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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIA ELENA CASTRO,

Defendant and Appellant.

B233013

(Los Angeles County
Super. Ct. No. KA093190)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Steven P. Sanora, Judge. Affirmed.

Zula Ali for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and
Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Maria Elena Castro appeals the judgment (order granting probation) entered following her plea of no contest to possession for sale of methamphetamine. (Health & Saf. Code, § 11378.) We reject Castro's claim defense counsel rendered ineffective assistance in connection with the entry of the no contest plea and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

The report of the probation officer indicates that, on January 12, 2011, police officers searched Castro's home pursuant to a warrant and found 17 baggies of methamphetamine, a digital scale and narcotic packaging materials. Castro admitted to the officers that she sold narcotics.

On March 15, 2011, pursuant to a plea agreement, Castro pleaded no contest to possession for sale of methamphetamine. Before entering the plea, Castro signed and initialed a four page "Felony Advisement of Rights, Waiver, and Plea Form," which stated, among other things: "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."

The Attorney Statement at the end of the form, which was signed by Castro's counsel, stated counsel had reviewed the form with Castro, explained each of Castro's rights, answered all her questions about her rights and had explained the nature of the charge, any possible defenses and the consequences of the plea.

During the change of plea, the prosecutor advised Castro pursuant to Penal Code section 1016.5¹ as follows: "If you're not a U.S. Citizen, your conviction in this case will result in deportation, exclusion from the United States, denial of naturalization or reentry,

¹ Penal Code 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 . . . 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."

or denial of amnesty; do you understand?” Castro responded affirmatively. The trial court then “remind[ed]” Castro: “If you are not a citizen of the United States, conviction for this offense will result in deportation, denial of readmission to this country, denial of naturalization or amnesty. Do you understand?” Castro again responded affirmatively and specifically indicated, in response to a direct inquiry from the trial court, that she had no questions.

The trial court accepted Castro’s plea, finding it had been “understandingly made with full knowledge of the consequences of the plea.” The trial court imposed sentence as contemplated in the plea agreement, suspending imposition of sentence and granting Castro three years of formal probation with 180 days in county jail.

Castro filed a notice of appeal and requested a certificate of probable cause, asserting defense counsel rendered ineffective assistance in failing to advise Castro of the immigration consequences of the plea. The trial court granted Castro’s request for a certificate of probable cause.

CONTENTIONS

Castro contends she did not receive a timely warning of the immigration consequences of the plea in advance of the change of plea. She further claims she was not specifically warned that, as a result of the plea, she would be ineligible for asylum and defense counsel failed to offer any alternatives to entering the no contest plea.

In a declaration attached as an exhibit to Castro’s Opening Brief, Castro declares that, prior to the change of plea, her attorney did not advise her “of the specific immigration consequences [she] would face by pleading guilty” and failed to advise her she “would be ineligible for asylum if [she] pled guilty.” The declaration further states Castro fears she will be tortured or physically abused if she were returned to Mexico.

DISCUSSION

“Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] ‘It is well settled that where ineffective assistance of counsel results

in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.' ” (*In re Resendiz* (2001) 25 Cal.4th 230, 239, abrogated on another ground in *Padilla v. Kentucky* (2010) 559 U.S. ----, ----, [130 S.Ct. 1473, 1484, 176 L.Ed.2d 284].)

“To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.” (*In re Resendiz*, *supra*, 25 Cal.4th at p. 239.) Prejudice is demonstrated in the plea bargain context “by establishing that a reasonable probability exists that, but for counsel's incompetence, [defendant] would not have pled guilty and would have insisted instead, on proceeding to trial.” (*Id.* at p. 253.)

Here, because the conduct underlying Castro's claim of ineffective assistance is not documented in the record on appeal, the claim is not cognizable on appeal and should have been raised in a petition for writ of habeas corpus. (See *People v. Kim* (2009) 45 Cal.4th 1078, 1104 [ineffective assistance of counsel claim based on misadvising defendant of immigration consequences of plea “should be raised in a motion for a new trial or in a petition for a writ of habeas corpus”]; *People v. Barella* (1999) 20 Cal.4th 261, 272.)

“As [the Supreme Court] explained in *People v. Pope* [(1979)] 23 Cal.3d 412, 426, because, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct. ‘Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within

the range of reasonable competence.’ (*Id.*, at p. 426, fn. omitted.)” (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

However, even if this deficiency is overlooked and Castro’s opening brief is construed as a writ petition, the written waiver of rights and the repeated admonitions Castro received on the day she entered the no contest plea prevent Castro from showing prejudice attributable to defense counsel’s assertedly deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674] [“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.”].)

Prior to entering the no contest plea, Castro signed a “Felony Advisement of Rights, Waiver, and Plea Form.” She initialed the section labeled “Immigration Consequences” which stated, “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.” Castro’s attorney also signed the form and indicated counsel had explained, *inter alia*, the consequences of the plea to Castro.²

During the change of plea, the prosecutor and the trial court advised Castro that her conviction “*will result*” in deportation, exclusion from the United States, denial of naturalization or reentry, or denial of amnesty. Castro stated she understood and, when the trial court asked if Castro had any questions about the advisements, she responded in

² Under federal law, generally, a conviction of an “aggravated felony” is a deportable offense. (See 8 U.S.C.A. § 1227, subd. (a)(2)(A)(iii) [any alien who is convicted of an aggravated felony at any time after admission is deportable].) Title 8 United States Code section 1101, subdivision (a)(43)(B) defines “aggravated felony” to include “illicit trafficking in a controlled substance”

Castro also was deportable pursuant to Title 8 United States Code section 1227, subdivision (a)(2)(B)(i) which provides: “Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”

the negative. Castro did not express concern or request time to reflect or to discuss the matter with counsel.

Castro claims the plea agreement form, which she assertedly reviewed for the first time immediately before entering the no contest plea, and the oral advisements she received in open court did not dispel the prejudice attributable to defense counsel's conduct because the in court admonitions were not issued by counsel, were given immediately before entry of the plea and did not allow for "mature reflection," citing *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1480. However, more was at issue in *Soriano* than untimely advice.

In *Soriano*, the defendant alleged defense counsel inaccurately advised a guilty plea would not result in deportation or prevent the defendant from becoming a citizen. Defense counsel claimed she advised the defendant he "could" be deported as a result of the plea but admitted she was unaware the defendant would not have been subject to deportation had he been sentenced to 364 days in jail, rather than 365 days. Defense counsel was not asked if she were familiar with federal law which, at the time, permitted a convicted alien to avoid deportation if the trial court made a judicial recommendation against deportation. (See former 8 U.S.C. § 1251(b)(2).) Judicial recommendations against deportation no longer are a part of federal law. (*Padilla v. Kentucky, supra*, 559 U.S. at p. ---, 130 S.Ct. at p. 1480.) Thus, the defendant in *Soriano* received affirmative misadvice from defense counsel. Although affirmative misadvice is not necessary to establish ineffective assistance of counsel in the plea bargain context (*Padilla v. Kentucky, supra*, at p. ---, 130 S.Ct. at p. 1484, abrogating *In re Resendiz*, on this point), it nonetheless is a factor to be considered in assessing prejudice.

Here, Castro was not affirmatively misadvised as was the defendant in *Soriano*. Rather, Castro specifically was advised, orally and in writing, she would be deported and would be ineligible for amnesty as a result of her no contest plea. Castro said she understood and thereafter pleaded no contest. Based on these repeated admonitions, it strains credulity to believe Castro would not have entered the plea had she been advised it would render her ineligible for asylum. We therefore conclude Castro is unable to show

prejudice, i.e., that she would have refused the plea bargain and risked imprisonment had she been warned sooner or warned specifically that a conviction would preclude a grant of asylum.

Castro claims defense counsel failed to propose alternative resolutions but does not suggest what these alternative resolutions might have been. We note that, although Castro was ordered to serve only 180 days in jail as a condition of probation, the immigration consequences attributable to Castro's no contest plea did not depend on the term imposed, as in *Soriano*. (See *People v. Bautista* (2004) 115 Cal.App.4th 229, 240, fn. 8.) Further, as noted above, judicial recommendations against deportation no longer are a part of the law. Thus, "[u]nder contemporary law, if a noncitizen has committed a removable offense . . . , his [or her] removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses." (*Padilla v. Kentucky, supra*, 559 U.S. at p. ----, 130 S.Ct. at p. 1480, fn. omitted.) Given this landscape, it is unclear what alternative defense counsel might have recommended, short of going to trial.

In sum, Castro has failed to show defense counsel's assertedly ineffective assistance resulted in prejudice. We therefore affirm the judgment.

DISPOSITION

The judgment (order granting probation) is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.