

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR RAFAEL QUIROZ-
GOMEZ,

Defendant and Appellant.

B271101

(Los Angeles County
Super. Ct. No. TA120008)

APPEAL from an order of the Superior Court of
Los Angeles County, Eleanor J. Hunter, Judge. Reversed and
remanded.

Gary Finn for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Steven D. Matthews and Paul S. Thies, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Cesar Rafael Quiroz-Gomez moved to withdraw his no contest plea to possessing marijuana for sale on the ground he wasn't advised he could be excluded from admission to the United States. The trial court denied the motion. Defendant appeals. We reverse the order and remand for further proceedings.

BACKGROUND

An information filed in December 2011 alleged against defendant, count 1, possession of marijuana for sale (Health & Saf. Code, § 11359). On May 3, 2012, defendant pleaded no contest to count 1. Prior to his plea, defendant was advised, among other things, "If you're not a citizen of the United States, this plea today will result in your being deported, denied naturalization, or denied citizenship." Imposition of sentence was suspended, and defendant was placed on three years' formal probation on various conditions, including that he serve three days in jail.

Thereafter, on January 22, 2016, defendant moved to withdraw his plea because he wasn't advised he could be permanently excluded from the United States as a consequence of his plea. Defendant was facing this consequence, because he "is now" "in immigration court," and his fiancée, a United States citizen, could petition for defendant but for his conviction in this case. Also, defendant has five children, who are also United States citizens. The trial court denied the motion but issued a certificate of probable cause.

DISCUSSION

Defendant contends, and the People concede, that defendant was not adequately advised of the immigration consequences of his plea. Before accepting a guilty plea or a plea

of nolo contendere to any offense punishable as a crime under state law, a trial court shall, on the record, advise 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.” (Pen. Code, § 1016.5, subd. (a).) All three distinct immigration consequences must be given. (*People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1316, overruled on another ground by *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 200 & fn. 8.) If they are not, 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.” (Pen. Code, § 1016.5, subd. (b).)

Here, the trial court told defendant he could be deported, denied naturalization or denied citizenship as a consequence of his plea. The court did not advise defendant he could be excluded from admission to the United States. The advisement was therefore inadequate.

Notwithstanding the misadvisement, defendant must show he was prejudiced; i.e., it is reasonably probable he would not have pleaded nolo contendere if properly advised. (*People v. Totari* (2002) 28 Cal.4th 876, 884.) This question is a factual one, subject to review for sufficiency of the evidence. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 210.)

Defendant here did submit evidence of prejudice. In his declaration in support of his motion, he said that, in addition to the trial court’s failure to advise him properly, his counsel did not advise him of the possibility of exclusion from the United States. Had he known of this possibility, he would not have entered into

the plea. Although such self-serving declarations have been found insufficient to show prejudice (see, e.g., *In re Resendiz* (2001) 25 Cal.4th 230, 253, overruled on another ground by *Padilla v. Kentucky* (2010) 559 U.S. 356; *People v. Araujo* (2016) 243 Cal.App.4th 759, 763-764), defendant also introduced evidence that he has been the subject of removal proceedings since, it appears, 2009. Defendant has been in the United States for 20 years, and he has five children, all United States citizens and all under 18 at the time he moved to withdraw his plea. His fiancée is a citizen of the United States, and they were planning to get married, after which she planned to “petition” for defendant.

The trial court, however, based its decision denying defendant’s motion on the sole ground its advisement substantially complied with Penal Code section 1016.5. The court never reached the issue of prejudice and therefore never considered defendant’s situation and other relevant factors, such as the disparity between the terms of the proposed plea deal and the probable consequences of going to trial. (*In re Resendiz, supra*, 25 Cal.4th at p. 253.) We find it is appropriate for the court below to consider, in the first instance, the issue of prejudice on remand.

DISPOSITION

The order denying defendant's motion to vacate the judgment and withdraw his plea is reversed and the matter is remanded for proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.