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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ESEQUIL DE JESUS, Defendant and Appellant.	B280899 (Los Angeles County Super. Ct. No. GA055638)

APPEAL from an order of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Mathews and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Esequil De Jesus pleaded no contest to one count of assault with a firearm and admitted a specially pleaded allegation of personal use of a firearm. De Jesus appeals from the trial court's order denying his motion to vacate the negotiated plea. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

In an amended information filed April 29, 2004 De Jesus was charged with two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2))[1] and one count of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)). The amended information specially alleged personal use of a firearm (§ 12022.5) as to all three counts.

2. *Entry of the No Contest Plea*

On July 29, 2004 the parties advised the trial court a plea agreement had been reached. De Jesus agreed to plead no contest to one charge of assault with a firearm and to admit the allegation of personal use of a firearm. The recommended sentence would be a state prison term of two years (the low term) plus a stayed term of three years (the low term) for the enhancement for personal use of a firearm. The prosecution would dismiss the remaining counts in the amended information.

Prior to entry of the plea, the deputy district attorney, with the assistance of an interpreter, advised De Jesus of his constitutional rights and the nature and consequences of his plea. The deputy district attorney told De Jesus, "If you're not a citizen of the United States, you will be deported[,] denied reentry,

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[1] Statutory references are to this code.

denied naturalization and denied amnesty. Do you understand that?" De Jesus answered, "Yes." The deputy district attorney also asked De Jesus, "Are you entering that plea because after discussions with your attorney you believe it's in your best interest to do that?" De Jesus replied, "Yes."

De Jesus then pleaded no contest to one count of assault with a firearm and admitted personally using a firearm. His counsel joined in the waivers, concurred in the plea and stipulated to a factual basis for the plea. The trial court found De Jesus had "freely, voluntarily, knowingly and intelligently waived his constitutionality [*sic*] rights. That he understands the nature and consequences of his plea." The court accepted the no contest plea and admission. The court then sentenced De Jesus, in accordance with the plea agreement, to a state prison term of two years. The remaining counts were dismissed.

3. *The Motion To Vacate the Plea*

On August 26, 2016, 12 years after his no contest plea, De Jesus moved pursuant to section 1016.5 to vacate his plea, contending it was not entered knowingly or intelligently because he was not advised of the immigration and deportation consequences. According to De Jesus his attorney told him "to just answer YES to any and all" questions he was asked. De Jesus stated he had been removed from the United States due to the conviction.[2]

The trial court held a hearing on the motion on January 19, 2017. Neither De Jesus and his counsel nor the deputy district attorney appeared. The court stated it had read the reporter's

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[2] There is no indication in the record on appeal that the People opposed De Jesus's motion to vacate.

transcript of the 2004 plea hearing and found "prior to the plea, a detailed discussion on the record in the defendant's presence took place between counsel for the People, counsel for the defendant, and the court concerning the plea and the benefits it afforded the defendant." The court found De Jesus had stated he understood the immigration consequences of his plea and had believed entering a plea was in his best interests. The court denied the motion to vacate, stating the "plea was proper and not in violation of the defendant's rights."

DISCUSSION

Before accepting a plea of guilty or no contest, a trial court is required to explain to a defendant that, "if the defendant is not a citizen of this country, conviction of the charged offense 'may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization. . . .'" (*People v. Arriaga* (2014) 58 Cal.4th 950, 957; see § 1016.5, subd. (a).) Section 1016.5 "provides a remedy for a noncitizen defendant who is not advised of these consequences: 'If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which [the] defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization . . . the court, on [the] 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.'" (*Arriaga,* at p. 957, quoting § 1016.5, subd. (b).) Section 1016.5, subdivision (b), further provides, "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." (See also *Arriaga*, at p. 961.)

To prevail on a section 1016.5 motion, a defendant must establish three elements: "(1) that the advisements were not given; (2) that the conviction may result in adverse immigration consequences; and (3) that the defendant would not have pled guilty or no contest had proper advisements been given." (*People v. Arriaga*, *supra*, 58 Cal.4th at pp. 957-958.) We review an order denying a section 1016.5 motion to vacate the judgment for abuse of discretion. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192.) Under this standard we must decide "'whether the trial court's findings of fact are supported by substantial evidence, whether its rulings of law are correct, and whether its application of the law to the facts was neither arbitrary nor capricious.'" (*People v. Clancey* (2013) 56 Cal.4th 562, 578.) It is De Jesus's burden to show the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.)

Acknowledging the section 1016.5 immigration advisements were given to him at the plea hearing, De Jesus nonetheless contends the trial court abused its discretion in denying his motion to vacate his 2004 no contest plea. De Jesus argues the advisements were inadequate because they were administered by the prosecutor rather than the judge. De Jesus is correct that section 1016.5, subdivision (a), states "the court shall administer" the immigration advisements. However, the trial court here did not abuse its discretion in finding the prosecutor can, and did, properly accomplish this task.

In *People v. Quesada* (1991) 230 Cal.App.3d 525, the court rejected the same argument made by De Jesus here, that the statute should be interpreted literally to mean advisement of immigration consequences must be done by the trial court. In *Quesada* the defendant was advised of the immigration consequences of his guilty plea by his counsel and by means of a written plea form rather than orally by the court. The court of appeal found there was an inherent ambiguity in the word "court" as used in section 1016.5, and it looked to the intent of the Legislature to resolve it.[3] (*Quesada*, at pp. 534-535.) Section 1016.5, subdivision (d), states, "[I]t is the intent of the Legislature in enacting this section to promote fairness to [non-citizen defendants] by requiring . . . that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea."

Given this statement of intent, the *Quesada* court held, "[T]he legislative purpose of ensuring a defendant is aware of the

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[3] "Although it is true that the words 'court' and 'judge' are used interchangeably in common parlance and in some statutes, the word 'court' has multiple meanings. 'Court' sometimes refers to 'the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with "judge"; and, whether the act is to be performed by the one or the other, is generally to be determined by the character of the act, rather than by such designation.' [Citations.] Contrary to defendant's contention, because of the numerous meanings of the term 'court,' there is an inherent ambiguity in the language of section 1016.5." (*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 534.)

possible immigration consequences of a guilty plea and is given sufficient time to consider the choice of plea, is best and most reasonably served by construing the word 'court' as used in section 1016.5 to refer to the tribunal in which defendant enters his plea. Under this construction, the advisement referred to therein may be given through any of the numerous individuals acting on behalf of that tribunal, including the judge, counsel, the court reporter, or the clerk." (*People v. Quesada*, *supra*, 230 Cal.App.3d at pp. 535-536.) As long as the defendant is made aware of the immigration consequences of the plea on the record, "the actual advisor is immaterial. . . . [T]he dispositive question is whether the defendant has been advised of the immigration consequences of his plea as required by the statute, not who gave the admonition." (*Id.* at p. 536.) A contrary finding would "exalt form over substance and would place an unnecessarily restrictive burden on our trial courts." (*Ibid.*; cf. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 979 ["literal construction of an enactment, however, will not control when such a construction would frustrate the manifest purpose of the enactment as a whole"]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act"].)

Similarly in *People v. Gutierrez* (2003) 106 Cal.App.4th 169, while the court did not explicitly consider the propriety of the prosecutor giving the immigration advisement, the court nonetheless held the prosecutor's advisement satisfied the requirements of section 1016.5. In that case, the defendant had argued not that the advisement was improper because administered by the prosecutor, but instead because the wording did not exactly mirror the statute. Division Eight of this court

held the prosecutor's advisement was proper because "only substantial compliance is required under section 1016.5 as long as the defendant is specifically advised of all three separate immigration consequences of his plea." (*Gutierrez,* at p. 174; see also *People v. Ramirez* (1999) 71 Cal.App.4th 519, 522 [holding written advisement sufficient because "there is no language in the statue requiring verbal advisements by the court"].)

While we do not wholeheartedly agree with the *Quesada* court that the statute is ambiguous, we do agree with *Quesada* and *Gutierrez* to the extent they hold only substantial compliance is necessary.[4] The dispositive issue is not the form in which De Jesus was advised of the immigration consequences of his no contest plea but that he was actually advised. The record shows the prosecutor, through an interpreter, unambiguously informed De Jesus of the immigration consequences of his plea using substantially similar language as that prescribed by the statute. De Jesus stated he understood the advisement. He also stated he was entering the plea because he believed it was in his best interest to do so. The trial court then stated on the record that it found De Jesus understood the nature and consequences of the plea and that he had entered the plea freely, knowingly, voluntarily, and intelligently. This evidence supports the trial court's finding that De Jesus was properly advised of the immigration consequences of his plea. Given these circumstances, there is no showing, nor could there be, that the procedure employed had any impact on De Jesus's decision to enter his no contest plea.

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[4] De Jesus, who did not file a reply brief, does not address these cases in his opening brief, let alone provide any argument as to how they could be distinguished here.

Furthermore, even if the prosecutor's recitation of the immigration advisement were not sufficient under the statute, it would only raise the presumption that De Jesus was not advised. (See § 1016.5, subd. (b).) This "presumption of nonadvisement established by section 1016.5's subdivision (b) is controlling unless and until the prosecution rebuts it by proving it is more likely than not that the defendant *was* properly advised." (*People v. Arriaga*, *supra*, 58 Cal.4th at p. 963.) Here, as discussed, the reporter's transcript of the plea hearing shows, and De Jesus does not dispute, that the deputy district attorney advised De Jesus of the immigration consequences of his plea. Such evidence rebuts the presumption under section 1016.5, subdivision (b). (See *Arriaga,* at pp. 963-964 [holding presumption under section 1016.5, subdivision (b), was rebutted by prosecutor's testimony it was his practice to always advise defendants of immigration consequences of pleading guilty and by minute order's indication advisements were given].)

DISPOSITION

The order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. BENSINGER, J.*

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