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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANNY BARRIOS,

Defendant and Appellant.

B265061

(Los Angeles County
Super. Ct. No. BA127501)

APPEAL from an order of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steve Matthews, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Danny Barrios appeals from the April 24, 2015 order denying his motion to vacate his 1996 plea of no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2))¹ pursuant to section 1016.5. Barrios contends the trial court erred in denying the motion to vacate, because (1) the prosecutor suggested that some immigration consequences of the plea might not apply, and (2) Barrios was told by his attorney at the time of the plea he would not be deported. We affirm the order.

PROCEDURAL HISTORY OF CASE NO. BA127501²

Barrios and codefendant Edwin Cruz were charged by information with four counts of attempted murder (§§ 664/187), with additional allegations the attempted murders were willful, deliberate and premeditated (§ 664, subd. (a)) and a principal was armed with a firearm (§ 12022, subd. (a)(1)). Defendant was represented at a jury trial by Deputy Public Defender Doug Goldstein. A mistrial was declared on November 12, 1996, after the jury was unable to reach a verdict as to both defendants.

On November 14, 1996, defendant appeared in court, represented by Mr. Goldstein. The prosecution moved to dismiss the case as to Cruz because there was no “reasonable likelihood of obtaining a conviction in a jury trial against Mr. Cruz.” A case settlement agreement was reached as to Barrios, in which Barrios would plead no contest to assault with a firearm and admit a principal was armed with a firearm in the commission of the offense. In return, Barrios was to be sentenced to three years in state prison and all remaining charges and allegations would be dismissed.

The prosecutor explained the consequences of the plea to Barrios. For purposes of this appeal, the pertinent part of the explanation was as follows: “I need to advise you of the consequences of your plea even though some of these might not apply to you. If you

¹ All statutory references are to the Penal Code, unless otherwise indicated.

² We take judicial notice of the Los Angeles Superior Court file in Case No. BA127501. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

are on probation or parole in another matter, your conviction in the case would be a violation of that probation or parole, and you could spend additional time in custody. [¶] If you are not a citizen of the United States, your conviction could result in deportation, denial of naturalization, denial of amnesty, or denial of re-entry into this country.” Additional warnings were provided regarding use of the conviction to increase punishment on a subsequent offense and restitution fine. The prosecutor asked Barrios, “Now, do you understand all those consequences?” Barrios replied, “Yes.”

In addition, Barrios said no one “made any threats or promises” to him or anyone close to him. Barrios entered his plea and admission. The trial court made the requisite findings and accepted the plea. On December 5, 1996, Barrios was sentenced to three years in state prison, with custody and conduct credits totaling 465 days.

THE 2014 MOTION TO VACATE THE PLEA

Barrios filed his motion to vacate the plea on July 25, 2014. According to the moving papers, Barrios faces deportation unless the plea is vacated. He is a 38-year-old resident of the United States, who has lived in the country since 1992. Barrios has a wife and multiple children, all citizens of the United States. His mother, father, two brothers, and two sisters are all United States citizens.

Barrios was deported to his native country of Guatemala in 1997, but he faced persecution and returned to the United States that same year. He is a changed person, has refrained from past associations, married, and had four children. He has been working and paying taxes.

In September 2013, Immigration and Customs Enforcement detained Barrios and attempted to again deport him to Guatemala. He is contesting removal due to fear of returning to his country. Current counsel informed Barrios that he could attempt to vacate his 1996 conviction because he was not properly warned of the immigration consequences of the plea. Barrios acted in a timely fashion in seeking to vacate the plea after learning he had not been advised properly of his immigration consequences.

Barrios filed a declaration stating neither the court nor Mr. Goldstein told him he would be deported as a result of his plea. “The public defender made it clear that I was not going to be deported if I took the plea.” Barrios would not have entered the plea had he known he would be deported. Mr. Goldstein is not available to provide a declaration, as he is deceased.

The district attorney filed an opposition to the motion to vacate the plea. The opposition asserted that Barrios’s motion was procedurally barred due to the prolonged delay between the 1996 plea, 1997 deportation, and 2014 motion. In addition, Barrios was fully advised of the immigration consequences at the time of his plea, and he has not corroborated his declaration with independent evidence.

The trial court heard argument and denied the motion to vacate. The court ruled that Barrios was fully advised, on the record, of the immigration consequences of his plea. The court was not persuaded by defendant’s declaration that Mr. Goldstein advised him he would not be deported, stating, “I just don’t find it credible.”

DISCUSSION

Barrios argues on appeal that the prosecutor’s statement that some of the consequences of the plea may not apply to Barrios, combined with Mr. Goldstein’s statement that he would not be deported, required the trial court to grant the motion to vacate the plea. We disagree.

Requirements of Section 1016.5

Section 1016.5, subdivision (a) requires that before the acceptance of a plea of guilty or nolo contendere, the court must advise the defendant of the immigration consequences of the plea as follows: “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.”

If the court fails to give the advisement and “defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.” (§ 1016.5, subd. (b).) The Legislature’s intent in enacting this section was to “promote fairness to . . . accused individuals” who are not citizens of the United States and who are unaware of the immigration consequences that a plea of guilty or nolo contendere entail. (*Id.*, subd. (d).)

A trial court ruling on a motion under section 1016.5 engages in a three-part analysis. The trial court determines whether (1) “it formerly had failed to advise defendant as section 1016.5 requires,” (2) as a result of the conviction the defendant may face “one or more of the statutorily specified immigration consequences,” and (3) the “defendant was prejudiced by the court’s having provided incomplete advisements.” (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 200 (*Zamudio*).) Although section 1016.5 does not expressly state that a defendant must establish prejudice, the court in *Zamudio* interpreted the section “to require that defendants, in order to obtain relief under subdivision (b) of the statute, demonstrate they were prejudiced by any failure of the court to provide complete advisements under subdivision (a).” (*Id.* at pp. 199-200.) Prejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty if properly advised. (*People v. Martinez* (2013) 57 Cal.4th 555, 558.)

Compliance with Section 1016.5

We first address Barrios’s contention that the prosecutor’s advisement led him to believe he would not be subject to deportation as a result of his plea. The contention fails

at the first stage of *Zamudio*'s three-part analysis, as Barrios was properly advised of the immigration consequences, as follows: "If you are not a citizen of the United States, your conviction could result in deportation, denial of naturalization, denial of amnesty, or denial of re-entry into this country." The prosecutor used language that does not vary materially from section 1016.5's requirement that the defendant be advised "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." Other than the prosecutor using the word "could," instead of the statutory language of "may," the advisement Barrios received was entirely consistent with the mandate of section 1016.5. (See *People v. Limon* (2009) 179 Cal.App.4th 1514, 1518 ["Apart from the omission of a single nonsubstantive word ('hereby'), the court's advice to Limon about the immigration consequences of his pleas was *identical* to the statutory mandate"].) Because Barrios was properly advised, "his statutory claim for relief is meritless." (*Ibid.*)

We are not persuaded that the prosecutor's introductory statement that "I need to advise you of the consequences of your plea, even though some of these might not apply to you," would be understood to mean defendant would not face deportation. The statement was made immediately before the prosecutor gave Barrios the mandatory admonition that if he were on probation or parole, his plea could result in a probation or parole violation. Barrios makes no claim that he was on probation or parole, and the logical interpretation of the prosecutor's statement that "some of these might not apply to you" was in relation to probation and parole revocation, which were apparently not an issue. The prosecutor's comment was not tethered to the immigration consequences, which were unequivocally explained to Barrios. The trial court did not err in finding full compliance with section 1016.5, subdivision (a).

Competency of Trial Counsel

The remaining issue is Barrios's contention that Mr. Goldstein misled him by advising that Barrios would not be deported. The Sixth Amendment right to effective assistance of counsel includes the obligation of counsel "to inform her noncitizen client that he faces a risk of deportation." (*Padilla v. Kentucky* (2010) 559 U.S. 356, 373-374 (*Padilla*).)

The trial court rejected Barrios's factual claim that Mr. Goldstein affirmatively told him he would not be deported, a finding entitled to great weight. (*In re Resendiz* (2001) 25 Cal.4th 230, 252 (*Resendiz*), disapproved on other grounds in *Padilla, supra*, 559 U.S. at pp. 370-371; *People v. Ledesma* (1987) 43 Cal.3d 171, 219.) The trial court was well within its power to make this factual determination, in the absence of independent corroboration of Barrios's claim with objective evidence. "The Attorney General rightly reminds us, however, that petitioner's assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.' (*In re Alvernaz* [(1992) 2 Cal.4th 924,] 938; see also *U.S. v. Horne* (D.C. Cir. 1993) 987 F.2d 833, 836.))" (*Resendiz, supra*, at p. 253.)

The trial court was in a uniquely qualified position to make the factual determination that Barrios's declaration was not credible, because the court had presided over the trial and plea in 1996. It bears emphasis that Barrios was indisputably aware of the immigration consequences in 1997, when he was deported and then reentered the United States illegally, but he took no steps to remedy the situation, waiting until he again faced deportation, by which point Mr. Goldstein had passed away and was unavailable to counter Barrios's allegation. The trial court's skepticism of Barrios's recently discovered claim of ineffective assistance of counsel was entirely reasonable under the circumstances. Although "the prosecution also did not introduce evidence in this regard, the burden remains" on Barrios to "prove by a preponderance of the evidence his entitlement to relief. (*In re Johnson* (1998) 18 Cal.4th 447, 460.))" (*Resendiz, supra*, 25 Cal.4th at p. 254.) The trial court's determination that Barrios failed to establish that

Mr. Goldstein affirmatively provided inaccurate advice on the immigration consequences of the plea is supported by the record.

DISPOSITION

The order denying the motion to set aside the plea and vacate the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

KUMAR, J.*

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