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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROGELIO MANZO MALDONADO, Defendant and Appellant.	2d Crim. No. B235306 (Super. Ct. No. 2008019851) (Ventura County)

Rogelio Manzo Maldonado appeals from an order denying his nonstatutory motion to vacate his guilty plea to possession of cocaine. (Health & Saf. Code, § 11350, subd. (a).) Appellant, who is not a citizen, contends that trial counsel was ineffective for failing to (1) advise him of the adverse immigration consequences of his plea, and (2) "attempt to secure a disposition that would avoid or minimize the possibility of deportation." We affirm.

Procedural Background

Before pleading guilty, appellant initialed a provision in a felony plea form. The provision stated: "If I am not a citizen and am pleading guilty to . . . a controlled substance offense, . . . I will be deported, excluded from the United States and denied naturalization." In open court, the prosecutor advised appellant: "Do you understand that,

if you're not a citizen, the conviction will result in your deportation, exclusion from the United States and denial of naturalization." Appellant responded, "Yes."[1]

Pursuant to Penal Code section 1210.1,[2] the trial court suspended the imposition of sentence and placed appellant on formal probation for 36 months. No jail time was imposed as a condition of probation. Appellant was required to participate in a drug treatment program.

With certain exceptions not applicable to appellant, section 1210.1 provides that " 'a defendant who has been convicted of a "nonviolent drug possession offense" must receive probation and diversion into a drug treatment program, and may not be sentenced to incarceration as an additional term of probation.' [Citation.] If the defendant completes such drug treatment and complies with the other conditions of probation, 'the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant.' (§ 1210.1, subd. (e)[(1)].)" (*People v. Parodi* (2011) 198 Cal.App.4th 1179, 1183.)

In January 2010, approximately 13 months after appellant had been placed on probation, the probation officer reported that appellant had complied with the terms of his probation and had completed the court-ordered drug treatment program. In February 2010, the trial court terminated probation, set aside appellant's guilty plea, and dismissed the case pursuant to section 1210.1, subdivision (e)(1).

The setting aside of a conviction pursuant to section 1210.1 does not release a defendant from all disabilities arising from the conviction. (See § 1210.1, subd. (e)(2) & (3).) In March 2011 appellant filed a nonstatutory motion to vacate his guilty plea for all purposes. Appellant was represented by attorney Matt Bromund. The motion was based

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[1] 8 United States Code section 1227(a)(2)(B)(i) provides: "Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

[2] All further statutory references are to the Penal Code.

on the denial of his constitutional right to the effective assistance of counsel. Appellant declared: "[Trial counsel] never advised me that this plea would have immigration consequences for me. I never would have pled guilty to the charge and agreed to this disposition if I had known that it would affect my immigration status and cost me my home in the United States. . . . I have been a Lawful Permanent Resident for over 20 years and am currently facing removal proceedings . . . as a cause of this plea." The trial court denied the motion.

Two months later, appellant retained new counsel and filed a second motion to vacate his guilty plea based on the alleged denial of his constitutional right to the effective assistance of counsel. In his declaration in support of the motion, appellant stated that, before he pleaded guilty, trial counsel had "assured [him] that the charges . . . would be entirely eliminated if [he] completed the drug program. [Counsel] never explained . . . that this was not true for immigration purposes . . . ." Appellant acknowledged that, at the time of his plea, he was informed that his conviction could have adverse immigration consequences. "[B]ut because [counsel] had told me that the charges would be eliminated if I successfully completed the drug program, I did not believe that this applied to me."

As to Matt Bromund's representation of appellant during the first motion to vacate, appellant declared: "Mr. Bromund never interviewed me with regard to the advice I received from my attorney nor did he ask for any documents from my family or me. In fact, I only once spoke with Mr. Bromund about the [sentence ends here without completion]."

Appellant's new counsel filed a separate declaration in which he stated: "This is [appellant's] second motion of this kind. Nevertheless, [appellant's] prior counsel, Attorney Matt Bromund, never advised the court of the exact advice given to [appellant] by his [trial] attorney nor does he appear to have made any investigation. In fact, in my interviews with [appellant], [he] has stated that Mr. Bromund never even interviewed him with regard to the advice that his attorney provided him at the time of the plea.

Consequently, Mr. Brumond [*sic*] also rendered ineffective assistance to [appellant] in presenting only a barebones motion to the court."

In its opposition to the second motion to vacate, the People argued, inter alia, that the motion should be denied pursuant to the rule that "piecemeal presentation of claims [is] forbidden." In support of its argument, the People cited *People v. Kim* (2009) 45 Cal.4th 1078.

Discussion

In *People v. Kim, supra,* 45 Cal.4th 1078, the defendant made a nonstatutory motion to vacate his guilty plea. "This motion alleged defendant's state and federal constitutional rights were violated because his trial counsel 'rendered ineffective assistance of counsel for his failure adequately to investigate the immigration consequences of the conviction' and also 'for his failure to defend Mr. Kim against a plea that would result in mandatory deportation or to make any effort to get an equivalent nondeportable conviction.' " (*Id*., at p. 1089.)

Our Supreme Court treated the nonstatutory motion to vacate as a petition for a writ of error *coram nobis.* The Court noted: "[A] nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for a writ of error *coram nobis* [citations]."[3] (*People v. Kim*, *supra*, 45 Cal.4th at p. 1096.) The court concluded that the defendant was not entitled to the writ because his "petition is successive and improperly raises claims piecemeal." (*Id*., at p. 1101.) The court observed: "As with petitions for writs of habeas corpus, one seeking relief via *coram nobis* may not attack a final judgment in piecemeal fashion, in proceedings filed seriatim, in the hopes of finally convincing a court to issue the writ." (*Ibid*.)

The rule for habeas corpus proceedings is stated in *In re Clark* (1993) 5 Cal.4th 750, 767-768: "It has long been the rule that absent a change in the applicable law or the

[3] "A petition for a writ of error *coram nobis* . . . is a motion to vacate judgment. [Citations.] However, the petition is a *nonstatutory* motion to vacate judgment [citations], since the petition seeks a common law remedy." (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1523.)

facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. [Citations.] . . . " 'In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him.' "

The *Clark* court reasoned: "Successive petitions . . . waste scarce judicial resources . . . . [¶] Willingness by the court to entertain the merits of successive petitions seeking relief on the basis of the same set of facts undermines the finality of the judgment. Moreover, such piecemeal litigation prevents the positive values of deterrence, certainty, and public confidence from attaching to the judgment." (*In re Clark*, *supra*, 5 Cal.4th at p. 770.)

Here, appellant brought successive motions to vacate his guilty plea based on the same claim arising from the same set of facts: trial counsel was ineffective because he failed to advise appellant of the adverse immigration consequences of his plea. Accordingly, the second motion was procedurally barred.

Even if the second motion were not procedurally barred, appellant would lose on the merits because the motion did not state a case of relief on *coram nobis*. "That a claim of ineffective assistance of counsel . . . is an inappropriate ground for relief on *coram nobis* has long been the rule. [Citations.] Although an attorney has a constitutional duty at least not to affirmatively *misadvise* his or her client as to the immigration consequences of a plea [citations], any violation in this regard should be raised in a motion for a new trial or in a petition for a writ of habeas corpus. [Citation.]" (*People v. Kim*, *supra*, 45 Cal.4th at p. 1104.)

Even were we to deem appellant's motion to constitute a petition for a writ of habeas corpus, no relief could be granted: "[P]ersons like [appellant], who have completely served their sentence and also completed their probation or parole period, may not challenge their underlying conviction in a petition for a writ of habeas corpus because they are in neither actual nor constructive custody for state habeas corpus purposes." (*People v. Kim*, *supra*, 45 Cal.4th at p. 1108.)

Nor is relief available under section 1016.5, which permits "a criminal defendant, even if no longer in custody, [to] move to withdraw a guilty plea if the trial court accepting the plea failed to admonish the accused of the immigration consequences of the plea." (*People v. Kim, supra,* 45 Cal.4th at p. 1106.) "[T]he trial court properly admonished [appellant] 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 the statute. [Citation.]" (*Id*., at p. 1107, fn. 20.)

In any event, appellant has failed to show that he was prejudiced by trial counsel's allegedly deficient performance. To prevail on a claim of ineffective counsel, a defendant "must prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) It is sheer speculation whether effective counsel could have "secure[d] a disposition that would avoid or minimize the possibility of deportation."

Moreover, appellant's "assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.' [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 253, disapproved on another ground in *Padilla v. Kentucky* (2010) __ U.S. __ [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284].) "In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court . . . may consider the probable outcome of any trial, to the extent that may be discerned. [Citations.] . . . [N]othing in [appellant's] declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial. Nor did [appellant] explain at the hearing on the [motion to vacate] how the evidence might have exonerated him. [¶] Based upon our examination of the entire record, [appellant] fails, ultimately, to persuade us that it is reasonably probable he would have forgone the distinctly favorable outcome he obtained by pleading, and instead insisted on proceeding to trial, had trial counsel not misadvised him about the

immigration consequences of pleading guilty. [Citations.]" (*In re Resendiz, supra*, 25 Cal.4th at p. 254.)[4]

Disposition

The order denying appellant's nonstatutory motion to vacate his guilty plea is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

[4] The above quotations are from Justice Werdegar's plurality opinion in which two other justices joined. Three justices concurred in the disposition because "petitioner has failed to show prejudice." (*In re Resendiz, supra*, 25 Cal.4th 230, 259 (conc. & dis. opn. of Brown, J.) Only one justice concluded that petitioner had made the requisite showing of prejudice. (*Id*., at p. 255 (conc. & dis. opn of Mosk, J.)

Edward E. Brody, Judge

Superior Court County of Ventura

Keli M. Reynolds, for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General.