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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICARDO RAFAEL RAMIREZ, Defendant and Appellant.	B240509 (Los Angeles County Super. Ct. No. PA018834)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In the underlying action, the trial court denied appellant Ricardo Raphael Ramirez's motion under Penal Code section 1016.5, which permits a plea of guilty or nolo contendre to be withdrawn if the defendant did not receive a specified advisement regarding the effect of the plea on the defendant's immigration status. Appellant's court-appointed counsel has filed an opening brief raising no issues. Following our independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude that no arguable issues exist and, accordingly, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Appellant's 1994 Guilty Plea*

Appellant is a citizen of Colombia. In December 1994, an information was filed in the underlying action, charging appellant with possession of cocaine base for sale (Health & Saf. Code, § 11351.5). On December 23, 1994, appellant pleaded guilty to the charge. Although the minute order from the hearing at which appellant entered the plea states that "[d]efendant [was] advised of possible effects of plea on any alien/citizenship/probation/parole status," the order does not describe the advisement's terms. In February 1995, the trial court suspended imposition of sentence and placed appellant on probation for three years.

B. *Subsequent Events*

In December 2000, appellant pleaded nole contendere to the charge of being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). According to the minute order from the hearing at which appellant entered the plea, appellant received the following advisement, which is set forth in subdivision (a) of Penal Code section 1016.5: "If you are not a citizen, you are hereby advised that a conviction of the offense for which you have been charged

will have the consequences of deportation, exclusion from admission to the United Sates, or denial of naturalization pursuant to the laws of the United States." Imposition of sentence was suspended, and appellant was placed on probation for three years.

By a final order dated April 29, 2005, appellant became subject to removal from the United States due to his criminal record. In early 2006, appellant filed motions to expunge his February 1995 and December 2000 convictions (Pen. Code, § 1203.4), which were granted.

In January 2008, appellant pleaded nolo contendere to a charge of corporal injury to a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)). The minute order from the pertinent hearing states that appellant received the advisement found in Penal Code section 1016.5.

C. *Underlying Proceedings*

1. *Appellant's Motion*

On November 14, 2011, appellant filed a motion to vacate his 1994 plea under Penal Code section 1016.5, contending that the trial court failed to give the advisement set forth in that section.[1] He argued that there was no evidence that he received the advisement, aside from the reference to an advisement in the December 23, 1994 minute order. He further contended that he would never have agreed to plead guilty had he known of the plea's consequences.

Accompanying the motion was appellant's declaration, which asserted that Allen Budde, his court-appointed counsel, never advised him regarding the plea's implications for his immigration rights. The declaration stated: ". . . At no time

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[1] All further citations are to the Penal Code, unless otherwise indicated.

before I made my plea did . . . [Budde] ask me about my immigration status in the United States . . . . [¶] . . . [¶] Prior to my plea, . . . [Budde] did not inform me that if I were to vacate these charges that I would have a felony drug conviction on my record. [¶] . . . Specially, . . . [Budde] did not inform me that if I did not honor all the terms of my probation, and complete . . . all matters ordered by the Court and vacate, that I would have a felony drug conviction on my record which would bar me from any/all immigration relief in the United States. [¶] . . . [Budde], prior to my plea in this case, never recommended that I consult with an attorney with specialized knowledge of the U.S. [i]mmigration laws and regulations . . . . [¶]. . . [¶] . . . Had I known that the consequences of my plea, including any violations of probation, would prohibit me from any immigration relief in the future, I would not have entered a guilty plea . . . . [¶] . . . Accordingly, I respectfully request that the instant motion be granted, and that my guilty plea . . . be vacated due to ineffective assistance of counsel."

2. *Opposition*

In opposing the motion, the Los Angeles District Attorney contended that appellant received the requisite advisement. The District Attorney acknowledged that the absence of a reporter's transcript of the December 23, 1994 hearing triggered a rebuttable presumption that no advisement had been given (§ 1016.5, subd. (b)), but argued that there was sufficient evidence to overcome the presumption. On this matter, the District Attorney relied on *People v. Arriaga* (2011) 201 Cal.App.4th 429 (*Arriaga*), review granted Feb. 22, 2012, S199339, which involved similar factual circumstances.

The District Attorney noted that the pertinent minute order referred to an immigration advisement, and that appellant's declaration did not deny that he received the required advisement. In addition, the District Attorney provided a

declaration from Burton Schneirow, the prosecutor present during the December 23, 1994 hearing. Schneirow stated: "In 1995 I was employed as a Los Angeles Deputy District Attorney assigned to the San Fernando Branch. In that capacity I was the Calendar Deputy for the Honorable Judge Charles Pevin. [¶] . . . As the Calendar Deputy . . . , I would orally advise defendants of their constitutional rights and consequences of their pleas, obtain constitutional rights waivers and take the pleas. [¶] . . . [¶] I have no present recollection of the case or the plea from almost 17 years ago. However, my custom and practice when taking felony pleas was to advise defendants of the immigration consequences in the language of . . . Section 1016.5 . . . . Judge Pevin was vigilant in making sure that the immigration advisement required by . . . Section 1016.5 was given at the time of the plea."

The District Attorney also opposed appellant's motion on other grounds, including that he had demonstrated no prejudice from the purported error. The District Attorney argued that appellant had failed to show that he would not have entered a guilty plea had he received the advisement, as he entered pleas of nolo contendere in later actions after hearing it.

3. *Reply*

Appellant's reply maintained that he never received the advisement, and that its absence was prejudicial to him. Supporting the reply was a declaration from his counsel, Shani Kochav, who stated: "On January 21, 2012, I visited [appellant] at the Adelanto Detention Facility where he is being held by Immigration and Customs Enforcement. [¶] . . . [¶] . . . During our legal visit, [appellant] explicity stated that he does not recall being advised by the Deputy District Attorney or the Court of the possible immigration consequences to his plea." According to Kochav, appellant also stated that he received no information regarding the implications of the plea for his immigration rights, and that he would not have

entered the guilty plea had he been so informed.

4. *Hearing*

The hearing on appellant's motion occurred on February 22, 2012. At the hearing, the trial court noted the similarity of the factual circumstances to those presented in *Arriaga*, sustained the District Attorney's hearsay objections to Kochav's declaration, and denied the motion. This appeal followed.

DISCUSSION

After an examination of the record, appellant's court-appointed counsel filed an opening brief raising no issues, and requested this court to review the record independently pursuant to *Wende*. In addition, counsel advised appellant of his right to submit by supplemental brief any contentions or argument he wished the court to consider. Appellant has presented no such brief.

Although the trial court appears to have given consideration to *Arriaga* in denying appellant's motion, our independent review of the record discloses "no arguable errors that would result in a disposition more favorable to [appellant]." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1467.) Because we review the trial court's ruling, not its reasoning (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15), we will affirm the ruling on any theory properly supported by the record (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1). As explained below, the record conclusively shows that the motion was properly denied, even though *Arriaga* is no longer a citable decision.

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion,

more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised. [Citation.]" (*People v. Totari* (2002) 28 Cal.4th 876, 884.) Generally, the trial court's ruling is reviewed for an abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.)

Here, appellant failed to establish element (1). When there is no reporter's transcript of the hearing at which the pertinent plea was entered, the defendant is "presumed not to have received the required advisement" (§ 1016.5, subd. (b).) Because this presumption implements a public policy, it is "[a] presumption affecting the burden of proof" (Evid. Code, §§ 605-606), and thus places the burden upon the prosecution to show that the required advisement was given. (*People v. Dubon* (2001) 90 Cal.App.4th 944, 952-955 (*Dubon*).) That advisement may be administered by "any of the numerous individuals acting on behalf of [the court], including the judge, counsel, the court reporter, or the clerk." (*People v. Quesada* (1991) 230 Cal.App.3d 525, 535-536.) Generally, the prosecution cannot carry its burden simply by pointing to a minute order that refers to an immigration advisement, but does not state that the advisement complied with section 1016.5. (*Dubon*, *supra*, 90 Cal.App.4th at p. 955.) However, such a minute order, coupled with a declaration from the person who administered the advisement, may suffice. (See *ibid*.)

Although section 1016.5 does not specify whether the prosecution must carry its burden by a preponderance of the evidence or by clear and convincing evidence, the trial court's ruling would be correct under either standard, as the

record contains no evidence of nonadvisement.[2] Aside from relying on the minute order for the December 23, 1994 hearing, the District Attorney submitted the declaration from Schneirow, who stated that it was his "custom and practice" to give the required advisement at the behest of Judge Pevin, who was "vigilant" regarding its administration. Furthermore, appellant submitted no admissible evidence that Schneirow failed to give the advisement. Appellant's declaration did not deny that he received the advisement; rather, he attributed his plea to his counsel's failure to inform him regarding plea-related immigration issues, including matters not covered by the advisement, such as the effect of probation violations. The court otherwise properly declined to admit Kochav's declaration describing appellant's statements to her. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 10, p. 688 [evidence of defendant's self-serving statements is inadmissible hearsay].)

In view of the District Attorney's showing and the absence of evidence of nonadvisement, the statutory presumption itself cannot support any inference in appellant's favor. (*Rancho Santa Fe Pharm. v. Seyfert* (1990) 219 Cal.App.3d 875, 882.) Nor is ineffective assistance of counsel a basis for relief under section 1016.5 when the defendant received the required advisement. (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1288.) In sum, because the record demonstrates that appellant's motion was properly denied, we conclude that no arguable issues exist. (*Wende, supra,* 25 Cal.3d at p. 441.)

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[2] The prosecution's burden of proof is presently before our Supreme Court in its review of *Arriaga*.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.