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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. SERGIO VACA, Defendant and Appellant	B276565 (Los Angeles County Super. Ct. No. VA064807)

APPEAL from an order of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed.

Eduardo A. Paredes for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

Noncitizen defendant Sergio Vaca pleaded no contest to a felony charge of possessing a controlled substance for sale. More than a decade later, he moved to vacate the conviction pursuant to Penal Code section 1016.5,[1] challenging the adequacy of the advisement concerning the immigration consequences of his plea. The trial court denied the motion. We affirm.

BACKGROUND

On July 6, 2001, defendant, represented by counsel, pleaded no contest to a violation of possessing methamphetamine for sale. (Health & Saf. Code, § 11378.) At the time, defendant was a documented resident alien. In entering the plea, defendant signed the superior court plea form and initialed all appropriate boxes, including the one that advised, "I understand that if I am not a citizen of the United States, the conviction for the offense 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." (§ 1016.5, subd. (a).) The minute order for that date also recited defendant was advised of the immigration consequences of the plea.

The reporter's transcript for the plea hearing confirmed the prosecutor asked defendant, "you have gone through the form with your lawyer, you have read the form, you understand what it said, and you agreed with what it said?" Defendant responded, "Yes." After taking defendant step by step through a series of waivers, the following colloquy occurred:

> [Prosecutor]: And sir, I'm not suggesting you're not a United States citizen, but I have to

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[1] All statutory citations are to the Penal Code unless otherwise indicated.

tell everyone if you're not a citizen of the United States, your conviction today will cause you to be deported.

The Defendant: Yes.

[Prosecutor]: If you're deported, it will cause - - it could cause you to be denied reentry into the United States or denied citizenship.

Do you understand that?

The Defendant: Yes.

[Prosecutor] Have you had a chance to talk with your lawyer about what [e]ffect this conviction could have if you're not a United States citizen?

The Defendant: Yes.

[Prosecutor]: Do you understand that you will be deported if you're not a United States citizen?

The Defendant: Yes.

[Prosecutor]: Do you have any questions about that?

The Defendant: Yes - - no.[2]

The trial court found defendant "made a knowing and intelligent waiver" and accepted his no contest plea.

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[2] Appellate counsel points to defendant's "Yes - - no" answer in response to the prosecutor's asking if he had any questions about being deported as "indicat[ing] that [defendant] did not understand the immigration consequence of his plea." As noted below, that argument is belied by defendant's statement that he knew he would be deported. In any event, that question followed 24 questions that were all phrased to—and did—elicit "yes" responses.

The appellate record is somewhat vague concerning the years between the 2001 plea and the 2016 hearing to vacate the conviction. It appears defendant was arrested on subsequent occasions for drug possession and entered a Proposition 36 drug program. In 2005, he was found to be in violation of the probation imposed on the possession for sale conviction and sentenced to prison. He was deported and at some point returned to the United States. He was arrested in 2015 for domestic violence. The appellate record does not include a disposition for this charge, but defendant was residing in Mexico when this motion was filed.

Defendant's motion to vacate was supported by his handwritten letter, but no declaration. In the letter, defendant admitted "the D.A. [at the 2001 plea hearing] said I would be deported. But [he] gave me hope that I could be back because the D.A. said that my admission 'could' be denied and didn't say 'must' be denied." He added, "[w]hen my release date from jail came, I was taken to another jail in the state of Arizona. . . . I [saw] the judge there. He told me I can't come back. [B]ecause I was [convicted] for selling drugs. . . . If anybody, like my lawyer or the judge would [have] told me this was going to happen to me, I would [have] taken a chance to go to trial . . . . [T]he immigration judge . . . told me there is no [waiver] for my offense."

The trial court denied the motion: "I would note the guilty plea form has the advisement in full. If he's not a citizen, conviction would have the consequences of deportation, exclusion from admission to the United States or denied naturalization pursuant to the laws of the United States pursuant to the laws of the United States pursuant to [section 1068.5. . . . . [¶] I think

there was a proper advisement given and he was properly advised. He was well aware of the consequences of entering this plea."

The trial court also observed that defendant admitted in his supporting letter he knew he would be deported when he was released from custody, was deported three times after the 2001 conviction, and never established he was deported because of the 2001 conviction, as opposed to any other case. Finally, defendant did not "act promptly, with diligence, to try to vacate an order saying he didn't understand."

Defendant filed a timely notice of appeal.

DISCUSSION

An order denying a motion to vacate a judgment is an appealable order under section 1237, subdivision (b). (*People v. Arriaga* (2014) 58 Cal.4th 950, 960.) We review the order for abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.)

Section 1016.5, subdivision (a) requires the trial court to give the following advisement before accepting a guilty or no contest plea: "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 trial court fails to so advise a defendant who enters such a plea and the defendant shows the conviction may have adverse immigration consequences, the trial court must, on the defendant's motion, vacate the judgment and permit the defendant to withdraw the plea. (§ 1016.5, subd. (b).)

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised." (*People v. Totari* (2002) 28 Cal.4th 876, 884.)

Defendant was properly advised, both in writing and orally on the record. The superior court plea form and the minute order contain verbatim iterations of the statutory language. At the hearing, the prosecutor varied the statutory language for one immigration consequence and asked defendant if he understood the plea "will cause - - it could cause you to be denied reentry into the United States." This slight variation in language from the statutory "may have the consequence . . . of exclusion from admission to the United States" (§ 1016.5, subd. (a)) has been held to be in substantial compliance with section 1016.5 and acceptable. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174-175 ["only substantial compliance is required under section 1016.5 as long as the defendant is specifically advised of all three separate immigration consequences of his plea. Appellant was expressly told that one of the immigration consequences of his conviction was that he would be denied reentry into the United States; in other words, under the statute, he would be excluded from the United States"].) In response to the question concerning denial of reentry into the United States, defendant answered with an unequivocal "yes."

Defendant conceded in the trial court and concedes here that he understood he would be deported; he argues he failed to understand that he would no longer be eligible to return to the United States because the prosecutor's use of the word "could" suggested he might be able to return. Defendant primarily relies on *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*), which, he argues, "broadened the scope of advisal of the immigration consequences of a plea to which a defendant is entitled to in any criminal proceedings." *Padilla* did not alter the advisements to be given to a noncitizen defendant. *Padilla* addressed the responsibilities of defense counsel: "[W]e hold that counsel must inform [the] client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." (*Id.* at p. 1486.)

California did codify the *Padilla, supra,* 559 U.S. 356 decision in 2015. (§ 1016.2.) Section 1016.2, subdivision (e) states, "Defendants who are misadvised or not advised at all of the immigration consequences of criminal charges often suffer irreparable damage to their current or potential lawful immigration status, resulting in penalties such as mandatory detention, deportation, and permanent separation from close family." Defendant would have this court broaden *Padilla*, as well as sections 1016.2 and 1016.5, and hold that defendants who are adequately advised may nonetheless seek to vacate their guilty or no contest pleas when an immigration judge renders an unfavorable immigration decision. We decline to do so.

As the Legislature has recognized, "[t]he immigration consequences of criminal convictions have a particularly strong

impact in California. . . . Once a person is deported, especially after a criminal conviction, it is extremely unlikely that he or she is ever permitted to return." (§ 1016.2, subd. (g).) Consistent with California law, defendant was not asked to disclose his immigration status when he entered the no contest plea. Although he was given the statutorily mandated advisements, he still had "hope" that he would be able to return to the United States after deportation. But the decision to exclude a deported noncitizen from readmission to the United States is made under federal, not state, law and in a federal, not a state, forum.

Defendant failed to meet his burden to demonstrate the advisements concerning the immigration consequences of a no contest plea were inadequate. He was not entitled to vacate his conviction. (See, e.g., *People v. Martinez* (2013) 57 Cal.4th 555, 565; *People v. Limon* (2009) 179 Cal.App.4th 1514, 1517.)

DISPOSITION

The order is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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