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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE JIMENEZ, Defendant and Appellant.	B238125 (Los Angeles County Super. Ct. No. NA015191)

APPEAL from an order of the Superior Court of Los Angeles County. Joan Camparet-Cassini, Judge. Reversed and remanded with directions.

Laws Offices of Michael S. Cabrera and Kristen M. Hart for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose Jimenez appeals from the denial of his motion to vacate his plea under Penal Code section 1016.5[1] on the grounds that the advisement he received at the taking of his plea did not substantially comport with the requirements of section 1016.5, subdivision (a), and the trial court that heard his motion to vacate the judgment abused its discretion in denying his motion.

FACTUAL AND PROCEDURAL HISTORY

On May 26, 1993, in case No. NA 015191, appellant entered into an open plea of "no contest" to possession for sale of heroin in violation of Health and Safety Code section 11351 (count 1) and to possession for sale of cocaine in violation of the same section (count 2). Appellant admitted being personally armed with a firearm in violation of section 12022, subdivision (c) in both counts. Appellant was sentenced to the low term of two years in count 1 plus three years pursuant to the allegation under section 12022, subdivision (c). Appellant received a concurrent sentence of two years in count 2, plus three years for the arming allegation.

On October 12, 2011, and November 22, 2011, appellant filed a motion to vacate judgment under section 1016.5. The trial court denied the motion on December 1, 2011.

DISCUSSION

I. Appellant's Argument

Appellant contends that the advisement he received at the taking of his 1993 plea did not properly inform him of the immigration consequences of his plea. He asserts that any failure to include a portion of the three distinct immigration advisements is a failure to comport with the requirements of section 1016.5, the remedy for which is to vacate the conviction.

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[1] All further references to statutes are to the Penal Code unless stated otherwise.

II. Relevant Authority

Section 1016.5, subdivision (a), requires a trial court to advise the defendant, prior to accepting a plea of guilty or nolo contendere, as follows: "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).)

Subdivision (b) of section 1016.5 provides, in pertinent part: "If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that 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 pursuant to the laws of the United States, 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. . . ."

"Although we review the trial court's denial of the motion for abuse of discretion [citation], statutory interpretation is an issue of law we decide de novo [citation]." (*People v. Akhile* (2008) 167 Cal.App.4th 558, 562-563.)

III. Proceedings Below

The reporter's transcript of the taking of appellant's plea reveals that the prosecutor, at the behest of the court, warned appellant of the immigration consequences of his plea as follows: "If you are not a citizen of the United States, this conviction could cause you to deported [*sic*], denied naturalization or denied naturalization." At the hearing on his motion to vacate his conviction, appellant argued that the court failed to advise him of all three categories of the immigration consequences of his plea. In denying appellant's motion, the trial court stated that, "substantial compliance is all that is necessary under *People v. Gutierrez* [(2003) 106 Cal.App.4th 169]; and under *People v. Gutierrez* I find substantial compliance. There is absolutely no evidence that the defendant did not receive the information he needed from his counsel or did not know it.

There is no declaration from the defendant. There is no statement by him under oath. There is nothing. So I'm finding substantial compliance and the motion is denied on that basis." Appellant filed a notice of appeal on December 22, 2011. He did not obtain a certificate of probable cause.

IV. Abuse of discretion; Prejudice Finding Required

Respondent asserts at the outset that appellant's appeal must be dismissed due to his failure to obtain a certificate of probable cause. Respondent quotes at length from *People v. Placencia* (2011) 194 Cal.App.4th 489 (*Placencia*), where the court held that a certificate is required in order to appeal from a denial of a section 1016.5 motion and dismissed the appeal. (*Placencia*, at pp. 494-495.) The issue of whether a defendant must obtain a certificate of probable cause in order to appeal from a section 1016.5 motion is currently pending before the California Supreme Court in a case from this Court, *People v. Arriaga* (2011) 201 Cal.App.4th 429 (*Arriaga*), review granted February 22, 2012, S199339. The majority opinion in *Arriaga* disagreed with *Placencia* and found no probable cause certificate was required. Assuming the certificate is not required, we proceed to the merits of appellant's case.

It is true that the exact language of the advisement is not crucial, as long as the advisement is complete; i.e., as long as it advises the defendant of *all three* of the possible immigration-related consequences he might suffer. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 207-208 (*Zamudio*); *People v. Gutierrez*, *supra*, 106 Cal.App.4th at p. 174 (*Gutierrez*).) In appellant's case, it is clear that the advisement he received did not substantially comply with the mandated advisement. Indeed, appellant's case is like *Zamudio*, where the advisement was lacking only the mention of the possibility of exclusion. The *Zamudio* court noted that this may have been the most serious consequence for the defendant, and perhaps the only one that might have weighed against entering a no-contest plea, since deportation does not necessarily preclude legal reentry. (*Zamudio*, at pp. 206-207, 208.) We therefore conclude that the trial court abused its discretion in finding that appellant's advisement was adequate under *Gutierrez*.

In that case, the defendant was warned that he would be "'denied reentry'" rather than being told he would suffer "'exclusion from admission to the United States'" in the exact language of the statute. (*Gutierrez*, at p. 173.) *Gutierrez* held that such a variance from the literal language of the statute did not require the plea to be vacated. (*Id*. at pp. 173-174.) In appellant's advisement, there was no mention at all of the exclusion consequence.

In order to prevail on his motion, however, appellant must show more than the fact of an inadequate advisement. In addition, he must show that "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 that he "was prejudiced by the nonadvisement." (*People v. Totari* (2002) 28 Cal.4th 876, 884 (*Totari*).) With respect to the issue of prejudice, a defendant "must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised." (*Id*. at p. 884.)

Appellant's opening brief asserts that he is currently in removal proceedings and that his legal permanent residence status will be terminated. Indeed, the denial of reentry, the missing element of appellant's 1993 advisement, caused appellant to be placed in immigration proceedings. According to appellant's attorney at the motion hearing, when appellant attempted to reenter this country with his permanent resident card after a recent visit abroad, he was stopped at the airport. Therefore, this element has been satisfied.

On the question of prejudice, "[w]hether defendant was prejudiced by the trial court's incomplete advisements is a factual question, appropriate for decision by the trial court in the first instance." (*Zamudio*, *supra*, 23 Cal.4th at p. 210.) The court below stated there was "no evidence that the defendant did not receive the information he needed from his counsel or did not know it. There is no declaration from the defendant. There is no statement by him under oath. There is nothing." The record does contain, however, a sworn declaration from appellant that, had he been aware of the consequences of the plea, he would not have entered into the plea.

Having concluded that appellant was not advised as required by section 1016.5 and that there is more than a remote possibility he will suffer adverse immigration consequences, we remand the matter to the trial court to determine whether appellant suffered prejudice; that is, if appellant has made a sufficient showing that it is "reasonably probable he would not have pleaded guilty or nolo contendere if properly advised." (*Totari, supra,* 28 Cal.4th at p. 884; see also *Zamudio, supra,* 23 Cal.4th at p. 210.) Whether a defendant knew of all of the potential immigration consequences, despite inadequate advisements at the time of the plea, may be a significant factor in determining prejudice.[2] (*Zamudio*, at pp. 199, 207, 209-210.) Appellant need not demonstrate the likelihood he would have obtained a more favorable result at trial. (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1245-1246.)

DISPOSITION

The order appealed from is reversed and the matter is remanded to the trial court with directions to determine whether appellant was prejudiced by the incomplete advisement under section 1016.5.

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BOREN, P.J.

We concur:

DOI TODD, J. CHAVEZ, J.

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[2] We note that appellant did not receive the benefit of a plea bargain and entered into an open plea to the court. His attorney in 1993, Marie Girolamo, refused to join in the plea. According to a "declaration letter" (this one unsigned), appellant was surprised when contacted by immigration authorities after he had served his sentence. He states that he was told if he wanted "to fight" it would take more time, and, if he lost, he would be given more time in prison. He then agreed to leave the country voluntarily. We also note that appellant later reentered the country without being detained or denied reentry, and he was granted permanent resident status.