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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ESTHER SOLIS, Defendant and Appellant.	B277249 (Los Angeles County Super. Ct. No. VA061084)

APPEAL from an order of the Superior Court of Los Angeles County, Debra Cole-Hall, Judge. Affirmed.

Mary Jo Strnad, 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, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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Almost 16 years after pleading guilty, Esther Solis sought to vacate her plea under Penal Code section 1192.5.[1] On appeal, it is not disputed that section 1192.5 applies only to felonies and that Solis pled no contest to a misdemeanor. The trial court reached that conclusion and found that Solis's declaration conflicted with provisions in her signed plea agreement and was not credible.

On appeal, Solis argues that the Supreme Court's recent case of *People v. Patterson* (2017) 2 Cal.5th 885 (*Patterson*) requires reversing the denial of Solis's motion to vacate her plea. *Patterson*, however, concerned a motion under section 1018, which is timely only if brought within six months of judgment or of a suspended sentence. Solis fails to show she preserved the only issue on appeal. And, in any event *Patterson* and section 1018 do not apply to this case. We affirm the order denying Solis's petition to vacate her plea.

BACKGROUND

On September 13, 2000, Solis plead no contest to one misdemeanor count of infliction of corporal injury. She initialed the following provision in her plea agreement: "I understand that if I am not a citizen of the United States, the conviction for the offense charged will have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The following was added to the plea and handwritten: "Plea to a misdemeanor 273.5. All other counts dismissed. 36 months summary probation . . . . I understand the immigration consequences."

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1 All statutory citations are to the Penal Code.

Solis also initialed the provision indicating that she entered her no contest plea "freely and voluntarily with a full understanding of all the matters set forth in the pleading and in this form. No one has made any threats, used any force against myself, family or loved ones, or made any promises to me except as set out in the form, in order to convince me to plead no contest." Solis signed the plea and indicated that she discussed each initialed box with her attorney. Specifically, she signed and initialed the following provision: "I have personally initialed each of the above boxes and discussed them with my attorney. 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." Solis's attorney indicated that he discussed the plea with Solis and concurred in her decision to plead no contest. The name of the interpreter was written on the plea.

On August 9, 2016, Solis filed a motion to vacate her conviction entered September 13, 2000, for violating section 273.5. She argued that her plea was not knowingly and voluntarily entered. She argued that her plea must be vacated pursuant to section 1192.5.[2]

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[2] Section 1192.5 provides:

"Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of paragraph (2), (3), or (6) of subdivision (a) of Section 261, paragraph (1) or (4) of subdivision (a) of Section 262, Section 264.1, Section 286 by force, violence, duress, menace or threat of great bodily harm, subdivision (b) of Section 288, Section 288a by force, violence, duress, menace or threat of great bodily harm, or subdivision (a) of Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or

fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

"Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.

"If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

"If the plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available.

"If the plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

"Section 1192.5 requires a trial court to determine by independent inquiry, before accepting a plea of guilty or nolo contendere to a felony offense, whether there exists a factual basis for the plea." (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1576.) "[A] bare statement by the judge that a factual basis

In her declaration dated October 8, 2010 (almost six years before her current motion), Solis stated that she entered a plea of no contest to a violation of section 273.5, subdivision (a), a misdemeanor. According to her, imposition of sentence was suspended and she was placed on probation. Solis declared that her attorney told her that her plea would "not result in [her] suffering any problems with immigration." Later, when she applied to become a legal resident, her application was denied and she was placed in deportation proceedings "with an order to voluntarily depart . . . by November 3, 2010." Solis declared that she would have demanded a trial if she had known the immigration consequences of her plea.

The victim, Solis's then boyfriend wrote the court a letter stating that Solis's "deportation, because of what I consider a relatively minor offense, would be a tragedy for all of us."

At the hearing on her motion, Solis's counsel argued there was no knowing and intelligent waiver of her right to a trial. Counsel did not argue that section 1016.5[3] waivers were not

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exists, without the above inquiry, is inadequate." (*People v. Holmes* (2004) 32 Cal.4th 432, 436.)

[3] Section 1016.5, subdivision (a) provides:

"Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

"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."

provided. Nor did counsel contest the prosecutor's argument that this case was distinguishable from one brought under section 1018. Solis's counsel represented that a petition for coram nobis had been filed "on separate grounds" but did not describe those grounds. The prosecutor suggested that the prior coram nobis petition (which is not a subject of the current appeal) had been based on section 1016.5. The trial court correctly noted that Solis's motion was based only on section 1192.5.

The court denied Solis's motion to vacate her conviction. The court concluded that section 1192.5 applied only to felonies. The court explained that the statute did not apply to this case because Solis pled to a misdemeanor. The court found that Solis's declaration, which conflicted with the plea agreement, was not credible. This appeal followed.

DISCUSSION

On appeal, Solis does not challenge the trial court's conclusions. Instead she argues that our high court's recent decision in *Patterson, supra*, 2 Cal.5th 885 should apply to this case and requires remanding the case for a new hearing. Solis's reliance on *Patterson* is misplaced for numerous reasons, as we shall explain.

In *Patterson*, the Supreme Court held that the standard advisement of immigration consequences under section 1016.5 does not bar a timely motion to withdraw a plea under section 1018. (*Patterson, supra*, 2 Cal.5th at p. 889.) Section 1018 provides: "Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear

with counsel, nor shall that plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel. *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.* Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice." (Italics added.)

Patterson is inapplicable for several reasons. First, Solis's motion was not brought under section 1018. Solis forfeited her appellate argument that section 1018 permits her to vacate her plea. (See *People v. Turner* (2002) 96 Cal.App.4th 1409, 1412-1413.)

Second, Solis's motion could not have been brought under section 1018. As the italicized language indicates, that motion under section 1018 to withdraw the plea must be made before judgment or within six months after an order granting probation. In *Patterson*, the defendant "filed a timely motion to withdraw the plea under Penal Code section 1018 on grounds of mistake or

ignorance." (*Patterson, supra*, 2 Cal.5th at p. 889.) Here, Solis's motion was filed 16 years after her plea and the order granting probation. It is not a timely motion under section 1018 as in *Patterson*.

Third, in *Patterson*, the defendant received advisements that this plea *may* have immigration consequences. (*Patterson, supra*, 2 Cal.5th at p. 895.) The court was concerned that such advisements did not inform the defendant that "a conviction for a specific charged offense *will* render the defendant subject to mandatory removal." (*Ibid*., italics added.) Here, Solis initialed a provision indicating that her plea "will" have immigration consequences. Specifically, she indicated, "I understand that if I am not a citizen of the United States, the conviction for the offense charged *will* 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.) In contrast to the defendant in *Patterson*, Solis was informed that her plea would have immigration consequences. In short, *Patterson* does not apply and appellant's argument lacks merit.

Additionally, Solis's appeal lacks merit for another reason. In this case the trial court found Solis's declaration that her conviction would not result in immigration problems lacked credibility. On appeal, we do not reweigh the trial court's credibility determinations but defer to the trial court's credibility determinations that are supported by substantial evidence. (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.) Thus, Solis has no credible evidence in support of her contentions, and cannot meet the burden under section 1018 to "present clear and

convincing evidence in support of the claim" that her guilty plea should be withdrawn. (*Patterson, supra*, 2 Cal.5th at p. 894.)

DISPOSITION

The trial court's order denying Solis's motion to vacate her plea is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.