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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. HIPOLITO DACOSTA BLANCO, Defendant and Appellant.	B290566 (Los Angeles County Super. Ct. No. YA033163)

APPEAL from an order of the Superior Court of the County of Los Angeles, James R. Brandlin, Judge. Affirmed.

Michael S. Evans 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 J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Hipolito Dacosta Blanco, a Spanish citizen, was convicted by a nolo contendere plea of inflicting corporal injury on a spouse or cohabitant. He appeals from an order denying his subsequent Penal Code section 1473.7[1] motion to vacate his conviction based on defense counsel's alleged failure to accurately advise him of the immigration consequences of his plea. We affirm.

II. BACKGROUND

A. *Underlying Conviction*

On April 28, 1997, police officers spoke to victim M.H., who stated that she had been living with defendant for the past five years and the two had a baby together. M.H. continued, that while she held the baby in her arms, defendant punched her in the face, causing her to lose consciousness and fall to the ground. She was not aware that defendant stomped on her foot during the altercation but she experienced severe pain afterwards. M.H. was admitted to the hospital, where she was diagnosed with a fracture to her right foot and underwent surgery for her broken ankle. She was hospitalized from April 28, 1997, to May 12, 1997. On June 6, 1997, defendant self-surrendered to the police.

On June 10, 1997, the District Attorney filed a felony complaint charging defendant with inflicting corporal injury on a spouse or cohabitant in violation of section 273.5, subdivision (a).

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1 All further statutory citations are to the Penal Code.

The complaint also alleged that defendant personally inflicted great bodily injury upon the victim. (§ 12022.7, subd. (a).)

On June 23, 1997, defendant entered a plea of no contest, pursuant to a plea agreement. As part of the plea colloquy, the prosecutor advised defendant, "If you do not understand something, please interrupt me. [¶] You may ask me any questions you wish, or you may simply stop me and confer with your attorney." The prosecutor asked defendant, "Do you understand that if you are not a citizen of the United States, your plea may cause you to be deported from this country, bar your subsequent reentry, and result in a later denial of naturalization and from obtaining the benefits of amnesty?" Defendant responded, "Yes."

On July 17, 1997, the trial court, after reviewing the probation report, agreed to sentence defendant consistent with the terms of the plea agreement. The prosecutor recommended a sentence of probation, with a condition that defendant serve 365 days in county jail. The plea agreement did not require that defendant admit the sentencing enhancement. The court stated that although this was "a very serious matter involving violence toward[] [defendant's] spouse, he has no other criminal record. [¶] He did plead at an early stage."

During the sentencing hearing, the trial court asked defendant if he had any questions about the obligations his plea imposed on him. In response, defendant asked if there was "a possibility that [he] could get a lesser sentence" since this was his first time committing such an offense. The court stated it had no authority to alter the plea agreement between defendant and the District Attorney's Office, and proceeded to enumerate defendant's obligations, including a requirement that "if [he was]

deported from the United States and return[ed], either legally or illegally," defendant would have to report to the probation office. Defendant stated that he understood his obligations.

B. *Motion to Vacate Plea*

On January 30, 2018, defendant filed a motion to vacate his plea. He submitted his own declaration in support, which stated that on September 1, 2017, he consulted with an immigration lawyer to begin the process of becoming a lawful permanent resident. The lawyer informed defendant that his no contest plea rendered him ineligible to become a permanent resident, and that if he filed a request for permanent residency, he would be placed in removal proceedings.

The declaration further stated that at the time of his plea negotiations in 1997, defendant was informed by his counsel that a conviction "may" result in his being "deported, excluded from admission from the United States, and/or denied naturalization." Defendant continued, "I was never advised that I will or would be deported as a result of this no contest plea in this matter prior to pleading no contest. If I would have been advised of this consequence, I would not have accepted the offer to settle the case, would not have pled no contest to the charge, and would have sought a plea agreement which would not have resulted in me being subject to deportation proceedings. If such a disposition or plea agreement could not be obtained, I would have insisted upon having a trial in this case."

On April 4, 2018, the trial court conducted a hearing on the motion. Later that day, the court issued its written ruling denying the motion. The court concluded that defense counsel's

performance was not objectively unreasonable and defendant had failed to establish prejudice.

III. DISCUSSION

Defendant argues his conviction should be vacated because his attorney told him he "may," as opposed to "will or would" suffer immigration consequences as a result of his no contest plea.[2] That inaccurate advice, defendant contends, constituted ineffective assistance of counsel under the Sixth Amendment and prevented him from meaningfully understanding the immigration consequences of his plea under section 1473.7, subdivision (a)(1).

A. *Applicable Law and Standard of Review*

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) A defendant seeking to overturn a conviction due to ineffective assistance of counsel must show both (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).)

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[2] The trial court expressed some doubt that defendant is definitely "ineligible for naturalization." We assume that defendant is subject to mandatory removal pursuant to title 8 United States Code section 1227, subdivision (a)(2)(E)(i), which states that "[a]ny alien who at any time after admission is convicted of a crime of domestic violence . . . is deportable."

Effective January 1, 2017, section 1473.7 extends a right to relief from a guilty or no contest plea to a person no longer incarcerated, including one who is subject to removal proceedings by federal immigration authorities due to a conviction or sentence. Subdivision (a) of section 1473.7 provides: "A person [no longer imprisoned or restrained] may file 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." (Italics added.) Relief under subdivision (a)(1) based upon defense counsel's failure to accurately advise a defendant of the immigration consequences of a plea does not require the defendant to show that defense counsel's performance was ineffective under the Sixth Amendment. (§ 1473.7, subd. (a)(1); *People v. Camacho* (2019) 32 Cal.App.5th 998, 1008 (*Camacho*) ["even if the [§ 1473.7, subd. (a)(1)] motion is based upon errors by counsel, the moving party need not also establish a Sixth Amendment violation as by demonstrating that 'counsel's representation "fell below an objective standard of reasonableness"' "'under prevailing professional norms'"'].) Sixth Amendment ineffective assistance of counsel claims and claims under section 1473.7, subdivision (a)(1) require a defendant to establish prejudice. (*Strickland*, *supra*, 466 U.S. at p. 694 [Sixth Amendment]; § 1473.7, subd. (a)(1); *Camacho, supra*, 32 Cal.App.5th at p. 1010.)

"We independently review the order denying the motion to vacate which 'presents a mixed question of fact and law.' (*In re Resendiz* [(2001)] 25 Cal.4th [230,] 248 . . . ; see *People v.*

Ogunmowo (2018) 23 Cal.App.5th 67, 67 [(*Ogunmowo*)] . . . .) We defer to the trial court's factual determinations if supported by substantial evidence, but exercise our independent judgment to decide whether the facts demonstrate deficient performance and resulting prejudice. (*In re Resendiz*, at p. 249.)" (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116.)

B. *Defendant Did Not Demonstrate Prejudice*

The trial court did not err in denying defendant's motion because defendant did not establish prejudice. "[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.'" (*Lee v. United States* (2017) __ U.S. __, 137 S.Ct. 1958, 1965 (*Lee*).)

To show prejudice for a section 1473.7, subdivision (a)(1) claim, a defendant must demonstrate that had he properly understood the true immigration consequences of the plea, "he . . . would have chosen to lose the benefits of the plea bargain despite the possibility or probability deportation would nonetheless follow." (*People v. Martinez* (2013) 57 Cal.4th 555, 565; *Camacho, supra*, 32 Cal.App.5th at p. 1010.) Such a showing requires a defendant to establish that the immigration consequences at issue were determinative in his or her decision to accept the plea, which in turn requires support by contemporaneous evidence; mere "'post hoc assertions from a defendant about how he would have pleaded but for his attorney's

deficiencies'" are insufficient. (*Lee, supra*, 137 S.Ct. at p. 1967; *Ogunmowo, supra*, 23 Cal.App.5th at p. 78, italics omitted.)

Defendant has failed to show prejudice supporting either his Sixth Amendment or section 1473.7, subdivision (a)(1) claim. There was no evidence corroborating defendant's claim that had he been properly advised about the immigration consequences of his plea, he would have declined the plea offer and proceeded to trial. Indeed, defendant did not allege in his own declaration that he told his plea counsel that immigration consequences were of determinative significance to him. There was no evidence that he even asked his counsel about the immigration consequences of his plea or asked for clarification after his counsel advised him that he "may be deported, excluded from admission to the United States, and/or denied naturalization." Moreover, defendant did not ask any questions during the plea colloquy when he was advised of the potential immigration consequences of his plea, even when invited to do so. Nor did defendant ask the court any questions when it informed him of his obligation in the event he was deported from the United States and subsequently reentered, to report to probation. (Compare *Lee*, *supra*, 137 S.Ct. at p. 1963 [testimony from both defendant and plea counsel that defendant asked counsel about the former's immigration status so many times the latter became "'upset"'] with *People v. Chen* (2019) 36 Cal.App.5th 1052, 1061 [defendant presented no evidence that corroborated her assertion that the immigration consequences of her plea were of primary importance to her at the time of her plea].)

The record demonstrates that at the time of his plea, defendant was primarily concerned about avoiding a lengthy sentence. His potential sentence was significant as he faced a

maximum term of four years in state prison on the underlying charge and a mandatory consecutive three-year term for the sentencing enhancement; and at the sentencing hearing, defendant inquired whether the court could impose a sentence even less than the 365 days in county jail that he had bargained for.

Finally, defendant took no action to remedy his immigration status until 20 years after his conviction, which further undercuts his claim that he would have declined the plea offer had he been properly advised that he "would" rather than "may" face adverse immigration consequences.

We conclude that even assuming that his counsel failed to properly advise defendant about the immigration consequences of the plea, defendant has failed to demonstrate resulting prejudice. Thus, the trial court did not err in denying his motion to vacate his conviction.

IV. DISPOSITION

The order below is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.