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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. ROBERTO SANTANA, Defendant and Appellant.	B286557 (Los Angeles County Super. Ct. No. BA109257)

APPEAL from an order of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Robert F. Jocobs, under appointment by the Court of Appeal, 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 John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTON

Defendant Roberto Santana appeals from an order denying his motion to vacate his felony conviction under Penal Code sections 1016.5 and 1473.7.[1] Defendant, a Mexican citizen, was convicted of conspiring to possess, transport, and sell cocaine. We affirm the order.

II. BACKGROUND

Defendant came to this country from Mexico in 1980. He married a United States citizen in 1988 and had four children, all born in this country between 1989 and 1993. He operated an automobile repair business.

In August 1996, following a grand jury indictment, defendant was arraigned on charges he conspired to possess, transport, and sell a large quantity of cocaine. He was 32 years old. This was defendant's first and only arrest. Defendant rejected the prosecution's initial offer of a plea that would have resulted in an 18- to 20-year prison sentence. On November 19, 1996, after a jury was empanelled, defendant accepted a plea to an eight-year sentence. (Pen. Code, § 182, subd. (a)(1), Stats. 1989, ch. 897, § 15.) He admitted the offense involved more than four kilograms of cocaine. (Health & Saf. Code, § 11370.4, subd. (a)(2), Stats. 1992, ch. 680, § 1.) The trial court sentenced defendant to eight years in state prison.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

The trial court that took defendant's plea in 1996 also heard the present motion. The court recalled: "On July 15, 1996, there was a seizure of 543 kilograms of cocaine in this Los Angeles County. [¶] Five defendants were arrested. All ended up pleading to various charges. A codefendant, Filaberto Rodriguez, agreed to cooperate. He took a ten-year sentence. Aljach, . . . one of the lead defendants, was sentenced to 18 years and agreed to cooperate. A defendant named Ruiz took an eight-year sentence . . . [a]nd [defendant] entered a plea and took an eight-year sentence."

After serving his sentence, defendant, according to his attorney, "voluntarily deported" without a hearing. The Attorney General contends defendant was deportable and therefore ineligible for voluntary departure after serving his sentence. When defendant filed the present motion, he was residing in Las Vegas, Nevada.[2]

More than 20 years after defendant entered his plea, on August 15, 2017, defendant filed this motion to vacate the judgment and allow him to withdraw his plea. There is no evidence deportation or other federal immigration proceedings have been initiated against defendant. Defendant did not appear at the hearing on his motion citing a fear of arrest by federal immigration authorities. Defendant did not attend the hearing

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[2] It appears defendant entered the country illegally in 1980, and again after his conviction and sentence. The trial court observed, "So, just to be clear, he's entered this country at least twice illegally." Defense counsel agreed.

even though the prosecution, in its written opposition to defendant's motion, had asserted its right to cross-examine him.[3]

III. DISCUSSION

A. *Section 1016.5*

Effective January 1, 1978, section 1016.5, subdivision (a), requires that, prior to accepting a guilty or no contest plea, the trial court must advise the defendant on the record about the

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[3] It is well established that a defendant in a criminal case may not testify by way of a hearsay declaration while refusing to be cross-examined as to the same matter. (*People v. Gurule* (2002) 28 Cal.4th 557, 605; *People v. Edwards* (1991) 54 Cal.3d 787, 820; *People v. Harris* (1984) 36 Cal.3d 36, 69; *People v. Williams* (1973) 30 Cal.App.3d 502, 509-510.) "It is a commonly known rule that no witness, even a defendant in a criminal case, will be permitted to testify concerning a matter while refusing cross-examination as to the same matter." (*People v. Williams, supra*, 30 Cal.App.3d at p. 510.) This is because by testifying in his own defense a defendant waives his federal and state constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination. (*People v. Saddler* (1979) 24 Cal.3d 671, 679; *People v. Perez* (1967) 65 Cal.2d 615, 621.) "'[One] cannot reasonably claim that the Fifth Amendment gives him not only this choice [of testifying to his own version of the facts] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. . . .'" (*People v. Williams, supra*, 30 Cal.App.3d at p. 510.)

potential immigration consequences of the plea.[4] Here, the trial court concluded defendant was not adequately advised before he entered his plea to a deportable offense.[5]

Because defendant was not adequately advised, the trial court was required, on defendant's motion, to vacate the judgment and permit defendant to withdraw his plea *unless*, after considering relevant evidence offered by the parties, the court concluded it was not reasonably probable defendant would have rejected the plea if properly advised. (*People v. Martinez* (2013) 57 Cal.4th 555, 559.) The burden is on the moving

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[4] "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."

[5] There is no reporter's transcript of the 1996 plea hearing. The minute order of that date reflects, "[d]efendant advised of possible effects of plea on any alien/citizenship/probation/parole status." The minute order does not reflect any advisement that deportation, exclusion from the United States, or denial of naturalization were possible consequences of defendant's plea. On the same date, November 19, 1996, the trial court on the record advised two codefendants: "[B]oth of you should understand that if you are not a citizen[] of the United States—these are felony pleas—you could subject yourself to being deported as a result of entering a plea to the charge." That on-the-record advisement did not comply with section 1016.5. At the September 19, 2017 hearing on defendant's motion, the trial court—which had presided over the criminal proceedings against defendant in 1996 and accepted defendant's plea—acknowledged that defendant was not properly advised.

defendant to establish prejudice. (*People v. Arriaga* (2014) 58 Cal.4th 950, 963; *People v. Martinez, supra*, 57 Cal.4th at p. 559.) Relief will be granted under section 1016.5 only if the defendant meets that burden. (*People v. Martinez, supra*, 57 Cal.4th at pp. 558-559.) "[P]rejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty if properly advised. [Citation.] [¶] . . . [T]he question is *what the defendant would have done* . . . ." (*Ibid.*) Relief is also available if the defendant establishes he or she would have rejected the existing bargain to attempt to negotiate a bargain that would not result in deportation. (*Id.* at p. 559.)

In order to meet his or her burden, "the [moving party] must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised." (*People v. Martinez, supra*, 57 Cal.4th at p. 565.) "It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*Ibid.*, accord, *People v. Arendtsz* (2016) 247 Cal.App.4th 613, 617.) "[I]n determining the credibility of a defendant's claim, the court in its discretion may consider factors presented to it by the parties, such as the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*People v. Martinez, supra*, 57 Cal.4th at p. 568.) Our review is for an abuse of

discretion. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 192; *People v. Arendtsz, supra*, 247 Cal.App.4th at p. 617.)

In his declaration in support of his motion, defendant stated he had recently consulted an immigration attorney and learned for the first time his conviction prevented him from achieving lawful status in this country. Moreover, he further averred that if properly advised he would not have pled guilty. He had been living in this country for 16 years, was married to a United States citizen, and had four young children born here. Defendant declared, "I had every reason to fight for the right and opportunity to remain in this country." Defendant stated that at a minimum he would have requested time to consult an immigration attorney and confer with the prosecution. Defendant concluded, "If I could not have obtained an immigration safe plea, I would have gone to trial."

The trial court concluded defendant's claim that if properly advised he would not have pled guilty was not credible. The court had presided over this case in 1996 and accepted defendant's and his codefendants' pleas. The court found it was a "very reasonable decision" and a "rational choice" under the circumstances for defendant to accept the plea deal and there was no likelihood immigration concerns would have prevented defendant from entering his plea. The court observed: "He took a deal, and the deal was he took 8 years instead of getting the 20 that the court believes he probably would have been convicted of and been sentenced to, which was a very reasonable decision by him, I felt, at the time. [¶] . . . [¶] I think, while the advisement was probably inadequate, I don't think it would have mattered. I don't think it is reasonably probable that the defendant would not have entered his plea if properly advised. I think he

understood that he was looking at between 8 years and the 20 years being offered, and I think he made the rational choice and took the 8 years." The court further observed that potential immigration consequences were not "a significant issue for anyone at the time." The court concluded it was not reasonably probable defendant would have rejected the plea if advised he would be deported and excluded from admission to the United States.

There was no abuse of discretion. The credibility determination was for the trial court to make. Moreover, the record supports the trial court's conclusion. We do not know the actual amount of cocaine defendant conspired to possess, transport, and sell. The parties agree it was a large amount, making defendant's crime a serious offense. The trial court recalled that 543 kilograms of cocaine were seized. Defendant faced at least 20 years in prison. He declined an initial offer of 18-20 years. He subsequently accepted an eight-year deal. His codefendants, except the "lead" defendant, accepted similar deals. There was no evidence the prosecution would have offered defendant a plea deal that avoided the immigration consequences. There is no evidence that any codefendant pled to a non-deportable offense. Defendant had entered this country in 1980. There was no evidence that he had sought legal status during the 16 years prior to his conviction in 1996. Defendant took no action to remedy his immigration status until 2017, more than 37 years after he first entered the country and more than 20 years after he entered his plea. These facts support the trial court's conclusion that in 1996, when defendant entered his plea, given how serious the charges were, and the fact that he could receive a long prison sentence if he went to trial (and still

potentially be deported), he would not have been swayed by an advisement about the immigration consequences he potentially faced.

In his briefs on appeal, defendant does not address the trial court's conclusion that even if properly advised, defendant would have accepted the plea deal. Instead, defendant argues the trial court's decision improperly turned on whether defendant would have obtained *a more favorable outcome* had he chosen not to plead guilty. In *Martinez*, our Supreme Court held this was not a proper basis for denying a section 1016.5 motion. (*People v. Martinez, supra*, 57 Cal.4th at pp. 559, 564.) "[T]he critical question is whether the defendant would have rejected the plea bargain, not what the outcome of that decision would have been." (*Id.* at p. 568.) We disagree with defendant's characterization of the trial court's decision. The trial court's reasoning was properly focused on what, if properly advised, defendant would have done.

B. *Section 1473.7*

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 states: "A person no longer imprisoned or restrained may prosecute 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." (Stats. 2016, ch. 739, § 1, italics added.)

The burden to establish prejudicial error and a right to relief rests with the defendant. (§ 1473.7, subds. (a), (e)(1); *People v. Perez* (2018) 19 Cal.App.5th 818, 829.) Pursuant to subdivision (e)(1), "The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)."

Here, defendant claimed his trial attorney was ineffective, which prevented him from understanding and defending against potential adverse immigration consequences. Ineffective assistance of counsel that "damag[es] 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)) is error that if proven entitles a defendant to relief under section 1473.7. (*People v. Olvera* (2018) 24 Cal.App.5th 1112; *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75.) "To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. [Citations.]" (*People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 75; accord, *People v. Olvera, supra*, 24 Cal.App.5th at p. 1116.)

Our review is de novo. (*People v. Olvera, supra*, 24 Cal.App.5th at p. 1116; *People v. Ogunmowo, supra*, 23 Cal.App.5th at p. 76.) "We independently review the order denying the [section 1473.7] motion to vacate which 'presents a mixed question of fact and law. [Citations.] We defer to the trial

court's factual determinations . . . but exercise our independent judgment to decide whether the facts demonstrate deficient performance and resulting prejudice. [Citation.]" (*People v. Olvera, supra*, 24 Cal.App.5th at p. 1116.) However, we need not resolve whether counsel's performance was deficient before examining prejudice; "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) We turn to the question of prejudice.

Defendant has not established prejudice. There was no evidence corroborating defendant's claim that had he been properly advised about immigration consequences, he would have declined the plea offer. The trial court, based on its experience with the case, disbelieved defendant. Defendant faced at least 20 years in prison and agreed to accept an eight-year offer. There is no evidence that any of defendant's codefendants pled to a non-deportable offense. Defendant had taken no action to remedy his immigration status during the 16 years prior to his plea, or 20 years after his conviction. We conclude defendant has failed to establish that he would have rejected the plea offer had his counsel properly advised him about the immigration consequences of his plea.

C. *Good Cause for Defendant's Absence from the Hearing*

Subdivision (d) of section 1473.7 states: "All motions shall be entitled to a hearing. At the request of the moving party, the court may hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the

court finds *good cause* as to why the moving party cannot be present." (Italics added.) Good cause is a question that rests in the trial court's sound discretion. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 646 [continuance motion].) Our review is for an abuse of that discretion. (*Ibid.*)

Defendant was not present at the hearing on his motion but was represented by counsel. Defendant's attorney argued there was good cause for defendant's absence because he feared arrest by federal immigration authorities. The trial court disagreed.[6] We need not consider whether the trial court abused its discretion because defendant was not prejudiced by the trial

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[6] At the outset of the hearing on defendant's motion, the court and counsel discussed defendant's absence at some length: "The Court: Why is the defendant not present? [¶] [Defense counsel]: Due to recent media information that the immigration has been a problem being in county courthouses, including Los Angeles County, and could arrest people. [¶] The Court: I don't see any agents here, do you? [¶] [Defense counsel]: No. Not in this courtroom. [¶] The Court: This is an empty courtroom. We have only family members. [¶] [Defense counsel]: That's correct. [¶] The Court: I know of no one arrested in this building on immigration holds or for immigration proceedings. [¶] [Deputy District Attorney], do you know of anybody? [¶] [Deputy District Attorney]: I do not, Your Honor. [¶] The Court: I don't think it's happened in this building. That doesn't mean it can't happen, but we'll take up the issue if you want to go forward in [defendant's] absence. [¶] . . . [¶] [Defense counsel]: There was an arrest at the Pasadena Courthouse, which is also in Los Angeles County, a mere ten minute[]s drive without traffic. [¶] The Court: I just don't know of any in this building. I've been here a long time." The trial court subsequently ruled there was no good cause for defendant's absence.

court's ruling. Despite finding no good cause for defendant's absence, the trial court, with defense counsel's agreement, proceeded to hear the matter on the merits. The court conducted a hearing at which it considered the briefs and evidence and heard argument from counsel. This, in our view, is the very nature of the hearing afforded by section 1473.7. (Cf. *People v. Duvall* (1995) 9 Cal.4th 464, 485 [evidentiary hearings required where the "proper resolution of a [petition] may hinge on the credibility of a witness"]; *Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 575 ["evidentiary hearings afford counsel the opportunity to present live testimony, examine former defense counsel, orally argue the case, and respond to any concerns by the court"].) The trial court's ruling did not, as defendant asserts on appeal, "prevent [his] access to justice."

D. *Continuance*

After the trial court denied defendant's motion, defense counsel inquired, "[y]our Honor, would the court reserve its decision and give me a moment to speak to the family to see if we could get him to come and testify?" The trial court responded: "No. I made my ruling."

Defendant asserts it was an abuse of discretion to not continue the hearing. Pursuant to section 1050, subdivision (e), continuances in criminal proceedings "shall be granted only upon a showing of good cause." Whether good cause exists for a continuance rests in the trial court's sound discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 650.) Our review is for an abuse of that discretion. (*Ibid.*) Defendant bears the burden of establishing an abuse of discretion. (*Ibid.*) "[D]iscretion is

abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.]" (*Ibid.*)

The trial court's ruling was not an abuse of discretion. At the outset of the hearing, defendant's attorney agreed to proceed to a hearing in defendant's absence. The trial court considered the briefs, the evidence, and heard argument from counsel. The trial court issued an extensive oral ruling. It was only after the hearing and ruling that defendant's attorney first requested a continuance. Counsel did not explain what purpose would be served by having defendant appear and testify at that point. The trial court could reasonably conclude the request came too late.[7]

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[7] In his reply brief, defendant claims, "[he] *would have testified* but was prevented from doing so by the Court's denial of the continuance." (Bold omitted.) There was no evidence to that effect. Defendant was on notice the prosecution sought to cross-examine him and nevertheless stated he would not attend the hearing.

IV. DISPOSITION

We affirm the order denying defendant's motion under Penal Code sections 1473.7 and 1016.5.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

BAKER, Acting P.J.

MOOR, J.