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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONS JEGOROVS,

Defendant and Appellant.

A140773

(Alameda County
Super. Ct. No. C160704)

Defendant Antons Jegorovs challenges the denial of his motion to vacate his 2005 conviction under Penal Code¹ section 1016.5. Defendant claims he was not properly advised of the immigration consequences of his plea. We affirm.

I. BACKGROUND

A. Charge and Conviction

Defendant was born in Uzbekistan and grew up in Latvia. In 2001, defendant entered the United States. On June 29, 2005, defendant was charged by information with one count of battery with serious bodily injury (§ 243, subd. (d)). The information was amended on October 14, 2005, to add one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). That same day, defendant pleaded no contest to the assault charge.

At the October 14, 2005 plea hearing, the trial court and the prosecutor reviewed the constitutional rights defendant was waiving. The prosecutor read those rights aloud

¹ All further undesignated statutory references are to the Penal Code.

and asked defendant whether he understood them. Defendant affirmed that he did. The prosecutor further established that defendant had not asked questions of his defense counsel, and that defendant understood the consequences of his plea. Defendant further confirmed that he had written his initials on the plea advisement form, next to each right to be waived. In particular, he initialed the advisement relating to his immigration status: “If I am not a citizen of the United States, I understand that the law concerning the effect of my conviction of a criminal offense of any kind on my legal status as a [noncitizen] will change from time to time. I hereby expressly assume that my plea of GUILTY/NO CONTEST in this case will, now or later, result in my deportation, exclusion from admission or readmission to the United States, and denial of naturalization and citizenship.” The superior court found the defendant had knowingly, intelligently, and voluntarily waived his constitutional rights with a full understanding of the consequences of his plea.

The trial court dismissed the battery count and sentenced defendant to three years felony probation on the condition that he serve 364 days in the county jail.

In 2009, defendant married an American citizen. Defendant successfully completed his probation on December 2, 2010. Shortly thereafter, he received a notice of removal proceedings in federal immigration court on December 17, 2010.

On September 21, 2011, defendant moved to reduce his felony conviction to a misdemeanor pursuant to section 17. According to the attorney declaration filed in support, defendant was seeking the reduction as a defense to the deportation proceedings filed against him. In his accompanying declaration, defendant averred that he had led a law-abiding life and had not committed any criminal offenses since 2005. On October 14, 2011, the court granted defendant’s motion and reduced his felony conviction to a misdemeanor.

B. Motion to Vacate Conviction

On December 14, 2012, defendant filed a motion pursuant to section 1016.5 to vacate his conviction. According to the motion, “[t]he Russian interpreter sped through the form, and . . . defendant did not have the opportunity to fully understand and

comprehend the multiple aspects of the plea form. Although the plea form contained a Penal Code 1016.5 admonition of the possible immigration consequences of the defendant's plea, this admonition was never fully explained to the defendant, and he was never told that he could have an opportunity to consider the immigration consequences of his plea; and if he needed additional time to determine the possible immigration consequences of his plea, the court would be required, pursuant to Penal Code section 1016.5(d), to give him a reasonable extension of time to review the immigration consequences of his plea before accepting the plea."

Defendant next claimed that his defense counsel "was unaware of the potential immigration consequences of the 245(a) plea, and she informed the defendant that as long as his sentence was less than 365 days, he would not be subject to deportation. . . . This advice was wrong and as a result, the defendant is now facing deportation despite the fact that his sentence was 364 days." Defendant further asserted that the plea advisement form was discriminatory because it was not translated into Russian, that his translator was not certified pursuant to Government Code section 68561, and that the trial court failed to personally admonish him "of the immigration consequences of his plea and insure that he understood these consequences."

By written order, the court rejected defendant's claims that the interpreter had failed to translate or convey the immigration consequence advisement. Specifically, the court noted that "the claim is undercut by the record. [Defendant] did not ask any questions about his plea form or request more time to consider his immigration consequences despite the court giving him the opportunity to do both. Here, the deputy District Attorney questioned both [defendant] and counsel about the plea form. Specifically, the deputy District Attorney asked [defendant] if he placed his initials and signature to indicate that he read all of the documents, if any questions about the document had been answered by his attorney, and if he understood what was going to happen with respect to the plea and consequences of that plea. [Defendant] replied 'yes.' Instead of just accepting that the waiver was free and voluntary at this point, as requested by the deputy District Attorney, the court itself then asked [defendant] if he had any

questions regarding the constitutional rights he was giving up and whether he had any questions regarding the consequences of entering a plea. Instead of asking for more time or asking questions, [defendant] told the court that he did not have questions. Counsel also concurred by signing the ‘attorney’s statement’ on the form stating that he had discussed the consequences of the plea with [defendant], including immigration consequences if applicable. Thus, the court did not violate section 1016.5 because [defendant] was given an opportunity to ask questions and therefore obtain more time, but did not do so.” The trial court concluded that defendant had read and understood the section 1016.5 advisement.

The trial court further found that defendant’s complaints about the Russian interpreter had been waived, and that defendant had no legal entitlement to a certified Russian interpreter, only a competent one. The court then proceeded to reject defendant’s claims on the merits: “[H]ere the record shows that [defendant] was given the section 1016.5 immigration advisement in his plea form through the interpreter and that he understood it. First, the record shows that the registered interpreter had filed an oath with the court. (See Evid. Code, section 751.) Second, the record indicates that the registered interpreter had previously interpreted for [defendant], including the preliminary hearing, without any complaints. Finally, there is no claim that the registered interpreter was unqualified. There is nothing on the record to indicate that there were any problems with the translation so that [defendant] did not understand it. Any questions regarding the meaning of advisement [*sic*] were not for the registered interpreter to answer, but for [defendant’s] attorney. [Defendant] indicated on the record to the court that he did not have any questions regarding the consequences of the plea.”

The trial court denied the motion and the instant appeal followed.

II. DISCUSSION

On appeal, defendant contends that his defense attorney gave him erroneous legal advice regarding the immigration consequences of entering a no contest plea to the assault charge. And therefore, his plea was not knowing and voluntary. He further

claims that the Russian interpreter was non-certified and rendered inadequate translation assistance.

A. *Applicable Law*

“A noncitizen who has been convicted of a felony based on a plea of guilty or nolo contendere, but who claims that he was not advised on the immigration consequences of his or her plea, has three possible remedies. (1) He or she can appeal from the judgment, pursuant to section 1237, if the record reflects the facts on which the claim is based. (2) He or she can bring a statutory motion to vacate the judgment, under section 1016.5, which requires the trial court to advise the pleading noncitizen felony defendant of the potential immigration consequences of his plea, and requires that the plea be set aside if it fails to do so. (3) He or she may petition for a writ of habeas corpus raising the issue of ineffective assistance of counsel, under theories approved in *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, and *In re Resendiz* (2001) 25 Cal.4th 230. [Citation.] These are the only potentially available remedies. A writ of error *coram nobis*, based on a claim of ineffective assistance of counsel for failure to advise the defendant of the immigration consequences of his or her plea, cannot be used to challenge a conviction or withdraw the plea.” (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 68, fn. omitted.)

As we shall explain, all of these potential remedies are foreclosed to defendant.

B. *Defendant Not Entitled to Habeas Corpus Relief*

As defendant concedes, he has fully served his sentence arising from the 2005 assault conviction, and he is in neither actual nor constructive California custody as a result of that conviction. He, therefore, is ineligible as a matter of law for habeas corpus relief. (*People v. Aguilar, supra*, 227 Cal.App.4th at p. 68.)

C. *Defendant is Not Entitled to Corum Nobis Relief*

In *People v. Aguilar, supra*, 227 Cal.App.4th 60, the Second District Court of Appeal recently reviewed a case involving a criminal defendant in much the same position as defendant herein. There, as here, the defendant moved to set aside a conviction that threatened him with deportation, based in part on a claim that his trial counsel had rendered ineffective assistance of counsel by failing to adequately advise him

of the immigration consequences of his plea and conviction. (*Id.* at p. 69.) In concluding that the defendant was not entitled to *coram nobis* relief, the appellate court discussed and applied *People v. Kim* (2009) 45 Cal.4th 1078.

In *People v. Aguilar, supra*, 227 Cal.App.4th at page 69 citing *People v. Kim, supra*, 45 Cal.4th 1063, the California Supreme court explained that “the modern writ of *coram nobis* is a nonstatutory remedy, with three requirements: The petitioner must show: (1) that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial, and which if presented would have prevented the rendition of the judgment; (2) that the newly discovered evidence does not go to the merits of issues tried (because issues of fact, once adjudicated, cannot be reopened except on motion for new trial); and (3) that the facts on which he relies were not known to him and could not reasonably have been discovered substantially before his motion for the writ. (*Id.* at p. 1093, citing *People v. Shipman* (1965) 62 Cal.2d 226, 230, and *People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352.) The court reaffirmed the long-standing rules that the *coram nobis* remedy ‘ “does not lie to enable the court to correct errors of law,” ’ and that it is not available where the defendant failed to use other available remedies to challenge the conviction, such as an appeal or a motion for a new trial. ‘ “The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But . . . where other and adequate remedies exist the writ is not available.” ’ (*People v. Kim, supra*, 45 Cal.4th at pp. 1093, 1094.)” (*People v. Aguilar, supra*, 227 Cal. App.4th at p. 69.)

“Most notably for our purposes, in *People v. Kim* the Supreme Court held that the supposed new facts on which the defendant based his motion for *coram nobis* relief cannot—as a matter of law—satisfy the requirement for facts that, if presented at trial, would have prevented the rendition of the judgment. The new facts alleged in that case—that the defendant’s counsel had not fully advised him of the consequences of his plea—involve only ‘the legal effect of his guilty plea and thus are not grounds for relief on *coram nobis*.’ ‘New facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different

strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment.’ (*People v. Kim, supra*, 45 Cal.4th at p. 1103.)” (*People v. Aguilar, supra*, 227 Cal.App.4th at pp. 69-70, fn. omitted.)

Here, the facts on which defendant bases his claim are equally insufficient to satisfy the minimum legal requirements for a writ of error. Defendant alleges that his counsel had failed to adequately advise him concerning the immigration consequences of his plea, and that he would not have entered that plea if he had been aware of its potential consequences. Just as in *People v. Kim* and *People v. Aguilar* these alleged new facts (assuming defendant’s ability to establish their truth) involve only “the legal effect of his guilty plea”; if they had been known at the time of his plea, they would merely have affected his willingness to enter the plea, “ ‘or would have encouraged or convinced him . . . to make different strategic choices or seek a different disposition’ ”; they therefore “ ‘are not facts that would have prevented rendition of the judgment’ ” and are not grounds for *coram nobis* relief. (*People v. Aguilar, supra*, 227 Cal.App.4th at p. 70; *People v. Kim, supra*, 45 Cal.4th at pp. 1102-1103.)

D. The Trial Court Did Not Err in Denying the Section 1016.5 Motion

A defendant’s right to an advisement about immigration consequences is statutory, not constitutional. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 194 (*Zamudio*)). To prevail on a motion pursuant to section 1016.5, a defendant must establish: (1) at the time of the plea, the trial court failed to advise the defendant “of the immigration consequences” of the plea “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) properly advised, the defendant would not have entered the plea. (*People v. Totari* (2002) 28 Cal.4th 876, 884; *Zamudio, supra*, 23 Cal.4th at p. 192.) The underlying purpose of section 1016.5 is to ensure the defendant has actual knowledge of the possible adverse immigration consequences of a guilty or no contest plea and has had an opportunity to make an intelligent choice to plead guilty or no contest. (*Zamudio, supra*, 23 Cal.4th at pp. 193-194; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173.) We review the denial of a

motion to vacate under section 1016.5 for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.) As we shall explain, we conclude the trial court acted well within its discretion in denying the section 1016.5 motion.

Once again, *People v. Aguilar, supra*, 227 Cal.App.4th 60 is particularly instructive. There, as here, the defendant's motion claimed primarily that his own counsel failed to advise him of the immigration consequences of his plea, rather than that the trial court failed to do so. (*Id.* at p. 70.) In holding that Aguilar was not entitled to relief, the court explained that "[s]ection 1016.5 addresses only the duty of trial courts to advise the defendant of the immigration consequences of the plea, and it empowers the court to vacate a conviction and set aside a plea only for the *court's* failure to fulfill that duty. It does not address any duty that defense counsel may have to provide such advice, nor does it empower the court to vacate a conviction or set aside a plea for counsel's failure to fulfill his or her duty in that regard. For that reason, section 1016.5 does not provide the trial court with jurisdiction to address a claim that a defendant was deprived of the effective assistance of counsel by counsel's failure to fully advise him or her of the immigration consequences of a guilty plea. (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1288.) 'We find no basis to conclude that the statute grants the trial court broad authority to vacate a conviction based on any error or deficiency of counsel related to advisement of adverse immigration consequences.' (*Id.* at p. 1290.)" (*People v. Aguilar, supra*, 227 Cal.App.4th at p. 71.)

In the instant appeal, defendant maintains that the trial court "should have specifically asked . . . whether or not he was aware" that he would be deported if he pled no contest to the assault charge. There is no language, however, in section 1016.5, "which states the advisements must be verbal." (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521.) Rather, the only requirement is that the advisements "must appear on the record and be given by the court." (*Id.* at p. 521.) "So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the

consequences with counsel, the legislative purpose of section 1016.5 is met.” (*Id.* at p. 522.)

All of the requirements set forth in *People v. Ramirez* were satisfied here. The advisements were given in the waiver form, and defendant acknowledged them by initialing them, signing the form, and telling the judge that he understood the waiver form. Defendant takes issue with the language in the waiver form. He argues the language in the waiver form differs “diametrically” from the statutory language, in that the former refers to mandatory deportation, whereas the later references only that a guilty/no contest plea *may* subject the defendant to deportation. According to defendant, this divergence in language warranted a verbal advisement from the court. Not so. “Both now and at the time of its enactment, section 1016.5, subdivision (a) has provided that prior to accepting a guilty or nolo contendere plea, a court must advise the defendant as follows: ‘If you are not a citizen, you are hereby advised that 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.’ The advisement need not be in the statutory language, and substantial compliance is all that is required, ‘as long as the defendant is specifically advised of all three separate immigration consequences of his plea.’ ” (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244.) Here, the advisements in the waiver form satisfied section 1016.5. Moreover, defendant explicitly acknowledged in the waiver form his attorney had “explained . . . the consequences” of the plea. The trial court expressly found, when finding a factual basis for the plea, that defendant “has a full understanding of the consequences of entering a plea” As a consequence, there is no showing that the trial court abused its discretion.

To the extent that defendant suggests the court should have granted the motion based on inadequate assistance of the Russian interpreter, we reject it. “The Legislature has set up a comprehensive plan to provide for certification of court interpreters. (Gov. Code, § 68560 et seq.) Only those interpreters who are properly certified may be utilized unless good cause is found by the judge for appointment of an interpreter not on the

recommended list. (Gov. Code, § 68562.) There is no requirement, however, that a certified interpreter be assigned as long as there is good cause shown for appointment of an uncertified interpreter. (Gov. Code, § 68562.)” (*People v. Estrada* (1986) 176 Cal.App.3d 410, 415.) The record reflects that at the time of defendant’s 2005 plea, there was no requirement that interpreters be certified in the Russian language. In any event, “[t]here is no right . . . to a certified interpreter. There is only a right to a competent interpreter. . . . Certification is simply foundational to the interpreter’s competence. He or she should not be found incompetent just because he or she is not on the certification list. Should defendant disagree with the decision of the court regarding use of a noncertified interpreter, a hearing could then be held to determine the competence of the interpreter or if any rights defendant might have would be prejudiced by the use of a noncertified interpreter.” (*People v. Estrada, supra*, 176 Cal.App.3d at pp. 415-416.)

Here, the qualifications of the interpreter were never disputed prior to the motion to vacate the conviction. Nevertheless, defendant now challenges the competency of the interpreter. According to defendant, “it is inconceivable” that he would have initialed the box indicating that he *would* be deported “if he truly understood the meaning of the language in that box.” This argument, however, pertains to the competency of defendant’s trial counsel. Any questions defendant had about the meaning of the waiver he signed were for his attorney, not his interpreter.

Defendant also claims that the incompetency of the interpreter is demonstrated by the fact that he initialed a box relating to an offense committed while driving under the influence, when he had not been charged with any such offenses. A so-called *Watson*² warning is a warning on the dangers of driving under the influence, it is given to a defendant convicted of a drunken driving offense pursuant to California Vehicle Code Section 23593. If a defendant later causes a death in a subsequent drunken driving incident, a prior *Watson* warning is considered sufficient to prove the defendant’s actual knowledge that his conduct posed a risk to human life. Although this warning certainly is

² *People v. Watson* (1981) 30 Cal.3d 290.

not applicable in the instant case, it too raises questions about trial counsel's competency, not the adequacy of the interpreter.

E. Defendant is Not Entitled to Pursue a Nonstatutory Motion for Ineffective Assistance of Counsel

Finally, we address defendant's claim that notwithstanding a proper section 1016.5 advisement, his plea is still subject to collateral attack based on ineffective assistance of counsel. To the extent this claim can be construed as raising a nonstatutory motion for relief under *Padilla v. Kentucky* (2010) 559 U.S. 356, it too fails.

In *People v. Aguilar*, the court rejected a similar argument. (*People v. Aguilar, supra*, 227 Cal.App.4th at pp. 73-74.) There, the court noted a "nonstatutory" motion is the legal equivalent of a petition for a writ of error *coram nobis*, and that petition is unavailable pursuant to *People v. Kim* (*People v. Aguilar, supra*, 227 Cal.App.4th at pp. 73-74.) The court also cited *People v. Shokur* (2012) 205 Cal.App.4th 1398, in which the court rejected the defendant's argument that the trial court has "inherent authority" to hear a nonstatutory motion to vacate a plea based on the failure to advise of immigration consequences when all other relief is foreclosed. (*Id.* at p. 1404.) "The cases relied upon do not, however, compel the conclusion that the trial court retains jurisdiction to vacate its long-since final judgment when the state provides the means for challenging the judgment and the time limits in which the various remedies must be exercised have expired. In other words, a nonstatutory motion is not an all-encompassing safety net that renders all other remedies redundant and their respective time restrictions meaningless." (*Ibid.*; see *People v. Aguilar, supra*, 227 Cal.App.4th at p. 74.)

Here, defendant is similarly without a remedy. The time to move to withdraw his plea or appeal his conviction has long since expired. (§§ 1018, 1237; Cal. Rules of Court, rule 8.308(a).) A writ of habeas corpus is unavailable because he is no longer in actual or constructive state custody. A writ of error *coram nobis* is foreclosed because, as in *People v. Aguilar* and *People v. Kim*, his motion involves "only 'the legal effect of his guilty plea and thus [is] not grounds for relief on coram nobis.'" (*People v. Aguilar, supra*, 227 Cal.App.4th at p. 69.) He may not bring a section 1016.5 motion because the

record establishes that the trial court properly advised defendant of the immigration consequences of his plea.

Finally, like *People v. Aguilar* and *People v. Shokur*, we are unwilling to find the trial court has “inherent authority” to entertain defendant’s motion because “a nonstatutory motion is not an all-encompassing safety net that renders all other remedies redundant and their respective time restrictions meaningless.” (*People v. Shokur, supra*, 205 Cal.App.4th at p. 1404; see *People v. Aguilar, supra*, 227 Cal.App.4th at p. 74.)

We realize this may be a harsh result, but as our high court has noted, “ ‘The maxim, “for every wrong there is a remedy” [citation] is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even though such failure accrued without fault or negligence on his part.’ ” (*People v. Kim, supra*, 45 Cal.4th at p. 1099; see *People v. Aguilar, supra*, 227 Cal.App.4th at p. 75 [quoting same]; *People v. Shokur, supra*, 205 Cal.App.4th at pp. 1406-1407 [same].)

III.DISPOSITION

The order denying defendant’s motion to vacate his conviction is affirmed.

REARDON, ACTING P. J.

We concur:

RIVERA, J.

STREETER, J.