COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal
Fourth Appellate District
FILED ELECTRONICALLY
07/13/2020
Kevin J. Lane, Clerk
By: Michael Hubbard

In re BENJAMIN LEE BATHAN on Habeas Corpus.	D077657 (San Diego County Super. Ct. No. SCS294342)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Benke, Huffman, and Aaron. Judicial notice is taken of the record and opinion filed in appeal No. D074538.

On three days in June and July of 2017, Benjamin Lee Bathen telephoned the psychotherapist who treated him in California for several years before he moved to the east coast in 2008 and left messages on her voicemail stating in obscene language that he was going to rape and kill her and her daughter. At trial Bathen took the position that the People had not proven he was the caller who left the threatening messages, and he presented an expert witness who challenged the accuracy of the prosecution evidence that cell tower tracking records showed the threatening calls had been made from locations nears Bathen's home and place of business. Bathen alternatively argued that even if he had placed the calls, his former psychotherapist could not reasonably have feared imminent harm because he was on the east coast when the threats were made. The jury found Bathen guilty of three counts of making criminal threats, and on June 19, 2018, the superior court sentenced him to concurrent prison terms of two years on each count.

On appeal, Bathen claimed the evidence was insufficient to establish the immediate prospect of execution and reasonable fear elements of the offense of making a criminal threat, the superior court erroneously failed to instruct the jury on the lesser included offense of attempted criminal threat, and the court erred by denying probation and sentencing him to prison. This court rejected those claims of error and affirmed the judgment. (*People v. Bathen* (Oct. 4, 2019, D074538) [nonpub. opn.].)

Approximately six months later, Bathen collaterally attacked the judgment in the superior court by filing a petition for writ of habeas corpus. He claimed his trial counsel

had provided ineffective assistance by failing to investigate and present a defense that an antidepressant medication he was taking, Lexapro, caused him to threaten his former psychotherapist. The superior court summarily denied the petition.

By the present petition, Bathen continues his collateral attack on the judgment. He contends that although "a mental defense of some kind was obvious" and it was "well-known in the criminal defense community that the ingestion of certain antidepressants . . . could cause violent outbursts," his counsel "made no attempt to investigate a defense based on Lexapro." Had counsel investigated and presented such a defense, Bathen argues, it is reasonably probable the jury would have found he lacked the specific intent to make criminal threats and acquitted him. Bathen also complains the superior court erroneously denied his habeas corpus petition based on a misunderstanding of the law regarding his pleading burden. Attached to the petition are declarations from Bathen, his trial counsel, legal and medical experts, and "potential witnesses"; a letter from a forensic medical examiner regarding Bathen's decreased rate of metabolism of antidepressants; printouts from websites with information about adverse effects of Lexapro and other antidepressants; a pretrial psychological evaluation of Bathen; telephone records showing calls between Bathen and his trial counsel; the opinion on Bathen's appeal; the superior court's order denying his petition for writ of habeas corpus; and prescriptions for a 30-day supply of Lexapro and a 90-day supply of a diuretic dated November 15, 2016. Bathen asks this court to issue an order to show cause, hold an evidentiary hearing, and set aside the judgment of conviction.

We do not consider Bathen's complaints against the superior court's order denying habeas corpus relief. The order is not appealable. (Pen. Code, § 1506; *In re Hochberg* (1970) 2 Cal.3d 870, 876.) The proper procedure when a superior court denies a petition for writ of habeas corpus in a noncapital case is for the petitioner to file a new petition in the Court of Appeal. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) We therefore consider only the claim of ineffective assistance of counsel Bathen asserts in the petition he filed in this court.

Bathen's petition is procedurally barred as untimely. "A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner" by filing a petition for writ of habeas corpus "without *substantial delay*." (*In re Reno* (2012) 55 Cal.4th 428, 459, 460.) "Substantial delay is measured from the time 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. A petitioner must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*In re Robbins* (1998) 18 Cal.4th 770, 780.) Bathen does not specifically allege when he first became aware of the "medication-based defense" he faults trial counsel for not investigating and presenting at trial. According to his declaration, Bathen is "a college-educated computer programmer"; "[w]hile incarcerated, using the

very basic prison law library, [he] found a reference to [certain antidepressants] causing 'problems with rages' " and stopped taking Lexapro; "[a]fter [his] release, [he] continued researching and learned how prevalent the issue was"; and when he had enough money, he hired current counsel. He then filed a petition for writ of habeas corpus in the superior court on April 1, 2020. By Bathen's account, it thus appears approximately 21 months elapsed between the time he alleges he first became aware of the "medication-based defense" and the time he sought habeas corpus relief. Such delay is substantial. (E.g., *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 [18 months]; *People v. Miller* (1992) 6 Cal.App.4th 873, 882-883 [2 years].) Although "any significant delay in seeking collateral relief . . . must be fully justified" (*People v. Jackson* (1973) 10 Cal.3d 265, 268; accord, *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1221), Bathen does not even address the issue of delay in his petition. Moreover, his attached declaration suggests he knew, or at least should have known, about the potential "medication-based defense" before he retained trial counsel. Bathen alleges that in January 2017 he began experiencing a movement disorder, "memory issues," "periods of disorientation," and other adverse effects of Lexapro; those adverse effects increased in severity over the following six months; and on the days he left the threatening messages on his former psychotherapist's voicemail, he experienced "disorientation, profuse sweating and violent verbal outbursts." Bathen, who says he is a "college-educated computer programmer," did not share this information with trial counsel, however, and waited nearly two years after he was sentenced to prison to present it in a petition for writ of habeas corpus. He has not provided "an adequate explanation for [this] delay," which "is a prerequisite to our consideration of a collateral attack on the judgment." (*Miller*, at p. 882; see *In re Swain* (1949) 34 Cal.2d 300, 304 [habeas corpus petitioner "must fully disclose his reasons for delaying in the presentation of [the petition]".)

The petition, even if timely, fails to state a prima facie case for habeas corpus relief. A prisoner challenging a presumptively valid final judgment of conviction "bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474; accord, *In re Figueroa* (2018) 4 Cal.5th 576, 587.) To satisfy the initial pleading burden, "[t]he petition should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits of declarations." (*Ibid.*) Where, as here, the petitioner claims trial counsel was ineffective for failing to discover and present evidence at trial, the petitioner must allege specific facts and submit documents showing that counsel knew or should have known further investigation was needed, and that there is a reasonable probability that, had the investigation been done and the evidence presented, the outcome of the trial would have been better for the petitioner. (*In re Cox* (2003) 30 Cal.4th 974, 1016; *People v. Williams* (1988) 44 Cal.3d 883, 937.) Bathen has not made this required showing in his petition.

The record Bathen has provided does not show counsel knew or should have known an investigation of a "medication-based defense" was needed. In his declaration, Bathen states he told trial counsel he "was on the medication on the dates of the incidents," but he "had no explanation as to why the incidents occurred." Bathen states counsel asked him if he "had taken any illegal or recreational drugs," and he "responded no." He did not tell counsel about the increasingly severe adverse side effects from Lexapro he now says he had been experiencing for six months before he left the threatening messages on his former psychotherapist's voicemail. Instead, he repeatedly told counsel "he wished to deny the allegations in their entirety in that he never made the phone calls, and if he did, the issue went to the 'immediacy' aspect, as he was physically located on the other side of the country during the time of the alleged calls." Counsel nevertheless referred Bathen to a psychologist for an evaluation. In his report, the psychologist wrote that Bathen stated, " 'I am medicated with Lexapro by my general practitioner for depression. I think it helps.' " Bathen told the psychologist he had no thoughts of suicide or homicide, had never been hospitalized for a psychiatric condition, and had taken antidepressants that were not effective but "Lexapro has been helpful." Bathen also told the psychologist there was "no factual basis" for the criminal charges and "den[ied] that [he] made those voicemail messages." The psychologist diagnosed Bathen with "[m]ild depression related to current legal circumstances," but made no mention of adverse side effects from Lexapro. Based on what little Bathen told trial counsel about his experience with Lexapro, the psychologist's report that Bathen found the drug was "helpful" and had not experienced homicidal thoughts (such as those expressed in the messages left on his former psychotherapist's voicemail) while taking it, and Bathen's repeated denials of having made the threats, counsel's failure to pursue a defense attributing Bathen's criminal conduct to Lexapro was not "inexcusabl[e]" and thus does not constitute ineffective assistance. (*People v. Williams*, *supra*, 44 Cal.3d at p. 936; see *People v. Pinsky* (1979) 95 Cal.App.3d 194, 200 ["Whether the attorney's conduct falls within the range of a reasonably competent attorney is in this case a question of law for this court to decide."].)

The record also does not establish a reasonable probability of a better outcome for Bathen had trial counsel investigated and presented a "medication-based defense." "In a habeas corpus petition alleging incompetent investigation or presentation of evidence by trial counsel, a petitioner . . . must generally produce that evidence . . . [to] show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different." (*In re Fields* (1990) 51 Cal.3d 1063, 1071; accord, *In re Hardy* (2007) 41 Cal.4th 977, 1025.) The legal defense Bathen faults counsel for failing to investigate and present is involuntary intoxication, a form of unconsciousness that relieves a defendant of liability for criminal conduct. (Pen. Code, § 26, subd. Four; *People v. Velez* (1985) 175 Cal.App.3d 785, 793.) "Involuntary intoxication can be caused by the voluntary ingestion of prescription medication *if the person did not know or have reason to anticipate the drug's intoxicating effects*." (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1313, italics added.) Based on documents Bathen attached to his

petition, an involuntary intoxication defense would not have been available to him. In his own declaration Bathen states that in January 2017 he began experiencing adverse effects of Lexapro, including "memory issues," "periods of disorientation," and "mania," which worsened over the next six months. He also states a "warning stapled to the outside of the bag the medication comes in" advised him to call his healthcare provider if he had symptoms such as "acting aggressive or violent" or "agitation, hallucinations, coma or other changes in mental status." Bathen admits his supervisors "reprimanded" him in January 2017 for "compulsively pacing back and forth at work." Other declarations attached to the petition also undermine an involuntary intoxication defense. The declarants (whom Bathen calls "potential witnesses") state that: (1) Bathen engaged in "strange and sudden aggressive behavior" and had an "abrupt change in mood" when he started taking antidepressants in 2004; (2) he had "uncharacteristic behavioral changes" and was "very agitated and uneasy, at times, and unable to sleep well" when he was taking antidepressants in 2006; (3) his "personality changed" and he engaged in "erratic behavior" in the beginning of 2017, when he started taking "new medication"; and (4) he "g[o]t up from his desk, nearly every five minutes at times" and had abnormal facial movements at work in January and February 2017, and told his supervisor a recent change in medications "may be causing some of the abnormal behavior." Bathen's evidence thus shows he knew or had reason to know of the adverse effects of Lexapro and other antidepressants on his behavior and mental status before he made the criminal threats against his former psychotherapist. Since the defense of involuntary intoxication therefore was unavailable (*Mathson*, at p. 1327; *Velez*, at p. 797), Bathen suffered no prejudice from his trial counsel's failure to pursue it (*In re Fields*, *supra*, at p. 1070).

The petition is denied.

BENKE, Acting P. J.

Copies to: All parties