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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IRMA AGUILAR MOSQUEDA, Defendant and Appellant.	B287162 (Los Angeles County Super. Ct. No. BA345740)

APPEAL from an order of the Superior Court of Los Angeles County. Bernie C. LaForteza, Judge. Affirmed.

Bernardo Lopez, under appointment by the Court of Appeal, 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, and Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.

* * * * *

Irma Aguilar Mosqueda (defendant) moved the trial court to vacate her two 2008 drug possession convictions on the grounds that her counsel was constitutionally ineffective for not advising her of the immigration consequences of her plea and for not negotiating an "immigration-safe" disposition. Because the trial court correctly determined that defendant had not carried her burden of establishing the ineffective assistance of counsel, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Underlying crime*

In August 2008, police searched defendant's home and recovered 23.53 grams of methamphetamine, 2.23 grams of cocaine, a digital scale, a "pay and owe" notebook, and $350 in cash. When questioned, defendant admitted that the drugs were hers and that she was selling them.

B. *2008 prosecution*

The People charged defendant with (1) possessing cocaine for sale (Health & Saf. Code, § 11351), and (2) possessing methamphetamine for sale (*id.*, § 11378). Defendant pled guilty to both crimes in order to be placed in the deferred entry of judgment program. She was sentenced to three years of formal probation, including a term that she complete 250 hours of community labor with Caltrans. She received no jail time. In 2011, defendant admitted to violating her probation; the court revoked and reinstated her probation but imposed a 30-day jail sentence that amounted to "time served."

C. *Penal Code section 1473.7 motion*

In 2017, defendant filed a motion to vacate her 2008 drug convictions pursuant to Penal Code section 1473.7.[1] In her motion, she argued that her trial counsel was constitutionally ineffective because he (1) did not advise her of the immigration consequences of her plea, and (2) did not negotiate an immigration-safe disposition. Along with her motion, defendant submitted a declaration in which she stated that she was not a United States citizen; that she had not been made "aware of the immigration consequences" of her plea at the time; and that, had she known of those consequences, she would have urged her attorney to negotiate an immigration-safe disposition. She also expressed fear of being deported, even though removal proceedings had yet to be initiated against her.

The trial court convened an evidentiary hearing. The trial court took judicial notice of the plea transcript from defendant's 2008 plea, which included the trial court's advisement to defendant that "a plea in this case *will* result in deportation" if she was "not a citizen of the United States." The trial court also heard testimony from (1) defendant's attorney during the 2008 prosecution, and (2) defendant. The attorney testified: (1) that defendant told him that she wanted to avoid serving any jail time because she feared incarceration would lead to deportation; (2) that he told her that a jail sentence for a drug crime created a "probability" or a "high probability" of deportation; (3) that she should consult an immigration attorney if she had further concerns about her immigration status; and (4) that going to trial would most likely lead to her conviction, a sentence involving jail

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1 All further statutory references are to the Penal Code unless otherwise indicated.

time, and subsequent deportation. He provided her no advice regarding the immigration consequences of the no-jail disposition actually imposed. Defendant testified and denied that her attorney said anything to her about deportation and that, notwithstanding the trial court's express advisement to the contrary, she did not think her pleas could result in deportation.

The trial court ruled that defendant had not carried her burden of establishing an entitlement to relief under section 1473.7 and denied her motion.

Defendant filed this timely appeal.

DISCUSSION

Defendant argues that the trial court erred in denying her section 1473.7 petition. That provision empowers a defendant who is no longer in custody to "prosecute a motion to vacate a conviction or sentence" on the ground that it is "legally invalid due to a prejudicial error damaging the [defendant's] ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea . . . ." (§ 1473.7, subd. (a)(1).) A conviction is "legally invalid" if the defendant's attorney provided constitutionally ineffective assistance. (*People v. Perez* (2018) 19 Cal.App.5th 818, 830-831 (*Perez*); *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.) An attorney provides constitutionally ineffective assistance if (1) his representation is deficient, and (2) prejudice flows from that deficient representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 692 (*Strickland*).) As the moving party, defendant bears the burden of establishing the ineffective assistance of counsel necessary to invalidate her conviction by a preponderance of the evidence (§ 1473.7, subd. (e)(1)), and we independently review whether the defendant has carried this

burden (*Ogunmowo*, at p. 76; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116 (*Olvera*)).

Defendant argues that her attorney's representation was constitutionally ineffective because (1) he failed to research and advise her regarding the immigration consequences of her plea and sentence, (2) he gave her incorrect advice about those consequences, and (3) he did not negotiate an immigration-safe disposition. As to each of these grounds, defendant has failed to establish either deficient performance or prejudice, or both.

I. Deficient Performance

A. *Failure to research and provide advice regarding immigration consequences*

Although defense counsel now have an affirmative duty to investigate and correctly advise a criminal defendant regarding the immigration consequences of a plea (and thus could be deemed constitutionally ineffective for failing to discharge that duty) (*Padilla v. Kentucky* (2010) 559 U.S. 356, 360 (*Padilla*)), no such duty existed at the time defendant entered her pleas in 2008. Back then, defense counsel had a more limited duty not to misadvise a defendant regarding the immigration consequences of a plea. (*In re Resendiz* (2001) 25 Cal.4th 230, 247, abrogated in part on other grounds in *Padilla*, at p. 370; *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1481-1482 (*Soriano*).) Thus, defendant's argument that her attorney's representation was deficient because he did not affirmatively research and advise her about the immigration consequences of her plea and sentence lacks a basis in the law applicable at the time of her pleas.

Defendant offers two reasons why her attorney was required, even in 2008, to investigate and advise her regarding the immigration consequences of her plea. First, she cites the United States Supreme Court's decision in *Padilla*, *supra*,

559 U.S. 356. But *Padilla* was not decided until 2010, and the Supreme Court subsequently held that *Padilla*'s expansion of the Sixth Amendment right to the effective assistance of counsel does not apply retroactively to defendants whose convictions were final when *Padilla* was decided. (*Chaidez v. United States* (2013) 568 U.S. 342, 344, 357-358.)

Second, defendant cites *Soriano*, *supra*, 194 Cal.App.3d 1470 and *People v. Barocio* (1989) 216 Cal.App.3d 99 (*Barocio*) as authority for the proposition that *California* courts recognized a duty to research and advise criminal defendants regarding immigration consequences back in 2008. To be sure, *Soriano* and *Barocio* contain language that supports defendant's position: *Soriano* criticized the defense attorney in that case for "not mak[ing] it her business to discover what impact [the defendant's] negotiated sentence would have on his deportability" and for not "adequately advis[ing]" the defendant "of the immigration consequences of his plea (*Soriano*, at pp. 1480, 1482), and *Barocio* noted that *Soriano*, if "[c]onstrued broadly," "require[d] defense counsel to . . . research the specific immigration consequences of the alien defendant's guilty plea" (*Barocio*, at p. 107). But *Soriano*'s language sweeps beyond its holding, which is that a defense attorney engages in deficient performance if he gives a "pro forma" or "formulaic" "caution" that a negotiated sentence may have immigration consequences when that sentence actually "ma[kes the defendant] deportable." (*Soriano*, at pp. 1480-1482.) Thus, *Soriano*'s holding merely reaffirms the general rule at the time that *misadvisement* regarding immigration consequences constitutes deficient performance, as *Barocio* itself noted. (*Barocio*, at p. 107 [observing how "*Soriano* can be limited to its facts, i.e., a

situation where the defendant may have been misinformed of the deportation consequences of his plea"].) We decline to give effect to *Soriano*'s dicta, which makes *Soriano* an outlier among the pre-*Padilla* case law. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 247 [recognizing "ineffective assistance claims based on erroneous immigration consequences advice"].)

Because defendant's attorney was under no duty to investigate or provide advice regarding the immigration consequences that would flow from the probationary sentence defendant actually received, his failure to do so was not deficient performance.

B. *Misadvisement*

As explained above, defense counsel was obligated, even in 2008, not to misadvise a defendant about the immigration consequences of her plea and sentence. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 247; *Soriano*, *supra*, 194 Cal.App.3d at p. 1482.) However, defendant's attorney did not breach that obligation. Defendant denies getting *any* immigration advice, so if her declaration and testimony are credited, there could be no misadvisement. But even if we credit her attorney's testimony instead, there was still no misadvisement because he provided her no advice regarding the probationary sentence the trial court actually imposed; instead, he merely told her that there was a "probability" or a "high probability" that she would be deported if jailed for her drug crimes.

Defendant nonetheless asserts that her attorney's latter statement constitutes bad advice for two reasons: (1) because the attorney's estimate of a "probability" or a "high probability" of deportation is akin to the formulaic advice of possible deportation condemned in *Soriano*, and (2) the attorney once referred to these

consequences with regard to a "transportation" charge, and *People v. Bautista* (2004) 115 Cal.App.4th 229, 240 (*Bautista*) assumed that deportation is not a consequence of a drug transportation plea, even one where jail time is imposed. Neither argument has merit. The formulaic advice regarding possible deportation in *Soriano* constituted a misadvisement because deportation for the crime imposed was mandatory, rendering the formulaic advice legally incorrect. Defendant has not shown that her attorney was incorrect in telling her that deportation was likely (or highly likely) if she were convicted of possession for sale and sentenced to jail or prison; nor has she shown *any* misadvisement regarding the deportation consequences for the non-jail sentence that was actually imposed. Further, counsel's reference to "transportation" was obviously a misstatement: Defendant was never charged with transporting drugs, and her attorney elsewhere in his testimony referred to the charged crimes.

C. *Failure to negotiate an immigration-safe disposition*

Several cases decided prior to 2008 recognized a duty on the part of defense counsel "to investigate, [to] advise," and to try to negotiate an immigration-safe disposition, at least where a defendant makes her concerns about possible immigration consequences known to counsel. (*Bautista*, *supra*, 115 Cal.App.4th at p. 242; *Barocio*, *supra*, 216 Cal.App.3d at pp. 102, 109 [vacating sentence due to defense attorney's failure to advise the defendant that he could ask the trial court for a recommendation against deportation].) Here, defendant's attorney testified that he sought to avoid the near-certain deportation that would flow from a jail term on defendant's drug charges by negotiating a plea involving no jail time, but he

admitted that he did not investigate the immigration consequences flowing from the probationary sentence actually imposed and thus did not try to negotiate a disposition with even fewer possible immigration consequences. On these facts, we will assume for the sake of argument that defendant's attorney's representation was deficient for not doing so.

II. Prejudice

A defense attorney's deficient representation constitutes ineffective assistance of counsel warranting relief only if it prejudiced the defendant. (*Strickland*, *supra*, 466 U.S. at pp. 688, 692.) In the context of a plea, deficient representation is prejudicial only if there is a "'reasonable probability'" that, but for the deficient representation, the defendant "'would not have pleaded guilty and would have insisted on going to trial.'" (*Lee v. United States* (2017) 137 S.Ct. 1958, 1969, quoting *Hill v. Lockhart* (1985) 474 U.S. 52, 59; accord, *People v. Martinez* (2013) 57 Cal.4th 555, 564 ["the test for prejudice considers what the defendant would have done, not what the effect of that decision would have been"].) In assessing whether a defendant would have still entered a plea, we must "look to contemporaneous evidence to substantiate a defendant's expressed preferences" rather than rely on her more self-interested "*post hoc* assertions . . . about how [she] would have pleaded but for [her] attorney's deficiencies." (*Lee*, at p. 1967.) In fact, the post hoc assertions are *insufficient* by themselves to overturn a plea. (*Ibid.*)

Defendant has not carried her burden of proving, by a preponderance of the evidence, that she was prejudiced by any of the three types of deficient performance she alleges.

Although defendant in her 2017 declaration and testimony says that she would not have pled guilty had she known her pleas exposed her to a risk of deportation, her actions contemporaneous with her 2008 plea belie her current statements: The trial court specifically told defendant that, if she were not a United States citizen, her plea "*will* result in deportation," and she nevertheless went ahead and entered her pleas. Although a trial court's standard advisement that a defendant "may" face immigration consequences does not foreclose a claim for ineffective assistance of counsel (*In re Resendiz*, *supra*, 25 Cal.4th at pp. 241-242), defendant's decision to enter a plea in this case notwithstanding the trial court's advisement that her plea *will* result in her deportation is powerful evidence that she would still have pled guilty even if she had possessed more specific knowledge about immigration consequences that she now claims she lacked. (*Olvera*, *supra*, 24 Cal.App.5th at pp. 1116-1117 [so noting]; *Perez*, *supra*, 19 Cal.App.5th at p. 829 [same].)

Further, defendant has not established that her attorney's failure to negotiate a more immigration-safe disposition was prejudicial. Such a failure is prejudicial only if a defendant "identif[ies]" an "immigration-neutral disposition to which the prosecutor was reasonably likely to agree." (*Olvera*, *supra*, 24 Cal.App.5th at p. 1118; *Perez*, *supra*, 19 Cal.App.4th at pp. 830-831; *In re Resendiz*, *supra*, 25 Cal.4th at pp. 253-254.) Defendant suggests she might have been able to "plead up" to a drug transportation charge or to an "accessory after the fact" charge under section 32 but has provided no evidence that these charges fit the actual facts of her crimes or that a prosecutor would be reasonably likely to agree to her suggested charges.

DISPOSITION

The order is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST