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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUAN RAMONE ACIEGO, Defendant and Appellant.	B269811 (Los Angeles County Super. Ct. No. BA066379)

APPEAL from an order of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juan Ramone Aciego, also known as Jorge Raul Marcia Valladares, appeals from the trial court's denial of a motion to vacate his conviction for possession of cocaine base for sale. Appellant pleaded guilty to the offense, but claims he was not properly advised of the immigration consequences of his plea, as required under Penal Code section 1016.5.[1] We conclude the trial court did not abuse its discretion in finding appellant failed to show prejudice from the lack of advisement, and affirm.

BACKGROUND

1. The underlying offense

On November 17, 1992, the Los Angeles District Attorney filed an information charging appellant and codefendants Herman Mondragon and Rodolfo Nolasco with a single count of possession for sale of cocaine base (Health & Saf. Code, § 11351.5). The prosecution presented the following evidence at the preliminary hearing:[2]

On October 16, 1992, Los Angeles Police Officer Chris Rowles, accompanied by three other officers, observed the three defendants standing on a street corner. Rowles watched as a man approached the defendants and spoke to them. Appellant reached towards a wrought iron fence and removed a small black container from it. Appellant opened the container, removed something, and handed it to Mondragon. Mondragon then handed something to the man, who gave him an unknown amount of currency.

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

[2] The transcript of the preliminary hearing is the only transcript in the record from the 1992 criminal proceedings. The trial court relied on it in ruling on appellant's motion to vacate.

A few minutes later, a woman approached the group and the process repeated, this time with Nolasco retrieving the black container from the fence.

Rowles and the other officers then detained the three defendants. One of the officers retrieved a black container attached to the fence with magnets. Inside were 50 to 75 white "wafer-type" objects, later identified by a chemist as containing cocaine base. The officers also found $87 tucked in Mondragon's pants. Rowles opined that the defendants had possession of the cocaine base for sale, based on Rowles's observations and the quantity of cocaine base involved.

2. The plea

Appellant was arraigned on October 20, 1992. The minute order from the arraignment states that appellant was given numerous advisements by videotape, including that "a 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."

Approximately two months later, on December 16, 1992, appellant pleaded guilty to the charge. He was sentenced to 180 days in jail, reduced to 87 days after custody and conduct credits, and put on probation for three years. The minute order contains a preprinted statement that "Defendant [was] advised of possible effects of [the] plea on any alien/citizenship/probation/parole status," and the box next to the statement is checked.

3. The motion to vacate the conviction

In 2015, appellant consulted an attorney about applying for legal residency in the United States. The attorney informed

appellant that his 1992 plea and conviction barred him from doing so.

Appellant filed a motion to vacate his conviction and withdraw his guilty plea under section 1016.5. In his supporting declaration, appellant stated that at the time he took the plea he "was afraid of any jail sentence," and had been told by counsel that pleading guilty would reduce his time in custody. Appellant stated that he did not recall the court advising him during the plea proceedings of potential immigration consequences, and had he known the consequences, he would not have pleaded guilty.

The trial court found there was no evidence that appellant had been properly advised during the plea proceedings. But based on the evidence presented in the transcript of the preliminary hearing, and the sentence appellant received, the court found no reasonable probability that appellant would have chosen not to plead guilty even if properly advised. The court thus denied the motion. Appellant timely appealed.[3]

DISCUSSION

Appellant argues the trial court abused its discretion in finding there was no reasonable probability appellant would have declined the plea offer even if he had been properly informed of the immigration consequences. We disagree. The trial court correctly found that appellant had not received the required advisements, but did not abuse its discretion in concluding that appellant suffered no prejudice as a result.

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[3] The trial court's order denying appellant's motion to vacate is appealable. (*People v. Totari* (2002) 28 Cal.4th 876, 887.)

1. Applicable law

"Section 1016.5(a) requires a trial court, before accepting a plea of guilty or no contest, to explain to a defendant that if the defendant is not a citizen of this country, conviction of the charged offense 'may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization . . . .' Section 1016.5(b) provides a remedy for a noncitizen defendant who is not advised of these consequences: 'If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which [the] defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization . . . the court, on [the] defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.' To prevail on a section 1016.5 motion, a defendant must establish (1) that the advisements were not given; (2) that the conviction may result in adverse immigration consequences; and (3) that the defendant would not have pled guilty or no contest had proper advisements been given."[4] (*People v. Arriaga* (2014) 58 Cal.4th 950, 957-958 (*Arriaga*).)

We review a denial of a motion under section 1016.5, subdivision (b) for abuse of discretion. (*People v. Castro–Vasquez* (2007) 148 Cal.App.4th 1240, 1244.) "When applying the deferential abuse of discretion standard, 'the trial court's findings

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[4] The parties do not dispute that appellant's conviction "may result in adverse immigration consequences." (*Arriaga, supra*, 58 Cal.4th at p. 958.) Thus, this opinion discusses only the first and third prongs.

of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' " (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.)

2. Whether advisements were given

The trial court correctly found that appellant had not been properly advised. "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." (§ 1016.5, subd. (b)). Here, there is no record that appellant received the advisement. The record does not contain a reporter's transcript of the plea proceedings. Although the December 16, 1992 minute order states that appellant was advised of the effect of his plea on "alien/citizenship/probation/parole" status, this is insufficient because it does not specify that the defendant was warned of possible deportation, exclusion, and denial of naturalization as required by the statute. (*People v. Dubon* (2001) 90 Cal.App.4th 944, 954-955 [finding insufficient a pre-printed statement identical to the one here]; see *Arriaga, supra*, 58 Cal.4th at pp. 956, 961 [parties agreed that minute order stating " 'Defendant advised of possible effects of plea on any alien or citizenship . . . status' " did not "set forth the actual advisements given" and thus "section 1016.5(b)'s presumption of nonadvisement applies"].)

Nor is it sufficient that appellant was provided the full advisement during his arraignment two months before he took his plea. To satisfy section 1016.5, the advisement must take place "within the context of the taking of the plea." (*People v. Akhile* (2008) 167 Cal.App.4th 558, 564.) *Akhile* held that an advisement was inadequate when, like here, it was given at an

arraignment weeks before the plea was taken. (*Id.* at p. 561.) The court explained that when an advisement is given weeks in advance of the actual plea, there is "significant uncertainty as to whether the defendant actually recalled the advisement and understood the possible immigration consequences at the time of entry of the plea." (*Id.* at p. 564.) The court concluded that the Legislature's purpose in enacting section 1016.5 was to "eliminate such uncertainty," which necessarily required that the advisement be given at the time the plea was taken. (*Akhile*, at p. 564.) Under *Akhile*, the trial court was correct to find that the advisements at appellant's arraignment did not satisfy section 1016.5.

3. Prejudice

The trial court did not abuse its discretion in finding that, although appellant did not receive the required advisements, he suffered no prejudice as a result. When evaluating prejudice, "relief may be granted if the court is convinced the defendant, if properly advised, would have rejected an existing plea offer in the hope or expectation that he or she might thereby negotiate a different bargain, or, failing in that, go to trial." (*People v. Martinez* (2013) 57 Cal.4th 555, 567 (*Martinez*).) "[I]n determining the credibility of a defendant's claim, the court in its discretion may consider factors presented to it by the parties, such as the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*Id.* at p. 568.)

Here, the court evaluated the evidence presented at the preliminary hearing and the "pretty lenient probationary offer," and concluded that it was not reasonably probable appellant would have rejected the offer. This conclusion is supported by substantial evidence. (*In re C.B., supra*, 190 Cal.App.4th at p. 123 [under abuse of discretion standard, trial court's findings of fact are reviewed for substantial evidence].) Contrary to appellant's assertion, the case against appellant was strong. Four police officers had witnessed him participate in a cocaine sale, with a substantial quantity of drugs recovered from the scene. This was powerfully incriminating evidence even if, as appellant notes, there was no confession or video or audio recording of the sale. Nor did it matter, as appellant argues, that appellant had no contraband on his person and did not directly interact with the drug purchasers, when he clearly was handling the container with the drugs and assisting his codefendant in conducting the sale.

The trial court also reasonably concluded that the plea offer was one appellant was likely to accept given the evidence against him. At the time, the offense with which he was charged carried a potential sentence of three, four, or five years in state prison. (Health & Saf. Code, former § 11351.5 (eff. Sept. 26, 1987).) In his declaration, appellant stated that he "was afraid of any jail sentence," and an offer of a short jail stay followed by probation would certainly be preferable to several years in state prison. The trial court did not abuse its discretion in concluding that this was a lenient and attractive offer.

Although appellant asserted in his declaration that he would have turned down this offer if properly advised, he put forth little evidence to support this claim. Appellant did not, for

example, suggest that he had reason to believe he could obtain a better, immigration-neutral bargain, or explain why his concern for immigration consequences would have overridden his admitted fear of imprisonment at that time. Appellant's declaration described the reasons he wanted to stay in the United States *now*, such as not disrupting the life and family he had built in the 25 years after his plea was taken, but he did not claim that these concerns or similar ones existed at the time he took his plea, just a few years after his arrival in the United States.[5] Thus, although appellant claimed he would have rejected the offer if properly advised, he provided little basis for the trial court to find this claim credible.

We reject appellant's argument that the trial court abused its discretion by applying the wrong legal standard. Before hearing argument, the court stated "it does not appear to me that it's reasonably probable that [appellant] would have gone to trial given the testimony at the preliminary hearing and the pretty lenient probationary offer to which he pleaded." Appellant argues this misstates the legal standard, because the test for prejudice is not solely whether appellant, if properly advised, would have gone to trial, but also whether he would have "tr[ied] to obtain a better bargain that does not include immigration consequences." (*Martinez, supra*, 57 Cal.4th at p. 567.)

We do not view the trial court's comment as a formal statement of the legal standard applied. In making its ruling, the court said that, given the leniency of the sentence and the strength of the evidence of guilt, "I don't think there's a

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[5] Appellant's declaration stated that he came to the United States from Honduras in the "late 1980s."

reasonable probability that [appellant] would have turned [the offer] down . . . ." Thus, the trial court was not considering solely whether appellant would have gone to trial, but whether appellant would have turned the offer down for any reason, including, presumably, to seek a better offer. But even accepting appellant's argument, as discussed above appellant provided no evidence by which the trial court could evaluate whether he would have "tr[ied] to obtain a better bargain." (*Martinez, supra*, 57 Cal.4th at p. 567.) In the absence of such evidence, any error by the trial court in not considering the possibility of a "better bargain" is understandable and, more importantly, harmless.

DISPOSITION

The trial court's order denying appellant's motion to vacate his conviction is affirmed.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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