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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. ARMEN TOROSYAN, Defendant and Appellant.	B231089 (Los Angeles County Super. Ct. No. GA075706)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patrick Hegarty, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant and appellant, Armen Torosyan, appeals the denial of his post-judgment motion to vacate the judgment and withdraw his plea. Torosyan pled no contest to 23 counts of theft by access card (Pen. Code, § 484e, subd. (d)).[1]

The judgment is affirmed.

BACKGROUND

Because Torosyan's conviction was based on a guilty plea, the record does not reflect the facts of the underlying case.

On June 22, 2009, Torosyan pled guilty to 23 counts of theft by access card pursuant to a plea bargain in which the trial court sentenced him to a 16-month state prison term.

After completing his prison term, Torosyan was picked up by federal immigration authorities who instituted removal proceedings. He then filed a motion in the trial court under section 1016.5, seeking to vacate the judgment and his no contest plea, and to enter instead a plea of not guilty. The trial court denied the motion.

CONTENTION

Torosyan's section 1016.5 motion should have been granted because he was not adequately advised of the immigration consequences of his guilty plea.

DISCUSSION

Trial court properly denied Torosyan's section 1016.5 motion.

Torosyan contends the trial court should have granted his section 1016.5 motion to vacate his conviction because he had not been adequately advised of the immigration consequences of his plea. This claim is meritless.[2]

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Although the Attorney General argues Torosyan's appeal should be dismissed for failure to obtain a certificate of probable cause, that certificate was granted by the trial court on March 30, 2011.

1. *Legal principles.*

"Penal Code section 1016.5[[3]] requires that, before accepting a plea of guilty or nolo contendere to any criminal offense, the trial court must advise the defendant that if he or she is not a United States citizen, conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization. The statute allows the defendant to move to vacate the judgment if the trial court fails to give the required advisements. In *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 203-204 . . . , we recognized that a motion to vacate a judgment under section 1016.5 may be brought in the trial court after judgment has been imposed." (*People v. Totari* (2002) 28 Cal.4th 876, 879, fn. omitted.)

"In *Zamudio*, we recognized that a noncitizen defendant has a 'substantial right' to be given complete advisements under section 1016.5." (*People v. Totari, supra,* 28 Cal.4th at p. 883.) "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. [Citations.]" (*Id*. at p. 884.)

"An order denying a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion. [Citations.] An exercise of a court's discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. [Citation.]" (*People v. Limon*

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[3] Subdivision (a) of section 1016.5 provides: "Prior 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."

(2009) 179 Cal.App.4th 1514, 1517-1518; accord *People v. Superior Court (Zamudio), supra,* 23 Cal.4th at p. 192.)

2. *Background.*

a. *Torosyan's no contest plea.*

The record contains a "Felony Advisement of Rights, Waiver, and Plea Form," which advised Torosyan he faced a possible maximum term of 17 years, 8 months, and was entering a plea bargain that would result in a prison term of 1 year, 4 months. Section 12 of this form, entitled "Consequences of My Plea," stated: "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." Torosyan initialed the box next to this statement.

Torosyan also signed and dated a statement reading: "I have read and initialed each of the paragraphs above and discussed them with my attorney. My initials mean that I have read, understand and agree with what is stated in the paragraph. The nature of the charges and possible defenses to them, and the effect of any special allegations and enhancements have been explained to me. I understand each and every one of the rights outlined above and I hereby waive and give up each of them in order to enter my plea to the above charges."

A similar signed statement by Torosyan's attorney stated, in part: "I have reviewed this form with my client. I have explained each of the defendant's rights to the defendant and answered all of his or her questions with regard to those rights and this plea. I have also discussed the facts of the case with the defendant, and explained the nature and elements of each charge, any possible defenses to the charges, the effect of any special allegations and enhancements, and the consequences of the plea."

At a hearing on June 22, 2009, the trial court said: "I show you a form entitled, 'Felony Advisement of Rights, Waiver and Plea Form.' That form contains initials and a signature. Did you place them on this form? [¶] The Defendant: Yes, Your Honor? [¶]

The Court: Did you read and understand the form before you did that? [¶] The Defendant: Yes, Your Honor."

b. *Torosyan's motion to vacate his no contest plea.*

In a declaration attached to his motion to vacate, Torosyan stated: "On Friday, June 19, 2009, my attorney, Theodore Flier, visited me in holding and told me that I had to plead to the charges that would result in a 16 month prison sentence. I explicitly asked him whether there would be any immigration consequences and he replied that he did not know and did not expect any problems. At that point, since he didn't ask a single question about my immigration status nor did he exhibit any interest or concern about potential collateral problems, I decided I needed a new attorney. I told him to continue the matter for two weeks for me to 'think it over.' He told me that was impossible and that my court date was the coming Monday. He told me that if I did not accept the 16 month deal, I would go to prison for a minimum of 5 years."

Torosyan's declaration continued: "On Monday, June 22, 2009 . . . Flier visited me in the holding [*sic*] and gave me a form to initial and sign. He had filled out some of the boxes and spaces and told me to initial the boxes and sign at the end. He merely told me that the form was required and said that I was giving up my right to a trial and accepting the 16 month deal. I felt helpless and afraid of his statement that I would go to prison for a minimum of 5 years if I refused to sign. I signed the form and pled to the charges and received 16 months in prison. [¶] . . . While entering the plea, I was not advised that conviction would result in my deportation. [¶] . . . Had I known I would become deportable with no possible relief, I would not have agreed to the plea deal. I would have insisted on more time to consider the consequences and consult another attorney to consider the consequences of the plea to my immigration status."

Torosyan also declared he had lived in the United States for the past 20 years. "I have no one in Armenia and if deported I will suffer extreme hardship. . . . I was . . . the sole provider of my mother, sister and brother all of whom suffer from serious mental illness. Presently, I am informed that they are being evicted from our family apartment and are financially destitute. As such, my deportation will result in a severe financial

hardship to my family. I would have never knowingly consented to a plea bargain that would have resulted in my deportation."

At the December 23, 2010 hearing on Torosyan's motion to vacate, the trial court pointed out he had initialed and signed the waiver form which contained an express advisement of the immigration consequences of pleading no contest to the charges he faced. The trial court also noted the waiver form contained defense counsel's signed statement asserting he had reviewed the form with Torosyan and explained the consequences of the plea.

The trial court stated: "The transcript in this case also indicates that when the defendant was brought out and prior to his plea, I asked the defendant if he recognized the waiver form that I had in my possession. He said he did. I asked him if he put his initials and signature on that form. He said he did. I asked him if he did that after reading and understanding the form and he said he did. [¶] So he was advised in the form. That advisement is part of the court record. His attorney advised him by the statement included in the waiver form and he did not accept the self-serving declaration by some defendant that said he wasn't advised by his attorney in an effort to get out of the plea he entered into." The trial court concluded: "This was a 45-count identity theft case. There were thousands of dollars lost. He pled to 23 counts for low term 16 months concurrent. He would not have received any better disposition at any time. He was not prejudiced by his plea and he was advised of his immigration consequences. *He was aware of his immigration consequences and he took the plea to avoid a much longer prison sentence*." (Italics added.)

When defense counsel argued the waiver form also contained Torosyan's initials next to several inapplicable advisements, and that the record showed Torosyan had signed the form without understanding it, the trial court said, "Counsel let me stop you. I believe he was advised. He understood and he took the disposition because it was the best disposition possible for a 45-count identity theft case."

The trial court denied the motion to vacate.

3. *Discussion*.

Torosyan contends the trial court erred by denying the motion to vacate his no contest plea. This claim is meritless.

a. *Advisement by form is valid method*.

Torosyan argues the only proper way under section 1016.5 to advise a defendant of the possible immigration consequences of a criminal conviction is by an oral admonishment in open court. Not so. A written waiver form explaining immigration consequences can properly be used to effect the advisement required by section 1016.5. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522; *People v. Quesada* (1991) 230 Cal.App.3d 525, 536; cf. *People v. Panizzon* (1996) 13 Cal.4th 68, 83 [trial court "may rely upon a defendant's validly executed waiver form as a proper substitute for a personal admonishment" with respect to losing right to appeal a sentence after pleading no contest].)

"[T]he legislative purpose of section 1016.5 is to ensure a defendant is advised of the immigration consequences of his plea and given an opportunity to consider them. So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met. [Citation.]" (*People v. Ramirez, supra,* 71 Cal.App.4th at p. 522.) "Nor need the statutory admonition be given orally. It is sufficient if, as here, the advice is recited in a plea form and the defendant and his counsel are questioned concerning that form to ensure that defendant actually reads and understands it." (*People v. Quesada*, *supra*, 230 Cal.App.3d at p. 536.)

As the Attorney General notes, the waiver form in this case contained the specific admonition about immigration consequences required by section 1016.5, Torosyan initialed the box next to this admonition, and he signed the statement at the end indicating he had read the form and discussed it with trial counsel. Trial counsel also signed the statement asserting he had reviewed the wavier form with Torosyan, and discussed the

consequences of the plea. Torosyan cites *People v. Akhile* (2008) 167 Cal.App.4th 558, but that case involved the *timing* of the advisement, holding it must be done at the time the plea is taken rather than at the arraignment, not the *way* in which the advisement was communicated.

b. *Torosyan's advisement was adequate*.

Torosyan argues that, even if a plea waiver form is generally a proper means of advising a defendant of immigration consequences, "the record in this case demonstrates that [he] neither read the form advisement himself nor reviewed it with defense counsel." Torosyan points to the assertion in his declaration that he just did whatever defense counsel told him to do, and to the fact some of the boxes he initialed on the plea waiver form had no applicability to his case. "Therefore [his] written and oral acknowledgments that he reviewed the form thoroughly and discussed it with counsel were not credible."

The Attorney General acknowledges, Torosyan "initialed the statements regarding parole, surrendering to custody at a later date, stipulation to a commissioner, and right to an attorney – statements that had no relevance to his case," but argues "these admonitions, as well as many others in the form, clearly state 'if applicable.' The fact that appellant initialed boxes next to statements that did not apply to him does not lead to the inference that he did not understand any other part of the form." We agree. This "check every box" approach may constitute unnecessary bureaucratic overkill, but it does not mean Torosyan did not understand the admonitions that obviously *did apply* to his situation. Moreover, the trial court was not obligated to believe Torosyan's assertion he would have gone to trial had he been aware of the immigration consequences. (See *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 176 ["[T]o the extent appellant states in his written declaration that his understanding was different than what he said in court, the trial court impliedly disbelieved him when it denied the motion to set aside the plea. We are not free to disregard this implied finding that is supported by substantial evidence." (See *People v. Superior Court (Zamudio), supra,* 23 Cal.4th at p. 210 [factual issues presented on a motion to vacate plea are to be resolved by trial court]; cf. *In re Alvernaz* (1992) 2 Cal.4th 924, 945 ["Petitioner has failed to establish a

reasonable probability that, had he accurately been informed of his potential life sentence and prison confinement for 16 years and 7 ½ months prior to parole, he would have accepted the plea bargain offered. Petitioner's statement in his most recent declaration that, had he been given adequate advice, he would have accepted the plea offer, is self-serving and thus insufficient in and of itself to establish prejudice."].)

We conclude the trial court did not abuse its discretion by denying Torosyan's section 1016.5 motion.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.