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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME CAMPOS,

Defendant and Appellant.

B281820

(Los Angeles County  
Super. Ct. No. VA120264)

Appeal from an order of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Nina Bonyak for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Jaime Campos is a lawful permanent resident of the United States. In 2011 he pleaded no contest to one count of burglary (Pen. Code, § 459)<sup>1</sup> and one count of assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), and admitted an enhancement allegation that he personally inflicted great bodily injury upon a victim (§ 12022.7). The trial court sentenced him to five years in state prison. Upon his release in 2016, the United States Department of Homeland Security (DHS) detained him and initiated deportation proceedings. Campos filed a motion in the superior court to vacate his conviction under section 1473.7 on the ground that his trial counsel was constitutionally deficient for failing to advise him that his guilty plea would subject him to deportation. The court denied the motion and Campos appealed. We affirm.

### **FACTUAL AND PROCEDURAL HISTORY**

Campos was born in 1981 and began living in the United States at the age of three when he and his twin sister were adopted by United States citizen parents. He thereafter lived in the United States as a lawful permanent resident and married a United States citizen. His twin daughters, both United States citizens, were born in 2001.

On a night in May 2011, Campos entered the home of L.S., a former girlfriend, without her permission, grabbed her by her neck, and pushed her into a wall.<sup>2</sup> He then kicked in the door to a bedroom where a man was sleeping. Campos repeatedly punched

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Our summary of the facts regarding the alleged crimes is based on testimony adduced at the preliminary hearing in Campos's criminal case.

the man in his head, body, and arms. When L.S. tried to stop him, Campos hit her head with his elbow, causing her head to hit a wall. Campos then pulled the man off the bed and “began to stomp on his head, his face, [and] kick him in his back and on his head,” until the man lost consciousness. Campos left the house and got into a vehicle. Although Campos could have left the area by driving forward, he drove the car “forcefully” in reverse toward L.S. and would have hit her if she had not “jumped out of the way.” The male victim suffered a fractured hand and a concussion, and was treated at a hospital.

In August 2011, the district attorney charged Campos by information with burglary (§ 459) and three counts of assault with a deadly weapon or by means likely to produce great bodily injury (former § 245, subd. (a)(1)).<sup>3</sup> The information further alleged that he personally inflicted great bodily injury upon the male victim within the meaning of section 12022.7, subdivision (a).

On November 28, 2011, Campos signed a “Felony Advisement of Rights, Waiver, and Plea Form” (the plea advisement form). The plea advisement form describes the terms of the plea, certain constitutional rights and an acknowledgement of his waiver of such rights, and the consequences of his plea. Next to each paragraph is a box, which the defendant was instructed to initial “only if [he or she] understand[s] and agree[s] with it.” Among the specified consequences of the plea is the following: “Immigration Consequences—I understand that if I am not a citizen of the United States, I must expect my plea of guilty or no contest will

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<sup>3</sup> At the time Campos committed his crime, section 245, subdivision (a)(1) made it a crime to commit “an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury.”

result in my deportation, exclusion from admission or reentry to the United States, and denial of naturalization and amnesty.” (Boldface omitted.) Campos initialed each box and signed the form immediately below the statement that he had “read and initialed each of the paragraphs [on the form] and discussed them with [his] attorney,” and that he understood and agreed with what was stated in each paragraph. Campos’s attorney signed the form below a statement that he had reviewed the form with Campos and “explained each of the defendant’s rights to the defendant and answered all of his . . . questions with regard to those rights and this plea,” and discussed with him “the consequences of the plea.”

At a hearing held on the same day that Campos signed the plea advisement form, Campos’s attorney informed the court that “[w]e have agreed to take the government’s offer” and “we will accept the plea agreement.” Under the agreement, Campos would plead guilty to one count of burglary and one count of assault by means likely to produce great bodily injury, and he would admit the personal infliction of great bodily allegation.

In response to the prosecutor’s questions, Campos indicated that he had “had enough time to discuss this case and any possible defenses [he had] with [his] attorney,” and that it was now his “desire to plead guilty or no contest to the charges in count[s] 1 and 2,” and to admit the great bodily injury allegation. The prosecutor then obtained Campos’s *Boykin-Tahl*<sup>4</sup> waivers and informed Campos: “If you are not a citizen of the United States, your conviction in this case will result in your deportation, exclusion from the United States, and denial of naturalization.” The prosecutor then asked Campos whether he had “discussed the

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<sup>4</sup> *Boykin v. Alabama* (1969) 395 U.S. 238, 240; *In re Tahl* (1969) 1 Cal.3d 122, 128-129.

immigration consequences with [his] attorney,” and Campos responded, “Yes.”

The court asked Campos about the plea advisement form, which Campos acknowledged he had filled “out along with the assistance of [his] attorney.” The court asked Campos: “By filling the form out, did you want to show me you understood the rights and consequences on the form, that you wanted to waive and give up the rights on this form, and you want to entered a guilty plea in this case?” Campos responded: “Yes, sir.” After further colloquy, Campos pleaded no contest to one count of first degree burglary in violation of section 459 (count one) and one count of assault by means likely to produce great bodily injury in violation of section 245, subdivision (a)(1) (count 2). With respect to both counts, Campos also admitted the truth of the allegation that he personally inflicted great bodily injury upon one of the victims within the meaning of section 12022.7, subdivision (a). At the prosecution’s request, the court dismissed the two remaining counts and sentenced Campos to five years in state prison.

In October 2016, upon Campos’s release from prison, DHS served Campos with a notice to appear in immigration court to respond to charges that he is subject to removal from the United States as a result of his of 2011 conviction.

On January 20, 2017, Campos filed a motion to vacate his conviction pursuant to section 1473.7. He asserted that his counsel was constitutionally deficient by failing to accurately advise him about the specific immigration consequences of his plea, and asserted that he would have rejected the plea offer had he known the consequences.

Campos supported the motion with his handwritten declaration, in which he stated: “When I took my deal for my criminal case I was not aware of what can happen to my legal status. My lawyer did not advise me [that] by taking this deal

that I would be deported. If I would have known I would not have [taken] the deal. . . . I was not aware that I would be signing any deportation papers or even aware that I would have been elig[i]ble for that.” Campos further stated that prior to his conviction, he was employed and had no criminal history, and that he committed his crimes while acting in a “heat of passion” after seeing “another man” with his “girlfriend.” He said he is “sorry” for what he did, and has apologized to the victims. He explained that he has known life only in the United States, and said that his wife and daughters need him in their lives.

The motion was further supported by an exchange of emails between Nina Bonyak, the attorney representing Campos in connection with the motion to vacate the conviction, and Campos’s attorney during the 2011 plea negotiations. Bonyak informed the former attorney that Campos was facing deportation and was asserting that the former attorney had never discussed the immigration consequences of entering a plea. Bonyak asked the former counsel if he would provide “a declaration as to what advice and/or negotiations occurred at the time of the initial plea.” The former attorney responded by stating that he does not keep records beyond 60 months and would not “be able to respond to [Bonyak’s] request.”

Campos also provided the court with written statements from Campos’s adoptive mother, his sister, and others, attesting to Campos’s life in the United States, his devotion to his daughters, the burden that his deportation would have on his family, and his good character.

The court heard the motion on February 21, 2017. Campos, who was in DHS custody, appeared through counsel. The People did not file a written response to the motion, but argued in opposition to the motion at the hearing. The court denied Campos’s motion without stating its reasons. Campos timely appealed.

## DISCUSSION

### I.

Generally, vacating a conviction based on ineffective assistance of counsel is not available when, as here, the time for filing an appeal has expired and relief by writ of habeas corpus is unavailable because the person is no longer in state custody. (See *People v. Villa* (2009) 45 Cal.4th 1063, 1072; *People v. Kim* (2009) 45 Cal.4th 1078, 1108; *People v. Aguilar* (2014) 227 Cal.App.4th 60, 68.) In 2016, however, the Legislature enacted section 1473.7, which provides a mechanism to vacate a conviction or sentence that is “legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a)(1).)

The statute provides a vehicle “for a person who is no longer in actual or constructive custody to challenge his or her conviction based on a mistake of law regarding immigration consequences or ineffective assistance of counsel in properly advising of these consequences when the person learns of the error post-custody.” (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 813 (2015-2016 Reg. Sess.) July 7, 2015, p. 6; see also Assem. Com. on Public Safety, Rep. on Assem. Bill No. 813 (2015-2016 Reg. Sess.) April 21, 2015, p. 5.) Thus, when the time for filing an appeal has expired and the defendant is no longer in state custody, he may challenge his conviction under section 1473.7 on the ground that his trial counsel was constitutionally deficient by failing to advise him of the immigration consequences of his plea. (See *People v. Landaverde* (2018) 20 Cal.App.5th 287, 293-294.) If he establishes that ground “by a preponderance of the evidence,” the “court shall grant the motion.” (§ 1473.7, subd. (e)(1).)

## II.

The Attorney General contends that we should review the court's order for an abuse of discretion, citing decisions involving sections 1016.5 and 1018. (See, e.g., *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1287; *People v. Patterson* (2017) 2 Cal.5th 885, 894-895 (*Patterson*).) These statutes, however, do not implicate the defendant's constitutional rights. Section 1016.5 permits a court to grant a motion to withdraw a guilty plea when the court failed to provide a statutorily required notice to the defendant prior to taking the defendant's plea (§ 1016.5, subd. (a)); section 1018 permits a court to grant a defendant's application to withdraw a plea "for a good cause shown" (§ 1018), such as the defendant's "[m]istake, ignorance or any other factor overcoming the exercise of free judgment" (*People v. Cruz* (1974) 12 Cal.3d 562, 566). When, however, the trial court's decision implies the rejection of a defendant's argument that he or she has been deprived of a *constitutional* right, such as the right to effective assistance of counsel, the issue is a mixed question of law and fact, which we determine independently. (See, e.g., *In re Resendiz* (2001) 25 Cal.4th 230, 249 (lead opn. of Werdegar, J.), 255 (conc. & dis. opn. of Mosk, J.), abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370 (*Padilla*); *People v. Ledesma* (1987) 43 Cal.3d 171, 219 (*Ledesma*); see generally *People v. Ault* (2004) 33 Cal.4th 1250, 1264 [de novo review of mixed law and fact questions is particularly favored when a constitutional right is implicated].) Thus, in *People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725, the court noted that although the denial of a motion for new trial is ordinarily reviewed for abuse of discretion, when the motion is based upon the defendant's allegation that he was deprived of his constitutional right to the effective assistance of counsel, the appellate court will indulge all presumptions in



favor of the trial court’s express and implied factual findings, but retain “ ‘the ultimate responsibility . . . to measure the facts, as found by the trier, against the constitutional standard . . . .’ ” [Citation.] On that issue, in short, the appellate court exercises its independent judgment.’ [Citations.]” (*Id.* at p. 725.) Because the denial of Campos’s motion implicates his constitutional right to the effective assistance of counsel, we will apply these standards here.

### III.

In order to establish the deprivation of the right to the effective assistance of counsel, “a defendant must show that counsel’s representation ‘fell below an objective standard of reasonableness’ and that he was prejudiced as a result.” (*Lee v. U.S.* (2017) \_\_\_ U.S. \_\_\_ [137 S.Ct. 1958, 1964] (*Lee*); see also *Strickland v. Washington* (1984) 466 U.S. 668, 688; *Ledesma, supra*, 43 Cal.3d at p. 216.) The defendant bore the burden of proving these elements by a preponderance of the evidence (*id.* at p. 218), and, on appeal, has the burden of affirmatively establishing error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *People v. Garza* (2005) 35 Cal.4th 866, 881.)

In *Padilla, supra*, 559 U.S. 356, decided one year before Campos’s plea, the Supreme Court held that defense counsel who fails to advise a defendant of the risk that pleading guilty will result in the defendant’s deportation is constitutionally deficient. (*Id.* at pp. 367, 369.)<sup>5</sup> The nature of the advice that

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<sup>5</sup> In 2015, the Legislature expressed its intent to codify the holding of *Padilla* by enacting section 1016.3, which provides: “Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of

counsel must give regarding the immigration consequences of a plea depends upon the likelihood that the client will be deported as a result of a conviction. “ ‘When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen that pending criminal charges may carry a risk of adverse immigration consequences.’ ” (*Id.* at p. 369.) When, however, “the law is ‘succinct, clear, and explicit’ that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty.” (*United States v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 786 (*Rodriguez-Vega*), quoting *Padilla, supra*, at pp. 368-369.) Here, the Attorney General concedes that Campos’s conviction for assault likely to produce great bodily injury would “trigger deportation.”<sup>6</sup>

A factual issue facing the trial court, therefore, was whether Campos’s counsel advised him that his plea of no contest would make it virtually certain that he would be deported. Although the trial court made no express findings on this or any other factual issue, we can infer from the trial court’s ruling that it found that

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the defendant, and consistent with professional standards, defend against those consequences.” (§ 1016.3; see also § 1016.2, subd. (h).)

<sup>6</sup> As the Attorney General points out, title 8 of United States Code section 1227(a)(2)(A)(iii) provides that an “alien who is convicted of an aggravated felony at any time after admission is deportable.” An “aggravated felony” includes a “crime of violence . . . for which the term of imprisonment [is] at least one year” (8 U.S.C. § 1101(a)(43)(F)), and a “crime of violence” is defined as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another” or “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” (18 U.S.C. § 16(a) & (b).)

Campos had been so advised. (See *People v. Therman* (2015) 236 Cal.App.4th 1276, 1279; *People v. Francis* (2002) 98 Cal.App.4th 873, 878.)

The prosecutor's advisement during the plea hearing and the colloquy between the court and Campos are insufficient to determine whether Campos's counsel properly advised Campos. (*Rodriguez-Vega, supra*, 797 F.3d at p. 787.) Although the colloquy may satisfy the court's statutory obligation to advise the defendant (see § 1016.5, subd. (a)), it does not satisfy or excuse defense counsel's independent, constitutionally-mandated obligation to advise his or her client. (*Rodriguez-Vega, supra*, at p. 787; *In re Resendiz, supra*, 25 Cal.4th at pp. 240-241, 247-248 (lead opn. of Werdegar, J.), 255 (conc. & dis. opn. of Mosk, J.), abrogated in part on other ground in *Padilla, supra*, 559 U.S. at p. 370; *Patterson, supra*, 2 Cal.5th at p. 896; *People v. Perez* (2015) 233 Cal.App.4th 736, 742; see also *U.S. v. Urias-Marrufo* (5th Cir. 2014) 744 F.3d 361, 369 ["It is counsel's duty, not the court's, to warn of certain immigration consequences, and counsel's failure cannot be saved by a plea colloquy."].)

When, however, the statements made in court are viewed together with the evidence of the plea advisement form, the record supports a reasonable inference that Campos's attorney adequately advised him of the immigration consequence of the plea.

The plea advisement form that Campos signed stated that Campos "must expect" that his plea of no contest would result in his deportation. This is substantially identical to a statement that deportation is virtually certain. Campos not only initialed the box next to the "must expect" deportation language in the plea advisement form, but also acknowledged by his signature on the form that he had read, understood, and agreed with this language and discussed it with his attorney. Campos's attorney confirmed by his signature on the plea advisement form that he had explained

“the consequences of the plea” to Campos. In open court, Campos expressly confirmed that he understood the consequences of his plea as described in the plea advisement form. Lastly, the prosecutor also directly questioned Campos about his understanding of the plea consequences and informed Campos that, if he is not a citizen, his conviction “will result in your deportation, exclusion from the United States, and denial of naturalization.” Viewed in their entirety, the trial court could reasonably infer that Campos’s attorney had advised Campos of the immigration consequences as described in the plea advisement form and as expressed at the hearing when the plea was taken. This is sufficient to establish that Campos’s attorney had competently advised him of the likelihood that he would be deported.

Because there is substantial evidence to support the trial court’s implied finding that Campos’s attorney had advised Campos that he would be, or must expect that he would be, deported, we conclude that Campos was not deprived of his constitutional right to the effective assistance of counsel. The trial court, therefore, did not err in denying his motion to vacate the judgment.

**DISPOSITION**

The order denying Campos's motion to vacate his conviction is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.