Filed 9/26/18 P. v. Murillo-Meza CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IGANCIO MURILLO-MEZA, Defendant and Appellant.	B282190 (Los Angeles County Super. Ct. No. PA035539)

APPEAL from an order of the Superior Court of Los Angeles County. Cynthia L. Ulfig, Judge. Affirmed.

Alejandro Garcia for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ignacio Murillo-Meza (defendant) appeals from a postjudgment order denying his motion under Penal Code section 1473.7[1] to vacate his March 2000 conviction for possession for sale of cocaine base in violation of Health and Safety Code section 11351.5 and possession for sale of a controlled substance (methamphetamine), in violation of Health and Safety Code section 11378. Defendant's conviction was based on a no contest plea, and he was subsequently deported as a result of that conviction.

Defendant contends the trial court erred by denying his motion to vacate the conviction because he received ineffective assistance of counsel. Defendant claims the attorney representing him at the time of his plea mistakenly advised him that no immigration consequences would result from his plea, and that had he been properly advised, he would not have pled no contest.

Defendant failed to meet his burden of establishing prejudice, a necessary element of a claim for ineffective assistance of counsel. We therefore affirm the trial court's order.

BACKGROUND

On March 16, 2017, defendant filed a motion under section 1473.7 to vacate his March 14, 2000 conviction for violating Health and Safety Code sections 11351.5 and 11378. In support of his motion, defendant submitted his own undated declaration in which he stated: "At some point prior to accepting to plead no-contest, I had a conversation with my attorney, Stacie Howard, wherein she advised me that I would not have a problem with immigration if I pled no-contest because I was going to be sentenced to 364 days in jail." Defendant's wife, Maritza Alicea, submitted a similar undated declaration in which she stated that

---

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

"[a]t some point towards the end of my husband's court hearings, . . . Ms. Howard advised me that my husband would not have problems with immigration because my husband was going to be sentenced to 364 days in jail." Alicea further stated in her declaration that she was a United States citizen, that she is attempting to get defendant a green card, and that defendant's conviction is preventing him from obtaining one. Defendant's brother, Arturo Magana, submitted an undated declaration nearly identical to Alicea's that stated in relevant part: "At some point towards the end of my brother's court hearings, during a conversation with attorney Stacie Howard, Ms. Howard advised me that my brother would not have problems with immigration because my brother was going to be sentenced to 364 days in jail."

After defendant entered his plea, the court suspended imposition of sentence and placed him on three years formal probation on condition that he serve 365 days in county jail. While defendant was serving his jail sentence, he learned that he had an immigration hold. Upon his release in October 2000, defendant was picked up by immigration officers, transferred to an immigration detention facility, and deported to Mexico on January 18, 2001.

Defendant stated in his declaration that at the time he entered his plea, he did not understand that he could be deported, excluded from admission, and denied naturalization as a result of his conviction, and that he did not believe the court's admonition to the contrary applied to him. Defendant further stated that had he been advised by Howard that he would be facing deportation, exclusion from admission to the United States, or denial of naturalization, he would not have pled as he did.

At the March 16, 2017 hearing on the section 1437.7 motion, the trial court stated that it had reviewed defendant's

motion, the District Attorney's opposition, as well as police reports, booking information, and the 12-page transcript of the March 14, 2000 hearing at which defendant entered his plea. The trial court noted that the March 14, 2000 transcript indicated that defendant had been accompanied by both a Spanish language interpreter and by his counsel. The transcript also showed defendant had been advised about the potential immigration consequences of his plea, and the trial court read the advisement that was given: "[T]he defendant was advised by the court on page 6, beginning at line 14, 'I don't know whether this applies to you, if you are not now a citizen of the United States, you are hereby advised that a plea of no contest in this case may cause you to be deported, denied re-entry if you leave this country and denied naturalization or amnesty.'"

The trial court further noted that defendant's file included a July 1985 conviction for illegal entry and transportation of illegal aliens, and that he had previously been deported. The trial court found that because defendant had "already been subject to deportation and hearing, . . . he was very well aware of the consequences" of his plea and that he was "on notice that the plea would result in him or could result in him being deported."

At the conclusion of the hearing, the trial court denied, with prejudice, the motion to vacate the conviction. This appeal followed.

DISCUSSION

I. Applicable law and standard of review

Section 1473.7 provides in pertinent part: "A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for . . . the following reason[]: [¶] (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." (§ 1473.7, subd. (a).)

A court must grant a motion to vacate a conviction or sentence under section 1473.7 "if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)" of the statute. (§ 1473.7, subd. (e).) "Ineffective assistance of counsel that damages a defendant's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.]" (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*).)

When reviewing an order denying a motion to vacate under section 1473.7, we accord deference to the trial court's factual determinations if supported by substantial evidence, but exercise our independent judgment when deciding whether the facts demonstrate deficient performance by counsel and resulting prejudice to the defendant. (*In re Resendiz* (2001) 25 Cal.4th 230, 249; *Ogunmowo, supra,* 23 Cal.App.5th at p. 76.)

II. Ineffective assistance of counsel

A defendant bears the burden of demonstrating ineffective assistance of counsel. (*People v. Mayfield* (1993) 5 Cal.4th 142, 185.) To do so, a defendant must show (1) deficient performance under an objective standard of professional reasonableness, and (2) prejudice under a test of reasonable probability. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland, supra,* 466 U.S. at p. 697.) "If it is easier to dispose

of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid.*) The trial court here made no finding as to whether defendant established deficient performance by his plea counsel, but based its ruling on the absence of prejudice.

We note, however, that defendant submitted no declaration by his counsel at the time of his plea, Howard, to corroborate his claim that Howard gave him affirmative misadvice concerning the immigration consequences of his plea, nor did he submit a declaration as to Howard's unavailability.[2] Although defendant suggests that the People had the burden of providing a declaration by Howard in order to refute his ineffective assistance of counsel claim, the burden of establishing deficient performance by counsel is solely the defendant's. (*Strickland, supra,* 466 U.S. at pp. 668, 688, 691-692; *Mayfield, supra,* 5 Cal.4th at p. 185.) The only evidence of deficient performance by Howard are uncorroborated statements in defendant's declaration and the declarations of his wife and brother. (Evid. Code, § 1200; *In re Fields* (1990) 51 Cal.3d 1063, 1070.)

The trial court's factual determination that any misadvice by Howard did not impair defendant's ability to meaningfully understand, or knowingly accept the adverse immigration consequences of his guilty plea is supported by the record. The trial court reviewed and considered the transcript of the March 14, 2000 hearing at which defendant entered his plea, noted that he was accompanied by both his counsel and a Spanish language interpreter, and that he was advised by the court about the immigration consequences of his plea pursuant to section

---

[2] The People point out in their appellate brief that a search of California State Bar records lists only one attorney named Stacie Howard, currently employed by the Office of the Alternate Public Defender of Los Angeles County.

1016.5.[3] That transcript shows that defendant was given a section 1016.5 advisement at the time his plea was entered, that the trial court twice asked defendant whether he understood everything that had been explained to him, and defendant responded "yes" to both inquiries.[4] The March 14, 2000 minute order also indicates that defendant was given an immigration advisement, and that he was assisted by a Spanish language interpreter and accompanied by his counsel at the March 14, 2000 hearing. Defendant concedes that he was given such an advisement.

Although a proper section 1016.5 advisement by the trial court is not a bar to a section 1473.7 motion to vacate a conviction (see *People v. Patterson* (2017) 2 Cal.5th 885, 896), that the advisement was given to defendant, with the assistance of a Spanish language interpreter, and in the presence of his attorney, and that defendant twice affirmed on the record that he understood all of the advisements given to him, is substantial evidence that defendant was aware of the immigration consequences of his plea. The only evidence that defendant did not understand the advisement or the consequences of his plea is

---

[3] Section 1016.5 requires a court, prior to accepting a plea of guilty nolo contendere to a criminal offense, to administer the following advisement on the record to the defendant: "If you are not a citizen, you are hereby advised that the 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).)

[4] On our own motion, we augment the record to include the reporter's transcript of defendant's March 14, 2000 plea hearing, as well as the superior court file in Los Angeles Superior Court case No. PA035539. (Cal. Rules of Court, rule 8.155(a).)

his own declaration, submitted more than 17 years after he pled guilty, in which he claims that he "did not believe that the Court's admonition would mean anything to me or apply to me because nobody, including Ms. Howard, ever indicated that it would be a problem" and his assertion that had he been advised by Howard of the immigration consequences of his plea, he would not have pled no contest. We may properly discount defendant's *post hoc* assertions, given the absence of any contemporaneous evidence to substantiate them. (*Lee v. United States* (2017) __ U.S. __ [137 S.Ct. 1958, 1967] ["Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, [judges] should instead look to contemporaneous evidence to substantiate a defendant's express preferences"].)

The record also shows that the trial court weighed the credibility of defendant's assertions against other information in the court file, including defendant's 1995 conviction for illegal entry and transportation of illegal aliens, and a subsequent deportation that occurred before defendant's January 2001 deportation, and determined that defendant was "very well aware" of the consequences of the plea and resulting conviction he challenges in this appeal. Substantial evidence supports that determination.

Defendant failed to meet his burden of establishing prejudice as the result of any alleged deficient performance by his plea counsel.

DISPOSITION

The order denying the section 1473.7 motion to vacate the conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT