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Opinion following remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK RIVAS,

Defendant and Appellant.

B229097

(Los Angeles County  
Super. Ct. No. A042525)

APPEAL from an order of the Superior Court of Los Angeles County, Arthur Jean, Judge. Reversed and remanded.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Julie A. Harris, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Frank Rivas appeals from the denial of his motion to vacate his 1989 conviction for possession of cocaine base for purpose of sale (Health & Saf. Code, § 11351.5), which followed his plea of guilty. Appellant contends he was not adequately advised of the immigration consequences of his plea as required by Penal Code section 1016.5.<sup>1</sup> We reverse.

### **PROCEDURAL HISTORY**

This appeal is before us for a second time. Previously, we dismissed it for failure to obtain a certificate of probable cause. (*People v. Rivas* (Sept. 12, 2011, B229097) [nonpub. opn.].) While appellant's petition for review of his direct appeal was pending in the California Supreme Court, he petitioned for a writ of mandate. Upon that petition, we issued an Order and Alternative Writ of Mandate directing the superior court to consider issuing a certificate of probable cause. (*People v. Rivas* (Oct. 26, 2011, B235974).) The trial court issued the certificate and our Supreme Court subsequently transferred the direct appeal back to this court with directions to vacate our dismissal order and to consider whether to reinstate the appeal. (*People v. Rivas*, review granted Dec. 21, 2011, S197364.) We reinstated the appeal and now address its merits.

### **FACTS**

Appellant was not an American citizen in March 1989, when he pled guilty to violation of Health and Safety Code section 11351.5 (possession of cocaine base for sale), an aggravated felony under immigration law. A reporter's transcript of the proceeding is not available because the reporter's notes were destroyed pursuant to Government Code section 69955 and, despite requests, the clerk's transcript was never before the trial court. Accordingly, we must presume that appellant was not advised in accordance with section section 1016.5. (§ 1016.5, subd. (b) ["Absent a record that the court provided the advisement required by this section, the defendant shall be presumed

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<sup>1</sup> All further undesignated statutory references are to the Penal Code, unless otherwise stated.

not to have received the advisement.”].) There is no dispute that conviction of an aggravated felony makes appellant subject to *mandatory* exclusion from the United States under federal law.

On September 13, 2010, appellant filed a section 1016.5 motion to vacate his conviction on the grounds that he had not been advised of the immigration consequences of his plea. In his declaration, appellant states that he first learned of those consequences when he contacted an immigration attorney about an application for lawful permanent residency. If he had known at the time he entered his plea that he was bargaining away his permanent resident status, appellant says he would not have agreed to plead guilty to an aggravated felony; he would have tried to negotiate a plea to some other offense or taken his chances with a jury trial. Appellant explains that he has lived in the United States for 34 years, since he was five years old. Since 2002, he has worked as a roofer. He has two sons – 17 years old and 18 years old – for whom he provides financial support; if he is permanently excluded from the United States, his family will be unable to meet the household expenses. Appellant also identifies various family members living in the United States as legal residents or lawful permanent residents. He has no family or friends in Mexico. The declaration concludes, “Given the devastation this conviction can potentially visit upon me and my family, I ask the court to permit my withdrawal of my guilty plea and vacate the judgment.”

At the November 5, 2010 hearing on the motion, the trial court stated, “I am going to make a finding that there was no prejudice to you whether you heard those warnings or not. In my view, having served in my capacity as a judge in these criminal courtrooms, men like you who are addicted to drugs took whatever chances you could to get out of jail and you entered into these pleas. I think you would have entered the plea whether you heard that warning or not when you were in your drug user state. [¶] So I am going to deny your motion. You haven’t convinced me by a preponderance of the evidence but for the warnings you would not have entered these pleas or this plea. So your motion is denied.”

## DISCUSSION

### A. *Denial of the Section 1016.5 Motion Was an Abuse of Discretion*

In relevant part, section 1016.5 reads: “If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have [specified immigration consequences for the defendant], the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.”<sup>2</sup>

Appellant contends the trial court abused its discretion when it denied his section 1016.5 motion upon a finding of no prejudice based solely on facts outside the record: the trial judge’s past experience with criminal defendants addicted to drugs. Respondent counters that appellant failed to establish prejudice and further contends that denial should be affirmed because appellant did not exercise due diligence in bringing the motion 20 years after he entered his plea. For reasons we shall explain, we remand for a new hearing at which the trial court is directed to decide the factual questions of prejudice and diligence based on matters in the record.

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<sup>2</sup> Section 1016.5 reads: “(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] 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. [¶] (b) . . . If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.”

## 1. Standard of Review

We begin with the standard of review, which is abuse of discretion. (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244 (*Castro-Vasquez*)). “When applying the deferential abuse of discretion standard, ‘the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.’ [Citations.]” (*In re C.B.* (2010) 190 Cal.App.4th 102, 123; see, e.g., *People v. Bennett* (2009) 45 Cal.4th 577, 621 [trial court’s determination whether to excuse juror is reviewed for abuse of discretion and upheld if supported by substantial evidence].)

An “ ‘action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an abuse of discretion.’ [Citations.]” (*People v. Parmar* (2001) 86 Cal.App.4th 781, 793.) Thus, it is an abuse of discretion to base a finding of lack of prejudice on information outside the record. (See *In re Calhoun* (1976) 17 Cal.3d 75, 84 [due process considerations prevent a court from receiving information adverse to the defendant without affording the defendant an opportunity to respond].) But a mere “gratuitous statement” by the trial judge does not transgress the constitutional limitations on the court’s discretion. (*People v. Vatelli* (1971) 15 Cal.App.3d 54, 65 (*Vatelli*); see also *People v. Lopez* (1957) 151 Cal.App.2d 121, 123 (*Lopez*).)

## 2. Prejudice

“ ‘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.]’ [Citations.]” (*Castro-Vasquez, supra*, 148 Cal.App.4th at p. 1244, citing *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 199-200 (*Zamudio*).)

Here, only prejudice, the third of the three elements, is at issue. Whether prejudice has been shown is a factual question. (*Zamudio, supra*, 23 Cal.4th at p. 210.) “To establish prejudice, the defendant must show that it was ‘ “ ‘reasonably probable’ ” ’ he ‘ “would not have pleaded guilty if properly advised.” [Citations.]’ [Citation.]” (*Castro-Vasquez, supra*, 148 Cal.App.4th at p. 1244.) It is not necessary to demonstrate a likelihood that the defendant would have obtained a more favorable result at trial (*People v. Akhile* (2008) 167 Cal.App.4th 558, 565), although the strength of the prosecution’s case is a factor that may be considered. Other factors that may be considered are whether the defendant knew of the immigration consequences of his plea despite the inadequate advisement (*People v. Totari* (2002) 28 Cal.4th 876, 884 (*Totari I*)); whether the defendant had children or other family members legally residing in the United States; whether he had a home here; and whether he was employed (*Zamudio, supra*, at pp. 206-207). These factors are relevant because “a deported alien who cannot return ‘loses his job, his friends, his home, and maybe even his children, who must choose between their [parent] and their native country.’ [Citation.]” (*Id.* at p. 209.) For this reason, “a noncitizen defendant with family residing legally in the United States may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges.” (*In re Resendiz* (2001) 25 Cal.4th 230, 253, abrogated on another ground by *Padilla v. Kentucky* (2010) \_\_\_ U.S. \_\_\_ [130 S.Ct. 1473].)

The record does not reflect the trial court’s consideration of any of the relevant factors articulated by the courts in *Totari I* and *Zamudio*. Instead, the trial judge’s statement reveals that he based his finding of no prejudice largely, if not exclusively, on his personal experience that “people addicted to drugs” enter pleas without considering the consequences.<sup>3</sup> Because the trial judge’s personal experience was a matter outside the record, it was an abuse of discretion to use it as the basis of the court’s determination that appellant had not shown prejudice. This case is distinguishable from *Lopez* and

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<sup>3</sup> There was no evidence that defendant was addicted to drugs. His plea was for possession of cocaine base for purposes of sale.

*Vatelli* because the trial court’s comments in this case were not merely an introduction to a more detailed explanation for the reasons it denied the motion, nor were they merely gratuitous.<sup>4</sup>

Because the factual question of prejudice is appropriately decided by the trial court in the first instance (*Zamudio, supra*, 23 Cal.4th at p. 210), the proper remedy is to remand to the trial court for determination of whether appellant has shown prejudice based solely on matters in the record.

### 3. Diligence

Respondent argues that appellant’s statement that he did not discover the inaccuracy of the advisements under section 1016.5 until he consulted an immigration attorney was insufficient because appellant does not state the date upon which he consulted the immigration attorney, only that the immigration attorney referred him to a criminal defense attorney whom appellant retained in August 2010.

Because the People may be substantially prejudiced by having to bring a case to trial after a long delay, a defendant seeking to withdraw his plea for misadvisement under section 1016.5 has the burden to prove that he or she used reasonable diligence. (*People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207 (*Totari II*)). Like prejudice, whether the defendant has shown the requisite diligence in bringing the motion is a factual question. (*Id.* at p. 1208.) But absent evidence that the defendant had reason to question

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<sup>4</sup> In *People v. Lichens* (1963) 59 Cal.2d 587, 589, the court held that the trial judge’s “single allusion to matters of knowledge outside the record concerning defendant’s pattern of conduct was merely a brief introduction to his clear statement that his order to deny probation was based on weighing . . . matters in the record.” In *Vatelli, supra*, 15 Cal.App.3d 54, the trial judge commented at the sentencing hearing that if a man has been convicted of 13 felonies “it could be assumed that he was guilty of ‘13 burglaries (sic),’ since it is the normal experience that ‘You don’t get caught every time.’ ” (*Vatelli*, at p. 64.) The appellate court characterized this as “a gratuitous remark which should have been left unsaid.” (*Ibid.*) But it affirmed the trial court’s sentencing choice, finding the statement to be “merely an appraisal of defendant’s criminal record.” (*Id.* at p. 65.)

the accuracy of the immigration advisements, it would be unfair to hold that the defendant should have objected to them sooner. (*Id.* at pp. 1206-1207.)

*Totari II, supra*, 111 Cal.App.4th 1202, is instructive. In that case, the defendant was in the United States on a student visa when he pleaded guilty to narcotics-related offenses in 1985; he was not advised of the immigration consequences of his plea. After he entered his plea but before he was sentenced, the defendant learned that he was the subject of an immigration hold. INS documents which were introduced in the appellate court (but not the trial court) established that the basis of the 1986 deportation proceedings that followed, and which resulted in the deportation warrant, was not the convictions, but the fact that the defendant had overstayed his student visa. In 1987, following successful completion of his probation on the narcotics convictions, those convictions were expunged, which the defendant believed, eliminated any adverse immigration consequences of his plea. The defendant maintained a “spotless criminal record” for the next several years. But in 1998, the 1986 deportation warrant was executed and defendant was deported. He moved to vacate his conviction under section 1016.5. The trial court denied the motion, finding the defendant had not exercised due diligence in bringing it. The appellate court reversed and remanded for a new hearing. (*Totari II*, at pp. 1203-1205.) It reasoned that the INS records, which had not been introduced in the trial court, were highly relevant inasmuch as they undermined the only rational basis for finding no due diligence: that the 1986 deportation proceedings put the defendant on notice of the immigration consequences of his plea. (*Id.* at p. 1209.) The court concluded that the parties were not precluded from offering additional evidence on the diligence issue. (*Ibid.*)

Here, the record is ambiguous on the issue of diligence. Although appellant does not state when the immigration attorney advised him of the immigration consequences of his plea, it is reasonable to infer that the advisement occurred shortly before appellant contacted the criminal defense attorney. It is also plausible that the failure to state a date was intended to obfuscate an unreasonable delay. Because the trial court made no finding on the diligence issue, which is a factual question appropriately decided by the

trial court in the first instance, it should do so upon remand. (Cf. *Zamudio, supra*, 23 Cal.4th at p. 210.)

Our decision does not decide the merits of appellant's motion to vacate, nor does it foreclose the parties from introducing additional evidence in conjunction with a new hearing on the motion, including, for example, the clerk's transcript of the underlying proceedings.

### **DISPOSITION**

The trial court's order denying the motion to vacate is reversed. On remand, the trial court shall hold a new hearing on the motion.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.