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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TAURINO JIMENEZ CRUZ,

Defendant and Appellant.

B235765

(Los Angeles County  
Super. Ct. No. SA009214)

APPEAL from an order of the Superior Court of Los Angeles County, Antonio Barreto, Jr., Judge. Affirmed.

Marc A. Karlin, for Defendant and Appellant.

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

Defendant, Taurino Jimenez Cruz, was convicted pursuant to his January 29, 1992 guilty plea of felony attempted grand person. (Pen. Code<sup>1</sup>, §§ 487, subd. (2) (Stats. 1989, ch. 930, § 6, p. 3255), 664 (Stats. 1986, ch. 519, § 2, p. 1859).) On January 14, 2011, defendant moved to set aside his guilty plea on ineffective assistance of counsel grounds. Defendant, a Mexican citizen, was represented in 1992 by a deputy public defender, Irv

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<sup>1</sup> Future statutory references are to the Penal Code.

Rubin. Defendant asserts he was never properly advised of the immigration consequences of his guilty plea. When defendant filed his motion to withdraw his guilty plea, he was the subject of deportation proceedings. The trial court denied defendant's motion to set aside his guilty plea.

Defendant argues the motion should have been granted. We review this contention for an abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192; *People v. Shaw* (1998) 64 Cal.App.4th 492, 495-496.) To begin with, section 1016.5 provides no basis for challenging the validity of defendant's plea on ineffective assistance of counsel grounds. (*People v. Kim* (2009) 45 Cal.4th 1078, 1107, fn. 20; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1290.) This case has nothing to do with section 1016.5.

In any event, no abuse of discretion occurred. First, defendant failed to act with sufficient diligence. He pled guilty on January 29, 1992. His probationary term expired on February 12, 1995. His motion to withdraw his guilty plea was filed on January 14, 2011. Defendant has failed to act with the requisite diligence in seeking relief. (*People v. Kim, supra*, 45 Cal.4th at pp. 1096-1098 [coram nobis]; *People v. Superior Court (Zamudio), supra*, 23 Cal.4th at pp. 203-207 [§ 1016.5 challenge to a plea]; *In re Robbins* (1998) 18 Cal.4th 770, 780 [habeas corpus]; *People v. Walker* (1991) 54 Cal.3d 1013, 1023 [challenge to plea based on the failure to advise of collateral consequences].)

Second, defendant was advised when he pled guilty, if he was not a citizen, of the following potential immigration consequences: "Conviction of the offense to which you are now pleading may have the consequence of deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States." Defendant acknowledged his understanding of these potentialities when he pled guilty. Defendant was aware of the immigration consequences of his felony guilty plea.

Third, defendant had the burden of proving he was not advised or misadvised by Mr. Rubin. All defendant's declaration states is, "I do not recall Mr. Rubin advising me that a guilty plea in my case would affect my immigration status or any future immigration applications I might file." Defendant presented no evidence of any

misadvice, merely he could not remember being given appropriate immigration advice. Defendant pled guilty in 1992 and he filed his motion to set aside his guilty plea in 2011. The trial court reasonably could find defendant, who suffered from a lack of memory, failed to sustain his burden of proving he was given no advice or was misadvised. (*Lafler v. Cooper* (2012) 566 U.S. \_\_, \_\_ [132 S.Ct. 1376, 1384]; *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

Fourth, defendant had the duty of demonstrating that had different advice been given, he would have proceeded to trial or would have achieved a more favorable result. (*Lafler v. Cooper, supra*, 566 U.S. at p. \_\_ [132 S.Ct. at p. 1384]; *In re Resendiz* (2001) 25 Cal.4th 230, 253; *In re Alvernaz* (1992) 2 Cal.4th 924, 938.) Defendant has provided no objective evidence concerning: the evidence supporting the second degree robbery charge; available defenses; a prosecutorial willingness to offer him an opportunity to plead guilty to a nondeportable offense; or the probable outcome of a trial. (*In re Resendiz, supra*, 25 Cal.4th at pp. 253-254; *In re Alvernaz, supra*, 2 Cal.4th at pp. 933-934, 938.) Defendant has failed to show any prejudice from any advice given by Mr. Rubin or the absence of further discussion between the two of the immigration issue. We need not address the other issues briefed by the parties.

The judgment is affirmed.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.

