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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. FIDELINA GARCIA, Defendant and Appellant.	B268925 (Los Angeles County Super. Ct. No. BA328484)

APPEAL from an order of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Robert F. Jacobs & Associates and Robert F. Jacobs for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Fidelina Garcia appeals from the trial court's denial of her Penal Code section 1016.5 (§ 1016.5) motion to vacate the judgment and to withdraw her no contest plea to one count of transportation of a controlled substance. Garcia contends she was not properly advised of the immigration consequences of her plea. We conclude the advisement substantially complied with the statutory requirements. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Garcia is a native of Honduras and is not a United States citizen. In 1999, the United States immigration authorities granted her Temporary Protective Status (TPS).

On October 31, 2007, the Los Angeles County District Attorney filed an information charging Garcia with four felonies: (1) transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)); (2) possession for sale of a controlled substance (*id.*, § 11351); (3) transportation of marijuana (*id.*, § 11360, subd. (a)); and (4) possession of marijuana for sale (*id.*, § 11359).

On August 19, 2008, Garcia pled no contest to the first count (transportation of a controlled substance), and the other counts were dismissed pursuant to a plea negotiation. Garcia was assisted by the services of a Spanish language interpreter. During the change of plea colloquy, the prosecutor advised Garcia: "If you're not a citizen of the United States, admission of this offense will result in a denial of citizenship, deportation, denial of reentry into the United States, and a denial of amnesty." The prosecutor went on to ask, "Do you understand all the terms and conditions of . . . the consequences of your plea?"

Garcia responded, "Yes."[1] The court imposed and suspended a four-year sentence and placed Garcia on three years formal probation.[2]

On March 14, 2011, the trial court terminated Garcia's probation early and dismissed Garcia's conviction pursuant to Penal Code section 1203.4.

On December 4, 2013, the United States Department of Homeland Security commenced proceedings to remove Garcia from the United States as a result of her conviction.

On July 8, 2014, Garcia moved to set aside her conviction and withdraw her no contest plea based on ineffective assistance

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[1] The minute order from the change of plea confirms the section 1016.5 advisement was given and quotes the statutory language verbatim. The reporter's transcript, however, contains a different version of what was said during the plea colloquy. Under these circumstances, and especially given that both counsel as well as the trial court relied upon the reporter's transcript without objection, the reporter's transcript is the more accurate version of what was stated during the plea colloquy. (See *People v. Beltran* (2013) 56 Cal.4th 935, 945, fn. 7, citing *People v. Smith* (1983) 33 Cal.3d 596, 599 [""whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case"""]; *People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2 ["When a clerk's transcript conflicts with a reporter's transcript, the question of which of the two controls is determined by consideration of the circumstances of each case"], disapproved on another ground in *People v. Hall* (2017) 2 Cal.5th 494, 503, fn. 2.)

[2] Garcia did not sign a pre-printed advisement and waiver of rights form commonly referred to as a *Tahl* form (*In re Tahl* (1969) 1 Cal.3d 122).

of counsel.[3] On November 12, 2014, the trial court denied the motion.

On May 6, 2015, Garcia moved to vacate her conviction pursuant to section 1016.5. She argued the trial court had failed to properly advise her of the immigration consequences of her no contest plea. On October 6, 2015, the trial court denied the motion. The court found the advisement was "substantially in compliance" with the statutory mandate. Garcia timely appealed.

DISCUSSION

A. *Standard of Review*

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 (*Zamudio*); *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 172 (*Gutierrez*).) 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.' [Citation.]" (*People v. Clancey* (2013) 56 Cal.4th 562, 578.) It is Garcia'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.)

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[3] During the hearing, counsel for Garcia referred to the section 1016.5 advisement and stated she "was admonished correctly by the court, and we are not making a dispute."

B. *Standards Governing Section 1016.5 Motions*

We begin with the statute. Section 1016.5, subdivision (a), 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." When the trial court fails to advise the defendant as required, "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." (§ 1016.5, subd. (b).)

"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." (*People v. Totari* (2002) 28 Cal.4th 876, 884; accord, *People v. Arriaga* (2014) 58 Cal.4th 950, 957-958; *Zamudio*, *supra*, 23 Cal.4th at pp. 192, 199-200; *People v. Akhile* (2008) 167 Cal.App.4th 558, 562; *People v. Dubon* (2001) 90 Cal.App.4th 944, 951-952.) The underlying purpose of section 1016.5 is to ensure the defendant has actual knowledge of the possible adverse immigration consequences of a guilty or no contest plea and has had an opportunity to make an intelligent

choice to plead guilty or no contest. (*Zamudio*, at pp. 193-194; *Gutierrez*, *supra*, 106 Cal.App.4th at p. 173.)

Section 1016.5 requires the court to expressly warn defendants of the "'three distinct possible immigration consequences'" of their convictions before taking their pleas. (*Gutierrez*, *supra*, 106 Cal.App.4th at p. 173.) Although section 1016.5, subdivision (a), specifically defines those consequences as "deportation, exclusion from admission to the United States, or denial of naturalization," the statutory language need not be used verbatim. "[O]nly 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.)

The advisement may be given by the judge orally, by counsel orally or through a colloquy eliciting that the defendant was advised of these consequences in a written plea form. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 536 ["So long as the legislative purpose is advanced by having some person acting on behalf of the tribunal actually advise [the] defendant of the immigration consequences of his plea and that advice is reflected 'on the record,' the actual adviser is immaterial"].) The advisement "must occur within the context of the taking of the plea." (*People v. Akhile*, *supra*, 167 Cal.App.4th at p. 564.)

C. *The Immigration Advisement Substantially Complied With the Statute*

Garcia contends she was not advised that her plea of no contest could result in "exclusion from admission to the United States" or "denial of naturalization" as required by the statute. (§ 1016.5, subd. (a).) Garcia is correct that the prosecutor's

language did not mirror the language of the statute. The prosecutor did not use the terms "exclusion from admission to the United States" or "denial of naturalization." Instead, the prosecutor advised Garcia that her plea would have the consequences of "deportation," "denial of reentry into the United States," "denial of citizenship," and "denial of amnesty." While Garcia's factual observation is correct that the language did not track the statute verbatim, her legal point that the section 1016.5 motion should have been granted is not. (See *Gutierrez*, *supra*, 106 Cal.App.4th at p. 173.)

1. *Exclusion From Admission*

Garcia argues the statutory language "exclusion from admission to the United States" (§ 1016.5, subd. (a)) encompasses both denial of reentry, for a person outside the United States, and denial of lawful admission, for a person already inside this country. Garcia claims her TPS status constitutes a form of lawful admission to the United States. Garcia contends that by advising her of the consequence of "denial of reentry" without expressly advising her of "exclusion from admission" or "denial of lawful admission," the trial court and the prosecutor failed to advise her regarding the potential loss of her TPS status and the potential loss of her ability to adjust her status through her United States citizen children.

Garcia argues that because the court failed to advise her concerning "exclusion from admission," she was unaware her plea might affect her TPS status and might result in her deportation. The fact she was specifically advised concerning deportation and denial of reentry, however, belies this contention. The statute does not require the trial court to advise Garcia concerning any

particular preliminary event such as the possible loss of her TPS status or loss of adjustment related to her citizen children.[4] The advisement that her plea could result in deportation and denial of reentry into the United States substantially complied with the statute and adequately informed Garcia of the immigration consequences from her plea.

Moreover, the exact same phrase used during the plea colloquy in this case ("denial of reentry") was specifically reviewed and discussed in *Gutierrez*. As in our case, the prosecutor in *Gutierrez* advised the defendant he would be "'denied re-entry'" as a result of his plea, rather than telling the defendant he would be excluded from admission. (*Gutierrez*, *supra*, 106 Cal.App.4th at p. 171.) After examining the law and the definitions of the operative terms, the *Gutierrez* court found the phrase "'denied re-entry' [to be] the legal equivalent of 'exclusion of admission.'" (*Id*. at p. 174, fn. 4.) The Court of

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[4] Regardless of which language was included in the advisement, whether it would have been "denial of reentry" or "exclusion from admission," the court was not required to inform Garcia specifically that a consequence of her plea must have been the loss of her TPS status. The court providing a section 1016.5 advisement is not required to examine the constellation of immigration issues and give specific advice. (See *Gutierrez*, *supra*, 106 Cal.App.4th at p. 174, fn. 4 ["a trial court does not have an obligation to advise on those immigration consequences that appellant may suffer other than the ones listed in [§] 1016.5"].) Defense counsel may have had such a responsibility (see *Padilla v. Kentucky* (2010) 559 U.S. 356 [130 S.Ct. 1473, 176 L.Ed.2d 284]), but Garcia's motion raising ineffective assistance of counsel was previously denied by the trial court and not appealed.

Appeal wrote: "[The defendant] 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 [the defendant's] plea." (*Id.* at p. 174.) The same is true here.

Garcia contends *Gutierrez* is not controlling because the defendant in *Gutierrez*, following his deportation, attempted to reenter the country. The advisement the defendant received concerning denial of reentry, therefore, was adequate to advise him of the consequence he suffered. But the same is true here. Garcia was adequately advised she would be deported and denied reentry. These are the immigration consequences she is facing and for which she seeks relief.

Similarly, the California Supreme Court in *Zamudio* noted that, even in the absence of an advisement concerning exclusion from admission, if the advisement concerning deportation and naturalization would have informed the defendant of the only consequences pertinent to his or her situation, such an advisement would be in substantial compliance with the requirements of section 1016.5. (*Zamudio*, *supra*, 23 Cal.4th at p. 208.) As stated, the pertinent consequences facing Garcia are deportation and denial of reentry. As such, the advisement given substantially complied with the statutory requirements under section 1016.5.

2. *Denial of Naturalization*

Garcia also argues that by advising her of the consequence of "'[d]enial of citizenship'" without expressly advising her of

"'[d]enial of naturalization,'" the trial court and the prosecutor failed to properly advise her. According to Garcia, the process of applying for naturalization is "so completely different" from the process of applying for citizenship that there was no basis for finding substantial compliance.

"Naturalization" refers to the process by which a person becomes a naturalized citizen of the United States. (8 U.S.C. §§ 1421, 1422.) The California Supreme Court in *Zamudio* defined "'[n]aturalization'" as "a process by which an eligible alien, through petition to appropriate authorities, can become a citizen of the United States." (*Zamudio*, *supra*, 23 Cal.4th at p. 208.) Here, Garcia was specifically advised that as a result of her plea she would be denied citizenship. The advisement substantially complied with the statutory requirement regarding "denial of naturalization."

DISPOSITION

The order is affirmed.

BENSINGER, 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.