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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. HUY VIEN LIEU Defendant and Appellant.	2d Crim. No. B235662 (Super. Ct. No. YA018788-02) (Los Angeles County)

Huy Vien Lieu appeals an order denying his motion to vacate his robbery conviction (Pen. Code, § 211) (two counts), after pleading guilty to those offenses in 1994.[1] We conclude, among other things, that 1) the trial court properly denied Lieu's motion to vacate; and 2) before entering his plea, Lieu was adequately advised about the adverse immigration consequences of his conviction. We affirm.

FACTS

In 1994, the district attorney filed an information alleging Lieu committed five counts of second degree robbery in February 1994. Lieu, who was represented by counsel, entered a guilty plea to two robbery counts as part of a written plea agreement with the prosecution.

[1] All statutory references are to the Penal Code.

In 2011, Lieu filed a motion to set aside his plea and vacate that conviction pursuant to section 1016.5, claiming that he was not advised of the immigration consequences of his plea. He claimed that because of his two felony convictions, he is now subject to deportation under federal immigration laws.

The trial court denied the motion. The court found that Lieu "was given actual notice of the citizenship consequences, and volitionally entered into the plea . . . ." It noted that some of the 1994 court records had been destroyed and there was no reporter's transcript of the hearing involving Lieu's guilty plea. But there were other documents in the record. The court said Lieu had initialed an immigration advisement in a "two page Boykin-Tahl form." It said, "We also located a minute order from September 22, 1994, in Judge Shook's court, wherein the clerk checked the box indicating: 'Defendant is advised and personally waives his right to confrontation of witnesses for the purposes of further cross-examination, and waives privilege against self-incrimination.'" The minute order also contained the entry, "Defendant advised of possible effects of plea on any alien/citizenship/probation/parole status."

DISCUSSION

Advisement of the Immigration Consequences of a Conviction

Lieu contends that his motion to vacate his conviction should have been granted. He claims he was not adequately advised about the immigration consequences for a conviction of two counts of robbery. We disagree.

To prevail on a motion to vacate his conviction on this ground, Lieu had to establish that: 1) he was not properly advised about the immigration consequences of his plea, 2) there is a possibility that he will suffer adverse immigration consequences, and 3) he "was prejudiced by the nonadvisement." (*People v. Totari* (2002) 28 Cal.4th 876, 884.) A defendant may appeal from the denial of a post-conviction motion to vacate based on the lack of immigration consequences advisements required by section 1016.5. (*Id.* at p. 879.) Here there is a certificate of probable cause in the record.

California law requires that all defendants who enter pleas must receive the following immigration consequences advisement: "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." (§ 1016.5, subd. (a).) "[S]ubstantial, not literal, compliance with section 1016.5 is sufficient." (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174.) The immigration advisement is sufficient if it warns "'the defendant expressly of each of the three distinct possible immigration consequences of his conviction . . . .'" (*Id.* at p. 173.) Those consequences are: 1) deportation, 2) exclusion from admission to the United States, and 3) denial of naturalization. (§ 1016.5, subd. (a).)

Lieu claims: 1) he was never advised of these immigration consequences; and 2) "had he known of the possible immigration consequences attendant to his plea, he would not have entered the guilty plea . . . ." But from the evidence in the record, the trial court rejected Lieu's claims. Lieu has not shown error.

In 1994, before the trial court accepted his plea, Lieu signed a document entitled "Guilty Plea in the Superior Court." One of the advisements on that form, which Lieu initialed, provided, "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." (Italics added.)

This advisement gave Lieu notice of the three potential adverse immigration consequences of his guilty plea, including the possibility of deportation. Lieu entered this plea on advice and in consultation with his lawyer. Lieu signed a statement in the plea agreement that he personally initialed the box containing the immigration advisements and that he had "discussed them with [his] attorney." The plea agreement was filed with the court as "a permanent record" of the advisements he received and Lieu's waivers of his rights.

Lieu notes that section 1016.5, subdivision (b) provides, in relevant part, "Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." The trial

court did not have the reporter's transcript of the 1994 proceedings involving his plea. Lieu claims that transcript is the only evidence sufficient to establish that he received the advisements required by the statute. He suggests that the advisements in his plea agreement are not sufficient to prove that he received a verbal advisement by the court which he claims is required by section 1016.5. We disagree.

Lieu's contentions have been repeatedly rejected by California appellate courts. In *People v. Ramirez* (1999) 71 Cal.App.4th 519, 521, the court reviewed section 1016.5 and said, "We note there is no language which states the advisements must be verbal . . . ." It held that immigration advisements in a written plea agreement may be utilized. The court said, "Our state Supreme Court has held a validly executed waiver form is a proper substitute for verbal admonishment by the trial court." (*Ibid.*) "'Thus, a defendant who has signed a waiver form upon competent advice of his attorney has little need to hear a ritual recitation of his rights by a trial judge.'" (*Id.* at p. 522.) Here the guilty plea agreement is part of the record. Consequently, "the language of the advisements appears in the record for appellate consideration of their adequacy . . . ." (*Ibid.*)

Immigration advisements in a plea agreement are consistent with the underlying statutory goal. "[T]he 'legislative purpose' is fully served if the required advice is provided in a written document which the party may read and consider at his or her own pace." (*Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 570.) "Arguably such a method is *more* effective than expecting a party to take in and understand a litany of rights and consequences rattled off by a busy trial judge." (*Id.* at p. 570, fn. 5.) "'A sufficient waiver form can be a great aid to a defendant in outlining [a defendant's] rights. The defense attorney, who is already subject to a duty to explain the constitutional rights outlined in a proper waiver form to his client prior to the client's entering a plea, may even find it desirable to refer to such a form.'" (*People v. Ramirez, supra,* 71 Cal.App.4th at p. 522.) Consequently, in considering a motion to vacate under section 1016.5, a "court 'may rely upon a defendant's validly executed waiver form as a

proper substitute for a personal admonishment.'" (*People v. Gutierrez, supra*, 106 Cal.App.4th at p. 175.)

Moreover, as the trial court noted, here the court's minute order reflects that Lieu received oral advisements of his rights at his 1994 court hearing and he appeared with counsel. The minute order also contains the notation that the "court accepts" Lieu's waivers of his rights and that his guilty plea was entered with the "approval" of the court.

Lieu has not shown that he was not advised of the immigration consequences. But even had he made such a showing, he still had to show prejudice to vacate his conviction. (*People v. Totari, supra*, 28 Cal.4th at p. 884.) This is a factual issue and he had the burden to present evidence. (*Ibid.*) Lieu contends he would not have pled guilty had he been properly advised. He relies, in part, on his moving papers, but those documents are not in the clerk's transcript. The appellant has the responsibility for presenting a complete record on appeal. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549-550.) Lieu has not moved to correct or augment the record. He did not obtain a settled statement. To the extent the trial court rejected factual claims in those moving papers, we cannot presume error because of the incomplete appellate record Lieu has presented. (*Ibid.*) But even on the record we have, the result does not change.

At the hearing on his motion, Lieu did not testify, he called no witnesses, and presented no evidence. His counsel presented only oral argument. The trial court found his plea was voluntary. The record supports this finding. In his plea agreement, Lieu stated, "I am pleading guilty to take advantage of a plea bargain"; "My attorney will stipulate to a factual basis for my plea"; and "I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my plea to the above charges."

Lieu's trial counsel signed a certification on the plea agreement stating, "I have explained each of the above rights to the defendant . . . . I . . . stipulate this document may be received by the court *as evidence of defendant's intelligent waiver of these rights, and that it should be filed by the clerk as a permanent record of that waiver*." (Italics added.) In that document, Lieu's trial counsel also said that he had

"explored the facts" with Lieu and "studied [his] possible defenses." His plea was entered on advice of counsel. This constitutes strong evidence of an intelligent and voluntary plea.

The People claim the trial court's findings are supported by the record and the plea agreement was beneficial to Lieu. We agree. Lieu had been charged with five counts of robbery. The prosecution alleged these were "serious" felonies and a "principal" was armed with a handgun. But as a result of his plea agreement, three robbery counts were dismissed. Lieu faced a potential aggregate 12-year sentence for the two remaining robbery counts which included firearm enhancements. But as a result of the agreement his counsel negotiated, Lieu received an aggregate four-year sentence. At the hearing on his motion to vacate, Lieu made no showing that his trial counsel in negotiating the plea agreement was either ineffective or was not seeking to obtain the best possible result for him. Moreover, as the People correctly note, Lieu has made no showing on appeal that his claims of prejudice were "corroborated independently by objective evidence." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

We have reviewed Lieu's remaining contentions and conclude he has not shown error.

The order is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James R. Brandlin, Judge

Superior Court County of Los Angeles

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