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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. PEDRO ROSALEZ LOPEZ, Defendant and Appellant.	B233591 (Los Angeles County Super. Ct. No. LA003431)

APPEAL from a postjudgment order of the Los Angeles County Superior Court, Leslie A. Dunn, Judge. Affirmed.

Law Offices of Jaime Jasso and Jaime Jasso for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lane C. Winter, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Carl N. Henry, Deputy Attorney General, for Plaintiff and Respondent.

Pedro Rosalez Lopez appeals from the trial court's order denying his motion to vacate his plea of guilty to one felony count of trafficking a controlled substance (Health & Saf. Code, §11352, subd. (a)), and his motion requesting that the court exercise its discretion to vacate his conviction in the interest of justice (Pen. Code, § 1385[1]). Appellant contends he was improperly advised of the immigration consequences of his plea, and that the trial court erred when it failed to state its reasons for denying his motion under section 1385. We affirm.

BACKGROUND

In early April 1990, appellant was charged with two felony counts of sale or transportation of a controlled substance (heroin) in violation of Health and Safety Code section 11352, subdivision (a), and one felony count of possession for sale of a controlled substance (heroin) in violation of Health and Safety Code section 11351.

In mid-April 1990, appellant entered a plea of guilty to one count of sale or transportation of a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) Before entering his plea, appellant received the following advisement, delivered by the prosecutor: If you are not a "citizen of the United States, as a result of your plea in this case, you can be denied naturalization or citizenship, deported from the United States, or if you leave the United States, you can be denied reentry or excluded from entering the United States pursuant to the laws of the United States."[2] "Do you understand that, sir?"

In the presence of his court-appointed attorney and a court-appointed Spanish language interpreter, appellant replied, "Yes I do understand . . . ." Appellant's guilty plea was entered and the two remaining felony counts were dismissed in the interest of justice. (§ 1385.)

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[1] Further undesignated statutory references are to the Penal Code.

[2] The record contains only one page from the reporter's transcript of the mid-April 1990 hearing. We presume, the words "if you are not" were on the page preceding the excerpt that begins with "citizen."

In October 2001, appellant filed a motion seeking to have the 1990 felony reduced to a misdemeanor pursuant to section 17, subdivision (b)(3) or, in the alternative, to have the guilty plea set aside and vacated and a plea of not guilty entered, and also sought to have the complaint dismissed pursuant to section 1203.4. The trial court granted the motion under section 1203.4, but denied further relief. In November 2002 appellant renewed his request to have the offense reduced to a misdemeanor under section 17, subdivision (b)(3). The court denied that petition on the ground that appellant's drug trafficking conviction was not eligible for reduction to a misdemeanor.

In January 2003, appellant filed a motion to "Reopen and Application for Adjustment of Status" with the Immigration and Naturalization Service (INS), in an effort to obtain permanent resident status in the United States.

In May 2010, appellant requested that the trial court, on its own motion, dismiss his drug trafficking conviction in the interest of justice. (§ 1385.) Appellant also requested that the trial court vacate his conviction, asserting he had been misadvised of the immigration consequences of his plea, as required by section 1016.5. Both motions were heard in March 2011, by the same judge before whom appellant entered his plea in 1990. With respect to the section 1016.5 motion, the court found that "in terms of being advised at the time of the plea by the [prosecutor] in this court, there was sufficient advisement, and [appellant] claimed that he understood. He didn't . . . counter that advisement with any of the misinformation that he supposedly had been given, so . . . the motion to vacate the judgment is denied." The court summarily denied appellant's section 1385 motion. Appellant initiated this appeal and secured a certificate of probable cause.[3]

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[3] An order denying a section 1016.5 motion is appealable (*People v. Totari* (2002) 28 Cal.4th 876, 881–887 (*Totari*)), provided a defendant obtains a certificate of probable cause. (*People v. Placencia* (2011) 194 Cal.App.4th 489, 494.)

DISCUSSION

1. Section 1016.5 motion

Appellant contends he was misadvised regarding the immigration consequences of his conviction because the admonition he received from the prosecutor did not accurately inform him of the consequences of his plea and erroneously led him to believe he would not be subject to exclusion, deportation or denial of naturalization so long as he did not voluntarily leave the country. We conclude otherwise.

a. The requirements of 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 fails to give the admonition required by subdivision (a), upon defendant's motion, it must vacate the judgment and allow the defendant to withdraw his or her plea and enter a plea of not guilty if the defendant can show that the conviction or offense to which he or she pleaded guilty or nolo contendere might result in his or her deportation, exclusion from admission to the United States, or in denial of naturalization. (§ 1016.5, subd. (b).)

b. The governing standard

"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; *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192

(*Zamudio*).) 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 or no contest plea and a chance to make an intelligent choice whether to plead guilty or no contest. (*Zamudio*, at pp. 193–194; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173 (*Gutierrez*).) A trial court's denial of a motion to vacate under section 1016.5 is typically reviewed for abuse of discretion. (*Zamudio*, at p. 192.) But, to the extent the trial court's denial is based on the court's statutory interpretation, it is an issue of law which we review de novo. (*People v. Akhile* (2008) 167 Cal.App.4th 558, 562–563 (*Akhile*).)

c. Appellant received an adequate advisement

The parties focus on the third (prejudice) prong of the *Totari*, *supra*, 28 Cal.4th 876 test. In our view this case hinges on the first of the three requirements of that test, i.e., whether appellant was properly advised of the immigration consequences of his plea. The advisement given to appellant stated: "[If you are not a] citizen of the United States, as a result of your plea in this case, you can be denied naturalization or citizenship, deported from the United States, or *if you leave the United States*, you can be *denied reentry* or *excluded from entering* the United States . . . ." The components of the admonition given to appellant regarding deportation and denial of naturalization correspond directly to the section 1016.5, subdivision (a) advisement, and are not at issue here. "'Exclusion' is 'being barred from entry to the United States.' [Citation.]" (*Zamudio*, *supra*, 23 Cal.4th at pp. 207–208.)

Appellant argues that the advisement he received, that he would be denied the right to "reenter" the United States if he left the country, was improper because the precise language of section 1016.5, subdivision (a)—which does not refer to "reentry"—was not used, and because the advisement misleadingly implied that, so long as he did not voluntarily leave the United States, he could avoid the adverse immigration consequences. This argument has been resoundingly rejected. An advisement under section 1016.5 is not improper simply because the language used does not track the language of the statute exactly. (*Zamudio, supra*, 23 Cal.4th at pp. 207–208 [in some circumstances, substantial compliance with the statutorily described advisement is

adequate]; *Gutierrez, supra*, 106 Cal.App.4th at p. 174; *People v. Limones* (1991) 233 Cal.App.3d 338, 345 ["exact language of the advisement is not crucial"]; *People v. Barocio* (1989) 216 Cal.App.3d 99, 105 [the "critical issue under § 1016.5 is whether defendant is advised that his guilty plea may have immigration consequences; "exact language of the warning is not crucial"]; *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1475 [same]; *People v. Valenciano* (1985) 165 Cal.App.3d 604, 605–606.)

A markedly similar issue to the one before us arose in *Gutierrez*, *supra*, 106 Cal.App.4th 169. There, the defendant was orally advised by the prosecutor 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, italics added.) The trial court denied the defendant's motion to set aside his plea. (*Id*. at p. 172.) Our colleagues in Division Eight affirmed this ruling. Relying on *Zamudio, supra*, 23 Cal4th 183, the *Gutierrez* court concluded that the oral advisement was adequate because it substantially complied with section 1016.5, subdivision (a). (*Gutierrez*, at p. 174.)[4] The court observed that *Zamudio* established that "'denied re-entry'" is the legal equivalent to the statutory language regarding "'exclusion of admission'" to the United States and, actually, more precisely stated the immigration consequences of a plea like the one at issue here. (*Gutierrez*, at p. 174, fn. 4; *Zamudio*, at p. 207.)

Based on *Zamudio* and *Gutierrez*, we find that the oral advisement appellant received substantially complied with the requirements of section 1016.5. Only substantial compliance with the statutory language is required so 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.) Appellant was warned of the three possible immigration consequences, and there is no merit to his assertion that the

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[4] The defendant in *Gutierrez* also executed a written waiver form that recited the statutory advisement. (106 Cal.App.4th at pp. 171–172.) The court found that, if and to the extent there were any errors in the oral advisement, they were independently cured by the written waiver form. (*Id*. at pp. 174–175.)

advisement he received affirmatively misrepresented the existence of a precondition to exclusion. The fact that the prosecutor noted that, if appellant left the country, he might not be let back in constituted a clear explanation of the meaning of the word "exclusion" a term of art of immigration law that might not otherwise be clear to a lay person. The implied addition of the word "voluntarily" cannot function as a precondition for exclusion. Interpreting the admonition to mean that appellant would be allowed to return to the United States if deported, but not if he chose to leave voluntarily, flies in the face of logic and immigration practice and renders the concept of deportation meaningless.

Appellant was sufficiently and properly advised of the immigration consequences of his plea as required by section 1016.5. Assisted by his attorney and an interpreter, appellant informed the court that he understood the admonition and the consequences of that plea. Nothing more was required of the court before taking appellant's plea.[5]

d. Appellant was not prejudiced by the advisement

Even if we found appellant 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 required by the third prong of the *Totari* test. To show prejudice, appellant must show that it is reasonably probable he would not have pleaded guilty if properly advised. (*Totari*, *supra*, 28 Cal.4th at p. 884; *Zamudio*, *supra*, 23 Cal.4th at pp. 209–210; *Akhile*, *supra*, 167 Cal.App.4th at p. 565.) Ordinarily, this factual inquiry is undertaken by the trial court. (*Zamudio*, *supra*, 23 Cal.4th at p. 210.) Here, however, the record contains no cognizable evidence of prejudice. Appellant's

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[5] Although the parties do not address the issue of timeliness, we note that a "postjudgment motion to change a plea must be 'seasonably made.' [Citation.]" (*People v. Casteneda* (1995) 37 Cal.App.4th 1612, 1618; *Totari*, *supra*, 111 Cal.App.4th at p. 1207.) Appellant, a noncitizen, entered his plea in 1990, but did not file his section 1016.15 motion until mid-2010, two decades after he was presumptively aware of the adverse immigration consequences of his conviction. (See *Zamudio*, *supra*, 23 Cal.4th at p. 207 [A § 1016.5 "motion is timely if brought within a reasonable time after the conviction actually 'may have' . . . [immigration] consequences"].)

motion was not supported by any declarations, and he declined to present any testimony or other evidence at the "evidentiary" hearing held at his request. (*See In re Alvernaz* (1992) 2 Cal.4th 924, 938 [defendant's self-serving statement of prejudice must be corroborated independently by objective evidence].)

In this case, appellant faced a maximum possible sentence of five years in state prison on just the single felony drug trafficking count for which he ultimately entered a plea. By virtue of his plea, appellant was placed on probation, which he completed in 1993, his imposed sentence was suspended, subject to terms and conditions (not specified in the appellate record), and appellant avoided a lengthy incarceration in state prison. Appellant apparently stayed in the United States following entry of his plea, remained steadily employed, married and had a child. Had appellant proceeded to trial and been convicted, he would have been subject to the same immigration consequences. Apart from unsubstantiated and self-serving claims of factual innocence, appellant offers no evidence of possible defenses to the charged offenses or to excuse his inability to do so. (See *In re Resendiz* (2001) 25 Cal.4th 230, 254, disapproved on another point in *Padilla v. Kentucky* (2010) ___ U.S. ___ [130 S.Ct. 1473, 1484, 176 L.Ed.2d 284].)

In short, appellant presented no evidence—objective or otherwise—that he would not have pleaded guilty and would have proceeded to trial if he had been told in the exact language of section 1016.5, that "conviction of the offense for which [he had] been charged may have the consequence[ ] of . . . exclusion from admission to the United States," whether or not he voluntarily left the country. Appellant failed to present objective evidence to establish the prejudice required to succeed on a motion to vacate a guilty plea. (*In re Alvernaz, supra*, 2 Cal.4th at p. 938.) On this record, there is no reason to believe appellant would have proceeded differently under the circumstances existing at the time of his plea, even if the words "if you leave the United States" had not been contained in the advisement.

2. Appellant has forfeited any claim of error regarding the trial court's order denial of his section 1385 motion which, in any event, lacks merit.

Appellant contends this action must be remanded to the trial court with instructions to articulate its reasons for denying appellant's motion requesting that the court exercise its discretion and strike his 1990 conviction. He is mistaken.

The Attorney General maintains that appellant forfeited any assertion of error regarding the court's failure to articulate its reasons for denying the motion when he failing to object at the hearing. We agree. "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . [I]t is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.'" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1, italics omitted.) Appellant chose to remain silent in the face of the court's summary denial of his section 1385 motion, or *Romero* motion,[6] making no objection to either the court's adverse decision or its failure to articulate its reasons for denying the motion. As a result, his claim is forfeited on appeal. (*Ibid*.; see also *People v. Saunders* (1993) 5 Cal.4th 580, 589–590 [failure to make timely assertion of a right before a tribunal having jurisdiction to determine it results in forfeiture of that right].)

In any event, appellant's argument fails on the merits. Trial courts have limited discretion under section 1385 to strike prior convictions in three strikes cases. (*Romero*, *supra*, 13 Cal.4th at p. 530.) We review the denial of a section 1385 motion under the deferential abuse of discretion standard. (*Id*. at p. 531.) In this regard, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Absent an "affirmative indication in the record that the trial court committed error or would have

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[6] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

exercised discretion under section 1385 . . ., relief on appeal is not appropriate . . . ." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 945.) The appellant has the burden of demonstrating an abuse of discretion, and in the absence of such a showing, there is a "'strong presumption' [citation] that the trial judge properly exercised his discretion in refusing to strike a prior conviction allegation." (*In re Large* (2007) 41 Cal.4th 538, 551.)

Contrary to appellant's assertion, although section 1385 requires that the court state its reasons for dismissing a strike, the statute contains no comparable requirement if the court *denies* a request to dismiss a prior strike. (See § 1385, subd. (a); *Romero*, *supra*, 13 Cal.4th at p. 531; *People v. Orin* (1975) 13 Cal.3d 937, 945.) A trial court need not state any reasons when it denies a *Romero* motion; denial is strongly presumed to be a proper exercise of discretion. (*In re Large*, *supra*, 41 Cal.4th at p. 551.)

"The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The record contains no indication that the trial court failed to consider any relevant information or was unaware of its discretion in this matter. Accordingly, appellant failed to overcome the strong presumption that the trial court properly exercised its discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.