

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TORVALD GUBINS,

Defendant and Appellant.

B265703

(Los Angeles County
Super. Ct. No. LA042908)

APPEAL from an order of the Superior Court of Los Angeles County, Karen Joy Nudell, Judge. Affirmed.

Berke Law Offices and Robert G. Berke, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

Torvald Gubins appeals from the trial court's January 26, 2015 order denying his motion pursuant to Penal Code section 1016.5¹ to vacate his April 22, 2005, no contest plea to kidnapping (§ 207, subd. (a).) Gubins argues the trial court erroneously denied the section 1016.5 motion, because the court in 2005 failed to fully advise him of the immigration consequences of his plea, as mandated by section 1016.5, he was prejudiced by the defective warning, and is now subject to deportation.

We determined that the appellate record is inadequate because it does not include Gubins's section 1016.5 motion, nor does it include a reporter's transcript of the plea containing the warning regarding immigration consequences that was the basis for Gubins's motion. In a footnote to Gubins's opening brief, he recognizes that the motion and transcript were not included in the record on appeal. The brief stated in part as follows: "Although a copy of the motion with supporting documents was not included in the Clerk's Transcript filed with the Court on August 13, 2015, it is nonetheless part of the normal record on appeal. See California Rules of Court Rule 8.320(d)(1)(C)."

Counsel for Gubins and the Attorney General were notified by letter from this court that the appellate record is incomplete because it does not contain the motion to vacate the guilty plea or the transcript of the no contest plea. We explained that the order denying the section 1016.5 motion is subject to summary affirmance due to the inadequacy of the record. Our letter noted, "The judgment of the trial court is presumed to be correct. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) It is the appellant's burden to show error by an adequate record. (*Osgood v. Landon, supra*, at p. 435.) Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Foust v. San Jose Construction Co., Inc., supra*, at p. 187; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)"

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

The parties were given the opportunity to respond with letter briefs on the issue of the adequacy of the record. The Attorney General filed a timely response. Gubins filed a belated response,² arguing the record was satisfactory for appellate review. Gubins did not file a motion to either correct the record on appeal or augment the record with the motion to vacate the plea and the reporter's transcript of the plea. (See Cal. Rules of Court, rule 8.340(b) [record correction] & (c) [augmentation of the record].)

Our letter to counsel was intended to convey the need for completion of the record at the risk of summary affirmance. It was incumbent on Gubins to take steps to complete the record on appeal. We apply the settled rule that a judgment is presumed correct. (*Denham v. Superior Court of Los Angeles County* (1970) 2 Cal.3d 557, 564.) "It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)" (*Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660.)

The issue on appeal is whether the trial court abused its discretion in denying the motion to vacate the plea. The record does not contain a copy of the motion. Gubins' argument on appeal centers around his 2005 plea, but the transcript of the plea is not part of the appellate record. Without these documents, this court is unable to conclude that Gubins established error or prejudice. To be clear, the record presented contains no declaration from Gubins setting forth his immigration status, what he understood regarding the immigration consequences of his plea, why he waited ten years to file his motion to vacate, and how he suffered prejudice. (*People v. Martinez* (2013) 57 Cal.4th 555, 567 [relief under section 1016.5 may be granted if defendant convinces the court he would have rejected a plea offer if properly advised]; *People v. Kim* (2009) 45 Cal.4th 1078, 1096-1097 [burden is on defendant to diligently seek relief and justify undue delay]; *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198 [defendant must

² This court granted leave to file the late letter brief.

establish a failure to properly advise of immigration consequences and that he would not have entered the plea had he known the consequence].)

We presume the judgment is correct. The order denying the section 1016.5 motion 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.