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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ISIDORE B. MENSAH, Defendant and Appellant.	B240803 (Los Angeles County Super. Ct. No. PA068228)

APPEAL from an order of the Superior Court of Los Angeles County. Beverly Reid O'Connell, Judge. Affirmed.

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Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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An information, dated September 13, 2010, charged Isidore B. Mensah with three counts of committing a lewd act upon a child under the age of 14 years in violation of Penal Code section 288, subdivision (a). According to the preliminary hearing transcript, the charges related to oral copulation and sexual intercourse between Mensah, when he was 37 and 38 years old, and a 13-year-old girl, whose mother was Mensah's friend. Mensah pleaded not guilty to the charges.

On December 28, 2011, Mensah changed his plea and entered a plea of no contest to the first count under Penal Code section 288, subdivision (a). As part of the no contest plea, among other admonishments, the trial court informed Mensah that, "[i]f you are not a citizen of the United States, your plea today will cause you to be deported, denied reentry into the United States, denied citizenship, naturalization and/or amnesty." The court asked Mensah if he understood, and Mensah replied, "Yes, your honor." On his "Felony Advisement of Rights, Waiver, and Plea Form," Mensah initialed the box for the section entitled "Immigration Consequences." That section stated, "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." Mensah indicated that he was "pleading freely and voluntarily, meaning it's what [he] want[s] to do given [his] situation[,]" and that it was in his best interest to enter a no contest plea to count 1. Mensah's counsel joined in the waivers of constitutional rights, concurred in the plea and stipulated to a factual basis for the plea based on his review of the preliminary hearing transcript and the police reports. The court suspended imposition of sentence and placed Mensah on formal probation for five years with certain terms and conditions. The court dismissed the remaining counts.

On March 7, 2012, Mensah, represented by new counsel, filed a motion pursuant to Penal Code section 1018 to withdraw his no contest plea. According to Mensah's declaration filed in support of the motion, after his no contest plea and resulting conviction, he was informed that he was subject to mandatory deportation. Mensah indicated that, although he had represented that he understood the plea could result in deportation, he did not believe, based on the advice of his attorney and his immigration

status, that the plea would have such consequences. Mensah indicated that, had he been aware the plea would result in mandatory deportation, he would have "continued on the path to trial" or, "[a]t the very least, . . . urged [his] counsel to keep negotiating in order to achieve a better result[,]" such as "pleading to a similar charge that would not result in mandatory deportation."

The People opposed the motion, arguing that Mensah had not established good cause under Penal Code section 1018 for withdrawal of his plea. The People relied on Mensah's acknowledgements in open court and in writing that his plea to a violation of Penal Code section 288, subdivision (a), would result in deportation. According to the People, "the defendant was represented by counsel and provided the court with a knowing and intelligent written waiver of his rights. The court should be suspect of the defendant's subsequent claim of mistake or ignorance. There is nothing to indicate that the defendant was not properly advised of the consequences of his plea, including his immigration consequences."

After reading the parties' submissions and hearing argument from counsel, the trial court denied the motion. The court stated, "I have read and considered the declaration of Mr. Mensah. I was present during the change of plea. . . . And I beg to differ with Mr. Mensah's declaration both based on my memory and my practice. I took the plea and I . . . specifically said:

"'If you are not a citizen of the United States, your plea will cause you to be deported, denied reentry into the United States, denied citizenship, naturalization and/or amnesty.'

"'Do you understand?'

"'Yes, your honor.'

"I take issue with the fact that Mr. Mensah's declaration says that he looked to his attorney and his attorney 'told [him] to say yes by nodding.' The practice, if I am going to find that a plea is knowingly, intelligently and voluntarily made, my practice is to ask, if there is any hesitation, whether or not counsel needs additional time to confer with their client. That did not happen. I observed the defendant's demeanor during the change of

plea. At no time did he express any hesitation or misunderstanding. At no time did he visually or orally indicate that he did not understand the constitutional rights I was going over. I beg to differ with counsel that they are boilerplate. I take my job very seriously. If someone does not understand the immigration consequences, we'll take the time so that each and every constitutional right is understood. I also disagree with you as to your reading of *Padilla v. Kentucky* [(2010) 130 S.Ct. 1473]. *Padilla v. Kentucky* was factually distinct from this case. In *Padilla*, the defendant was not advised that his plea to the crime carried the risk of deportation. Mr. Mensah[,] specifically by the court, both in writing and orally, was informed that he would. I did not even use the word 'might.' Under [Penal Code section] 1016.5, the statute requires that a defendant be advised that his . . . plea may cause deportation. That did not occur. I specifically said 'will.' And looking at it from a *Strickland [v. Washington* (1984) 466 U.S. 668] standpoint, it's a two-pronged analysis. Even if he was mis-advised by a state lawyer not trained in federal immigration law, you have to show prejudice under the *Strickland* standard. So first I disagree with . . . how you characterize [the plea] and how Mr. Mensah now self-servingly characterizes the change of plea in this case. He faced, as a result of the charges, substantial time. . . . His maximum exposure was 12 years, and he received a sentence of time served, [and] . . . five years formal probation. And I had a conversation with him, . . . his initials were a little bit different than his name, so I specifically asked him if he initialed every box. . . . [W]e had a conversation about [his initials] to make sure that everyone understood what was going on. So I am rejecting, finding not credible the declaration of Mr. Mensah based on my recollection of his demeanor during the proceedings, and I am finding that you have failed to meet your burden of good cause showing justification of withdrawal of his plea."

Mensah filed a notice of appeal, along with a request for a certificate of probable cause, stating that, "[t]he trial court improperly denied the defendant's Penal Code section 1018 motion to withdraw his plea. Defendant's motion was based on the misadvice of his trial counsel in regards to the actual immigration consequences defendant faced by plea[d]ing to an 'aggravated felony.' At the time of his plea, the

defendant was not aware that he faced mandatory deportation based on the misadvice of his counsel who only advised him that he may have a problem renewing his green card. This ignorance resulted in a plea that was not knowing nor voluntary. Had defendant known that plea[d]ing to an aggravated felony would result in his mandatory deportation, he would have rejected the offer and proceeded to trial. [¶] The trial court ruled that the defendant knew he had a 'risk' of deportation and that the [Penal Code section] 1016.5 waivers given by the court cured any erroneous advice that the defendant may or may not have received from counsel, making his plea knowing and voluntary. The court improperly denied defendant's motion." The trial court granted Mensah's request for a certificate of probable cause.

We appointed counsel to represent Mensah in the matter. After examining the record, counsel filed a *Wende* brief raising no issues on appeal and requesting that we independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.)

On September 5, 2012, and again on October 23, 2012, we directed appointed counsel to immediately send the record on this appeal and a copy of the opening brief to Mensah and notified Mensah that he had 30 days to submit by letter or brief any ground of appeal, contention or argument he wished us to consider.

On December 10, 2012, Mensah filed a letter with the court, which we interpret as a response to our notice informing him that he could raise any ground, contention or argument he wished us to consider on appeal. In his letter, Mensah repeated the argument asserted in his Penal Code section 1018 motion that, although he acknowledged orally and in writing that his plea would result in deportation, he did not understand based on the advice of his attorney that pleading no contest to a violation of Penal Code section 288, subdivision (a), subjected him to mandatory deportation. After reviewing Mensah's letter, and examining the appellate record, we conclude that the trial court did not abuse its discretion in denying Mensah's motion to withdraw his plea. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561 ["decision whether to allow a defendant to withdraw a guilty or no contest plea is discretionary, and an appellate court will not disturb it absent a showing the trial court has abused its discretion"].) The appellate

record does not provide a basis for determining on direct appeal that Mensah received ineffective assistance of counsel based on the alleged advice he received from his attorney before entering his no contest plea. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [claim of ineffective assistance of counsel generally more appropriately addressed in habeas corpus proceeding]; see *Padilla v. Kentucky*, *supra*, 130 S.Ct. at pp. 1480-1481 [determining in postconviction proceeding that defendant entitled to effective assistance of counsel on effect of plea on immigration status].) We are satisfied that Mensah's appointed counsel on appeal has fully complied with his responsibilities and that no arguable appellate issue exists. (*People v. Wende*, *supra*, 25 Cal.3d at p. 441; *People v. Kelly* (2006) 40 Cal.4th 106, 110.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.