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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WAYNE ANDREW RUSSELL, Defendant and Appellant.	B266278 (Los Angeles County Super. Ct. No. BA340669)

APPEAL from an order of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Dismissed.

Robert Dennis Rentzer for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 2009, Wayne Andrew Russell, a citizen of Jamaica, pleaded no contest to, and was convicted of, felony possession of marijuana for sale. The trial court suspended the imposition of Russell's sentence and placed him on formal probation for three years, the terms and conditions of which included serving 30 days in the county jail. Russell served his jail term and also successfully completed the other terms and conditions of his probation. In 2013, the trial court dismissed Russell's conviction and withdrew his no contest plea pursuant to Penal Code section 1203.4.[1] The dismissal of Russell's conviction and withdrawal of his plea under section 1203.4 did not have the effect of eliminating the potential immigration consequences of the conviction and plea. Accordingly, Russell filed a statutory motion later in 2013 under section 1016.5 to vacate the conviction and withdraw his plea for immigration purposes on the ground that his attorney did not advise him of the immigration-related consequences of the plea, including the possibility that he could be deported. The trial court denied Russell's motion in 2014. Russell did not appeal.

The following year, Russell filed a second motion to vacate his conviction and withdraw his plea. The motion had both nonstatutory and statutory dimensions. The nonstatutory claim was that Russell's waiver of his right to a jury trial at the time he entered his plea was defective because his attorney failed to explain the full contours of that right and thus rendered

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

ineffective assistance to Russell. The statutory claim again was based on section 1016.5. Russell revised the basis of his section 1016.5 claim, however; he argued that section 1016.5 requires the trial court to give the advisement regarding the immigration-related consequences of a plea, and the advisement he received was inadequate because the prosecutor, rather than the court, delivered it. The trial court denied the second motion.

Russell filed a petition for a writ of mandate directing the trial court to vacate the order denying the second motion. The petition raises the statutory and nonstatutory claims that Russell made in the second motion. (*Russell v. Superior Court* (No. B265740).) Russell also timely appealed from the order denying the second motion; he raises only the statutory claim in his appeal briefs. We asked the parties to address whether the order is appealable. We hold that the trial court's dismissal of Russell's section 1016.5 claim was not appealable because Russell failed to appeal from the denial of his initial section 1016.5 motion and thereby waived the right to the one, and only one, appeal that we believe section 1016.5 affords. Accordingly, we dismiss Russell's appeal. In light of our disposition, we do not address the merits of Russell's section 1016.5 claim.[2]

FACTUAL AND PROCEDURAL BACKGROUND

A. *Russell's Arrest, Plea, and Conviction*

Russell is a Jamaican citizen. He alleges that he left Jamaica for Los Angeles in 2008.

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[2] We will issue a separate order containing our disposition of Russell's writ petition.

On May 12, 2008, Los Angeles Police Department officers arrested Russell after he was found in an apartment that contained a large amount of marijuana, scales, shipping supplies, handguns, and fraudulent documents. Russell was not the apartment's tenant; he told the officers he was staying there for a night with a friend. Russell's fingerprints were not found on any of the items seized from the apartment. A motor vehicle parked at another apartment building about five miles away also contained marijuana, a scale, and currency. Russell's fingerprints were not on any of these items, but his Jamaican passport was found in the vehicle.

On March 25, 2009, the People filed an information charging Russell with felony possession of marijuana for sale in violation of section 11359 of the Health and Safety Code. Russell was arraigned, and he pleaded not guilty.

On May 4, 2009, the parties informed the trial court that they had reached a disposition. In particular, the prosecutor stated that Russell was going to plead guilty or no contest and would be placed on three years of formal probation, conditioned on service of 30 days in county jail and waiver of the right to contest the forfeiture of the currency that the police had seized. The court asked Russell if he understood the terms of the disposition. Russell answered that he did. The court then asked the prosecutor to take the plea. Consistent with that directive, the prosecutor first advised Russell that he would be pleading to a felony, would be placed on probation, would have to register as a narcotics offender and would not be able to contest a forfeiture of the currency seized. Russell responded that he understood all of those advisements.

The prosecutor then advised Russell that he had a right to a jury trial and other constitutional rights, including the right to confront and cross-examine witnesses against him, the right against self-incrimination, and the right to present a defense. The prosecutor asked Russell if he had discussed with his lawyer his right to a jury trial and the other rights. Russell answered yes. The prosecutor next asked Russell if he understood these rights. Russell stated that he did. The prosecutor then asked Russell if he was giving up his right to a jury trial and other rights. Russell responded yes.

The prosecutor next gave the following immigration-related advisement to Russell: "If you are not a citizen of the United States, your conviction . . . will result in your being deported from the United States, excluded from admission to the United States, and denied naturalization. Do you understand that?" Russell responded, "Yes, sir."

The prosecutor continued with other advisements, all of which Russell said that he understood. The prosecutor then asked Russell if anyone had promised him anything else to get him to change his plea or had threatened him to get him to do so; Russell said no. The prosecutor next asked Russell if he was pleading guilty or no contest freely and voluntarily, "with what you believe to be full knowledge of the consequences." Russell answered yes. Russell also stated that he had no questions regarding his rights or the consequences of his plea.

Russell then pleaded no contest and stated that he understood that a no contest plea has the same force and effect as a guilty plea. Russell's counsel joined in the waivers and stipulated to a factual basis for the plea.

Following Russell's entry of his plea and counsel's concurrence in it, the trial court found that Russell "knowingly, expressly, and understandingly waived his statutory and constitutional rights in this case." The court further found that Russell's plea was "freely and voluntarily made with a full understanding of the nature of the charges and the nature of the consequences." The court additionally found there was a factual basis for the plea and found Russell guilty based on the plea. The court suspended imposition of sentence and placed Russell on three years of formal probation conditioned on service of 30 days in county jail.

Less than 18 months into his three-year probation term, Russell moved for early termination of probation. On November 23, 2011, the trial court granted that motion, finding that Russell had completed all the terms and conditions of probation.[3] On March 14, 2013, the court granted Russell's motion to set aside his conviction pursuant to section 1203.4. Consistent with this disposition, the court vacated Russell's no contest plea, and entered a not guilty plea instead.

B. *Russell's First Motion to Vacate and Withdraw His Plea*

Because a section 1203.4 dismissal does not eliminate the immigration-related consequences of a conviction following a no contest plea (*People v. Martinez* (2013) 57 Cal.4th 555, 560), Russell moved on December 3, 2013 to vacate the conviction and withdraw his plea for immigration purposes as well. This motion was statutory. It was based on section 1016.5, which provides

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[3] The court denied Russell's simultaneous request to reduce his felony conviction to a misdemeanor.

that, before accepting a no contest or guilty plea from a defendant, the trial court must advise the defendant that if he or she is not a United States citizen, the defendant's conviction following the plea may result in the defendant's "deportation, exclusion from admission to the United States, or denial of naturalization . . . ." (§ 1016.5, subd. (a).) Section 1016.5 authorizes the defendant to file a post-conviction motion to vacate the judgment and withdraw his plea based on the court's failure to provide the required immigration-related advisement. (*Id.*, subd. (b).)[4]

In support of his motion, Russell claimed that "he had no idea at the time of his [no contest] plea of the true immigration consequences of [the] plea, because his trial attorney merely advised him to plead guilty and never explained anything about deportation or possible defenses in this case or an alternate disposition to the charge[d] offense." Russell further claimed that his attorney's advice "reasonably caused him to believe that there were no immigration consequences to his [no contest] plea."

At the February 25, 2014 hearing on the motion, Russell's counsel (who was not the attorney advising Russell at the time of his plea) elaborated on Russell's section 1016.5 claim, stating that if Russell "would have known [that the plea] was going to cause him never to become a member of this community, why would he plead guilty? He was innocent." Russell's counsel

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[4] By the time that Russell filed his section 1016.5 motion, he had served his jail sentence and long since been released from custody. Therefore, he could not seek to vacate the judgment and withdraw his plea for immigration purposes through a petition for a writ of habeas corpus. (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 68.)

further stated: "Nobody put on the record clearly, understand this, . . . you are never going to be able to stay in this country if you plead guilty. Make it clear. They run through it. You have a right to remain silent. They go through the litany. Oh, you have a right to know that you will be deported. The guy is barely here from Jamaica a few days. He doesn't know our system. He is nervous as hell. This is a case that he should get a benefit because it is wrong what happened. The lawyer should have—I do this all the time—should have put it on the record."

At the close of the hearing, the trial court stated that, based on its review of the transcript of Russell's plea, it had concluded that Russell was "advised of the immigration consequences, including the fact he would be deported," and Russell nevertheless "elect[ed] to plead [no contest.]" Accordingly, the court ruled that it found no "legal basis under . . . section 1016.5 to vacate the plea," and it denied Russell's motion. Russell did not appeal from the court's order denying the motion.

C. *Russell's Second Motion to Vacate and Withdraw His Plea*

Just over a year later, on April 1, 2015, Russell filed a second motion to vacate his conviction and withdraw his plea. Russell characterized the motion as having both "nonstatutory" and "statutory" components. The nonstatutory component was based primarily on the claim that his plea was "unconstitutionally obtained by reason of a defective jury trial" waiver. Russell explained this claim as follows: his waiver of his right to a jury trial that accompanied his plea "was made in total ignorance of what a United States jury trial consists of," because "NOBODY, not defense counsel, not the [d]eputy [district

attorney], and not the court ever advised [him]" that 12 people sit on the jury and that the jury's "verdict had to be unanimous." Russell also argued in the second motion that his attorney's failure at the time of the plea to give him immigration-related advice constituted ineffective assistance of counsel. Russell did not label this argument as either statutory or nonstatutory

The component of the second motion that Russell identified as statutory was based on the claim that section 1016.5 requires the trial court itself to give advisement on the immigration-related consequences of a no contest plea. That requirement was not satisfied, Russell argued, because the prosecutor, rather than the court itself, gave the advisement. Russell acknowledged that he previously had made a statutory motion under section 1016.5 which the trial court denied. Russell asserted, however, that his previous statutory motion was "defective" because it was based on the argument that his lawyer at the time of the plea failed to explain the immigration-related consequences of the plea, rather than on the argument he now was making that the court should have delivered the immigration advisement, not the prosecutor. Russell asked the trial court to treat his revised section 1016.5 claim as a request for reconsideration of the denial of the first motion.

The trial court held a hearing on Russell's second motion on June 9, 2015. At the hearing, Russell's counsel began his presentation with the statutory claim that section 1016.5 requires courts to advise defendants of the immigration consequences of a plea and that the prosecutor's advisement to Russell of those consequences thus "was not legally sufficient." Russell's counsel then discussed the nonstatutory claim of defective jury trial waiver, arguing that Russell "was not told

that a jury trial consists of 12 people who must decide your guilt or innocence unanimously beyond a reasonable doubt. He was simply told you have a right to a jury trial. What does that mean, a right to a jury trial?"

At the close of the hearing, the trial court stated that Russell's "prior counsel filed a previous motion and argued the same issues, which was heard and denied by th[e] court" the year before. The court further stated, "In my reviewing the requirements of [section] 1016 [*sic*], [they] were in fact, complied with by the court. I don't find there is any undue prejudice to . . . Russell. If he wanted to have his case go to trial, he should have done it at that time. It is a buyer's remorse, unfortunately, for him. There is no legal basis for the court to grant the motion, so the motion to withdraw his plea is denied at this time." The trial court entered an order on June 9, 2015 memorializing its denial of Russell's motion.

D. *Russell's Writ Petition and Appeal*

On July 30, 2015, Russell filed a petition for writ of mandate requesting that we direct the trial court to vacate its June 9, 2015 order and to enter a new order granting his motion to withdraw his plea. (*Russell v. Superior Court* (No. B265740).) In his petition, Russell argued that his attorney at the time of his plea provided ineffective assistance of counsel because he failed to inform Russell of the immigration-related consequences of the plea and failed to explain the nature of his right to a jury trial. Russell also argued in his petition that section 1016.5 requires the trial court, not the prosecutor, to give the immigration-related advisement specified in that statute.

On August 6, 2015, we requested briefing on whether the June 9, 2015 order denying Russell's second motion was appealable. The next day, Russell filed a notice of appeal from that order. Russell's appeal briefs make just one argument: section 1016.5 requires the trial court, not the prosecutor, to give the immigration-related advisement specified in that statute.

The People submitted a letter brief on appealability; Russell addressed that question in his reply brief. On December 3, 2015, we issued an order stating that appealability would be addressed in our disposition of Russell's appeal, and that no further action would be taken on his petition for writ of mandate pending our appealability determination.

DISCUSSION

Russell's claim that section 1016.5 requires the trial court itself, not the prosecutor, to deliver the immigration-related advisement specified in that statute is the sole issue that Russell raises on appeal from the trial court's order denying his second motion to vacate his conviction and withdraw his plea. Russell argues that this claim necessarily is statutory because it is based on section 1016.5, and therefore the order denying it is appealable under *People v. Totari* (2002) 28 Cal.4th 876 (*Totari*). We agree with Russell that he is raising a statutory claim on appeal. But we disagree that the order denying the claim is appealable under *Totari*.

"[O]rdinarily, no appeal lies from an order denying a motion to vacate a judgment of conviction on a ground which could have been reviewed on appeal from the judgment." (*Totari*, *supra*, 28 Cal.4th at p. 882.) The rationale for this long-standing

limitation, known as the "'no second appeal' rule" (*id*. at p. 886), is rooted in society's interest in the finality of judgments of conviction. As the California Supreme Court has explained, "allowance of an appeal from [an] order denying [a] motion to vacate would virtually give defendant two appeals from the same ruling and, since there is no time limit[] within which the motion may be made, would in effect indefinitely extend the time for appeal from the judgment. [Citation.] The considerations are the same whether the matters sought to be presented by motion to vacate actually were presented to the trial court prior to judgment of conviction, or whether such matters should have been but were not so presented." (*People v. Thomas* (1959) 52 Cal.2d 521, 527; see also *Totari*, at p. 882.) The no second appeal rule promotes finality by "discourag[ing] defendants from raising *any* postjudgment claim that could have been raised before imposition of jdugment or by way of direct appeal from the original judgment." (*Totari*, at p. 886; see also *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981 ["an order ordinarily is not appealable when the appeal would merely bypass or duplicate appeal from the judgment itself"].)

The interest in finality is so strong that the no second appeal rule generally will even override the right to appeal afforded by section 1237, subdivision (b), which appears to sweep broadly by providing that a defendant may appeal "[f]rom any order made after judgment, affecting the substantial rights of the [defendant]." (§ 1237, subd. (b).) Because of the no second appeal rule, section 1237, subdivision (b), is simply not as expansive as its language suggests. (*Totari*, at p. 882 [no second appeal rule "limit[s]" § 1237, subd. (b)].)

In *Totari*, the Supreme Court determined that section 1016.5 creates an exception to the no second appeal rule because it expressly authorizes a defendant to file a postjudgment motion to vacate his conviction and withdraw his plea based on the trial court's failure to give the immigration-related advisement specified in the statute, and does so without placing any time constraints on when the motion can be made; thus, section 1016.5 permits a defendant to file a motion to vacate a judgment of conviction long after any appeal from the judgment has run its course. (*Totari*, *supra*, 28 Cal.4th at pp. 881, 886.)[5] By its terms, section 1016.5 does not specifically authorize an appeal from an order denying a postjudgment motion made thereunder. (*Totari*, at p. 881.) The Court in *Totari* held, however, that such an order is appealable through section 1237, subdivision (b), because it "qualifies as an 'order made after judgment, affecting the substantial rights of the [defendant]'" within the meaning of that statute. (*Totari*, at p. 887.) In reaching that conclusion, the Court reasoned that the limitation the no second appeal rule normally imposes on section 1237, subdivision (b), gives way when that provision is used as the vehicle for an appeal from an order denying a section 1016.5 motion. That is so, the Court said, because section 1016.5 explicitly confers on noncitizen defendants a "substantial right[]" to be advised of the immigration-related consequences of a guilty

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[5] In *Totari*, itself, the defendant filed his section 1016.5 motion 13 years after the judgment was entered. (*Totari*, at p. 879; see also *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 204 [§ 1016.5 permitted the defendant to file a motion to vacate a plea entered six years earlier].)

or no contest plea and affords them a means to redress violations of that right "by way of a *statutory* postjudgment motion to vacate" the plea. (*Totari*, at pp. 886-887.) *Totari* emphasized that the Legislature thus had made a determination in section 1016.5 to trump the no second appeal rule.[6]

Totari in no way, however, renders the no second appeal rule a nullity with respect to any and all section 1016.5 motions. To the contrary, we believe that even after *Totari*, the no second appeal rule retains its usual force when, as Russell did here, a defendant files an initial section 1016.5 motion, but fails to appeal from the order denying it, and then files a second section 1016.5 motion and seeks to appeal from an order denying that motion. *Totari* does not make the order denying the second section 1016.5 motion appealable. To the contrary, Russell's litigation tack fits to a tee the scenario that the no second appeal rule is designed to prevent: the indefinite extension of the time for appeal of a motion to vacate a judgment of conviction, which thereby leaves the finality of the judgment up in the air. (*Totari*,

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[6] The Court in *Totari* contrasted orders denying a statutory postjudgment motion to vacate under section 1016.5 with orders denying a "a *nonstatutory* postjudgment motion to vacate." (*Totari*, *supra*, 28 Cal.4th at p. 886.) The Court stated that, subject to narrow exceptions, the latter are generally nonappealable under the no second appeal rule "[b]ecause the grounds supporting a nonstatutory motion are not specifically defined" by statute. (*Ibid.*; see also *id*. at p. 882 [discussing exceptions to the nonappealability of orders denying nonstatutory motions to vacate].) Because Russell's appeal does not raise the nonstatutory claims he made in his section 1016.5 motion, we do not address whether the trial court's denial of those claims is appealable.

supra, 28 Cal.4th at p. 882.) Simply put, finality is uncertain if a defendant is free to file successive section 1016.5 motions and then pick and choose from which orders denying the motions to appeal.

Totari contemplates the prospect of two appeals following judgments of convictions, notwithstanding the no second appeal rule. Specifically, under *Totari,* a defendant can appeal from the entry of the judgment itself; and then if that fails, the defendant can file a section 1016.5 motion; and if that, too, fails, the defendant can appeal from the order denying it. *Totari*'s tolerance for two appeals presupposes, however, that the defendant will file just one section 1016.5 motion, and if it is denied, the defendant then will file an appeal from the denial order. We do not read *Totari* to license a defendant to file an initial section 1016.5 motion, decline to appeal from an order denying it, and then turn around and start the section 1016.5 litigation anew with yet another section 1016.5 motion. A holding that the order denying Russell's second section 1016.5 motion is appealable would bestow on defendants a right to appeal at three different junctures, not just the two (one after the entry of judgment and one after denial of a section 1016.5 motion to vacate) that *Totari* approves as an exception to the no second appeal rule. *Totari* does not give a defendant that many bites at the apple. We hold that the trial court's order denying Russell's second section 1016.5 motion is not appealable.

Russell's casting of his second section 1016.5 motion as a request for reconsideration of the order denying the first section 1016.5 motion does not change the outcome because orders denying motions for reconsideration themselves are not appealable. (E.g., *Association for Los Angeles Deputy Sheriffs v.*

County of Los Angeles (2008) 166 Cal.App.4th 1625, 1634.) Nor does it matter that Russell's first section 1016.5 motion was (as he correctly put it) "defective" due to the fact that it argued that Russell's attorney at the time of the plea failed to give Russell the immigration-related advisement specified in the statute, but made no mention of whether the trial court failed to give the advisement, which is the issue that section 1016.5 actually addresses. (*People v. Aguilar*, *supra*, 227 Cal.App.4th at p. 71 ["[§] 1016.5 addresses only the duty of trial courts to advise the defendant of the immigration consequences of the plea[; i]t does not address any duty that defense counsel may have to provide such advice"].) The problem is that the no second appeal rule applies even to matters presented in a second motion to vacate a judgment of conviction that "should have been but were not . . . presented" in the first motion. (*People v. Thomas*, *supra*, 52 Cal.2d at p. 527.) By the same token, the no second appeal rule also precludes an appeal from an order denying a second section 1016.5 motion when the defendant failed to appeal from the order denying the first section 1016.5 motion.

Two other principles limiting collateral attacks on judgments of conviction reinforce our holding that the order denying Russell's second section 1016.5 motion is not appealable. First, Russell's attempted appeal from that order runs afoul of the bar on "affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time." (*People v. Kim* (2009) 45 Cal.4th 1078, 1099.) In the context of the right to appeal, this bar means that a party who brought a claim, suffered an adverse judgment on the claim, but who then did not appeal from that judgment cannot bring the claim again because the failure to appeal renders the judgment final. (See

Franklin & Franklin v. 7-Eleven Owners for Fair Franchising (2000) 85 Cal.App.4th 1168, 1174.) Russell had a right to appeal from the order denying his first section 1016.5 motion. He did not avail himself of that right. Nothing in *Totari* suggests that we can excuse that failure and afford Russell a second chance at appeal.

Additionally, Russell's appeal from the order denying his second section 1016.5 motion is contrary to the principle that a criminal defendant may not collaterally attack a judgment of conviction in piecemeal fashion through successive motions, filed seriatim. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, *supra*, 85 Cal.App.4th at pp. 1170-1171.) Russell did just that, however, in his back-to-back section 1016.5 motions. Nothing in *Totari* suggests that section 1016.5 permits such a collateral attack on the judgment of conviction against him.[7]

Because we hold that the order denying Russell's second section 1016.5 motion is not appealable, we do not address the merits of the motion.[8]

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[7] We do not address the limitations on successive petitions for a writ of habeas corpus that argue that the trial court failed to provide the immigration-related advisement specified in section 1016.5.

[8] Russell filed a request for judicial notice of three documents, which were attached as exhibits A, B, and C to the request. We previously denied the request as unnecessary with respect to exhibits A and C and deferred ruling on the request with respect to exhibit B. In light of our dismissal of Russell's appeal, we now deny the request with respect to exhibit B.

DISPOSITION

The appeal is dismissed.

SMALL, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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