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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re

JASON ROTEVA VASQUEZ,

on

Habeas Corpus.

B231291

(Los Angeles County
Super. Ct. No. KA091644)
(Steven P. Sanora, Judge)

APPEAL from an order denying a petition for a writ of habeas corpus of the Superior Court of Los Angeles County. Appeal treated as a petition for a writ of habeas corpus filed in this court. Petition denied.

The Burdis Law Group and Lisa Marie Budris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Kenneth C. Byrne and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jason Rotea Vasquez appeals from an order denying a petition for a writ of habeas corpus filed following his negotiated plea of no contest to possessing methamphetamine for sale (Health & Saf. Code, § 11378). Following his no contest plea, the trial court suspended imposition of sentence and ordered Vasquez placed on formal probation for three years. We treat Vasquez's appeal as a petition for a writ of habeas corpus filed in this court, and deny said petition.

FACTUAL SUMMARY

1. Proceedings Leading to and Including Vasquez's No Contest Plea.

The probation report reflects as follows. Vasquez was born in the Philippines. He has no criminal record. The present offense¹ occurred on August 15, 2010, when Vasquez was 35 years old. Based on the present offense, a felony complaint alleged as count 1 that Vasquez sold, offered to sell, or transported methamphetamine in violation of Health and Safety Code section 11379, subdivision (a). The complaint alleged as count 2 that he possessed methamphetamine for sale in violation of Health and Safety Code section 11378.

On August 18, 2010, Vasquez appeared for arraignment. The court appointed Michael Coghlan as Vasquez's counsel. Vasquez, through Coghlan, entered not guilty pleas. The court continued the case to August 25, 2010.

On August 25, 2010, the court called the case and the prosecutor took Vasquez's no contest plea as discussed below. Throughout the taking of the plea the prosecutor asked Vasquez numerous questions normally asked of a defendant during the taking of a no contest plea, and Vasquez answered all of them in English and consistent with a desire to plead no contest.

¹ The facts pertaining to the present offense are not pertinent to this matter.

The prosecutor advised Vasquez he had rights to a preliminary hearing, to a court or jury trial, to remain silent, to present a defense, to testify, to subpoena witnesses, and to cross-examine witnesses. The prosecutor asked Vasquez if he understood each of those rights, and asked whether he waived each. Vasquez replied yes to each question.

The prosecutor explained to Vasquez numerous consequences of his plea. The prosecutor then stated, “If you’re not a citizen of the United States, your conviction in this case *will* result in your being deported, excluded from the U.S., and denied naturalization.” (Italics added.) The prosecutor then explained numerous additional consequences of the plea. The prosecutor asked Vasquez if he understood the consequences of his plea, and Vasquez replied yes.

The prosecutor asked if Vasquez was pleading guilty or no contest freely and voluntarily, and Vasquez replied yes. Vasquez pled no contest to possessing methamphetamine for sale (count 2). The prosecutor asked if Vasquez was pleading no contest because he believed it was in his best interest to do so. Vasquez replied, “Yes sir.” Coghlan joined in the waivers and plea. All of the above proceedings were conducted in English. Vasquez and Coghlan also completed a written plea form.²

² Vasquez completed a standard “Felony Advisement of Rights, Waiver, and Plea Form” (some capitalization omitted; hereafter, form). The form was completed in English. Term 12 of the section of the form entitled “Consequences of My Plea” (some capitalization omitted) 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.” (Some capitalization omitted; italics added.) Vasquez initialed the box next to this statement.

Vasquez initialed additional boxes indicating as follows. Prior to entering his plea, Vasquez had a full opportunity to discuss with Coghlan, inter alia, Vasquez’s constitutional rights, waiver of those rights, and the consequences of Vasquez’s plea. The form later stated, under the section “Defendant’s Signature,” (some capitalization omitted), “I have read and initialed each of the paragraphs above and discussed them with my attorney. My initials mean that I have read, underst[ood] and agree[d] with what is stated in the paragraph. . . . 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[.]” Vasquez

After Vasquez pled no contest in open court, the court granted the prosecutor's motion to dismiss count 1. The court accepted Vasquez's no contest plea, found him guilty, and found Vasquez made all waivers knowingly, intelligently, and voluntarily with full knowledge of the consequences of his plea. The court suspended imposition of sentence and placed Vasquez on formal probation for three years subject to conditions.

2. Vasquez's Habeas Corpus Petition and Related Proceedings.

Vasquez retained new counsel, Lisa M. Budris (who is also Vasquez's appellate counsel in this matter). On January 7, 2011, Budris filed a "Motion to Withdraw Plea Pursuant to Petition for Writ of Habeas Corpus." In his supporting declaration, Vasquez indicated as follows. Vasquez had resided in the United States since he was 15 years old and he was a lawful permanent resident of the United States. He had never returned to the Philippines and he has no ties there.

Vasquez had initialed boxes on the form because he was told it was a good offer. Coghlan never explained to Vasquez the federal immigration consequences of pleading no contest. If Vasquez had been aware of the immigration consequences of his plea, he would not have pled no contest and he would have insisted on going to trial. If Vasquez had had "any idea that [he] would now be in this mess, [he] would have done things differently, such as hire an immigration expert or negotiate for a better plea."

In the notice of motion, and the unsworn memorandum of points and authorities, Budris indicated as follows. The "Motion to Withdraw Plea Pursuant to Petition for Writ of Habeas Corpus" (some capitalization omitted) was a petition for a writ of habeas corpus. Vasquez was in the physical custody of the Department of Homeland Security in

signed the form "J Vasquez" and the name Jason Vasquez was printed below his name. The form had a section entitled "Attorney Statement" (some capitalization omitted), and Coghlan signed it indicating as follows. Coghlan was the attorney of record for Vasquez. Coghlan had reviewed the form with Vasquez. Coghlan had explained each of Vasquez's rights to him and had answered all of his questions with regard to those rights and his plea. Coghlan had also explained the consequences of the plea. Coghlan joined in the waiver of Vasquez's constitutional and statutory rights.

Lancaster, California. Pursuant to Immigration and Naturalization Act, section 237(a)(2)(C), Vasquez was subject to the mandatory detention of Immigration and Customs Enforcement, and would be eventually removed from the United States. Vasquez was currently facing permanent exclusion from the United States in immigration removal proceedings scheduled for February 28, 2011. Vasquez's immediate and extended family members were United States citizens or lawfully in the United States.

At the January 20, 2011, hearing on the petition, Budris indicated as follows. Vasquez's family retained Budris in November 2010. "[Vasquez] does not speak English as a primary language, he speaks Tagalog, so he was not afforded an interpreter at his plea and sentencing." The court observed that everything before the court had indicated Vasquez spoke and understood English, he had never requested an interpreter, and Budris's argument concerning an interpreter was belated. The court denied Vasquez's "motion."

ISSUES

Vasquez presents related claims the judgment must be reversed because his trial counsel provided ineffective assistance of counsel (1) by failing to advise him, prior to his no contest plea, of the immigration consequences of his plea, and (2) by failing to advise him, prior to said plea, of his constitutional rights and of said immigration consequences, with the result his plea was not knowing and intelligent.

DISCUSSION

Vasquez Has Not Appealed from an Appealable Order and, Treating This Matter as a Petition for a Writ of Habeas Corpus, We Conclude the Petition Is Without Merit.

Vasquez claims as previously indicated. We reject his claims. At the outset, we note Vasquez's "Motion to Withdraw Plea Pursuant to Petition for Writ of Habeas Corpus" was a petition for a writ of habeas corpus filed in the trial court. It follows Vasquez is appealing from an order denying a petition for a writ of habeas corpus. However, an order denying a detainee's petition for a writ of habeas corpus is not an appealable order. The detainee must instead file a new habeas corpus petition in the

reviewing court. (*In re Crow* (1971) 4 Cal.3d 613, 621, fn. 8; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 983, 986.) Nonetheless, in the interest of judicial economy, we will treat Vasquez's appeal as a petition for a writ of habeas corpus filed in this court. (Cf. *People v. Byron* (2009) 170 Cal.App.4th 657, 666; *Gallardo, supra*, 77 Cal.App.4th at p. 986.)

For the following reasons, we conclude the petition for a writ of habeas corpus filed in this court is without merit. We previously set forth Vasquez's two claims. However, Vasquez was required to allege facts showing due diligence, i.e., the petition had to set forth with specificity when Vasquez or Budris knew, or reasonably should have known, the information offered in support of the claims and the legal basis for them. (*People v. Kim* (2009) 45 Cal.4th 1078, 1097 (*Kim*).) Vasquez pled no contest on August 25, 2010. He presumably knew he was not a United States citizen. He filed his petition for a writ of habeas corpus in the trial court on January 7, 2011. Budris made the unsworn representation that Vasquez's family retained Budris in November 2010.

The petition filed in this court is deficient for the procedural reason the petition fails to allege when Vasquez or Budris first became aware of Coghlan's alleged failure to advise concerning immigration consequences, and fails to allege when Vasquez or Budris first became aware federal immigration authorities were allegedly attempting to deport Vasquez based (we assume solely) on his no contest plea. (Cf. *Kim*, at pp. 1096-1099.)

As to the merits, under *Padilla v. Kentucky* (2010) 559 U.S. ____ [176 L.Ed.2d 284] (*Padilla*), Coghlan had a duty to advise Vasquez of the *risk* of deportation consequent to his no contest plea. (*Id.* at p. 299.) Indeed, we assume *Padilla* also required Coghlan to advise Vasquez that his no contest plea *would* result in Vasquez's deportation, exclusion from admission or reentry to the United States, and denial of naturalization. (*Id.* at pp. 290, 292, 295.)

However, Vasquez completed a plea form indicating he had enjoyed a full opportunity to discuss with Coghlan the consequences of Vasquez's plea. Coghlan signed the form, indicating he had discussed with Vasquez the consequences of his plea. Thus, although Vasquez alleges in his petition filed in this court that Coghlan failed to advise Vasquez of immigration consequences, the plea form which Vasquez completed alleges Coghlan did advise Vasquez of the consequences of his plea. Vasquez has thus alleged inconsistent facts.

Under these circumstances, we are not obligated to believe Vasquez's self-serving statements that Coghlan failed to advise Vasquez of the immigration consequences of his plea. This is particularly true where, as here, the petition filed in this court does not contain a declaration from Coghlan or even explain why the petition does not contain such a declaration. The petition for a writ of habeas corpus filed in this court fails to allege facts demonstrating Coghlan provided constitutionally deficient representation which would entitle Vasquez to relief. (Cf. *People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Finally, even if Coghlan failed to competently advise Vasquez concerning immigration consequences, there is no need to reverse the judgment. Vasquez has failed to demonstrate prejudice for the following reasons. First, whether or not Coghlan advised Vasquez concerning immigration consequences, the *prosecutor* told Vasquez, "If you're not a citizen of the United States, your conviction in this case *will* result in your being deported, excluded from the U.S., and denied naturalization." (Italics added.) The plea form which Vasquez himself completed contained substantially the same language (see fn. 2, *ante*).

Second, Vasquez had to show a reasonable probability that, but for Coghlan's alleged incompetence, Vasquez "would not have pleaded [no contest] *and would have insisted on proceeding to trial*." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934, italics added.) However, Vasquez has asserted that if he had "any idea that [he] would now be in this mess, [he] would have done things differently, such as hire an immigration expert or

negotiate for a *better* plea.” (Italics added.) Third, Vasquez entered into a favorable plea bargain which, according to him, was in his best interests. The bargain included formal probation on one count instead of possible imprisonment on two counts. Any constitutionally deficient representation by Coghlan in failing to advise Vasquez concerning immigration consequences was not prejudicial. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)³

We also reject, for the reasons discussed below, Vasquez’s claim the judgment must be reversed because Coghlan provided ineffective assistance of counsel by failing to advise Vasquez, prior to his no contest plea, of his constitutional rights and of the immigration consequences of his plea, with the result it was not knowing and intelligent.

Vasquez completed a plea form indicating he had enjoyed a full opportunity to discuss with Coghlan, inter alia, Vasquez’s constitutional rights and waiver of those rights. Coghlan signed a section of the form indicating he had explained each of Vasquez’s rights to him and had answered all of Vasquez’s questions regarding them. Vasquez has thus alleged inconsistent facts, we are not obligated to believe Vasquez’s self-serving statements, and we conclude Vasquez has failed to allege facts demonstrating Coghlan provided constitutionally deficient representation on this issue.

Even if Coghlan failed to advise Vasquez concerning his constitutional rights, the *prosecutor* advised Vasquez concerning, inter alia, his right to jury trial, right to remain silent, and right to cross-examine witnesses. Vasquez completed the form, indicating he understood and waived those rights. The court found Vasquez made his waivers knowingly, intelligently, and voluntarily. As far as constitutional rights are concerned, nothing more was required to demonstrate Vasquez’s no contest plea was voluntary and intelligent. (Cf. *People v. Howard* (1992) 1 Cal.4th 1132, 1175, 1178-1179.)

³ *Padilla* does not help Vasquez. In *Padilla*, trial counsel provided ineffective assistance because trial counsel effectively advised Padilla that he would *not* be deported as a result of his conviction. *Padilla* thus had no occasion to reach the issue of what result would have obtained if trial counsel in that case had advised Padilla that he *would* be deported (which is what happened in this case).

Vasquez has thus failed to demonstrate Coghlan provided ineffective assistance of counsel by allegedly failing to advise Vasquez concerning his constitutional rights with the result his no contest plea was not knowing and intelligent. We already have concluded Vasquez has failed to demonstrate Coghlan provided ineffective assistance of counsel by allegedly failing to advise Vasquez concerning his immigration consequences. A fortiori, Vasquez has failed to demonstrate that any such advisement failure by Coghlan prevented Vasquez's plea from being knowing and intelligent.⁴

DISPOSITION

The appeal is treated as a petition for a writ of habeas corpus filed in this court. The petition for a writ of habeas corpus filed in this court is denied.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

⁴ To the extent Vasquez argues he did not speak English at the time of his no contest plea and this alleged fact supports his two claims, we reject the argument. The burden is on Vasquez to demonstrate error from the record; error will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) The record not only fails to demonstrate Vasquez did not speak English, but the record affirmatively demonstrates he did speak English. We note Vasquez never requested an interpreter, and Budris told the trial court Tagalog was Vasquez's "primary" language.