed a middle term, not a lower term, on that count.

In sum, appellant has failed to show that some fact existed which was not presented to the court and which, if presented, would have caused the court to grant him probation instead of sentencing him to prison for life with the possibility of parole, that is, appellant has failed to show that some fact existed which would have prevented the rendition of the judgment.

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[16] Although the former judge, in his declaration, indicated he had seriously considered probation, we note that, during sentencing, the following occurred: "The Court: Let me just stop you for a second, [defense counsel]. You are saying that the sentence in the count two is a state prison sentence is not mandatory?" (*Sic*.) The above quote suggests that, to that point, the sentencing court had been under the impression that count two mandated a prison sentence, and that probation was not, therefore, a dispositional option.

[17] In his opening brief, appellant states, "[t]o the extent the sentencing court did not have discretion to impose a determinate sentence on Count Three, appellant's companion Petition for Writ of Habeas Corpus should be granted because as stated in Judge Romero's subsequent *April 8, 2002* Declaration, to the extent he did not have discretion to impose a determinate term for Count Three, Judge Romero would have placed appellant on probation and imposed a one year county jail term rather than impose a life term for Count Two. (Italics added.) We note the record contains no declaration from former Judge Romero that if the judge had known at time of sentencing that appellant would remain incarcerated until *November 28, 2001*, when the petition was filed, the former judge would have placed appellant on probation."

DISPOSITION

The order denying appellant's petition for a writ of error *coram nobis* is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We concur:

KITCHING, J.

ALDRICH, J.