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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARTIN MARTINES, Defendant and Appellant.	B280678 (Los Angeles County Super. Ct. No. NA043088)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

Robert G. Berke and Edith Nazarian, 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 Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Martin Martines (a.k.a. Arturo Lara-Aguilera) appeals from the denial of his motion to vacate his plea pursuant to Penal Code section 1016.5.[1] He contends he was improperly advised of the immigration consequences of his plea and suffered prejudice as a result. We affirm.

FACTUAL AND PROCEDURAL HISTORY

In 2000, defendant pled guilty to six counts of robbery (§ 211) and admitted the special allegation that he personally used a firearm (§ 12022.53) in the commission of the robbery charged in count 1.

According to defendant, his original, court-appointed counsel presented him with an offer of 12 years. Defendant then met with a private attorney whom his family had hired; this attorney told defendant he could get a better deal. However, shortly before trial, defendant's private counsel informed him that the offer had been raised to 16 years, that if defendant lost, he would "probably get 30 to 40 years," and that he "would not win at trial."

At a pre-trial hearing discussing a potential plea, defendant's attorney told the court that defendant "could get a 40 year sentence out of this very easily" and he wanted defendant to understand that the "exposure that he has is frightening." He recommended that defendant take the plea offer. Defendant agreed to take the plea.

The court then gave the following advisement: "If you are not a citizen of this country, as a result of these pleas you will be deported. You will be denied reentry if you were to leave the country, and you will be denied naturalization if you were to apply to become a U.S. citizen." The court asked defendant if he understood what the court had said

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

about immigration consequences and if he had any questions. Defendant stated he understood and, after conferring further with his counsel, he had no questions. The court accepted defendant's plea and sentenced him to 16 years in state prison.

On September 20, 2016, defendant filed a motion to vacate his conviction and withdraw his plea pursuant to section 1016.5. In his accompanying declaration, defendant stated that after he completed his criminal sentence in July 2014, he was transferred to a detention facility by the Department of Homeland Security and placed in removal proceedings. Defendant retained immigration counsel, who advised him that his robbery convictions were classified as crimes of moral turpitude that would render him inadmissible to the United States. Defendant also stated in his declaration that at the time he entered his plea, he was married to a U.S. citizen. He stated that he "never considered the fact that, by entering my plea, I would become ineligible from adjusting my status or that the conviction would render me deportable from the United States because I was never made aware that these were things I was supposed to consider." Further, if he had known "that I would definitely be rendered inadmissible, be ineligible from relief, and be barred forever from immigrating to the United States after removal, I would never have entered this plea. I definitely would have taken my chances at trial or tried to get an immigration-safe deal. . . ."

The trial court denied the motion. The court found that the advisement given during the plea hearing substantially complied with the requirements of section 1016.5. Further, the court concluded that defendant failed to establish prejudice, finding that defendant

"accepted the plea deal because he was looking at 40 years, not because he could be potentially deported." This appeal follows.[2]

DISCUSSION

I. *Governing principles*

Defendant contends the trial court's advisement of the immigration consequences of his plea and conviction did not meet the requirements of section 1016.5. In pertinent part, that statute provides: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime 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." (§ 1016.5, subd. (a).)

If the court fails to give the admonition required by subdivision (a) and the defendant can show that the conviction might result in the immigration consequences addressed by the statute, then upon defendant's motion, the court must vacate the judgment and allow the defendant to withdraw his plea and enter a plea of not guilty. (§ 1016.5, subd. (b).)

"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." (*Totari, supra,* 28 Cal.4th at p. 884.)

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[2] The denial of a motion to vacate under section 1016.5 is an appealable order. (*People v. Totari* (2002) 28 Cal.4th 876, 887 (*Totari*).)

The purpose of section 1016.5 is to ensure that the defendant has both actual knowledge of the possible adverse immigration consequences of a guilty plea and a chance to make an intelligent choice whether to plead guilty. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 193-194 (*Zamudio*); *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173 (*Gutierrez*).)

Here, defendant challenges the trial court's findings on the first and third prongs of his motion—that he was properly advised of the immigration consequences of his plea and that, if there was any error in the advisement, he was not prejudiced by it. We review the trial court's denial of a motion to vacate under section 1016.5 for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.)

II. *Defendant was adequately advised of the immigration consequences of his plea*

Section 1016.5 requires that defendant be "specifically advised of all three separate immigration consequences of his plea"— deportation, exclusion from admission, and denial of naturalization. (*Gutierrez, supra,* 106 Cal.App.4th at p. 174.) Defendant challenges only the advisement regarding exclusion from admission to the United States. He contends that the trial court's advisement was inadequate because it stated defendant would be "denied reentry" rather than "excluded from admission." We disagree.

The immigration advisement pursuant to section 1016.5 need not be in the statutory language; substantial compliance is all that is required, "as long as the defendant is specifically advised of all three separate immigration consequences of his plea." (*Gutierrez, supra*, 106 Cal.App.4th at p. 174; *Zamudio, supra*, 23 Cal.4th at pp. 207-208 [substantial compliance with the statutorily described advisement is adequate]; *People v. Limones* (1991) 233 Cal.App.3d 338, 345 ["exact language of the advisement is not crucial"].) Defendant argues that the

advisement he received was not substantially compliant because "reentry" has a different meaning than "exclusion" in the immigration context, and the advisement regarding "reentry" therefore misleadingly implied that, so long as he did not leave the United States, he could avoid adverse immigration consequences. This argument has been uniformly rejected.

In *Gutierrez, supra*, 106 Cal.App.4th 169, the prosecutor similarly advised the defendant as follows: "'If you are not a United States citizen, you will be deported from the United States, denied re-entry and denied amnesty or naturalization.'" (*Id*. at p. 171.) The defendant contended that "there are actually three components to exclusion: reentry, rescission of resident status, and ineligibility to adjust one's status," and argued error because he was admonished only as to re-entry. (*Id*. at p. 174, fn. 4.) The court disagreed, stating, "[B]oth *Zamudio*[, *supra*, 23 Cal.4th 183] and [*People v.*] *Gontiz* [(1997) 58 Cal.App.4th 1309 (*Gontiz*)] make clear that the words used by the prosecutor here were the equivalent of the statutory language. '"Exclusion" is "being barred from entry to the United States." [Citation.]' (*Zamudio, supra*, 23 Cal.4th at p. 207.) 'Deportation is to be distinguished from exclusion, which is the denial of entry to the United States. [Citation.]' (*Gontiz, supra*, 58 Cal.App.4th at p. 1317.) . . . . Appellant was expressly told that one of the immigration consequences of his conviction was that he would be denied reentry into the United States; in other words, under the statute, he would be excluded from the United States. The trial court, thus, substantially complied with the statute, and, hence, committed no error in the manner in which it took appellant's plea." (*Gutierrez, supra*, 106 Cal.App.4th at p. 174.)

Defendant contends that *Gutierrez* was incorrectly decided because the court's analysis was based on "a natural reading of the words" rather than an examination of their use as terms of art under

federal immigration statutes. This argument ignores the language of both *Gutierrez* and *Zamudio*, which expressly considered the terms as they were incorporated into section 1016.5 from immigration law, and found them sufficiently equivalent for purposes of the advisement under section 1016.5. (See *Gutierrez, supra*, 106 Cal.App. 4th at p.174; *Zamudio, supra*, 23 Cal.4th at p. 207, quoting Roseman, The Alien and the Guilty Plea: Caveat to the Defense (1984) 12 W. St. U. L.Rev. 155, 165, fn. omitted ["Section 1016.5 incorporates several distinct terms of art from immigration law. . . . 'Exclusion' is 'being barred from entry to the United States.'"] Defendant also notes that, unlike the defendant in *Gutierrez*, he has articulated the ways in which "exclusion from admission" may differ from "denial of re-entry" under federal immigration statutes. But the crux of his argument is the same—that the advisement regarding denial of re-entry did not encompass the same array of circumstances as exclusion from admission, most pertinently the inability to adjust his status. Section 1016.5 does not require the articulation of any or all sub-components to exclusion. Moreover, even if the advisement had quoted the statutory language, advising defendant he would be subject to "exclusion from admission" would not have provided him the information he claims he lacked—that he would be prevented from adjusting his status while still in the United States.[3]

The trial court's advisement was in substantial compliance with the requirements of section 1016.5. Assisted by his attorney, defendant informed the court that he understood the admonition and the consequences of that plea. We find no abuse of discretion in the denial of defendant's motion to vacate.

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[3] As such, defendant's citation to federal case law discussing the meaning of "admission" is inapposite.

III. *Defendant failed to show prejudice*

Even if we found defendant received an inadequate advisement, we would nevertheless conclude his section 1016.5 motion was properly denied because he failed to make the required showing of prejudice. To establish prejudice, defendant must show that it is reasonably probable he would not have pled guilty had he been properly advised. (*Totari, supra*, 28 Cal.4th at p. 884; *Zamudio, supra*, 23 Cal.4th at pp. 209–210.)

"[T]he defendant bears the burden of establishing prejudice. [Citation.] To that end, the defendant must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*People v. Martinez* (2013) 57 Cal.4th 555, 565.)

The trial court found not credible defendant's assertion that he would not have entered into his plea if he had been advised of its immigration consequences in the language of section 1016.5. The court's finding is supported by defendant's failure to provide any objective evidence to corroborate this assertion, and by the fact that several statements in defendant's declaration are contradicted by the record. Defendant claimed that "at the time I entered my plea, I was married to a U.S. citizen and had a U.S. citizen child," and therefore he would have been willing to reject the plea if he had known it would render him unable to seek to adjust his status based on his marriage. But the marriage certificate in the record indicates that defendant's marriage was not until May 11, 2016, 16 years after he entered his plea. He also claimed he was never advised that he could be deported, which was undisputedly part of the advisement the court gave on the

record and which defendant acknowledged he understood. Finally, defendant's suggestion that he would have tried to negotiate a plea without immigration consequences is undercut by the circumstances of his plea—he was facing what his own attorney termed as a likely conviction and sentence of up to 40 years, and he had already seen the available plea deal increase from 12 to 16 years.

Moreover, had defendant proceeded to trial and been convicted, he would have been subject to the same immigration consequences. Defendant offers no rebuttal to his own counsel's assessment that defendant was likely to lose at trial, no evidence of possible defenses to the charged offenses, and no other basis to conclude that he would have likely proceeded to trial or been able to negotiate a better plea if given the a different immigration advisement. "'The choice . . . that petitioner would have faced at the time he was considering whether to plead, even had he been properly advised, would not have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation.' [Citation.] The defendant thus must convince the court he or she would have chosen to lose the benefits of the plea bargain despite the possibility or probability deportation would nonetheless follow." (*People v. Martinez, supra,* 57 Cal.4th at p. 565.)

Defendant failed to convince the trial court that he would have proceeded differently under the circumstances existing at the time of his plea if the court's advisement had precisely tracked the language of the statute. We find no error in that conclusion.

DISPOSITION

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.