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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.

GILBERTO RODRIGUEZ,

Defendant and Appellant.

B275911

(Los Angeles County
Super. Ct. No. A776441)

APPEAL from an order of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Affirmed.

Eduardo A. Paredes for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, and David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.

Gilberto Rodriguez appeals from the denial of his motion to vacate a guilty plea entered in 1986. (Pen. Code,¹ § 1016.5.) Appellant contends the trial court erred in denying his section 1016.5 motion to vacate the plea on the ground that he failed to exercise due diligence in bringing his motion to vacate nearly 30 years after entering the plea. He further maintains that he was entitled to relief under section 1016.5 because at the time of his plea, the court did not advise him of the immigration consequences of a conviction, an adverse immigration consequence was a likely result of the conviction, and he was prejudiced by the trial court's error in failing to advise him of the immigration consequences of a conviction when it accepted his plea. We find no abuse of discretion in the trial court's denial of relief under section 1016.5 based on appellant's nearly 30-year delay in bringing his motion. We therefore affirm.

BACKGROUND

An information filed on January 17, 1986, charged appellant with two counts of the sale of phencyclidine (PCP) in violation of Health and Safety Code section 11379.5. After initially pleading not guilty, appellant withdrew his plea as to count 1, waived his rights, and entered a plea of guilty; count 2 was dismissed. On March 17, 1986, the court imposed a sentence of 365 days in county jail and three years of probation. On April 18, 1988, appellant admitted he had violated the terms of his probation. The court revoked probation and sentenced appellant to three years in prison.

¹ Undesignated statutory references are to the Penal Code.

On August 1, 2014, appellant filed a motion to vacate his 1986 plea pursuant to section 1016.5 on the ground that the trial court had failed to advise him prior to accepting the guilty plea that conviction of the offense may carry adverse immigration consequences.² The motion was set for hearing on October 17, 2014, but there being no appearance by appellant or his attorney, the matter was taken off calendar.³

On March 10, 2016, appellant tried again, filing a duplicate motion to vacate the 1986 plea.⁴ The second motion contained no additional information or argument beyond what had been set forth in the original motion. Appellant argued that his 1986 plea should be vacated because the trial court did not advise him in accordance with section 1016.5, he actually suffered deportation following his conviction, and because of the conviction for a drug trafficking offense, he “is inadmissible to the United States” and “ineligible to adjust status as a permanent resident.” In his declaration in support of the motion, appellant claimed he would not have entered the plea had he been warned of the severe

² Appellant was represented by his current appellate counsel, Eduardo A. Paredes.

³ Contrary to appellant’s assertion in his opening brief on appeal, the record is devoid of any indication that the August 2014 motion “was taken off calendar in order to allow [appellant] to obtain additional proof that prior to 2014, he had sought relief from the trial court.” There is also nothing in the record to suggest that appellant sought relief in the trial court before 2014.

⁴ The second motion appears to be a photocopy of the first, including the signature pages, which indicate both motions were signed on March 15, 2014, and served on August 1, 2014.

consequences, because the “plea didn’t reduce [sic] my sentence since my original plea already included the three-year sentence if I violated probation. My priority was to remain in the United States.” Significantly, appellant’s motion to vacate the plea provided no explanation for the nearly 30-year delay in seeking relief under section 1016.5.

At the hearing, the district attorney objected to the motion as untimely and argued that granting it would cause substantial prejudice to the People due to the impossibility of prosecuting a 30-year-old drug trafficking offense. In response to the court’s question about appellant’s diligence in seeking to vacate the plea, defense counsel asserted that appellant “has diligently pursued his avenues of relief.” Specifically, “since this conviction, he was trying to legalize his status in the United States,” and “as of October 23, 1996, his application for permanent status in the United States was pending.”⁵

The trial court denied the motion, finding that appellant had failed to exercise due diligence in seeking to vacate the plea.

DISCUSSION

Section 1016.5 requires a trial court to administer the following advisement on the record before accepting a plea of guilty or nolo contendere from a 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

⁵ Various documents pertaining to appellant’s federal immigration proceedings, the first page entitled, “Decision on Application for Status as Permanent Resident,” were marked collectively as exhibit A and admitted into evidence.

deportation . . . or denial of naturalization pursuant to the laws of the United States.” (§ 1016.5, subd. (a).) If the court fails to advise the defendant in accordance with section 1016.5, the defendant may move to vacate the judgment and withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. (§ 1016.5, subd. (b).)

We review the trial court’s denial of the motion to vacate for abuse of discretion (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192), reversing only where the court has exercised its “discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.” (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.)

“To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.” (*People v. Totari* (2002) 28 Cal.4th 876, 884; *Zamudio, supra*, 23 Cal.4th at pp. 199–200.) To show prejudice, defendant must demonstrate a reasonable probability that he would not have pleaded guilty or nolo contendere if he had been properly advised. (*Zamudio, supra*, 23 Cal.4th at pp. 209–210.)

Although section 1016.5 contains no explicit time bar (*Zamudio, supra*, 23 Cal.4th at p. 204), “[a] postjudgment motion to change a plea must be ‘seasonably made.’ [Citation.] Thus, the trial court may properly consider the defendant’s delay in making his application, and if ‘considerable time’ has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay.” (*People v.*

Castaneda (1995) 37 Cal.App.4th 1612, 1618 (*Castaneda*); *People v. Kim* (2009) 45 Cal.4th 1078, 1097–1098 [acknowledging a diligence requirement for a motion to vacate a plea under § 1016.5].)

As our Supreme Court has explained, “[t]he diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state’s interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated.” (*People v. Kim*, *supra*, 45 Cal.4th at p. 1097.) *Castaneda* observed that the “obvious” reason for requiring a showing of due diligence is to avoid the “[s]ubstantial prejudice to the People [that] may result if the case must proceed to trial after a long delay.” (*Castaneda*, *supra*, 37 Cal.App.4th at p. 1618; see also *People v. Palmer* (1942) 49 Cal.App.2d 567, 572 [holding that to allow defendant to change his plea after 12 years, when material witnesses may have died or disappeared, “would reduce to mockery the administration of even and exact justice”].) To satisfy the burden of showing due diligence in seeking to vacate a plea after a substantial delay, the defendant must “‘aver not only the probative facts upon which the basic claim rests, *but also the time and circumstances under which the facts were discovered*, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence; a mere allegation of the ultimate facts, or of the legal conclusion of diligence, is insufficient.’” (*People v. Kim*, *supra*, 45 Cal.4th at pp. 1096–1097.)

Here, although appellant’s nearly 30-year delay in seeking to vacate his plea was excessive by any standard, appellant has alleged no facts to substantiate his assertion that he “has diligently pursued his avenues of relief.” He made no attempt to

justify the 30-year gap between the plea and the motion to vacate in his moving papers. He also failed to explain the delay at the hearing on the motion, arguing only that he had been busy attempting to “legalize his status in the United States,” and as of October 23, 1996, had an application for “permanent status” pending with the United States Immigration and Naturalization Services (INS).⁶ Appellant’s application was apparently denied at some unspecified point in time, but appellant claimed he still did not learn the conviction made him ineligible for permanent status until he consulted “with other attorneys,” again, at some unspecified time in the last 20 years.

On appeal, appellant argues the documentation issued by Immigration Services in October 1996, which he presented to the trial court, demonstrated that he did not have knowledge that his offense would result in a denial of permanent resident status in the United States. He thus maintains that he established “good cause” for failing to seek relief under section 1016.5 “earlier.” But appellant’s claim of prolonged ignorance of the immigration consequences of his conviction is no substitute for the required showing of due diligence in seeking relief in the trial court, much less the necessary averment of “the time and circumstances under which the facts were discovered,” which would allow a court to make a due diligence determination. (*People v. Kim, supra*, 45 Cal.4th at pp. 1096–1097.)

⁶ Since March 1, 2003, INS has been officially known as “United States Citizenship and Immigration Services.” (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981, fn. 2; *Nijjar v. Holder* (9th Cir. 2012) 689 F.3d 1077, 1081, fn. 13.)

We conclude, as did the trial court, that appellant failed to establish due diligence in seeking relief under section 1016.5 thirty years after he entered his plea. Accordingly, we find no abuse of the trial court's discretion in denying appellant's untimely motion to vacate his 1986 plea.

DISPOSITION

The order denying the motion to vacate pursuant to section 1016.5 is affirmed.

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LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.