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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ABEL SOTO, Defendant and Appellant.	B337140 (Los Angeles County Super. Ct. No. BA331387)

APPEAL from an order of the Superior Court of Los Angeles County, Armenui A. Ashvanian, Judge. Affirmed.

The Agopoglu Law Corp. and Berc Agopoglu for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Steven D. Matthews and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Abel Soto appeals from an order denying his motion to vacate a 2008 conviction for transportation of cocaine (Health & Saf. Code, § 11352, subd. (a)). He brought the motion under Penal Code[1] section 1473.7, which authorizes relief, in pertinent part, when a conviction "is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences" of the conviction. (§ 1473.7, subd. (a)(1).) The evidence Soto presented with his motion does not establish he is entitled to relief. Accordingly, we affirm the order.

BACKGROUND

A. In 2008, Soto Pleads No Contest to a Violation of Health and Safety Code Section 11352, Subdivision (a)

On December 21, 2007, the district attorney filed a felony complaint, alleging 50-year-old Soto committed possession for sale of a controlled substance, cocaine (Health & Saf. Code, § 11351; count 1) and transportation of a controlled substance, cocaine base (Health & Saf. Code, § 11352, subd. (a); count 2). At the arraignment held the same day, Soto pleaded not guilty. He was represented by private counsel at the arraignment and through disposition of this criminal case.

On March 14, 2008, Soto withdrew his not guilty plea and pleaded no contest to count 2, transportation of a controlled substance, cocaine. As reflected in the reporter's transcript of the plea hearing, before Soto entered the no contest plea, he

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[1] Undesignated statutory references are to the Penal Code.

indicated he understood the charge in count 2 and that he would face a maximum prison sentence of five years if convicted at trial on that charge. He also understood that under the plea deal, the court would place him on probation for three years, and he would serve 270 days in county jail with credit for one day. After Soto waived his constitutional trial rights, the prosecutor informed him, among other things: "You also need to understand the consequences of your plea. [¶] If you are not a citizen of the United States, your conviction in this case will result in your deportation, exclusion from the United States, and denial of naturalization. [¶] Do you understand that?" Soto responded, "Yes." He also indicated he understood that the court would treat the no contest plea the same as a guilty plea. Defense counsel and the prosecutor joined in the plea based on the police reports. The court accepted the plea, finding it was knowingly and intelligently made and there was a factual basis for it. In accord with the plea deal, the court suspended imposition of sentence on count 2 and placed Soto on probation for three years with terms and conditions (including jail time) and dismissed count 1 for possession for sale of a controlled substance, cocaine.

Five months later, on August 15, 2008, Soto was deported to Mexico.

B. In 2023, Soto Files a Motion to Vacate His Conviction

Effective January 1, 2017, the Legislature enacted section 1473.7. In June 2023, 65-year-old Soto filed a motion under section 1473.7 to vacate his 2008 conviction. The motion was supported by his declaration and attached exhibits.

In the declaration, Soto explained that he recently hired his present counsel, who advised him that he was not "properly

represented in [the] criminal proceedings." Soto stated that on March 14, 2008, the date of the plea hearing, his attorney advised him to plead no contest to a violation of Health and Safety Code section 11352, subdivision (a), even though he told his attorney he was innocent. His attorney said he would "fix [the] conviction" after Soto entered the plea. Soto trusted his attorney, and he "signed the plea forms."

Soto also asserted in his declaration that his attorney "never advised [him] of the immigration consequences of [his] plea despite [his] assertion that [he] was not a U.S. Citizen. Everything went very fast and [he] was not informed that [his] conviction would be a deportable crime and a crime of moral turpitude under immigration laws that prevents [him] from getting cancellation of removal under Immigration and Nationality Act Section 240A." He maintained that if his attorney had warned him about this, he "would not have plead[ed] to the crime as [he is] innocent and [he] was rushed to sign the papers." He claimed that he was prejudiced by his attorney's "representation and failure to warn," as he is "in Mexico and away from [his] family and this conviction is the only hurdle for [his] entry to the United States."

Soto attached to the motion a photocopy of his (expired) permanent resident card, indicating he became a lawful permanent resident of the United States in February 1990 when he was 32 years old. He also attached a January 2008 probation report from this case, listing a history of arrests and misdemeanor convictions in California dating back to 1976 when he was 19 years old. In February 1998, he was convicted of possession of a firearm with a prior conviction, a felony (former § 12021, subd. (c)(1)). According to the probation report, Soto

stated that when he was arrested in October 2007 for the offense at issue here, he was unemployed and living with his wife of nine years and their minor children (who are now adults). His children from a prior marriage were already adults by this time.

Soto also attached to his motion the July 14, 2008 Notice to Appear from the U.S. Department of Homeland Security, which listed two offenses that rendered him subject to removal from the United States: the March 14, 2008 conviction for transportation of cocaine, and the February 1998 conviction for possession of a firearm with a prior conviction.

In the memorandum of points and authorities in support of the motion, Soto argued the attorney who negotiated his plea violated his constitutional rights to effective representation, and he suffered prejudice as a result. The memorandum raised three main points: (1) Soto had a "valid defense" to the charge and if his attorney had "provided [a] proper defense to this case," Soto "would have been found not guilty"; (2) Soto "specifically asked his attorney . . . if his plea would affect his immigration status and the attorney affirmatively represented that nothing would happen to him" because "his case was a *small case*"; and (3) his attorney should have negotiated "an alternative plea deal that would have avoided some of the worst immigration consequences." Soto did not present evidence indicating he had a valid defense to the charge. Nor did he present evidence (in his declaration or otherwise) indicating his attorney made any representation to him at all about the immigration consequences of his plea.

In an opposition to the motion, the district attorney argued Soto failed to demonstrate his attorney's performance was prejudicially deficient, and Soto presented no valid justification

for his delay in filing the motion (more than 6 years after section 1473.7 was enacted). In disputing Soto's claim that he had a defense to the charge, the district attorney pointed to police reports detailing the evidence that was seized pursuant to a search warrant served on Soto. Addressing Soto's claim that he did not understand the immigration consequences of his plea, the district attorney noted Soto "fail[ed] to include [the] plea transcript" with his motion and relied on nothing other than his own "self-serving statements." The district attorney asserted that defense counsel and the prosecutor did discuss immigration consequences, citing to a February 14, 2008, signed entry in the prosecutor's notes stating, "D 'will not accept formal probation.' Why would we want to deport a drug dealer[?]" The district attorney also attached minute orders from Soto's firearm possession case, showing that when he pleaded guilty to that offense in February 1998, he was advised: "If you are not a citizen, you are hereby advised that a conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Thus, in 1998, he was advised his conviction "may" have such immigration consequences; in 2008, he was advised his conviction "will" have those immigration consequences (and it did).

On June 28, 2023, at a hearing on the motion, Soto's counsel requested the matter be taken off calendar because he planned to file an amended motion. The court continued the matter.

C. Soto Files an Amended Motion, Stating He Is Abandoning the Ineffective Assistance of Counsel Claim

On November 28, 2023, Soto filed an amended motion, stating he "is not alleging ineffective assistance of counsel but [rather] deficient immigration advice." Thus, he no longer claimed he had a defense to the charge. He argued his attorney "could have gotten a plea deal" on an "unspecified controlled substance offense" rather than one that specified cocaine, so he would not have been "deportable as an aggravated felon." He asserted, "If he had plead[ed] to [an] unspecified controlled substance offense, he could use his permanent resident spouse, or United States Citizen [*sic*] children to get immigration relief." He indicated that his 2008 drug conviction is currently the only bar to his reentry to the United States because his 1998 firearm conviction does not qualify as an aggravated felony pursuant to case law decided years after he was deported. He also reiterated his assertion that he "specifically asked his attorney . . . if his plea would affect his immigration status and the attorney affirmatively represented that nothing would happen to him" because "his case was a *small case*." He did not submit a new declaration but relied on the one attached to the original motion, which, as described above, is silent regarding any representation made to Soto by his attorney about the immigration consequences of his plea.

D. After Hearing Oral Argument, the Court Denies the Motion

On February 15, 2024, the court held a hearing on the amended motion. At the outset of the hearing, Soto filed a

proposed order to amend the 2008 plea to reflect a charge of personal use of an unidentified controlled substance rather than transportation of cocaine. The court and the prosecutor pointed out that this request was "inconsistent" with discussions between the parties at prior hearings during which the prosecution had agreed to strike the word "cocaine" from the plea. The prosecution did not agree to change the offense from transportation to personal use. Defense counsel said he was not prepared to agree to only strike the word "cocaine" from the plea. He stated, "I need to talk to my client and I need to see if, based on my research, this is still going to benefit him. [¶] The thing is that, Your Honor, if we get rid of the 'controlled substance' designation instead of -- meaning that if 'cocaine' is not there, he's not deportable, but he may be inadmissible. So it will be detrimental for him to take this plea. That's why he doesn't want to take it." Defense counsel asked to withdraw the motion in the meantime, which the prosecutor opposed, arguing that would be forum shopping. The court denied the request to withdraw the motion and asked defense counsel to present his argument.

Defense counsel stated: "Your Honor . . . when I filed an amendment to my motion, I didn't allege ineffective assistance of counsel; I alleged that there was not a good advice [*sic*] that prejudiced my client, which is immigration -- that my client didn't have a meaningful understanding of the immigration consequences. [¶] Now, it is true that he was warned about it, but he didn't meaningfully understand. He became deportable because of the word 'cocaine.' And . . . if the counsel for my client negotiated a plea just like today which the People offered, that they would get rid of the word 'cocaine' -- these deals are made routinely, Your Honor, and my client didn't know the word

'cocaine' versus the word 'controlled substance' would affect his immigration status and he would be deported."

Reading from the transcript of the plea hearing, the court asked defense counsel to address the warning Soto received during the plea colloquy and explain "what part of '[your conviction in this case] will result in your deportation' is not clear?" Defense counsel indicated attorneys "would say, 'This is okay,' you know, 'Just please, it's best for you so you save time.' But it may save jail time, but it's against immigration in turn." The court replied: "But right now you're speculating as to what that attorney potentially might have told your client. That's not for me to speculate. You need proof of that, and you're saying yourself you're not calling it 'ineffective assistance of counsel,' but then you're coming up with all kinds of speculative versions of what could have happened. [¶] I'm not here to speculate as to that. I'm here to look at the record. I'm here to see if your client was advised. And when your client was advised on the record at the time of the plea, your client unconditionally indicated to the court he understood that he 'will' get deported, not he 'might'; he 'will.' And indeed he did get deported 16 years ago and he stayed silent until you came to this court 6 months ago."

After hearing argument from the prosecutor, the court denied the motion, finding Soto did not establish by a preponderance of the evidence that he did not understand the consequences of his plea or that there was prejudicial error. The court concluded the district attorney's exhibits "directly contradict" the statements in Soto's declaration.

DISCUSSION

Soto contends the trial court erred in denying his section 1473.7 motion to vacate his 2008 conviction. We disagree. As explained below, there is a fundamental disconnect between what the evidence shows and what Soto's current counsel speculates might have occurred in 2008.

A. Legal Principles and Standard of Review

Soto brought his motion under subdivision (a)(1) of section 1473.7, which provides that "[a] person who is no longer in criminal custody may file a motion to vacate a conviction or sentence" where "[t]he conviction or sentence is legally invalid due to 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 conviction or sentence. A finding of legal invalidity may, but need not, include a finding of ineffective assistance of counsel." Thus, "even if the motion is based upon errors by counsel, the moving party need not also establish a Sixth Amendment violation as by demonstrating that 'counsel's representation "fell below an objective standard of reasonableness" . . . "under prevailing professional norms," ' as stated in *Padilla* [*v. Kentucky* (2010)] 559 U.S. [356,] 366, 368-369, quoting *Strickland* [*v. Washington* (1984)] 466 U.S. [668,] 688, 694." (*People v. Camacho* (2019) 32 Cal.App.5th 998, 1008 (*Camacho*).) The moving party's "own subjective error qualifies for relief under the statute if the evidence shows he or she misunderstood the immigration consequences of a plea deal." (*People v. Alatorre* (2021) 70 Cal.App.5th 747, 769.)

A party seeking relief under section 1473.7 must satisfy a two-part test. "The defendant must first show that he did not meaningfully understand the immigration consequences of his plea. Next, the defendant must show that his misunderstanding constituted prejudicial error," meaning " 'a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences.' " (*People v. Espinoza* (2023) 14 Cal.5th 311, 319.)

"The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in [section 1473.7,] subdivision (a)." (§ 1473.7, subd. (e)(1).) To satisfy this burden, "A defendant seeking to set aside a plea must do more than simply claim he did not understand the immigration consequences of the plea. The claim must be corroborated by evidence beyond the defendant's self-serving statements." (*People v. Abdelsalam* (2022) 73 Cal.App.5th 654, 664 (*Abdelsalam*).) For example, in *Camacho*, *supra*, 32 Cal.App.5th at page 1009, a case relied upon by Soto, the "defendant's claims of error were supported by his former attorney's undisputed testimony that he told defendant only that the charge *could* subject him to deportation and that 'we're going to get it down to a misdemeanor and expunged early and maybe that will help'; that he misunderstood the potential immigration consequences and the effect of expungement or reductions of felonies in immigration cases; and that he did not explore possible alternatives to pleading to an aggravated felony."

On appeal, a section 1473.7 motion is subject to independent review. (*People v. Vivar* (2021) 11 Cal.5th 510, 524-528.) Under this standard, " 'an appellate court exercises its

independent judgment to determine whether the facts satisfy the rule of law.' " (*Id.* at p. 527.) "Where, as here, the facts derive entirely from written declarations and other documents," we accord no deference to the trial court's factual findings. (*Id.* at p. 528.) "[A]s a practical matter, '[t]he trial court and this court are in the same position in interpreting written declarations' when reviewing a cold record in a section 1473.7 proceeding." (*Ibid.*, quoting *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79.)

B. Analysis

The record is devoid of evidence satisfying the first part of the test: that Soto did not meaningfully understand the immigration consequences of his plea. Here it is undisputed that at the time Soto entered the no contest plea, the prosecutor told him: "You also need to understand the consequences of your plea. [¶] If you are not a citizen of the United States, your conviction in this case *will* result in your deportation, exclusion from the United States, and denial of naturalization." (Italics added.) The prosecutor asked Soto if he understood that, and Soto responded, "Yes." There is no evidence in the record indicating Soto failed to understand the prosecutor's advisement. He stated in his declaration that his attorney failed to warn him of the immigration consequences of his plea, but he did *not* state he misunderstood the prosecutor's explicit and clear warning about the certain immigration consequences of his plea.[2]

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[2] Prior to 2010, when the United States Supreme Court decided *Padilla v. Kentucky*, *supra*, 559 U.S. 356, a criminal defense attorney did not have an affirmative duty to advise a defendant about the immigration consequences of a guilty or no contest plea absent an inquiry from the defendant. (*People v.*

Throughout the briefing below and on appeal, Soto's current counsel asserts Soto asked his plea attorney if the plea would affect his immigration status and the attorney told him no. There is no evidence in the record supporting these statements. Soto, himself, did not make these statements. He did not state in his declaration that his plea attorney made any representations about immigration consequences of the plea. Rather, he indicated his attorney said nothing on the topic at all. Counsel's speculation about what could have occurred in 2008 between Soto and his former attorney is not evidence.

Similarly, statements in the briefing that Soto's plea attorney should have and could have negotiated an immigration-neutral plea deal are not evidence. There is nothing in the record indicating the attorney did *not* attempt to do that. Soto's declaration does not speak to that. There is no declaration from the plea attorney. Nor is there "an expert declaration opining that alternative, nondeportable dispositions would have been available and acceptable to the prosecutor" in 2008. (*Abdelsalam*, *supra*, 73 Cal.App.5th at p. 665.)

We do not hold that the warning the prosecutor gave in this case would be sufficient to defeat a section 1473.7 motion in every (pre-2010) case where the moving party declares plea counsel did not provide immigration advice. For example, credible evidence that the moving party did not understand the prosecutor's

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Mejia (2019) 36 Cal.App.5th 859, 867.) Because Soto is not asserting ineffective assistance of counsel, we need not address the failure to warn issue further. What matters for our analysis is whether Soto proved he did not meaningfully understand the immigration consequences of his plea. As discussed herein, we conclude he did not satisfy his burden on this issue.

warning could be sufficient for a successful motion. In this case, however, Soto stated in court at the time of his plea that he understood the prosecutor's warning. He did *not* state in his declaration in support of the motion that he failed to understand the prosecutor's warning, and there is no other evidence in the record indicating he failed to understand the prosecutor's warning.

Because Soto has not demonstrated by a preponderance of the evidence that he misunderstood the immigration consequences of his plea, there was no error, and we need not move on to the second part of the test and evaluate prejudice.

DISPOSITION

The February 15, 2024 order denying Soto's section 1473.7 motion is affirmed.

NOT TO BE PUBLISHED

M. KIM, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.