Filed 8/27/18 P. v. De La Fuente CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARCELO DE LA FUENTE, Defendant and Appellant.	B285168 (Los Angeles County Super. Ct. No. GA092980)

APPEAL from an order of the Superior Court of Los Angeles County, Robert P. Applegate, Judge. Affirmed.

Alejandro Garcia for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Marcelo De La Fuente appeals from the denial of his motion to withdraw or vacate his pleas based on his claim that his counsel affirmatively misadvised him about the immigration consequences of entering no contest pleas to committing a lewd act upon a child and committing sexual penetration by foreign object. We affirm.

BACKGROUND

I. Defendant's No Contest Pleas

In April 2014, defendant was charged in a felony complaint with two counts of committing a lewd act upon a child, in violation of California Penal Code section 288, subdivision (a)[1] (counts 1 and 2), and one count of committing sexual penetration by foreign object, in violation of section 289, subdivision (j) (count 3).

On December 12, 2014, defendant appeared in court, represented by counsel. Although the People had offered defendant three years in state prison to resolve the matter, the trial court indicated it would impose a lesser sentence as follows: "In this matter, I had a discussion with both counsel and I've indicated . . . to your attorney that if you plead no contest to all charges that I will place you on five years of formal probation, primary conditions to be 364 days county jail, you'd register pursuant to Penal Code section 290, you'd have sexual abuser counseling, and you would stay away from minors unless accompanied by another adult. [¶] Is that your understanding of what's going to happen?" Defendant replied, "Yes, Your Honor."

---

1 All statutory citations are to the Penal Code.

During his change of plea colloquy with the court, defendant confirmed that he had initialed and signed the form entitled, "Felony Advisement of Rights, Waiver, and Plea Form," and that he read and understood the form before he initialed and signed it. Specifically, paragraph 12 of that form stated: "Immigration Consequences—I understand that if I am not a citizen of the United States, I must expect my plea of guilty or no contest *will result* in my deportation, exclusion from admission or reentry to the United States, and denial of naturalization and amnesty." (Italics added.)

Paragraph 14 of that form stated: "Prior to entering this plea, I have had a full opportunity to discuss with my attorney . . . the consequences of my plea." Immediately above defendant's signature, the form stated that he "read and also initialed each of the paragraphs . . . and discussed them with [his] attorney." Defendant's counsel signed the form as well to confirm, among other things, that he reviewed the form with defendant, explained his rights to him, answered his questions, and discussed the consequences of the pleas with him.

Defendant pleaded no contest to all three counts. When accepting the defendant's pleas, the trial court made the following findings: "the defendant has expressly, knowingly, intelligently, and understandingly waived his constitutional rights, that his plea has been entered freely and voluntarily with a full understanding of the nature and consequences of that plea. [¶] I find a factual basis for the plea and his plea is accepted by the court."

The trial court then placed defendant on five years of formal probation subject to various conditions and restrictions, including the condition that defendant serve 364 days in county

jail, minus any prior custody credits. The trial court permitted defendant to surrender for service of his jail term at a later date, even though the People objected "to the delay in surrender based on the defendant's potential immigration consequences."

II. The Section 1473.7 Motion

On March 22, 2017, defendant filed his "Motion to Withdraw/Vacate Plea Pursuant to PC. § 1473.7 or Alternatively Pursuant to *Padilla v. Kentucky,* 559 U.S. 356 (2010)." In it, defendant claimed that he was "unaware of the adverse immigration consequences of his plea[s]" because his counsel at the time he entered his no contest pleas had "failed to adequately research the immigration consequences of [his] plea, properly advise [him] accordingly, and properly defend [him] against the actual adverse consequences of his plea . . . ."

In support of the motion, defendant submitted a two-page declaration. In the declaration, defendant stated that he is not a United States citizen and that he entered the United States as a lawful permanent resident in 1976. With respect to his prior counsel's advice, defendant claimed that counsel "was well aware that I was not a United States citizen" and that "[p]rior to accepting the plea, [counsel] assured me that I was not going to have any problems with immigration because I was going to get a 364 day sentence instead of 365." Defendant thus declared that when entering the no contest pleas, which were "recommended" by counsel, "I did not understand that I would be deported, excluded from admission, and denied naturalization as a result of my plea." As for the basis for this belief, defendant further explained: "I did not believe that any of this could apply to me because of the representations made to me by [counsel]. I thus

agreed to do everything [counsel] suggested. Further, I did not believe that the Court's admonition [concerning immigration consequences] would mean anything to me or apply to me because nobody, including [counsel], ever indicated it would be a problem." Defendant thus contended that he "first learned [he] was going to have immigration problems as a result of [his] plea," when he was detained by immigration officials in August 2015, upon completion of his jail term. Defendant further contended: "Had I been advised by my counsel that I would be facing deportation, exclusion from admission, or denial of naturalization from the United States, I would have taken greater risks and would not have pleaded guilty. I would have attempted to obtain an acquittal, a dismissal, or, a conviction under another charge that would not have adverse immigration consequences or allow me to seek a waiver [from immigration authorities] for my offense."

On June 15, 2017, the trial court held a hearing on defendant's motion. New counsel for defendant argued that the "main error that we are alleging is that his defense counsel did not advise him properly" in that prior counsel "assured my client that he would not have any problems with immigration based on the fact that he negotiated a 364-day plea deal." As new counsel explained, it was the particular code section to which defendant pleaded no contest that carried adverse immigration consequences and not the length of custody time. Thus, contended new counsel, "[Prior counsel] did not attempt to negotiate a plea t[o] these other codes [having less severe immigration consequences]. What he did erroneously, maybe in good faith is get a 364-day plea, but that was in error. It doesn't do anything in favor of [defendant]. And he told [defendant] this

that based on that, he was not going to have any issues with immigration." In terms of prejudice to defendant, new counsel further argued that "had my client been properly advised there is no way he would have taken that deal . . . [h]e would have tried to do something else. Maybe even taken the case to trial. But more importantly perhaps tried to negotiate a plea to another penal code that would not have the adverse immigration consequences in terms of relief." Finally, new counsel conceded that, when entering his no contest pleas, defendant was advised of adverse immigration consequences pursuant to section 1016.5,[2] but asserted that fact was "irrelevant" to defendant's motion.

After taking the matter under submission, the trial court issued a memorandum decision denying defendant's motion. In its written decision, the trial court noted that defendant's declaration was the "only evidence" supporting defendant's claims that counsel "incorrectly advised him that a 364 day county jail term (as opposed to a longer term of imprisonment) would shield him from deportation" and that "this is why he pled no contest to the three charges and accepted the Court's offer of probation." The trial court specifically addressed the two assertions defendant made in his declaration to support his claims, namely: (1) that counsel assured defendant he was not going to have any problems with immigration because he was

---

[2] Section 1016.5 states that, prior to accepting a guilty or no contest plea, the court shall administer the following advisement to defendant on the record: "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." (§ 1016.5, subd. (a).)

going to get a 364 day sentence instead of 365; and (2) that defendant first learned he would have immigration problems as a result of his pleas when he was detained by immigration officials after completing his custody time in jail. The trial court found both assertions were "flatly contradicted" by a January 23, 2015, declaration defendant had previously submitted in support of his motion to modify his sentence by being placed on house arrest instead of serving time in county jail. In that prior declaration, defendant stated, "I know that there will come a day when I will no longer be allowed to stay in this country . . . ." Noting defendant made that declaration "27 months earlier, on the eve of his 364-day jail term," the trial court found that defendant "clearly anticipated being deported" at that time. The trial court also noted that, when the People objected to granting defendant a delayed surrender date to serve his jail time, they made an "on the record reference to adverse immigration consequences for this Defendant at the time of his plea." The trial court concluded that these contradictions "call[] into question all of the facts asserted in [defendant's] motion" and accordingly found "that Defendant's motion fails for lack of persuasive evidence that his conviction was legally invalid, or that he had ineffective assistance of counsel."

Defendant filed a timely notice of appeal.[3]

---

[3] "An order granting or denying the motion [to withdraw or vacate a plea] is appealable under subdivision (b) of Section 1237 as an order after judgment affecting the substantial rights of a party." (§ 1473.7, subd. (f).) Defendant also obtained a section 1237.5 certificate of probable cause, but sections 1473.7, subdivision (f), and 1237, subdivision (b), impose no such requirement to appeal.

DISCUSSION

I. Standard of Review

Because denial of a section 1473.7 motion implicates a defendant's constitutional right, it presents a mixed question of fact and law subject to de novo review. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 (*Ogunmowo*).) "We accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to defendant. [Citations.]" (*Ibid.*) Where, however, the trial court's factual determinations are based on written declarations or affidavits, as opposed to live testimony, we conduct an independent review and need not afford deference to those factual determinations. (*Id.* at p. 79 ["The trial court and this court are in the same position in interpreting written declarations"]; *In re Resendiz* (2001) 25 Cal.4th 230, 249.)

II. Analysis

Section 1473.7, subdivision (a)(1), provides that a defendant may bring a motion to vacate a conviction or sentence if "[t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." Such error under section 1473.7 includes constitutionally ineffective assistance of counsel in the form of misadvising a client about the adverse immigration consequences of entering a guilty or no contest plea. (*Ogunmowo, supra,* 23 Cal.App.5th at p. 77 ["Affirmatively misadvising a

client that he will not face immigration consequences as a result of a guilty plea . . .—when the law states otherwise—is objectively deficient performance under prevailing professional norms"]; see also *Padilla v. Kentucky* (2010) 559 U.S. 356, 368-369 [where defendant alleges counsel "provided him false assurance that his conviction would not result in his removal from this country," defendant "has sufficiently alleged constitutional deficiency"].) Even where there has been error, however, such error must have been prejudicial to defendant in order to prevail on a section 1473.7 motion. (*Ogunmowo, supra,* 23 Cal.App.5th at p. 78.) The defendant bears the burden to establish he is entitled to section 1473.7 relief by a preponderance of the evidence. (§ 1473.7, subd. (e)(1).)

A. *Ineffective Assistance of Counsel*

Here, defendant did not meet his burden to demonstrate error. We agree with the trial court that defendant failed to establish that his counsel provided erroneous immigration advice and, relatedly, that defendant first learned his convictions would have immigration consequences after serving his jail term. The only evidence of either claim is defendant's self-serving declaration submitted in support of his section 1473.7 motion. There is no corroborating evidence in the record. Notably absent is any communication, document, or declaration from defendant's prior counsel to confirm defendant's claims.

Instead, the record belies defendant's claims of error. When entering his no contest pleas, defendant acknowledged he read and understood the written advisements, including the statement, which he initialed: "I *must expect* my plea of guilty or no contest *will result*" in adverse immigration consequences.

(Italics added.) At the plea and sentencing hearing, the prosecutor also specifically objected to the trial court permitting a later surrender date for defendant's jail time because defendant had "potential immigration consequences." Moreover, when seeking additional leniency in the form of house arrest in lieu of jail time, defendant's declaration that "I know that there will come a day when I will no longer be allowed to stay in this country" clearly indicates defendant understood at the time he would be deported from the United States.[4] Although defendant now claims in connection with his motion that he did not understand the immigration consequences of his pleas, greater weight should be given to his then-contemporaneous statements over his after-the-fact rationalizations. (See *Lee v. United States* (2017) __ U.S. __, 137 S. Ct. 1958, 1967 (*Lee*) [courts should look to "contemporaneous evidence" over a defendant's "*post hoc* assertions"].)

In addition to his counsel misadvising him, defendant claims his counsel "did not do the proper research necessary or consult with an attorney familiar with the immigration consequences of criminal convictions in order to give an informed and correct opinion." He further claims counsel "did not seek a plea to other charges . . . which would have allowed appellant to seek a waiver of his removal from the United States or avoid removal altogether." We find defendant failed to meet his burden

---

[4] Defendant complains that this declaration was not cited to or produced at the motion hearing. The trial court, however, was entitled to take judicial notice of pleadings in the court's record. (Evid. Code § 452, subd. (d).) On our own motion, we ordered the record on appeal augmented to include defendant's Motion to Modify Sentencing, filed January 23, 2015, which contains defendant's declaration.

as to these claims too, as there is no evidence whatsoever in the record to support them, not even in defendant's declaration in support of his section 1473.7 motion.

Based on this record, we conclude, as the trial court did, that defendant has failed to meet his burden to demonstrate any error that affected his ability to understand the immigration consequences of entering his no contest pleas for purposes of relief under section 1473.7.

B. *Prejudice*

We also find defendant did not meet his burden to show the claimed purported errors were prejudicial. Here, defendant asserts that, if he had been properly advised by counsel as to the immigration consequences of his plea, he "would have taken greater risks and would not have pled guilty." Specifically, defendant contends he "would have attempted to obtain an acquittal, a dismissal, or, a conviction under another charge that would allow the immigration judge the discretion to permit him to remain" in the country.

"[W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' [Citation.]" (*Lee, supra,* 137 S. Ct. at p. 1965; see also *Ogunmowo, supra,* 23 Cal.App.5th at p. 78.) However, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's

expressed preferences." (*Lee, supra,* 137 S.Ct. at p. 1967.) That is, a defendant's assertion that he would not have pleaded no contest if given competent advice must be independently corroborated by objective evidence. (*In re Resendiz, supra,* 25 Cal.4th at p. 253; *In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Defendant's failure to meet his burden to establish prejudice here is amply demonstrated by the record in *Lee*, which contained "substantial and uncontroverted evidence" that the defendant "would not have accepted a plea had he known it would lead to deportation." (*Lee*, *supra*, 137 S. Ct. at p. 1969.) In *Lee,* the record showed that defendant asked his counsel repeatedly if he faced any risk of deportation from the proceedings. (*Id*. at p. 1967.) In addition, both defendant and his counsel testified at an evidentiary hearing that defendant would have proceeded to trial had he known about the deportation consequences. (*Id*. at pp. 1967-1968.) Further still, during the plea colloquy, "[w]hen the judge warned him that a conviction 'could result in your being deported,' and asked '[d]oes that at all affect your decision about whether you want to plead guilty or not,'" defendant answered "Yes, Your Honor." (*Id.* at p. 1968.) Only after defendant's counsel assured him that the judge's statement was a "'standard warning'" did defendant agree to proceed with his guilty plea. (*Ibid.*)

By contrast, other than post hoc assertions in the declaration in support of his section 1473.7 motion, there is no evidence in the record (contemporaneous to entering his pleas or otherwise) to substantiate defendant's claims that he would not have pled no contest and would have instead "taken greater risks" and proceeded to trial. If anything, the evidence in the record shows that immigration consequences were not the

"determinative issue" in defendant's decision to plead. (See *Lee, supra,* 137 S. Ct. at p. 1967.) To begin with, defendant confirmed he intended to plead no contest in order to receive the trial court's indicated sentence of probation with 364 days in jail instead of accepting the People's offer of three years in state prison. When the trial court advised defendant of the consequences of his plea, including adverse immigration consequences, defendant had no questions, raised no issues, and proceeded to plead no contest without incident. Similarly, when the People indicated they opposed defendant's surrender for custody at a later date "based on the defendant's potential immigration consequences," defendant raised no concerns and expressed no surprise. Indeed, when defendant initially admitted in a declaration he *knew* there would come a day when he would no longer be able to stay remain in the United States, he did so in furtherance of a request for additional sentencing leniency (i.e., house arrest), not in an attempt to withdraw his plea to avoid immigration consequences. On this record, we find defendant did not establish he would have proceeded to trial or "taken greater risks" but for his counsel's purported misadvisement.[5]

---

[5] Nor has defendant established any prejudice flowing from defense counsel's purported failure to seek an alternative charge, discussed *ante*. Contrary to defendant's assertion that "the prosecution may have been open to a plea to another charge," it was the trial court that agreed to leniency in the form of probation and 364-days' custody over the People's objection. The record indicates no willingness by the prosecution to accommodate defendant's requests. (See *People v. Olvera* (2018) 24 Cal.App.5th 1112 [rejecting ineffective assistance claim where defendant "does not identify any immigration-neutral disposition to which the prosecutor was reasonably likely to agree"].)

DISPOSITION

For the foregoing reasons, we hold defendant failed to meet his burden to establish prejudicial error to merit relief under section 1437.7. We therefore affirm the trial court's order denying defendant's motion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

---

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