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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

VIVIAN ZAGASTUME,

Defendant and Appellant.

B284266

(Los Angeles County
Super. Ct. No. BA001626)

APPEAL from an order of the Superior Court of
Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Marc A. Karlin, 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. Matthews and Heather Arambarri,
Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1989 Vivian Zagastume pleaded no contest to selling or transporting a controlled substance, a violation of Health and Safety Code section 11352. In 2016 she filed a motion to vacate her no contest plea, arguing that, when accepting her plea in 1989, the court failed to advise her of the immigration consequences of her plea. The trial court denied that motion, and we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Zagastume Pleads No Contest*

The People filed an information in 1989 charging Zagastume with selling or transporting cocaine. The information indicated the maximum term of imprisonment was five years.

Zagastume pleaded no contest, and the trial court placed her on probation for three years on condition she serve 90 days in jail, with credit for time served. The plea form contained the sentence stating: “Defendant advised of possible effects of plea on any alien/citizenship/probation/parole status.” A handwritten “x” across a small box appeared next to this sentence. The record contains no other court records documenting the plea proceedings.

B. *The Trial Court Denies Zagastume’s Motion To Vacate Her Plea*

Zagastume filed a motion in 2016 under Penal Code section 1016.5 to vacate her 1989 plea on the ground the court had failed to advise her of the immigration consequences of her plea.¹ After

¹ Undesignated statutory references are to the Penal Code.

an informal conference, the trial court asked counsel for Zagastume: “Based on the new law effective January 1st, 2017, . . . this is a motion to vacate [a] conviction or sentence by a person no longer in prison or restrained, pursuant to Penal Code section 1473.7, correct?” Counsel for Zagastume replied, “Correct.” The trial court stated, “In light of that, I think you have indicated that you would like to re-file the motion Is that right?” Counsel for Zagastume responded, “That is correct, Your Honor.”

Approximately one month later, Zagastume filed a motion under section 1473.7 to vacate her plea. Although Zagastume titled her motion “Motion To Vacate Plea of Guilty, Pursuant to Penal Code § 1016.5,” the notice of motion stated: “This motion is being made pursuant to California Penal Code § 1473.7 based on prejudicial error causing [Zagastume] not to knowingly and intelligently waive the immigration consequences to her guilty plea since the Court failed to advise [her] of the immigration consequences during the change of plea to guilty demonstrated by guidance utilizing Cal. Pen. Code § 1016.5.” Zagastume’s memorandum of points and authorities argued “Cal. Pen. Code § 1473.7 must apply to the defendant’s guilty plea to maintain the statutory intent of fairness by providing notice to the defendant of the immigration consequences that result from entering a guilty plea.”

Zagastume stated in her supporting declaration: “If I had known that pleading guilty to a violation of Health and Safety Code § 11352 would lead to a denial of residency through a United States citizen spouse many years after my conviction OR of my possible deportation, I would not have pled guilty to that charge.” Zagastume did not state in her declaration the trial court failed to advise her in 1989 of the immigration consequences of her plea.

At the hearing on the motion, the trial court confirmed with counsel that Zagastume wanted “to proceed on this motion pursuant to the new Penal Code section 1473.7.” The trial court denied the motion, stating: “The court finds that [Zagastume] has not proved by a preponderance of the evidence” her entitlement to “the relief requested.” The court added: “In particular, there’s no transcript of the records indicating that she was not advised of the . . . consequences of her plea. Therefore, the motion is denied.” Zagastume timely appealed.

DISCUSSION

Zagastume argues that the trial court erred by deciding the motion under section 1473.7, rather than section 1016.5, and that she “did not receive the required section 1016.5 advisements.” The People argue that Zagastume filed her motion to vacate under section 1473.7 and that, even under section 1016.5, the record shows the trial court gave the advisement and Zagastume cannot establish prejudice. Because Zagastume cannot establish prejudice under either statute, we affirm the trial court’s order denying her motion to vacate.

A. *Applicable Law and Standard of Review*

Section 1016.5, subdivision (a), provides: “Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime 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.”

Section 1016.5, subdivision (b), provides, in pertinent part: “If . . . the court fails to advise the defendant as required by this section and the defendant shows that the conviction of the offense to which 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 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.” “To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised . . . ; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have . . . the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.” (*People v. Totari* (2002) 28 Cal.4th 876, 884; accord, *People v. Arendtsz* (2016) 247 Cal.App.4th 613, 617.)

Section 1473.7, subdivision (a), which became effective January 1, 2017, provides, in pertinent part: “A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons: [¶] (1) The 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.” Under section 1473.7, the defendant “must establish by a preponderance of the evidence that his conviction is ‘invalid due to a prejudicial error.’” (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116; see *People v. Perez* (2018) 19 Cal.App.5th 818, 828-829 [“a court needs to evaluate whether a moving party satisfies the required elements to bring a

motion under [section 1473.7]”).) Section 1473.7, subdivision (e)(1), provides: “The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a).”²

We review the trial court’s order under either section 1016.5 or section 1473.7 for abuse of discretion. (See *People v. Gonzalez* (2018) 27 Cal.App.5th 738, ___, 238 Cal.Rptr.3d 443, 450 [under section 1473.7, “[a] decision to deny a motion to withdraw a guilty plea rests in the sound discretion of the court”]; *People v. Arendtsz*, *supra*, 247 Cal.App.4th at p. 617 [under section 1016.5, “our review is for abuse of discretion”].)

² “Section 1473.7 permits persons unable to assert . . . section 1016.5 claims to have standing to challenge a conviction.” (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 221.) For example, “section 1016.5 does not provide the trial court with jurisdiction to address a claim that a defendant was deprived of the effective assistance of counsel by counsel’s failure to fully advise him or her of the immigration consequences of a guilty plea.” (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 71.) Therefore, “[i]neffective assistance of counsel that damages a defendant’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea . . . is the type of error that entitles the defendant to relief under section 1473.7.” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.) Virtually all of the published cases on section 1473.7 involve assertions that trial counsel failed to properly advise a defendant of the immigration consequences of his or her plea.

B. *The Trial Court Properly Denied Zagastume’s Motion
To Vacate*

Under either section 1473.7 or section 1016.5, any error in the 1989 advisement was harmless because Zagastume cannot show a reasonable probability that, had the trial court properly advised her (assuming it failed to do so), she would not have pleaded no contest to selling and transporting a controlled substance and, instead, proceeded to trial. (See *People v. Martinez* (2013) 57 Cal.4th 555, 559 “[r]elief will be granted [under section 1016.5]. . . only if the defendant establishes prejudice”]; *People v. Olvera*, *supra*, 24 Cal.App.5th at p. 1117 [the defendant must show prejudice under section 1473.7]; *People v. Araujo* (2016) 243 Cal.App.4th 759, 763 [the defendant must show under section 1016.5 that, “but for the failure to advise, [the] defendant would not have entered a guilty plea”].) Statements by defendants that they would have pleaded differently had they been advised differently require corroboration. “Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded. . . . Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 78; see *People v. Martinez*, *supra*, 57 Cal.4th at p. 565 [“the court may reject an assertion that is not supported by an explanation or other corroborating circumstances”].)

Zagastume asserted in her declaration, 27 years after she pleaded no contest, that, had she known of the immigration consequences of pleading guilty to Health and Safety Code section 11352, “she would not have pled guilty to that charge.” Zagastume, however, did not present any corroborating evidence. Absent such evidence, she was not entitled to relief. (See *In re Resendiz* (2001) 25 Cal.4th 230, 253 [“petitioner’s assertion he

would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence’], disapproved on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370; *In re Alvernaz* (1992) 2 Cal.4th 924, 938 [defendant’s assertion of prejudice “must be corroborated independently by objective evidence”]; *People v. Arendtsz, supra*, 247 Cal.App.4th at p. 617 [defendant failed to establish prejudice because the record contradicted the defendant’s “uncorroborated declaration” that he would not have pleaded no contest had he been informed of the immigration consequences of his plea]; cf. *Ogunmowo, supra*, 23 Cal.App.5th at p. 79 [“contemporaneous evidence” of counsel’s account supported the defendant’s assertion he would have rejected the plea deal had his counsel not misadvised him about the immigration consequences of a conviction].)

Rather than corroborating Zagastume’s assertion she would not have pleaded no contest had the court advised her of the immigration consequences of her plea, the record undermines it. Zagastume argued in her motion to vacate that (in 2016) she had been married to her husband for five years and “recently” sought to adjust her immigration status. Zagastume’s waiting more than two decades before taking any steps to resolve her immigration status suggests that any advisement about the potential immigration consequences would not have outweighed the benefits of her plea, which earned her a probationary sentence with modest jail time on a conviction with a maximum exposure of five years in state prison. Zagastume did not present any evidence that the desire to avoid adverse immigration consequences played a central, or any, role in her decision to plead no contest in 1989. (Cf. *People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 79 [defendant showed that remaining in the United States was important to him because he sought his attorney’s advice about the immigration consequences of his plea

before pleading guilty].) Zagastume did not present evidence showing a reasonable probability she would not have accepted the deal if the court had properly advised her of the immigration consequences of pleading no contest to the charge against her.³

DISPOSITION

The trial court's order denying Zagastume's motion to vacate her no contest plea is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.

³ Although prejudice under section 1016.5 generally "is a factual question, appropriate for decision by the trial court in the first instance" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210; see *People v. Araujo* (2016) 243 Cal.App.4th 759, 763), as discussed, the record here contains no evidence to corroborate Zagastume's assertion of prejudice. In addition, Zagastume does not state in her declaration what the court advised or failed to advise her in 1989. Thus, even if Zagastume could rely on her declaration alone to establish prejudice, she did not show that, "but for the failure to advise," she "would not have entered a guilty plea." (See *People v. Araujo, supra*, 243 Cal.App.4th at p. 763.)