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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. HERNAN MORIEARA, Defendant and Appellant.	B281678 (Los Angeles County Super. Ct. No. PA004090)

APPEAL from an order of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Affirmed.

Adrian Cid Uribe for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. 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 Hernan Morieara[1] pled no contest to one count of felony driving under the influence (Veh. Code, § 23152, subd. (a)) and one count of driving with a suspended license (Veh. Code, § 14601.2, subd. (a)) in 1990. In 2016, defendant received notice of a hearing in removal proceedings against him in federal immigration court. Thereafter, he filed a motion to vacate his 1990 plea pursuant to Penal Code[2] section 1473.7, on the ground that prejudicial error damaged his ability to understand the immigration consequences of his plea. The error identified by defendant was a violation of his Sixth Amendment right to effective assistance of counsel during the plea bargaining process. The trial court denied the motion.

Defendant filed a timely notice of appeal from the trial court's order.[3] He contends the trial court erred in denying his motion to vacate his conviction because he established by a preponderance of the evidence that his counsel's performance was deficient and that he suffered prejudice as a result. Defendant identifies the prejudice he suffered as his plea of no contest to an offense that, unbeknownst to him, would result in an "immigration calamity." He maintains that if his counsel had properly advised him of the "true consequences" of the conviction, he would not have entered a no contest plea.

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1 Defendant's name is variously spelled as Moriera in the record.

2 Further undesignated statutory references are to the Penal Code.

3 An order denying a section 1473.7 motion is appealable under section 1237, subdivision (b) as an order after judgment affecting the substantial rights of a party. (§ 1473.7, subd. (f).)

Defendant has not shown what the immigration consequences of a Vehicle Code section 23152 conviction were in 1990 and so has not shown that he was prejudiced by any deficient performance by his counsel. The trial court did not err in denying defendant's motion to vacate.

BACKGROUND

On August 7, 1990, defendant ran a red light at the intersection of Sepulveda Boulevard and Nordhoff Street and collided with an unmarked police car driven by a Los Angeles police officer. A subsequent blood test showed that defendant's blood alcohol level was 0.21 percent. The officer was not injured.[4]

On August 22, 1990, defendant entered his no contest plea to the charges arising from the collision. The plea transcript shows that his trial counsel at the time (hereafter plea counsel) told the court, "We actually have no plea bargain at all. Mr. Morieara wishes to confess his sins and plead open to everything with no promises as to sentencing." The prosecutor asked defendant, "Your attorney has indicated you wish to plead no contest to count 1 and to count 3 under the following terms and conditions: that that will be an open plea and you could be sentenced to the maximum on each count. [¶] Is that your understanding of the agreement reached in this case, sir?" Defendant replied, "Yes. That's fine." The prosecutor asked, "Do you need any more time to talk to your attorney about this matter, sir?" Defendant replied, "Yes." The transcript shows that a discussion was held off the record. The court then asked,

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[4] Defendant pled guilty before the preliminary hearing and so these facts are taken from the probation report.

"Have you had enough time to talk to your attorney?" Defendant replied, "Yes." The court asked, "Has he answered your questions for you?" Defendant replied, "Yes." The court asked, "Are you ready to proceed?" Defendant replied, "Yes."

The prosecutor advised defendant of his constitutional rights and privileges and obtained defendant's waiver of those rights. Next the prosecutor advised defendant in detail of the consequences of his plea. As part of these advisements, the prosecutor stated, "Now, you may very well be a citizen of the United States. But if you are not, this plea today could cause you to be deported, could result in the denial of your reentry into the United States or this plea today could serve not to allow you to become a citizen of the United States sometime in the future. [¶] Do you understand that?" Defendant replied, "That's fine. Yes."

After inquiry by the court, defendant pled no contest to count 1 (Veh. Code, § 23152, as a felony) and to count 3 (Veh. Code, § 14601.2, a misdemeanor).[5] Defendant also admitted that he had suffered three prior convictions for violating Vehicle Code section 23152, subdivision (b). The trial court sentenced defendant to two years in prison.

In July 2016, defendant received a notice of hearing in removal proceedings in immigration court. In 2016 defendant filed a motion to vacate the judgment in his 1990 case pursuant to section 1473.7, which is not part of the record on appeal. In 2017 defendant filed a motion in which his current attorney argued that the 1990 plea was defective based on a claim of

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[5] Defendant was charged in count 2 with a violation of Vehicle Code section 23152, subdivision (b), driving with a blood alcohol percentage of 0.08 or greater, as an alternative to the count 1 charge.

ineffective assistance of plea counsel. The present claim is that plea counsel failed to advise defendant of the adverse immigration consequences of a conviction and that plea counsel failed to defend against the adverse consequences by seeking an alternative disposition.

The record does not contain a declaration from defendant's plea counsel. Defendant's current attorney did not provide a declaration in support of the section 1473.7 motion showing that plea counsel was unable or unwilling to provide a declaration.

In his declaration in support of the motion, defendant stated: "My defense attorney offered no advise [*sic*] to me at all regarding immigration or even about the case itself." He then elaborated: "At the time of entering my plea, my public defender did not assist me in any way. I do not even remember talking to him privately about my case. Instead, I remember being told to accept the plea deal being offered by the prosecutor. In spite of telling him about my immigration concerns, and obviously not speaking English my attorney at the time did not even mention anything about immigration." He concluded: "Had I known the true consequences of entering a guilty plea, I would never have pled."

At the conclusion of the March 3, 2017 hearing on defendant's motion, the court found that "at the end of the day, motions like this are only brought because there's prejudice, the prejudice being he may very well be deported . . . . [¶] The question, really, to me, is was there error? And I don't see any error here. I see the equities at play." The court continued, "[B]ased on the law presented to me that we have researched, I have researched, I have looked at, there was no error committed in the taking of this plea. If there was no error, the prejudice,

while unfortunate and tragic, doesn't trigger the granting of this motion. [¶] As such, the motion to vacate the plea is denied."

DISCUSSION

Defendant contends the trial court erred in denying his motion to vacate the 1990 plea on the ground that the trial court properly advised defendant pursuant to section 1016.5. He maintains that a proper advisement under section 1016.5 is not a bar to a claim for relief based on ineffective assistance of counsel. Defendant claims he established ineffective assistance of counsel in connection with his plea and that the trial court should have granted the section 1473.7 motion.

1. Section 1473.7 motions

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).)

Prior to the enactment of section 1473.7, a broad range of remedies was available to persons in custody to challenge their convictions, but "persons not presently restrained of liberty [could] seek [only] certain types of relief from the disabilities of a conviction." Such persons could "prosecute a motion to vacate a judgment based on newly obtained evidence of fraud or misconduct by a government official, as specified." (Legis. Counsel's Dig., Assem. Bill No. 813 (2015–2016 Reg. Sess.)

Summary Dig.) The enactment of section 1473.7 created "an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction or sentence based on prejudicial error." (Legis. Counsel's Dig., Assem. Bill No. 813 (2015–2016 Reg. Sess.) Summary Dig.) The "prejudicial error" specified in section 1473.7 includes ineffective assistance of counsel in connection with the conviction or sentence. (See *People v. Perez* (2018) 19 Cal.App.5th 818, 828.) The defendant must prove prejudicial error by a preponderance of the evidence. (§ 1473.7, subd. (d).)

A proper section 1016.5 advisement by the trial court (or district attorney) is not a bar to a section 1473.7 motion. (See *People v. Patterson* (2017) 2 Cal.5th 885, 896 (*Patterson*) ["receipt of the section 1016.5 advisement does not bar a criminal defendant from challenging his conviction on the ground that his counsel was ineffective in failing to adequately advise him about the immigration consequences of entering a guilty plea"].)

2. Trial court's ruling

At the hearing on the motion to vacate, defense counsel initially used the phrase "prejudicial error," and stated that he had listed six types of error in his motion. The court then summarized what it viewed as defendant's three strongest claims of "error"—plea counsel's "failure to investigate immigration status"; his "failure to advise of actual or potential immigration consequences"; and his "failure to defend against immigration consequences."

After further discussion, the trial court found there had been "substantial compliance," a phrase commonly used in analyzing section 1016.5 motions. Defense counsel, however,

responded that "this is not a 1016.5 motion. If it was, we could be examining the court's duty to [defendant]. But here we're not blaming the courts. I think we're blaming prejudicial error. And in this case, it was his attorney at the time." The court then made a broad ruling that no error occurred, stating, "I don't see any error here." The court added that "there was no error committed in the taking of this plea."

In context, the term "error" is most reasonably understood to include defendant's ineffective assistance of counsel claim. Throughout the hearing, defense counsel used the terms "error," "procedural error," and "prejudicial error" to refer to his claim that defendant had no meaningful understanding of the immigration consequences of his plea, including his ineffective assistance of counsel claim. The trial court appears to have adopted this nomenclature. Thus, when the court ruled that no error occurred, this included defendant's claim of ineffective assistance of counsel "error."

3. Ineffective assistance of counsel

Nothing in the language of section 1473.7 affects the standards by which motions to vacate pleas based on ineffective assistance of counsel are decided. A defendant must still show that his counsel's performance fell below an objective standard of reasonableness and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.)

As the Supreme Court explained in *Strickland*, "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*.)

Whether trial counsel performed competently, "presents a mixed question of fact and law. Such questions are 'generally subject to independent review as predominantly questions of law—especially so when constitutional rights are implicated'—and 'include the ultimate issue, whether assistance was ineffective, and its components, whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense.' (*People v. Ledesma*[, *supra*,] 43 Cal.3d 171, 219.)" (*In re Resendiz* (2001) 25 Cal.4th 230, 248–249 abrogated in part on other grounds by *Padilla v. Kentucky* (2010) 559 U.S. 356, 370.)

4. Prejudice

In ruling on defendant's section 1473.7 motion, the trial court stated that the prejudice to defendant from any insufficient advisement was that defendant was being deported now. This is too attenuated a measure of prejudice. In order to show prejudice from counsel's alleged deficient performance in connection with the entry of a plea, a defendant "must show 'that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty' [citation] to the charge . . . , which subjected him to . . . deportation." (*Patterson, supra,* 2 Cal.5th at p. 901.) Thus, prejudice must be assessed at the time a defendant enters his plea.

Defendant acknowledges on appeal that "[i]t is important to base the prejudice inquiry on the facts at the time of the plea." Defendant has attempted to show such prejudice. In his declaration in support of his motion to vacate, he stated, "Had I

known the true consequences of entering a guilty plea, I would never have pled." Defendant, however, has not shown that the consequences of a Vehicle Code section 23152 conviction in 1990 were anything other than what the trial court advised him at the time of the plea, which was possible deportation and exclusion from re-entry.

We recognize that "[t]he landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation." (*Padilla v. Kentucky, supra,* 559 U.S. at p. 360; see *People v. Superior Court (Zamudio*) (2000) 23 Cal.4th 183, 206 [pointing to significant changes in federal immigration law in 1990 and 1996 and noting that "[b]y 1997, the immigration laws, generally, had become much more severe"].)

However, defendant has not shown where on the deportation spectrum a felony Vehicle Code section 23152 conviction fell in 1990. For example, he has not offered expert testimony showing the state of immigration law in 1990 as it related to this charge, and he has provided no citations to then-current law to fill this gaping hole.[6] The only evidence of the

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[6] This is not a minor omission. Assuming arguendo that, as defendant suggests, an attorney had a duty in 1990 to advise his client of extraordinary immigration consequences of a plea, then proof of the applicable immigration law in 1990 would be necessary to prevail on a claim that counsel failed in that duty. As the United States Supreme Court has explained,

state of the immigration law is the affidavit of his current immigration attorney Alma Puente and the declaration of his current defense counsel Cid Uribe.

Puente states that defendant's "conviction and the lengthy sentence imposed affects [his] ability to obtain an immigration benefit insofar as the Immigration Court could deem his conviction an aggravated felony." She offers no explanation of how a "driving under the influence" conviction "could" qualify under current law as an aggravated felony or what factors the immigration court would consider in deciding whether or not to deem the conviction an aggravated felony. More importantly, Puente offers no information on the state of immigration law in 1990. Even if today's law automatically deemed a felony driving under the influence conviction an aggravated crime that mandated deportation, Puente provides no evidence or legal authority showing that such a conviction would have had the same consequences in 1990—or any immigration consequences at all.

"Immigration law can be complex . . . . There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. . . . When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." (*Padilla v. Kentucky, supra,* 559 U.S. at p. 369; see *Patterson, supra,* 2 Cal.5th at p. 898 [agreeing and noting "there are indeed some cases in which the most that can reasonably be said is that the conviction 'may' have adverse immigration consequences"].) Similarly, it would not be possible to evaluate defendant's claim that his counsel did not adequately defend against the consequences of his plea without knowing what those consequences were at the time the plea was entered.

Uribe states in his declaration that defendant's "two year sentence is notorious for causing an immigration calamity for immigrant defendants," yet he offers no evidence or legal authority to support his claim about the "notorious" consequences of defendant's sentence today and does not state that any such consequences existed or were "notorious" in 1990.

The memorandum of points and authorities in support of the motion also does not show the state of immigration law in 1990. Defendant's current attorney argued in that document that defendant's driving under the influence conviction is considered an "aggravated felony" and "crime of moral turpitude" under immigration law and as such carries severe immigration consequences. The legal citations he provides to support this argument offer no assistance in determining whether driving under the influence falls into one of the categories now or in 1990, or in determining the consequences of such a conviction in 1990.[7]

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[7] Defendant cited "8 U.S.C. 101(a)(43)" and "Title 8, CFR section 316.10" to support his claim that defendant's conviction is an aggravated felony and a crime of moral turpitude. Section 101 does not exist. Respondent suggests that defendant intended to cite to title 8 of the United States Code section 1101(a)(43), which lists aggravated felonies. Driving under the influence is not included in that list. Respondent argues, convincingly, that the closest category is "a crime of violence." Defendant, however, does not explain how driving under the influence qualifies as such a crime. "Title 8 C.F.R. section 316.10" does not define crimes of moral turpitude. In fact, "the immigration statutes do not specifically define offenses constituting crimes involving moral turpitude." (*Latter-Singh v. Holder* (9th Cir. 2012) 668 F.3d 1156, 1161.)

Defendant has not remedied these flaws on appeal. Defense counsel argues that defendant's plea and sentence carried a deportation consequence that was "truly clear" but cites no legal authority at all to show what the consequences of his conviction were in 1990. It is defendant's burden to provide legal authorities to support his legal argument. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) Defendant still has not shown that a violation of Vehicle Code section 23152 is an aggravated felony or a crime of moral turpitude under immigration law today or that it would have been one in 1990.

Respondent points to federal law indicating that it is neither. (*Montiel-Barraza v. I.N.S.* (9th Cir. 2002) 275 F.3d 1178, 1180 [felony violation of Veh. Code, § 23152 punished pursuant to Veh. Code, § 23175 as fourth drunk driving conviction is not a crime of violence and so not an aggravated felony]; (*U.S. v. Trinidad-Aquino* (9th Cir. 2001) 259 F.3d 1140, 1146 [violation of Veh. Code, § 23153 of driving under the influence and causing injury to another is not a crime of violence and is therefore not an aggravated felony].) A federal district court decision noted that as of 1998 it was not established that a California felony drunk driving conviction constituted an aggravated felony. (*U.S. v. Lopez-Menera* (N.D.Cal. 2008) 542 F.Supp.2d 1025, 1028-1029.)

Defendant's citations purporting to show the consequences of conviction of an aggravated felony or a crime or moral turpitude lack precision; on appeal respondent agrees that federal law currently provides that persons convicted of an aggravated felony at any time are deportable, and persons convicted of a crime of moral turpitude within 10 years of admission to the United States are deportable. (8 U.S.C. § 1227(a)(2)(A)(i) & (iii).) That is not proof of the consequences of those convictions in 1990.

Although this opinion is not determinative of the state of the law in 1998 (or earlier), we agree with the district court that it is "significant that [*Trinidad-Aquino*] the [2001] Ninth Circuit case holding that California DUI convictions were not 'aggravated felonies' does not state that the court is reversing any pronouncement of law, as opposed to interpreting the law in the first instance." (*Id*. at p. 1029.) Similarly, the Ninth Circuit has indicated that a violation of Vehicle Code section 23152 is not a crime of moral turpitude. (See *Singh v. Waters* (9th Cir. 1996) 87 F.3d 346, 348 [misdemeanor violation of Veh. Code, § 23152, subd. (a) is not a crime of moral turpitude]; *Vasquez-Atempa v. Ashcroft* (9th Cir., Nov. 18, 2003, No. 02-70359) 81 Fed.Appx. 256 [2003 WL 22718178] [violation of Veh. Code, § 23152, subd. (b) alone is not a crime of moral turpitude].)

It is possible that defendant was subjected to deportation proceedings based at least in part on his 1990 conviction. That fact alone, however, would not establish prejudice. He has not shown that deportation was a likely consequence of his conviction when he entered his plea in 1990.[8] Thus, he has not shown prejudice.

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[8] We note that defendant has not shown the precise basis for his deportation. The record shows that defendant suffered another DUI conviction in 1997, although there is ambiguity about the details of that conviction. It may be based on conduct pre-dating his 1990 conviction. It is certainly possible that this more recent conviction played a role in making defendant deportable based in part on his 1990 conviction. Defendant has left us with an insufficient record to review this overarching premise.

DISPOSITION

The court's order denying defendant's section 1473.7 motion is affirmed.

ROGAN, J.*

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.