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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PEDRO GARCIA RODRIGUEZ, Defendant and Appellant.	2d Crim. No. B294765 (Super. Ct. No. 2002029843) (Ventura County)

Pedro Garcia Rodriguez appeals an order denying his motion to vacate a judgment following his 2002 guilty plea to possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), a felony. He claims he was not properly advised about the immigration consequences of his plea. (Pen. Code,[1] § 1473.7.) We affirm.

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

FACTUAL AND PROCEDURAL HISTORY

On September 10, 2002, Rodriguez pled guilty to possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), a felony. He entered into a written plea agreement and initialed an immigration advisement which provided, among other things, "If I am not a citizen and am pleading guilty to . . . a controlled substance offense, . . . I will be deported, excluded from the United States and denied naturalization." He signed the plea agreement as did the interpreter who translated it for him. The court placed him on a deferred entry of judgment (DEJ) program for two years.

On November 8, 2018, Rodriquez filed a motion to "vacate judgment" under section 1473.7, claiming the judgment was "invalid due to prejudicial error damaging his ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea." In his declaration, Rodriguez said he appeared in court with his counsel on September 10, 2002. He said, "[i]t was never explained to me that by pleading guilty or by participating in the programs that were offered, that I could be deported or that I would be denied entry to the United States if I left the country. If I had known that, I would have rejected the offer and insisted on attempting to negotiate an immigration safe plea bargain or going to trial." He said, "I was assisted by an interpreter who read the form to me. I just initialed where I was told and signed the form." He declared that the prosecutor told him "that if I failed DEJ I would be sent to prison and would then be deported. I understood it to mean that I would only be deported if I violated the terms of DEJ and was sentenced to state prison."

Rodriguez declared that in 2006 he was "arrested by Immigration Customs Enforcement" in Texas. "It was there that I learned my 2002 California conviction prevented my admission back into the United States. Removal proceedings were initiated and my residency status was revoked. I was deported in May of 2006." He returned to the United States in 2009.

In 2012 he retained an attorney who assisted him in recalling "an outstanding warrant," completing "the terms of [his] probation" and getting "the case dismissed." Rodriguez said, "I was under the belief that the conviction was removed and the dismissal protected me from immigration consequences." In 2013 he went to Texas and started a construction business.

In July of 2018, "ICE arrested" him in Texas. He said, "At this time, I learned that the dismissal of conviction in 2013 did not have an effect on my immigration status and that I was still subject to immigration consequences." "I am currently facing removal proceedings as a result of the 2002 conviction."

Rodriguez attached the declaration of attorney Brian Vogel, the attorney who represented him in court in 2002. Vogel explained his "general practice" of advising clients on immigration consequences. He was unable to remember Rodriguez's case. He said, "I do not have an independent recollection of the case of [Rodriguez], but a review of his file indicates that I represented him on this date." Vogel declared, "I do not recall asking [Rodriguez] specifically about his immigration status. I do recall being assisted by an interpreter."

In his motion Rodriguez conceded that on October 12, 2004, he "violated the terms of DEJ. DEJ was revoked and terminated. He was subsequently sentenced to three years of formal probation under [section 1201.1], Proposition 36." On

April 24, 2013, his Proposition 36 probation was "terminated successfully."

The People filed an opposition to the motion to vacate. They claimed Rodriguez was advised of the immigration consequences and acknowledged them. The prosecutor attached a three-page transcript of the advisements Rodriguez received at that 2002 hearing before he entered his guilty plea.

Rodriguez was not present at the December 18, 2018 hearing on the motion to vacate. Vogel and the interpreter for the 2002 hearing were present and were available to testify, but Rodriguez's counsel did not call any witnesses.

The trial court denied the motion. It found that Rodriguez's declaration was not credible, that there was a lack of corroborating evidence to support the motion, and his claims were contradicted by the record of the 2002 proceedings.

DISCUSSION

Rodriguez contends he was not properly advised about the immigration consequences of his plea and his counsel provided ineffective assistance. The People contend Rodriguez's "motion under section 1473.7 was not timely." They claim we "can affirm the judgment based on these grounds alone." We disagree that the motion was untimely.

Timeliness of the Motion

The People claim Rodriguez's 2018 motion was untimely because his declaration shows "he reasonably knew that his conviction resulted in adverse immigration consequences since his first deportation in 2006." But his motion was based on section 1473.7. That is a new law with new grounds for relief. The statute's effective date was January 1, 2017. Rodriguez could not file a motion under this statute before its enactment.

(*People v. Perez* (2018) 19 Cal.App.5th 818, 829 (*Perez*) ["the rights giving rise to the motion did not take effect until January 1, 2017"].)

Moreover, the statute provides that the motion "may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following . . . [t]he moving party receives a notice to appear in immigration court . . . [or] . . . [N]otice that a final removal order has been issued against the moving party based on the existence of the conviction." (§ 1473.7, subd. (b)(2).)

The People argue Rodriguez's motion does not contain sufficient facts regarding his "deportation, reentry into the country, and pending removal proceedings." But they did not raise this issue in their filed opposition to the motion. The prosecutor only briefly mentioned it in argument during the hearing. She did not make an offer of proof that there was a final removal order issued in the current removal proceedings. Thus, the trial court reached the merits of the motion. We will also do so.

Immigration Advisements

Rodriguez contends the record shows he was never properly advised of the immigration consequences of his plea. We disagree.

A defendant must be advised of the immigration consequences before pleading guilty. Section 1016.5, subdivision (a) requires an advisement stating: "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."

In his 2002 negotiated plea agreement Rodriguez pled guilty to possession of cocaine. He initialed an immigration advisement on that plea agreement. It provided, "If I am not a citizen, I could be deported, excluded from the United States or denied naturalization. . . . If I am not a citizen and am pleading guilty to an aggravated felony, conspiracy, or a controlled substance offense, a firearm offense, or under certain circumstances a moral turpitude offense, I will be deported, excluded from the United States and denied naturalization."

This advisement complied with the language required by section 1016.5. (*People v. Araujo* (2016) 243 Cal.App.4th 759, 762 (*Araujo*).) But the advisement Rodriguez received went further than the standard may have consequences advisement required by section 1016.5. It also advised him of the mandatory deportation consequences of his controlled substance offense plea. (*People v. Patterson* (2017) 2 Cal.5th 885, 889, 895.)

Section 1473.7, subdivision (a)(1) authorizes a person to move "to vacate a conviction or sentence" where "[t]he conviction or sentence is legally invalid due to 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. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel."

A defendant moving under section 1473.7 must show (1) that there were "one of more" errors involving the immigration advisements and (2) that the errors "were prejudicial" in that they damaged the ability to "'meaningfully understand, defend against or knowingly accept the actual or potential adverse immigration consequences of [his] plea . . . .'

[Citation.]" (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1009 (*Camacho*).) "Because the errors need not amount to a claim of ineffective assistance of counsel, it follows that courts are not limited to the *Strickland* test of prejudice, whether there was reasonable probability of a different outcome in the original proceedings absent the error." (*Ibid.*) Instead, the defendant must convince the court "that he would never have entered the plea if he had known that it would render him deportable." (*Id.* at pp. 1011-1012.)

In his declaration Rodriguez said, among other things, that his "attorney did not ask me about my immigration status" and "[i]t was never explained to [him] that by pleading guilty" he could be deported. He claims that had he known about that consequence he "would have rejected the offer" and not entered the plea.

But "[c]ourts should not upset a plea solely because of [post hoc] assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States* (2017) __ U.S. __ [137 S.Ct. 1958, 1967] (*Lee*).) "An allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting appellant's claimed failures." (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223-224.)

The evidence regarding the 2002 court proceedings involving his guilty plea does not corroborate his claims. It does the opposite. At the 2002 hearing the prosecutor asked Rodriguez about the plea agreement. The prosecutor's questions included the following advisements:

[Prosecutor]: Have you gone over this disposition statement with your attorney with the aid of the interpreter?

[Rodriguez]: Yes.

[Prosecutor]: Have you placed your initials in various areas of this document to indicate that you understood them?

[Rodriguez]: Yes.

[¶] . . . [¶]

[Prosecutor]: Do you understand that if you are not a citizen, you would then be deported, excluded from the United States and denied naturalization?

[Rodriguez]: Yes.

[¶] . . . [¶]

[Prosecutor]: Are you entering this guilty plea freely and voluntarily?

[Rodriguez]: Yes.

[¶] . . . [¶]

[Prosecutor]: Did you place your signature on page 11 of this document?

[Rodriguez]: Yes.

[Prosecutor]: Did you do that to indicate that you understood everything you signed and initialed?

[Rodriguez]: Yes.

[Prosecutor]: Do you have any questions?

[Rodriguez]: No.

On the plea agreement Rodriguez signed he said, "I have discussed with my attorney the facts of the case, the elements of the charged offenses and allegations, and all possible defenses which I might have." He said he understood the plea form he signed. He stated, "I have discussed with my attorney and understand the consequences of this plea and my constitutional rights."

The trial court in accepting Rodriguez's guilty plea found that he "understands" the "consequences of his plea." He "knowingly, intelligently, and understandingly" waived his rights. His "waivers of his rights" was "free and voluntary."

At the hearing on the motion to vacate, Rodriguez did not testify. His counsel relied primarily on Rodriguez's declaration. But that 2018 declaration involves Rodriguez's memory of events which took place in 2002. The court did not find Rodriguez to be credible. (*People v. Martinez* (2013) 57 Cal.4th 555, 565 (*Martinez*) ["It is up to the trial court to determine whether the defendant's assertion is credible"].) The court said, "Rodriguez wants me to accept that he has a very clear recollection of this event 16 years later." The court said the declaration "is not what it appears to be per the record, but something totally different." (See *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 176 (*Gutierrez*) ["to the extent appellant states in his written declaration that his understanding was different than what he said in court, the trial court impliedly disbelieved

him when it denied the motion to set aside the plea. We are not free to disregard this implied finding that is supported by substantial evidence"].)

Rodriguez's claim that he "just initialed where [he] was told and signed the form" is contradicted by his own statements at the 2002 hearing. (*Araujo*, *supra*, 243 Cal.App.4th at p. 764 [trial court and appellate court could consider defendant's current claims about immigration consequences impeached, in part, by their conflict with "the record made when [defendant] entered into the negotiated disposition"]; *Gutierrez*, *supra*, 106 Cal.App.4th at p. 176.) Moreover, the interpreter who translated his 2002 plea agreement was present in court and available to testify at the 2018 hearing on Rodriguez's motion to vacate. The trial court offered counsel the opportunity to call the translator "to make a record." Her testimony could have been significant as she had signed the 2002 plea agreement. (*In re Johnson* (1965) 62 Cal.2d 325, 331 [evidence about standard practice may be admitted]; *People v. Dubon* (2001) 90 Cal.App.4th 944, 955-956 [testimony about standard practice is admissible].)

But Rodriguez's counsel did not request that she testify. The trial court could reasonably draw negative inferences against Rodriguez because of this. "'[W]here a party has an opportunity to call a witness who is prepared and qualified to testify as to a fact in issue and fails to do so, it may be inferred by the trier of fact that the evidence if given would be adverse to such party.' [Citation.]" (*People v. Vaughn* (1968) 262 Cal.App.2d 42, 55 (*Vaughn*).)

Vogel's Performance as Counsel

Rodriguez included the declaration of Vogel, the attorney who represented him at his 2002 hearing, as part of the

2018 motion to vacate. But that declaration does not corroborate Rodriguez's claims. Vogel said he did not have "an independent recollection of the case or [Rodriguez]." Consequently, he did "not recall asking [Rodriguez] specifically about his immigration status." But Vogel also said that in 2002 it was his "general practice" to advise his clients about the immigration consequences of their pleas.

Rodriguez next claims Vogel provided ineffective assistance by not negotiating for "an immigration-safe alternative plea." Again, the record does not support this claim.

Ineffective assistance of counsel is shown where counsel's deficient performance prejudiced the client's case (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692), or pursuant to section 1473.7, where counsel's errors damaged the defendant's ability to defend against adverse immigration consequences (*Camacho*, *supra*, 32 Cal.App.5th at p. 1009). The appellant has the burden to present facts and a record to support the contentions on this ground. (*Perez*, *supra*, 19 Cal.App.5th at p. 830.) A defendant's argument that there may have been other plea alternatives that were immigration safe is not, by itself, sufficient. (*Ibid.*; see also *Martinez*, *supra*, 57 Cal.4th at p. 568 [claim that defendant would have rejected a plea offer "is not established" merely by claiming "an immigration-neutral bargain was possible"].)

Rodriguez did not make an evidentiary showing to support this claim. He presented no corroborating evidence. There was no showing about the content of plea negotiations, whether alternatives were discussed or available, or whether the prosecutor would have accepted them. (*People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1149 (*Mbaabu*).)

Moreover, Vogel was present at Rodriguez's 2018 hearing on his motion to vacate, and available to testify. The trial court offered counsel the opportunity to make a record by having Vogel testify. But Rodriguez's counsel did not call Vogel to testify. Instead, Rodriguez's counsel essentially relied on: (1) a legal argument in the trial court brief that Vogel should have "attempted to protect his immigration status by accepting an immigration safe alternative" and (2) conclusory statements in Rodriguez's self-serving declaration.

The trial court could thus reasonably infer Vogel's "testimony would not be corroborative" for Rodriquez (*People v. Beal* (1953) 116 Cal.App.2d 475, 479), Vogel's "omitted evidence would be unfavorable" (*In re Estate of Moore* (1923) 65 Cal.App. 29, 34) or "adverse" to his claims (*Vaughn*, *supra*, 262 Cal.App.2d at p. 55), and the court consequently "could properly discount the value" of Rodriguez's contentions on this issue (*People v. Ochoa* (1985) 165 Cal.App.3d 885, 888-889).

The Prosecutor's Statements

Rodriguez claims he relied "on the deputy district attorney's statement" about the immigration consequences at the 2002 hearing. He contends he was misadvised about those consequences when the prosecutor discussed the DEJ program. We are not persuaded.

The prosecutor said, "[W]hat I'm going to do now is go over the consequences of what could happen to you if you fail in that program. Do you understand that if you fail, you could ultimately be sent to prison for up to three years followed by a three-year parole period?" Rodriguez replied "Yes." The prosecutor's next question was "Do you understand that if you are not a citizen, you would then be deported, excluded from the

United States and denied naturalization?" Rodriguez replied "Yes."

That Rodriguez elects to combine these two advisements does not mean that the prosecutor misadvised him. These were two separate advisements requiring two separate responses by Rodriguez. One involved DEJ, the other a different subject—immigration. Moreover, Rodriguez does not claim that the two advisements, when individually reviewed, are incorrect.

Rodriguez claims he understood the advisements to mean "I would only be deported if I violated the terms of DEJ and was sentenced to prison." He had the "burden of showing that the circumstances as they existed at the time of the plea, judged by objective standards, reasonably justified" his subjective belief. (*United States ex rel. Curtis v. Zelker* (2d Cir. 1972) 466 F.2d 1092, 1098.) But his claim about only being deported in those two circumstances is not part of the language the prosecutor used. Moreover, to make this argument he also ignores the immigration advisements he received on the plea form that included mandatory deportation, and his statements in court that he understood these advisements. "Solemn declarations in open court carry a strong presumption of verity." (*Blackledge v. Allison* (1977) 431 U.S. 63, 74.) A defendant may not set aside a plea by claiming to be misled because of their own unreasonable interpretation of valid immigration advisements. (*Araujo*, *supra*, 243 Cal.App.4th at p. 763; *Zelker*, at p. 1098.)

But even assuming one could interpret these two advisements in combination as a single advisement, the result would not change. The trial court rejected Rodriguez's claim that he actually relied on the prosecutor's remarks or was actually misled by them. It said, "memories fade over time and it's hard

. . . to accept that [Rodriguez] would have that level of recall to the extent that he relates in his declaration." The court said Rodriquez claims he "has this clear of a recollection of those events from 16 years ago" and "that he actually did not understand." But that was "contrary to what he said on the record" and "what was stated on the disposition statement." (See *Araujo*, *supra*, 243 Cal.App.4th at p. 764; *Gutierrez*, *supra*, 106 Cal.App.4th at p. 176.)

Prejudice

Even assuming Rodriguez was misadvised, to prevail on his motion he still had to "show prejudice, i.e., that but for the failure to advise, [the] defendant would not have entered a guilty plea." (*Araujo*, *supra*, 243 Cal.App.4th at p. 763.) A "defendant's self-serving statement of prejudice must be corroborated independently by objective evidence." (*Ibid*.)

In *Lee*, the court held prejudice is shown where "'deportation was the determinative issue in [the defendant's] decision whether to accept the plea deal.'" (*Lee*, *supra*, 137 S.Ct at p. 1967.) In *Lee* the defendant "asked his attorney repeatedly whether there was any risk of deportation from the proceedings." (*Ibid*.) "[B]oth Lee and his attorney testified at the evidentiary hearing . . . that Lee would have gone to trial if he had known about the deportation consequences." (*Id*. at pp. 1967-1968.)

Here the declarations contain no facts showing that Rodriguez ever asked Vogel about the risk of deportation or told him that avoiding deportation was his primary goal. There was thus no "contemporaneous evidence to substantiate [Rodriguez's] expressed preferences." (*Lee*, *supra*, 137 S.Ct. at p. 1967.) Rodriguez declares that he was married in 2004, his children were born in 2007 and 2009, and he became active in his

community in 2013. But these facts are not relevant regarding what he intended in 2002 when he entered his plea.

Rodriguez's declaration shows he was concerned about being sent to jail. He said without bail, "I believed that I would have been detained the entire time while waiting for trial and that scared me." He said, "I was told if I pleaded guilty, I'd be able to get out quickly." Consequently his discussions with his attorney involved incarceration. But there is nothing in the record that indicates Rodriguez asked about his possible deportation, and this suggests immigration consequences were not the primary consideration. The record also shows Rodriguez was willing to enter a guilty plea with immigration consequences because he signed a form acknowledging his guilty plea would result in his deportation.

Moreover, in his declaration Rodriguez did not state any facts about the drug possession offense to which he pled guilty. His failure to make a record on this issue further weakens his claim of prejudice. (*Mbaabu*, *supra*, 213 Cal.App.4th at p. 1149 ["Without the plea bargain, defendant faced two felony charges and there is nothing in the record to support a conclusion that he would have been convicted of anything less . . . if he had proceeded to trial"].) Rodriguez did not allege that the evidence against him was weak or that specific defenses were available.

The above factors, his statements to the court in 2002 and on the plea form, and the potential exposure to a longer prison sentence after which he could have still faced removal proceedings show that immigration concerns would not have motivated him to reject a plea. "It is not reasonably probable that [he] would have forgone the distinctly favorable outcome [he] negotiated had [he] been advised in some other manner about the

immigration consequences of pleading guilty." (*Araujo*, *supra*, 243 Cal.App.4th at p. 764.) He has not shown prejudice.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Benjamin F. Coats, Judge

Superior Court County of Ventura

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