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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARCENIO VIGIL, Defendant and Appellant.	B276139 (Los Angeles County Super. Ct. No. YA026169)

APPEAL from an order of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed.

Eduardo A. Parades for Defendant and Appellant

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

In July 1996, defendant Arcenio Vigil entered an open plea of guilty to second degree robbery (Pen. Code, § 211[1]), and admitted to firearm allegations under section 12022.5, subdivision (a). Defendant faced a potential maximum total punishment of 15 years in state prison. The trial court sentenced him to a total of nine years in state prison.

Nearly 20 years later, in April 2016, defendant filed a motion to vacate the judgment and his plea pursuant to section 1016.5. He contended he was not adequately advised of the potential immigration consequences of his guilty plea. The trial court denied the motion to vacate.

Finding no abuse of discretion, we affirm.

BACKGROUND

When pleading guilty in 1996, defendant signed a standard plea form. (*In re Tahl* (1969) 1 Cal.3d 122.) That form included a paragraph stating the immigration consequences of a plea: "I understand that if I am not a citizen of the United States, the conviction for the offense charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Defendant initialed and placed a check mark next to this paragraph, as he did next to all other advisements on the *Tahl* form. He declared by his signature at the end of the form that he "personally initialed each of the above boxes and discussed them with my attorney. I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my plea to the above charges." Additionally, in the *Tahl* form, defendant's attorney declared that he "explained each of the above rights to the defendant, and having explored the facts with him . . . and studied his . . . possible defenses to the charge(s), I concur in his . . . decision

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1 All further statutory references are to the Penal Code.

to waive the above rights and to enter a plea of guilty."[2] The trial court found that defendant "knowingly, understandingly, and explicitly" made each waiver in the form.

In April 2016, defendant filed a motion to vacate his 1996 judgment and plea pursuant to section 1016.5. He argued that the advisement he received regarding the plea agreement was insufficient because he was not informed his removal and permanent exclusion from the United States was a definite consequence of the plea.

Defendant was apparently deported in or around 2003. In connection with his motion to vacate, he provided a declaration from his residence in El Salvador stating that, in 1996, he advised his attorney that he was not guilty of robbery but that his attorney advised him to plead guilty. According to the declaration, the attorney told him if he pleaded guilty he would receive "a penalty of 5 years," while if he went before a jury he would receive a sentence of 15 to 25 years. Defendant further declared that the attorney never told him he would be deported if he pled guilty, and that if he had been so informed, he would not have entered a guilty plea.

At the hearing on the motion to vacate the plea, the trial court found that the *Tahl* form was validly executed and was a sufficient advisement of the possible deportation consequences. The court stated: "It's really stretching common sense to suggest that [defendant] wasn't fully aware of the trouble he was in. He had already been deported once. And signing this waiver, he knew the—in the court's mind, he clearly knew the consequences." The court found no basis to vacate the plea and therefore denied defendant's motion.

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[2] No reporter's transcript of the 1996 hearing could be located when defendant filed his motion to vacate.

DISCUSSION

Prior to acceptance of a plea of guilty or nolo contendere, the trial court must give the defendant the following advisement: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (§ 1016.5, subd. (a).) A defendant who was not so advised may move to vacate the judgment and the plea. (§ 1016.5, subd. (b).)

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement." (*People v. Totari* (2002) 28 Cal.4th 876, 884.) In attempting to establish prejudice, the defendant must prove, by declaration or testimony, that he or she would not have entered into the plea bargain if given the proper advisement. (*People v. Martinez* (2013) 57 Cal.4th 555, 565.) "It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*Ibid.*) We review the trial court's decision to grant or deny a section 1016.5 motion for abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 (*Zamudio*).)

The trial court here properly denied defendant's motion because the evidence showed defendant was given a proper advisement. The language pertaining to immigration consequences in the *Tahl* form signed by defendant was effectively identical to the language required by section

1016.5, subd. (a). "'[A] validly executed waiver form is a proper substitute for verbal admonishment by the trial court.'" (*People v. Araujo* (2016) 243 Cal.App.4th 759, 762 (*Araujo*).) Substantial compliance with the language of section 1016.5 is all that is required (*Zamudio, supra,* 23 Cal.4th 183, 207-208), and substantial compliance certainly was present here.

The advisement was also proper in that it informed defendant of possible deportation consequences. Section 1016.5 only requires a defendant be advised of the "potential adverse immigration consequences." (*Zamudio, supra,* 23 Cal.4th at p. 209.) It does not require an admonishment of the specific immigration consequences of a plea. (*Ibid.*; *Araujo, supra,* 243 Cal.App.4th 759, 763.)

The trial court also did not abuse it discretion in finding that defendant failed to show he was prejudiced by any alleged deficiency in the advisement. In his declaration, defendant stated he would not have pled guilty if he had known he would be deported. Similar self-serving declarations have been found insufficient to establish prejudice. (See *Araujo, supra,* 243 Cal.App.4th 759, 763; *In re Resendiz* (2001) 25 Cal.4th 230, 253 [criticized on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370 (*Padilla*)].) "While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and excludable, it is equally true that a conviction following trial would have subjected him to the same immigration consequences." (*In re Resendiz,* at p. 254.) The trial court here found defendant, contrary to his declaration, knew the consequences of his guilty plea. It was within the trial court's discretion to find defendant's declaration not credible. (*People v. Martinez, supra,* 57 Cal.4th 555, 565.)

Defendant argues that *Padilla* requires reversal of the trial court's order. *Padilla*, however, involved ineffective assistance of counsel, not a trial court's obligation to inform a defendant of possible immigration consequences. *Padilla* held that defense counsel must inform the defendant whether a plea carries a risk of deportation. (559 U.S. 356, 373-374.) Defendant here did not base his motion to vacate, or his appeal, on ineffective assistance of counsel. Even if he had, such an argument could not be properly raised in a motion under section 1016.5. (*People v. Kim* (2009) 45 Cal.4th 1078, 1107-1108, fn. 20 ["We note the trial court properly admonished defendant regarding the possible immigration consequences of his plea, and his further claim that his trial attorney was somehow ineffective is not a wrong encompassed by [§ 1016.5]"]; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1290.)

For the first time, on appeal, defendant argues that section 1016.2 required the trial court to apply *Padilla*. Defendant did not raise this argument below and thereby forfeited it. Even if he had raised it below, reversal would not be warranted. Section 1016.2 codifies the holding of *Padilla* that "the Sixth Amendment requires defense counsel to provide affirmative and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases." (§ 1016.2, subds. (a), (h).) Section 1016.2, which became effective January 1, 2016, indicates no intent of retroactive application. "Criminal statutes presumptively apply only prospectively." (*People v. Sandoval* (2007) 41 Cal.4th 825, 845.) And *Padilla* itself has been held to apply only to defendants whose convictions became final after *Padilla* was decided in 2010. (*Chaidez v. United States* (2013) __ U.S. __ [133 S.Ct. 1103, 1113].)

Finally, defendant argues that *People v. Soriano* (1987) 194 Cal.App.3d 1470 provides a basis for his ineffective assistance of counsel claim. *Soriano* concluded that if defense counsel gives advice regarding immigration consequences, he or she must give adequate advice, but the opinion did not require counsel to give such advice in the first place. (*Id.* at pp. 1477-1482; see *People v. Reed* (1998) 62 Cal.App.4th 593, 602 [finding *Soriano* inapposite as to an attorney's "complete failure to tell the defendant about a particular plea effect"].) Here, defendant contends only that his attorney failed to provide any advice about immigration consequences, and so *Soriano* would not apply. Even if the circumstances in *Soriano* were analogous to those in this case, *Soriano* would not provide a basis for vacating the plea under section 1016.5. (See *People v. Kim, supra,* 45 Cal.4th 1078, 1107.) Furthermore, defendant fails to show that the trial court erred in finding that defendant was not prejudiced by any asserted improper advisement.

In sum, defendant was properly given the statutorily required advisement, and the trial court did not abuse its discretion in denying defendant's motion to vacate.

DISPOSITION

The trial court's order denying defendant's motion to vacate the judgment and plea is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, J., Acting P.J. HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.