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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE EDUARDO PEDROZA, Defendant and Appellant.	B232825 (Los Angeles County Super. Ct. No. VA025910)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Asherson, Klein & Darbinian, Neville Asherson and Anna A. Darbinian for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Steven D. Matthews, Supervising Deputy Attorney General, for Plaintiff and Respondent.

In 1994, Jose Eduardo Pedroza pleaded guilty to two counts of second degree robbery and one count of attempted second degree robbery, and admitted the truth of allegations on each count that a principal was armed with a firearm. The trial court sentenced Pedroza to nine and a half years in state prison, a sentence that eventually was reduced to seven years and eight months. In 2011, Pedroza filed a motion to vacate his sentence, along with other motions and petitions, arguing that in 1994 he was improperly advised of the immigration consequences of his plea. The trial court denied relief on all the motions and petitions, and we affirm.

BACKGROUND

A consolidated and amended information filed November 15, 1993, charged Pedroza and codefendant Walter Arturo Rivera with kidnapping for robbery in violation of Penal Code[1] section 209, subdivision (b), (count 1); two counts of second degree robbery, in violation of section 211 (counts 2 and 3); and attempted second degree robbery, in violation of sections 664 and 211 (count 4). The information alleged that each of the four counts was a serious felony within the meaning of section 1192.7, subdivision (c), and that in each of the four counts a principal was armed with a firearm, within the meaning of section 12022, subdivision (a)(1).[2]

On April 4, 1994, Pedroza pleaded guilty to counts 2, 3, and 4, with a possible sentence maximum of nine and a half years in prison. Pedroza initialed a checked paragraph on the first page of the plea form providing: "I understand that if I am not a citizen of the United States, the conviction for the offense 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."[3] Pedroza signed and initialed a

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

[2] The information alleged other counts against codefendant Rivera, which are not in issue on this appeal.

[3] Four of the paragraphs on the first page, and five of the paragraphs on the second page, are crossed out, including the paragraph stating, "Commitment to CYA." Pedroza

statement that "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." His attorney signed a statement that "I have explained each of the above rights to the defendant."

The court entered Pedroza's guilty plea on April 8, 1994. On the minute order form, a box is checked stating, "[d]efendant advised of possible effects of plea on any alien/citizenship/probation/parole status." Pedroza pleaded guilty to counts 2, 3, and 4, and admitted the firearm allegations in those counts.

On October 27, 1994, the trial court sentenced Pedroza to nine years and six months in state prison with 760 days of custody credits.[4] On the prosecution's motion, the court dismissed count 1. On April 17, 1995, the court issued a nunc pro tunc order adding the words "ordered stayed" as to the enhancement on counts 3 and 4. On May 5, 1995, the trial court issued another nunc pro tunc order correcting the total sentence to seven years and six months. On September 12, 1995, the court entered a nunc pro tunc order deleting the October 27, April 17, and May 5 orders, substituting a sentence of seven years and eight months, and noting, "This sentence represents a reduction in time over that imposed 10/27/94."[5] Pedroza was deported in 1997.

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initialed all the paragraphs on the second page of the plea form, but none of them is checked (including the paragraph designating his plea as an open plea, Pedroza's signature acknowledging his rights, and the signature of his defense attorney confirming advice of rights and the signature box of the prosecutor).

[4] The minute order committed Pedroza to state prison but ordered him "to be housed at California Youth Authority pursuant to section 1731.5(c) W.I.C. [Welfare and Institutions Code]." Under that section, when the court imposes a term in state prison, it can also order a defendant under the age of 18 transferred to CYA solely for the purpose of housing, and the sentence remains a prison term. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1175.)

[5] The September 12, 1995, minute order erroneously states that a five-year sentence was imposed on count 1, which had been dismissed. It is clear, however, that the court imposed the same five-year term on count 2 it had originally imposed, and mislabeled it as count 1.

On October 4, 2010, in response to Pedroza's request for transcripts of the plea hearing, Pedroza was notified that the court reporter's notes from 1994 had been destroyed under section 69955 of the Government Code.[6]

On January 3, 2011, Pedroza filed a 57-page motion entitled "Notice of Motion to Vacate under Penal Code § 1016.5; Non Statutory Motion to Vacate; Or in the Alternative Motion to Vacate on the Grounds of Ineffective Assistance of Counsel; In the Alternative to the Aforegoing a Sua Sponte Motion to Vacate and Modify the Sentence; Petition for Writ of Error Coram Nobis or in the Alternative Petition for Writ of Habeas Corpus; Incorporated Petition for a Writ of Audita Querela." He filed an amended motion on January 20, 2011, and a supplement to the motion on February 2, 2011.

In an attached declaration signed October 4, 2010, Pedroza stated that he was born in Mexico on June 28, 1975, making him 17 years old at the time of his arrest in 1993 and 18 years old at the time of his guilty plea. He had no contact with his defense attorney outside the courtroom, and "prior to my plea, the Court never advised me of the immigration consequences of my guilty plea. This is based on the fact that to my knowledge I was not given any advisement of any immigration consequences by the court nor by my attorney at the time, Mr. Richard LaPan. [¶] . . . I maintain that I was personally not made aware of the possible immigration consequences nor do I recall being advised personally of such possible results at the plea hearing either by the court or by counsel." Pedroza stated he learned of the immigration consequences in September 2010, when he hired appellate counsel "to advocate for my immigration petition," and counsel advised him "of the grave consequences that my guilty plea has on my immigration status. . . . [¶] . . . I understood for the first time that my plea of guilty would result in my banishment from the United States, exclusion from the United States, and the denial of naturalization to a United States citizen." He also stated that the court did not deliver the warning in a way he could understand because his "best language is Spanish."

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[6] Government Code section 69955, subdivision (e) provides that reporting notes "may be destroyed upon the order of the court after 10 years from the taking of the notes in criminal proceedings . . . ."

Had he known of the immigration consequences he would not have pleaded guilty. His wife, a United States citizen, had begun the process to change his immigration status in 2000, and when he filed with the INS a petition for an adjustment of his immigration status to permanent resident on September 14, 2001, he had fully disclosed his past conviction and sentence.

At the hearing on February 2, 2011 (at which Pedroza was not present), the court stated, "It looks to me—although we don't have the transcript, I think there is overwhelming evidence your client was advised of the possible consequences of the immigration. [¶] I have the docket that sets forth that he was advised such. And also his initials and his signature shows that he filled out a Tahl form[7] that he did receive it. Do you dispute that? And even by his declaration, it is not as though he denies—it's not that he denies he was given it, he just didn't recall." Pedroza's counsel argued that there were inconsistencies in the court record and no transcript. The court responded that contrary to Pedroza's statement in his declaration that he did not receive a preliminary hearing,[8] the court had read part of the lengthy transcript of the preliminary hearing, and "he was definitely there." The court stated that the form signed by Pedroza, by his attorney, and by the prosecutor was "sufficient evidence to show that he was advised."

The court also expressed concern that Pedroza "waited forever to come to this court." When Pedroza's counsel stated that Pedroza only found out about the immigration consequences in October or November of 2010, the prosecutor countered: "I have his rap sheet that shows in 1997 [Pedroza] was deported" after he got out of prison. Noting that the declaration did not state that there was anything wrong with the form initialed and signed by Pedroza, the prosecutor continued: "we have a Tahl waiver form, we have a person who has been deported, knew he was in this country unlawfully, [and] advised of the consequences." Asked by the court "when he was deported in 1997,

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[7] A guilty plea form is often referred to as a *Tahl* form. (See *In re Tahl* (1969) 1 Cal.3d 122, 132.)

[8] Pedroza stated, "I did not receive a preliminary hearing in my criminal case."

he didn't realize it was going to be a problem?," Pedroza's counsel answered that deportation "didn't put him on notice that there was [sic] inconsistencies in the record." Counsel later acknowledged that the basis for Pedroza's deportation was his 1994 conviction.

The court addressed whether Pedroza's 1994 counsel was ineffective, noting that the sentence was "very favorable" and asked: "How would he have had a more favorable outcome if he was advised of his immigration status?" After Pedroza's counsel stated that Pedroza would have negotiated a better deal, the prosecutor explained that on the day of the plea the case was set for a court trial. If Pedroza went to trial he faced a life sentence on the first count (which was dismissed), and the subsequent changes "chipped away" at the nine and a half year sentence.

The court stated: "I find that based upon the record that I see, that he was advised of the consequences of the plea affecting his immigration status. I find that he unnecessarily delayed in bringing this matter; that in 1997 he was deported over this conviction. Clearly in 1997, he was given notice that there was going to be adverse consequences because of that. [¶] He knew he was illegal, and the probation report said it. And I am sure in 2006 when he had his first DUI, he was advised . . . the conviction would have negative immigration consequences on his status.[9] [¶] In regards to ineffective assistance of counsel, from the record I reviewed it would appear from an objective review that Mr. LaPan did an excellent job in representing Mr. Pedroza, someone looking at a life sentence was only sentenced to 9 and a half years. [¶] Even assuming that there was some deficiency that he fell below the reasonable standard, I don't see how it had an impact on what the result would be; and that it's unlikely that he would have received any other favorable disposition or been able to get any type of conviction that was more beneficial, and that would not have affected his immigration status. [¶] The court notes that this was an open plea to the court. The normal reason why there is an open plea to the court is that the People are unwilling—the defendant

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[9] Pedroza had DUI convictions in 2006 and 2010.

feels that he can get a better offer from the court, and the People have a higher offer. [¶] If this was not an agreement between the defendant and the People, he has to plead to all the charges which would be these charges. I don't see if he would have gone to trial he would have had any more of a favorable result."

The trial court denied relief on all the motions and petitions. Pedroza filed a notice of appeal with a request for certificate of probable cause, which the court granted.

DISCUSSION

Pedroza argued in the trial court and on this appeal that his motions and petitions should have been granted because he was not advised of the immigration consequences of his decision to enter a guilty plea. We address his contentions in turn, and we conclude that the trial court did not abuse its discretion in denying relief.

I. Motion to Vacate Under Section 1016.5

Section 1016.5, subdivision (a) states: "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." If the court failed to make that advisement and the defendant's conviction had any of those immigration consequences, "the court, on 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. 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." (*Id.* at subd. (b).) We review the court's order denying the section 1016.5 motion for an abuse of discretion. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517–1518.)

In this case, given the lack of a transcript of the 1994 plea hearing, there is no exact record of the court's oral advisement on the immigration consequences of Pedroza's guilty plea. The order entering the guilty plea stated that Pedroza was advised

of the possible effects of his plea on any alien or citizenship status. In addition, Pedroza initialed the statement on the plea form (dated the same date as the hearing) that he understood that as a noncitizen, his conviction may result in deportation, exclusion from admission, or denial of naturalization. "To prevail on a section 1016.5 motion, 'a defendant *must* establish' that he or she 'was *not* properly advised of the immigration consequences *as provided by the statute*.' [Citation]." (*People v. Limon*, *supra*, 179 Cal.App.4th at p. 1518.) Pedroza's declaration states that he does not recall receiving the advisement, but the 1994 record we have shows that he was so advised.

Further, "[a] postjudgment motion to change a plea must be 'seasonably made.' [Citation.]" (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618; see *People v. Totari* (2003) 111 Cal.App.4th 1202, 1207.) Pedroza, who knew he was not a citizen, entered his plea in 1994, initialing the statement that he had been advised of the immigration consequences. Pedroza was deported upon his release in 1997. Nevertheless, he did not file his section 1016.5 motion until early 2011, nearly fourteen years after his deportation, at which time he certainly was aware of the consequences of his guilty plea and conviction. (See *People v. Kim* (2009) 45 Cal.4th 1078, 1097–1098.) This lack of diligence further undermines his claim, prejudicing respondent as the transcripts of the plea hearing had been destroyed in the interim.

The trial court did not abuse its discretion in denying the section 1016.5 motion.

II. Nonstatutory Motion to Vacate and Petition for Writ of *Coram Nobis*

"As a nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for a writ of error *coram nobis* [citations], we consider these claims together." (*People v. Kim*, *supra*, 45 Cal.4th at p. 1096).

Pedroza argues that his counsel was ineffective in failing to advise him of the immigration consequences of his plea, and that a writ of *coram nobis* should therefore issue. The argument that his trial counsel was ineffective in failing to tell him about his plea's immigration consequences does not involve new facts not presented to the court at the trial on the merits which would have prevented rendition of the judgment, the requirements for *coram nobis* relief. (*People v. Kim*, *supra*, 45 Cal.4th at pp. 1101–

1102.) "Defendant's alleged new facts, in contrast, speak merely to the *legal effect* of his guilty plea and thus are not grounds for relief on *coram nobis*. [Citations.]" (*Id.* at p. 1102.)

Pedroza has not presented grounds for *coram nobis* relief. *Padilla v. Kentucky* (2010) 559 U.S. ___ [130 S.Ct. 1473, 176 L.Ed.2d 284] does not require us to give special consideration to Pedroza's "nonstatutory motion." (See *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1404.)

III. Petition for writ of habeas corpus

The denial of a petition for habeas corpus is not appealable. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) Further, Pedroza's petition for writ of habeas corpus was properly denied because he was no longer in custody for the offense. "[P]ersons like defendant, who have completely served their sentence and also completed their probation or parole period, may not challenge their underlying conviction in a petition for a writ of habeas corpus because they are in neither actual nor constructive custody for state habeas corpus purposes." (*People v. Kim*, *supra*, 45 Cal.4th at p. 1108.) Pedroza argues that he was in custody at the time of filing, and remains on probation, in his misdemeanor DUI case. This actual or constructive state custody is unrelated to his underlying 1994 conviction. Further, his detention by federal Immigration and Customs Enforcement does not suffice, given that he has completely served his sentence and completed parole, so that he is no longer in custody on his underlying conviction. (*Ibid.*)

IV. Petition for writ of audita querela

Pedroza cites no California authority, and we have found none, justifying treatment of his claim as a petition for writ of audita querela. It is doubtful that the writ exists in California. (See *Arechiga v. Housing Authority* (1958) 159 Cal.App.2d 657, 660 [audita querela does not exist in California civil cases, its function having been preempted by certain sections of the Code of Civil Procedure].) In any event, the writ serves as a means of attacking a judgment that was correct at the time it was rendered, but is rendered infirm by matters arising after its rendition. (See *People v. Vasilyan* (2009)

174 Cal.App.4th 443, 457, fn. 2 (dissent).) Pedroza does not argue that his conviction was correct at the time of his guilty plea, and therefore the writ would not issue.

V. Ineffective assistance of counsel

Pedroza's underlying argument is that his trial counsel was ineffective because counsel failed to advise him regarding the immigration consequences of his plea. On the record before us we see no sign of ineffective assistance, which requires inadequate performance by counsel and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 690–694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) First, on the face of the record, Pedroza was advised of the immigration consequences of his plea, by counsel and by the court. This distinguishes the instant case from *Padilla v. Kentucky*, *supra*, 130 S.Ct. 1473, where the defendant's attorney incorrectly assured the defendant that his conviction would not result in deportation. (*Id.* at pp. 1478, 1483.) Second, even if counsel did not advise him, the trial court docket indicates that the court advised him. Pedroza has not shown prejudice, given his substantially reduced sentence and the lack of any indication other than his self-serving statements that he would have gone to trial if counsel had so advised him.[10] We note that Pedroza subpoenaed his trial counsel to appear at a hearing on January 20, 2011, but the court excused him because the court file was not yet available and Pedroza's counsel had not made a request for oral testimony. There is no declaration from trial counsel in the record.

Pedroza also raises a variety of issues related to the details of his sentence, but the time to appeal a sentence imposed in 1994 and amended in 1995 (and which Pedroza served preceding his release in 1997) has long since passed.

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[10] This case and *Padilla v. Kentucky*, *supra*, 130 S.Ct. 1473 involve different legal issues from those in *Missouri v. Frye* (2012) ___ U.S. ___ [132 S.Ct. 1399, 182 l.Ed.2d 379], wherein "the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation which preceded it with respect to other potential pleas and plea offers." (*Id.* at p. 1406.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.