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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.

JOSE A. OLIVAS,

Defendant and Appellant.

B292825

(Los Angeles County  
Super. Ct. No. BA190217)

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Law Offices of Michael Poole and Michael Poole, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steve D. Matthews, Supervising Deputy Attorney General, and Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.

Years after pleading no contest to possession of cocaine for sale, defendant and appellant Jose A. Olivas (defendant) moved to vacate his conviction, claiming he would not have entered the plea if he correctly understood the immigration consequences of it. The trial court, after an evidentiary hearing, found not credible defendant's claim that he trusted his attorney and disregarded the in-court immigration consequences advisement he received. We shall affirm the denial of defendant's motion because he has not made the requisite showing of prejudicial error.

## I. BACKGROUND

In August 1999, the Los Angeles County District Attorney charged defendant in a complaint with one count of manufacturing a controlled substance (Health & Saf. Code, § 11379.6, subd. (a)) and one count of unlawful possession for sale of a controlled substance (Health & Saf. Code, § 11351). Later that same month, pursuant to a negotiated disposition reached before the preliminary hearing, defendant agreed to plead no contest to the possession charge and the People agreed to dismiss the manufacturing charge. By virtue of this plea agreement, defendant secured a commitment that he would be sentenced to three years' probation with a condition that he serve no more than a year in jail, instead of the seven-year maximum sentence he could face if he went to trial and were convicted on the manufacturing charge the People agreed to dismiss.

At the plea hearing, defendant was represented by counsel and assisted by a Spanish-language interpreter. The trial court asked the prosecutor to conduct a colloquy with defendant to ensure his plea would be knowing and voluntary. The trial court

also admonished defendant to make sure he had a clear understanding of the ramifications of his plea.

The portion of the colloquy concerning the immigration consequences of defendant's plea was as follows: "[The Prosecutor]: And, [defendant], I have to inform you that your plea today in this case will mean that you will be found guilty. You *will* be deported from the United States, denied naturalization, and excluded from the United States. [¶] Do you understand this consequence? [¶] [Defendant:] Yes. [The Prosecutor:] And understanding these consequences, do you still wish to enter a no contest plea? [Defendant:] Yes." (Emphasis ours.) Defendant did not ask any questions during the plea colloquy and he entered his no contest plea at the appointed time. The trial court found defendant waived his rights "knowingly, intelligently, expressly, and understandingly" and entered into his plea "freely and voluntarily." Defendant was later sentenced to formal probation for three years, including a condition that he serve 120 days in county jail.

Many years later, in May 2018, defendant moved to vacate his conviction pursuant to Penal Code section 1473.7.<sup>1</sup> Defendant argued section 1473.7 "allows motions to be raised alleging at least three distinct causes of action," specifically, claims that (1)

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<sup>1</sup> Undesignated statutory references that follow are to the Penal Code. In relevant part, section 1473.7 permits a person who is no longer in criminal custody to move to vacate a conviction or sentence on the ground that it 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." (§ 1473.7, subd. (a)(1).)

defense counsel violated a duty to investigate and accurately advise a client about the immigration consequences of a plea, (2) defense counsel failed to defend against such consequences by attempting to plea bargain for an “immigration-safe alternative disposition,” or (3) a defendant failed to meaningfully understand the immigration consequences of a conviction. Immediately after listing these three possibilities, defendant’s section 1473.7 motion states, “In this case, [defendant] did not meaningfully understand the immigration consequences of this plea.”

Defendant submitted a declaration with his section 1473.7 motion. He asserted his attorney did not advise him of the immigration consequences of pleading no contest to the drug possession charge nor take any steps to defend against those consequences. Defendant asserted he felt he had viable defenses to the charged crimes, but he did not elaborate on what these defenses were. Defendant claimed he did not “recall that the court administered the immigration advisement on the record to me.” And defendant averred that if he were “properly advised, [he] would not have entered into the plea bargain and would have sought to negotiate a different bargain that would not result in deportation, exclusion, or a denial of naturalization.” The sole explanation provided by defendant for this last assertion were the following three sentences: “15. The right to remain in the United States was more important to me than any potential jail sentence. [¶] 16. I have strong family, community ties, obligations, and opportunities in [the] United States at the time of my plea, and me and my family would have faced extreme hardship if I w[ere] forced to return to my country. [¶] 17. There was little to gain by accepting the plea offer, if I’m forced to return to my country.”

In addition to his own declaration, defendant submitted a declaration from the attorney representing him at the time of his no contest plea. The attorney stated he gave defendant “advice regarding whether or not to accept the plea bargain that was offered by the prosecution,” but could “not remember one way or the other” whether he informed defendant of the immigration consequences of his no contest plea.

The People opposed defendant’s section 1473.7 motion, emphasizing defendant “was expressly advised [during the plea colloquy], not merely that he ‘could’ or ‘might’ be deported as a result of his conviction, but that he would in fact be deported.” The People also asked to cross-examine defendant on the matters raised in his declaration.

Defendant testified at the hearing on his section 1473.7 motion. His attorney asked whether defendant was aware, when he pled no contest, that his plea carried serious immigration consequences; defendant answered “no.” Defendant’s attorney also asked whether defendant would have entered his plea had he been aware of those consequences, and defendant again answered in the negative. Defendant’s attorney did not ask him to elaborate on either answer—those were the only two questions the attorney asked.

On cross-examination, the prosecutor asked defendant whether he said “yes” when told during the plea colloquy that he would be deported, denied naturalization, and excluded from the United States as a result of his plea. Defendant responded, “Maybe I said it, but I was not understanding very well what he was asking me.” Prompted by the prosecutor, defendant conceded he was being assisted by a Spanish interpreter during the plea colloquy. Then, when the trial judge asked defendant

how he provided responsive answers during the plea colloquy if he did not fully understand what was going on, defendant testified he gave “yes” answers to the plea colloquy questions “just because [he] trusted the attorney” who was representing him at the time.

The trial court denied defendant’s section 1473.7 motion after recessing the hearing to review pertinent case law cited by the parties. The court found defendant’s attorney at the time of the plea had not provided constitutionally deficient representation because there was no allegation defendant had been *misadvised* as to the consequences of his plea and there was no obligation at the time of defendant’s plea for a defense attorney to provide affirmative advice on collateral immigration consequences. The court further found, apart from the ineffectiveness issue, that defendant was not credible when claiming he did not meaningfully understand the immigration consequences of his plea. In making this finding, the court relied on the immigration advisement defendant received during the plea colloquy, the responsive answers he gave during that colloquy while being assisted by an interpreter (which indicated he understood the proceedings), and the common-sense inference that “[e]ven for someone who has left their situation in the trust of counsel, if counsel had not advised on deportation and the court informs that the conviction will result in deportation, red flags [for the defendant] would be raised.”

## II. DISCUSSION

The trial court denied defendant’s motion because it found he had not carried his burden to show he did not meaningfully understand the immigration consequences of his no contest plea.

As we will briefly explain, the trial court’s conclusion, which rests significantly on its credibility assessment of defendant, is amply supported by the record, including the unequivocal immigration advisement defendant received during the plea colloquy. That renders this case indistinguishable from *People v. Perez* (2018) 19 Cal.App.5th 818 (*Perez*), and we therefore reach the same conclusion as the *Perez* court did: affirming the denial of section 1473.7 relief.

Section 1473.7 provides that a person who is no longer in criminal custody may file a motion to vacate a conviction or sentence if “[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.” (§ 1473.7, subd. (a)(1).) Defendant, as the moving party under the statute, has the burden to establish prejudicial error by a preponderance of the evidence. (§ 1473.7, subd. (e)(1); *People v. Tapia* (2018) 26 Cal.App.5th 942, 949.)

In all material respects, this case is on all fours with *Perez*. The defendant in that case filed a declaration with his section 1473.7 motion that asserted “his attorney did not explain other options or the immigration consequences if he pled guilty” and “he did not understand what was happening at the hearing at which he pled guilty.” (*Perez, supra*, 19 Cal.App.5th at p. 823.) The trial court denied the motion and the Court of Appeal affirmed, explaining that the motion was both untimely and meritless in any event—meritless because “[s]imply put, the record belies [the defendant’s] contention that he did not

meaningfully understand the immigration consequences of his plea.” (*Id.* at p. 829.)

We quote at length a portion of the *Perez* court’s discussion that is equally applicable here, with alterations to conform to our record: “[T]he superior court explicitly informed [defendant] that if he were to plead [no contest], he would be deported from the United States. The court was unequivocal about the immigration consequences of a [no contest] plea, reiterating that the federal government would not allow [defendant] to become a citizen of the United States. This was not a situation where the court informed a defendant that there was “a high likelihood” that he would face deportation. (*U.S. v. Rodriguez-Vega* (9th Cir. 2015) 797 F.3d 781, 791.) The court below left no doubt. [Defendant] would be deported if he pled [no contest]. This is the only evidence in the record that is contemporaneous to [defendant’s no contest] plea. [¶] . . . [¶] [Defendant] offers his own declaration, executed more than [18] years after he pled [no contest], wherein he claims his attorney never explained the immigration consequences of his [no contest] plea and he did not understand he would be deported if he pled [no contest]. We find nothing in the transcript of his plea hearing . . . that offers a scintilla of support for [defendant’s] position here.” (*Perez, supra*, 19 Cal.App.5th at p. 830; see also *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.) We find this reasoning persuasive and adopt it as our own—as further augmented by the deference we give to the well-supported adverse credibility finding we have in this case that was not present in *Perez*. (See *People v. Dillard* (2017) 8 Cal.App.5th 657, 665; see also *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79 [“If the trial court had heard live testimony, instead of reading written declarations, its credibility



determinations would be entitled to deference if supported by the record”].)

Defendant offers two unpersuasive counterarguments we can easily dispatch. First, he cites *People v. Patterson* (2017) 2 Cal.5th 885 for the proposition that “receipt of the standard statutory advisement that a criminal conviction may have adverse immigration consequences ([ ]§ 1016.5), does not bar a noncitizen defendant from seeking to withdraw a guilty plea on that basis.” True, but irrelevant. As we have already explained, defendant was not told of immigration consequences that “may” ensue but consequences that “will” ensue. He admits he received no contrary advice from his attorney at the time of the plea. The parallel to *Perez* therefore holds. Second, defendant appears to alternatively argue he could withdraw his plea under section 1018 for mistake, ignorance, or inadvertence. As the Attorney General correctly responds, even if there were a factual predicate for a section 1018 motion, the time for making such a motion lapsed over a decade ago. (§ 1018 [“On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted”].)

DISPOSITION

The order denying defendant's section 1473.7 motion is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.