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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. HECTOR HERNANDEZ, Defendant and Appellant.	B254063 (Los Angeles County Super. Ct. No. BA334011)

APPEAL from a judgment of the Superior Court of Los Angeles County. David M. Horwitz, Judge. Affirmed.

Karlin & Karlin and Marc A. Karlin for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Hector Hernandez appeals from the denial of his motion to vacate his guilty plea to a firearms possession charge, contending that his constitutional right to the effective assistance of counsel was violated because his lawyer did not advise him of the immigration consequences of his plea. We affirm because Hernandez's delay has left him with no procedural vehicle by which to challenge his plea.

FACTS AND PROCEDURAL HISTORY

In January 2008 Hector Hernandez pled guilty to one count of carrying a loaded firearm in public. (Former Pen. Code, § 12031, subd. (a)(1).)[1] Pursuant to section 1016.5, the trial court advised Hernandez that as a result of his plea he was subject to deportation and other adverse immigration consequences if he were not a citizen. In July 2008 the trial court reduced the charge to a misdemeanor and sentenced Hernandez to serve 24 months on probation based on his completion of community service. The minute order from that hearing states that the trial court again advised Hernandez of the immigration consequences of his plea, but the reporter's transcript of the hearing does not reflect that the warnings were given.

In November 2013 Hernandez filed a nonstatutory motion to vacate his plea based on *Padilla v. Kentucky* (2010) 559 U.S. 356, which held that the constitutional right to the effective assistance of counsel sometimes required defense lawyers to advise their defendants of the possible immigration consequences of any guilty or no contest plea they might enter. Hernandez submitted a declaration stating that he was a Mexican citizen who entered the United States in 2002. He was married to an American citizen and his two children were born here. He was informed and believed that as a result of his 2008 plea he was "disqualified from any form of immigration relief, and [was] subject to removal from the United States." According to Hernandez his public defender did not

[1] This offense is now codified at Penal Code section 25850, subdivision (a). All further section references are to the Penal Code.

ask if he was an American citizen and did not advise him that his guilty plea could have adverse immigration consequences.

Although a Spanish language interpreter assisted him at the plea hearing, he was extremely nervous. He did not recall the trial court explaining that his plea might lead to deportation or other adverse immigration consequences. Had he known that, he would not have pleaded guilty at that time and "would have accepted a plea with a longer term in custody to avoid the extreme immigration consequences I am now facing. Or I would have proceeded to trial." The trial court denied the motion "based on the facts and the law," without further explanation.

DISCUSSION

1. *Hernandez Has No Available Remedy*

Hernandez contends that he appeals from the denial of a nonstatutory motion to vacate that is appealable as the functional equivalent of a petition for writ of error coram nobis. Hernandez had three remedies available in order to challenge his plea based on the failure to advise of the immigration consequences of that plea: (1) a timely appeal from the judgment; (2) a statutory motion to vacate under section 1016.5 if the *trial court* failed to advise of those consequences; and (3) a writ of habeas corpus raising a claim of ineffective assistance of counsel. (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 68 (*Aguilar*).) We conclude that Hernandez's failure to timely pursue the first and third options, and the inapplicability of the second, prevent him from challenging his conviction in this manner.

Ruling in a substantially identical case, the *Aguilar* court held that coram nobis was not an available remedy because: (1) the defendant failed to employ other available remedies; and (2) the alleged new facts – defense counsel's failure to advise of the plea's immigration consequences – involved only the legal effect of a guilty plea and did not raise facts that would have prevented the rendition of judgment. (*Aguilar, supra,* 227 Cal.App.4th at pp. 69-70, citing *People v. Kim* (2009) 45 Cal.4th 1078, 1093-1094,

1103.) Aguilar's attempt to vacate his plea through a nonstatutory motion to vacate was not allowed because such a motion is the legal equivalent of a coram nobis petition, which as *Aguilar* works is not available. (*Aguilar, supra*, at pp. 71-74.) Therefore the trial court did not err by denying Aguilar's motion to vacate due to a lack of jurisdiction. (*Id.* at p. 75.)

Based on *Aguilar*, we conclude that Hernandez could not challenge his guilty plea by way of a nonstatutory motion to vacate. He did not appeal from the judgment, and this case does not involve the trial court's failure to advise of adverse immigration consequences under section 1016.5. That leaves habeas corpus, which is available as a remedy only if Hernandez were still in the actual or constructive custody of the state. (*Aguilar, supra*, 227 Cal.App.4th at p. 68.) Because Hernandez's probationary term ended in July 2010, however, he is no longer in custody.[2]

In short, Hernandez is not entitled to a different remedy simply because he failed to pursue the remedies provided by law. (*Aguilar, supra*, 227 Cal.App.4th at p. 75.)[3]

2. *Hernandez Has Failed to Show Prejudice*

Even if we were to reach the merits of his ineffective assistance of counsel claim, Hernandez would have to show that his lawyer performed deficiently and that he was prejudiced as a result. (*In re Resendiz* (2001) 25 Cal.4th 230, 239 (*Resendiz*), overruled

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[2] Respondent's appellate brief asserted that Hernandez was placed on two years' probation starting in July 2013, leading us to ask for supplemental briefing on the issue whether habeas was a proper remedy because Hernandez was still in the state's constructive custody. Respondent conceded the point in its supplemental brief, but our examination of the record shows that concession was in error because Hernandez's probation began in July 2008, not July 2013.

[3] Respondent also contends that relief is not available under *Padilla* because it was decided after Hernandez's guilty plea and is not retroactive. (*Chaidez v. United States* (2013) 568 U.S. ___, 133 S.Ct. 1103, 1107-1108.) Hernandez points to *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1478-1479, which held that defense counsel in a criminal case may have the obligation to advise his client of the adverse immigration consequences of a guilty or no contest plea, and contends it required his lawyer to give such advice. Because we affirm on other grounds, we need not reach this issue.

on another ground in *Padilla v. Kentucky, supra,* 559 U.S. at pp. 370-371.) We assume for this argument that defense counsel performed below the required standard by failing to advise Hernandez of the immigration consequences of his plea. Even so, Hernandez still had to show that but for counsel's incompetence he would not have pled guilty and would have insisted on going to trial. (*Resendiz,* at p. 253.) We conclude that he has failed to establish prejudice.

Hernandez's claim that he would not have pled guilty or would have accepted a less favorable plea bargain to escape any adverse immigration consequences must be corroborated by independent evidence. (*Resendiz, supra,* 25 Cal.4th at p. 253.) Factors to be considered include: whether defense counsel accurately conveyed the terms of the plea deal; counsel's advice, if any; the difference between the terms of the proposed plea bargain and the probable consequences of going to trial; and whether the defendant indicated he was amenable to negotiating a plea bargain. (*Ibid.*) We may also consider the probable outcome of any trial to the extent that may be discerned. (*Id.* at p. 254.)

Hernandez does not contend that his lawyer misled him about the terms of his plea offer. He has not produced any evidence suggesting the prosecutor might have agreed to a plea that would have allowed him to avoid adverse immigration consequences. Had he gone to trial and been convicted of a felony as charged, he could have been sentenced to state prison for up to three years. (§§ 1170, subd. (h); 25805, subd. (c).) Instead, he bargained that down to a misdemeanor and two years on probation if he performed 200 hours of community service. Furthermore, Hernandez has not produced evidence that he had a viable defense to the charge or that a plea to some other charge would have saved him from adverse immigration consequences. The choice he faced was not between pleading guilty and being deported on the one hand or going to trial and avoiding deportation on the other. While insisting on a trial raised the theoretical possibility of an acquittal, the likelihood of acquittal was slight on the record before us, and a conviction after trial would have carried the same negative immigration consequences as his plea. (See *Resendiz, supra,* 25 Cal.4th at pp. 253-254.)

Based on this, we alternatively hold that Hernandez has not shown that he would have passed on the highly favorable plea bargain he obtained and chosen instead to go to trial had his lawyer advised him of the immigration consequences of his plea.

DISPOSITION

The order denying Hernandez's motion to vacate the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.