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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSENDO ENRIQUE LOPEZ,

Defendant and Appellant.

B289172

(Los Angeles County  
Super. Ct. No. BA164417)

APPEAL from an order of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed.

William J. Baker 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 Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

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Rosendo Enrique Lopez (true name Rigoberto Uribe Martinez) appeals from an order denying his motion to set aside his prior conviction and guilty plea based on the failure of defense counsel to advise him of the immigration consequences of his plea (Pen. Code, §§ 1016.5, 1473.7). We affirm.

## **BACKGROUND**

### **I. *Plea and Conviction***

On April 16, 1998, the People charged Lopez by information with possession for sale of cocaine base (Health & Saf. Code, § 11351.5). Counsel was appointed for him, and he pleaded not guilty.

On May 14, 1998, Lopez changed his plea to guilty in exchange for an agreed-upon sentence of three years formal probation, including 365 days of jail time. The clerk's transcript for the May 14, 1998 hearing indicates that Lopez was advised of the immigration consequences of his plea.

Lopez's probation was revoked on December 20, 2000. On January 25, 2001, he was sentenced to four years in state prison. After his release from prison, he was deported to Mexico, but he returned to the United States.

### **II. *Motion To Set Aside Plea and Conviction***

On January 29, 2018, Lopez filed a Penal Code section 1473.7 (section 1473.7) motion to set aside his plea and conviction. In his supporting declaration, he stated: "At one of the court hearings, the attorney told me he had arranged a good deal for me. The attorney told me that I should plead guilty and that I probably [would] be reinstated on probation. At the time I

was on probation because of a prior drug conviction. The attorney did not tell me that a drug conviction could get me deported or prevent me from legalizing my immigration status in the future.”

The attorney went over a form with him, but Lopez “did not understand much about what was going on.” He added: “I just understood I was pleading guilty and would be sentenced to probation. I do not remember anyone at the court warning me about the immigration consequences of the guilty plea.”

Now, in 2018, Lopez is married to a United States citizen, and they have two children who are citizens. He is employed and claims he has been “clean” and sober for many years. He wants to become a lawful permanent resident of the United States but is prevented from doing so by his 1998 felony drug conviction. He stated: “If I had known that my conviction in this case would result in my deportation and lifetime inadmissibility, I would never have pleaded guilty. I would have tried to get another deal.”

### **III. *Hearing and Denial of Motion***

At the March 5, 2018 hearing on Lopez’s motion, the trial court observed that the “transcript is very clear” that Lopez was advised of the immigration consequences of his plea. Apparently, the trial court was referring to the transcript of the May 14, 1998 plea hearing.<sup>1</sup> The prosecutor took Lopez’s waiver of his rights

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<sup>1</sup> That transcript was not provided to us as part of the record on appeal. The People claim that the trial court’s order should be affirmed based on Lopez’s failure to provide us with a complete record on appeal. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609; *Uniroyal Chemical Co. v. American*

and explicitly advised him: “If you’re not a citizen of the U.S., you are hereby advised your plea today may have the consequences of deportation, exclusion from admission to the U.S., or denial of naturalization as a citizen.” Lopez said he understood the sentencing consequences the prosecutor explained.

The trial court further quoted from the court’s advisements at the May 14, 1998 plea hearing: “Mr. Lopez, you’ve been advised as to the consequences of your plea. If you’re not a citizen of the United States, I’m going to go over that with you once again. If you’re not a citizen of the U.S., a conviction will result in your deportation. You’ll be denied readmission into the U.S. You will be denied naturalization which means that you cannot become a naturalized United States citizen. You’ll be denied amnesty and work privileges pursuant to the laws of the U.S.” Again, Lopez said he understood.

After reading these portions of the transcript in open court, the trial court denied Lopez’s section 1473.7 motion.

## DISCUSSION

Section 1473.7, subdivision (a)(1), provides in pertinent part that “[a] person no longer imprisoned or restrained may prosecute a motion to vacate a conviction” on the ground “[t]he conviction . . . is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand,

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*Vanguard Corp.* (1988) 203 Cal.App.3d 285, 302.) Based on our conclusion below that Lopez in any event failed to meet his burden of establishing entitlement to relief, we need not address the People’s claim.

defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” The person moving to vacate a conviction bears the burden of proving, by a preponderance of the evidence, grounds for relief. (*Id.*, subd. (e)(1).)

We apply de novo review “for a mixed question of fact and law that implicates a defendant’s constitutional right. [Citation.] A defendant’s claim that he or she was deprived of the constitutional right to effective assistance of counsel ‘presents a mixed question of fact and law,’ and we accordingly review such question independently. [Citations.] We accord deference to the trial court’s factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel’s deficient performance and resulting prejudice to the defendant. [Citations.]” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76.)

The transcripts of the plea proceedings, which the trial court apparently had before it when ruling on Lopez’s motion, clearly showed that Lopez was advised of the immigration consequences of his plea. He told the court he understood these advisements.

Lopez “does not address this unambiguous record on appeal. Instead, he offers his own declaration, executed [20] years after he pled guilty, wherein he claims his attorney never explained the immigration consequences of his guilty plea and he did not understand he would be deported if he pled guilty.” (*People v. Perez* (2018) 19 Cal.App.5th 818, 830.) This is insufficient to meet his burden of proving by a preponderance of the evidence that he is entitled to relief under section 1473.7.

(*Id.* at p. 829; see also *People v. Gonzalez* (2018) 27 Cal.App.5th 738, 753.)

Lopez claims that his attorney's failure to properly advise him of the immigration consequences of his plea deprived him of the effective assistance of counsel, because if he had been properly advised, he "would have tried to get another deal."

In *People v. Ogunmowo*, *supra*, 23 Cal.App.5th 67, the defendant submitted an affidavit from the attorney who represented him at the plea hearing. The attorney acknowledged that he failed to fully investigate the immigration consequences of the defendant's guilty plea, and he conceded that he gave the defendant "wrong" advice. (*Id.* at p. 73.) The defendant stated in his declaration that he relied on this wrong advice in deciding to plead guilty. (*Id.* at p. 78.) We concluded the fact the trial court advised the defendant of the immigration consequences of his plea did not prevent the defendant from establishing that he was deprived of the effective assistance of counsel and entitled to reversal of his guilty plea. (*Id.* at pp. 80-81.)

Here, unlike in *Ogunmowo*, Lopez failed to obtain an affidavit from his former attorney attesting to a failure to properly advise Lopez of the immigration consequences of his plea. Lopez simply stated that his attorney did not properly advise him and, had he been properly advised, he "would never have pleaded guilty."

As we explained in *Ogunmowo*, reversal for ineffective assistance of counsel requires a showing of prejudice. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

[Citation.] ‘[W]hen a defendant claims that his counsel’s deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” [Citation.] . . . ‘Courts 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.’ [Citation.]” (*People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 78.) Lopez offered no such evidence here.

Additionally, “[t]here is no indication in the record that the prosecution was willing to agree to an immigration safe disposition. Similarly, there is no suggestion that [Lopez’s] counsel did not attempt to negotiate such a disposition. Instead, [Lopez] merely asks us to presume he did not do so . . . . We cannot make any such presumption. An appellant has the burden of establishing, based on the record on appeal and based on facts, not speculation, that counsel rendered ineffective assistance of counsel. [Citation.]” (*People v. Perez, supra*, 19 Cal.App.5th at pp. 830-831; see also *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1118.) Lopez has not met this burden.<sup>2</sup>

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<sup>2</sup> We need not address the People’s assertion that the order should be affirmed because Lopez failed to file his motion with “reasonable diligence,” as required by subdivision (b) of section 1473.7. The trial court made no finding as to diligence and, in any event, Lopez failed to show error in the trial court’s denial of his motion on the merits.

**DISPOSITION**

The order is affirmed.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.