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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARCIANO ESTRADA NUNO, Defendant and Appellant.	B269795 (Los Angeles County Super. Ct. No. A391977)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Affirmed.

Gary Finn for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Marciano Estrada Nuno appeals from an order denying his motion to withdraw his plea of guilty to a charge of possession of marijuana (Health & Saf. Code, § 11360) and vacate the judgment of conviction. The gravamen of his motion was that he was not properly advised of the immigration consequences of his plea pursuant to Penal Code section 1016.5.[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On July 8, 1983, when defendant was 25 years old, he was convicted of felony possession of marijuana after entering a guilty plea. At the time he entered his plea, the prosecutor advised him: "[I]f you are not a citizen of the United States . . . conviction in this case could result in your being deported. It could mean you would be denied reentry into the Unites States, citizenship, or green card working privileges." Defendant stated he understood and "had plenty of time to talk this matter over with [his] lawyer."

On March 7, 2013, defendant filed a petition for dismissal of his conviction on the ground his offense was one which could be reduced to a misdemeanor under section 17. (§§ 1203.4, 1203.4a.) His petition was granted on April 19 2013.

On June 30, 2015, defendant filed a motion to vacate the judgment of conviction and withdraw his guilty plea pursuant to

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

section 1016.5. The basis of the motion was that he was not given the advisement required by section 1016.5.

In his supporting declaration, defendant stated that he was a citizen of Mexico who came to the United States as a teenager. He was married to a permanent resident of the United States, and his children were citizens. At the time of his conviction, he was represented by a public defender who recommended that he plead guilty in order to get out of jail. According to defendant, the public defender never asked him if he was a United States citizen "nor did he do anything to try to reduce the immigration consequences that a case like this could have. Since I did not know that there would be any immigration consequences associated with my plea, I decided to go ahead and plead guilty. When I went before the judge, the judge did not advise me before I pled guilty that my guilty plea could have any immigration consequences either."

Defendant stated, "[T]o the best of my knowledge and belief prior to pleading guilty to the charges against me I was never advised, either by my attorney or by the court, that if I pled guilty that I could face the drastic immigration consequences that I am now facing. Despite my family ties in the United States, because of the conviction in this case I am facing removal from this country and I am unable to adjust my status and acquire lawful permanent residence here, despite the time that has passed since I was convicted in this case and despite the fact that my wife has filed a visa petition for me that has been approved. Had I known at the time of my guilty plea that my guilty plea would lead to my deportation and permanent inadmissibility from the United States, I never would have pled guilty but instead would have fought my case or insisted on a different plea

bargain that would not have such drastic immigration consequences."

On November 20, 2015, the trial court denied defendant's motion, finding defendant was properly advised of the immigration consequences of his plea.

DISCUSSION

Section 1016.5 provides that "[p]rior 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." (*Id.*, subd. (a).)[2]

Defendant contends he was not properly advised pursuant to section 1016.5 because he was told that he could be "denied reentry into the Unites States" rather than "exclusion from admission to the United States."

In order "[t]o 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

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[2] Section 1016.5 further provides a court may vacate a judgment and permit a defendant to withdraw a plea if the defendant was not advised of the immigration consequences of the plea. (*Id.*, subd. (c).)

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. [Citations.]" (*People v. Totari* (2002) 28 Cal.4th 876, 884; accord, *People v. Arriaga* (2014) 58 Cal.4th 950, 957-958.) We review the trial court's ruling on a motion to vacate under the abuse of discretion standard. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192 (*Zamudio*).)

A defendant must be warned "expressly of each of the three distinct possible immigration consequences of his conviction(s) prior to his plea": deportation, exclusion from the United States, and denial of naturalization. (*People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1316-1317 (*Gontiz*), disapproved on another ground in *Zamudio*, *supra*, 23 Cal.4th at p. 200, fn. 8; accord, *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174 (*Gutierrez*).) However, the warning need not be given in the statutory language; substantial compliance is sufficient. (*Gutierrez*, *supra*, at pp. 174-175; see *Zamudio*, *supra*, at p. 208.)

In *Gutierrez*, as in the instant case, "[i]n taking the plea, instead of using the statutory language 'exclusion from admission to the United States,' the prosecutor used the phrase 'denied re-entry.' Appellant seizes on this misstatement and argues that under *Gontiz*, the plea must be vacated." (*Gutierrez*, *supra*, 106 Cal.App.4th at p. 173.) The court rejected this argument.

The *Gutierrez* court explained that "both *Zamudio* and *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, fn. omitted.)

Inasmuch as defendant here was advised of the three possible immigration consequences of his guilty plea, in substantial compliance with the requirements of section 1016.5, defendant was properly advised, and the trial court did not abuse its discretion in denying his motion to withdraw his plea. (*Zamudio*, *supra*, 23 Cal.4th at pp. 192, 208; *Gutierrez*, *supra*, 106 Cal.App.4th at p. 174.)[3]

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[3] While defendant is not entitled to relief under section 1016.5, we note that he may be able to obtain relief under Health and Safety Code section 11361.8, newly enacted as part of Proposition 64, the Adult Use of Marijuana Act. This section permits a person convicted of violating Health and Safety Code section 11360 who has completed his sentence to "file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction." (*Id*., § 11361.8, subd. (e).)

DISPOSITION

The order is affirmed.

KEENY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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