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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN SMITH,

Defendant and Appellant.

2d Crim. No. B240125
(Super. Ct. No. NA002335-02)
(Los Angeles County)

Stephen Smith appeals an order denying his motion to vacate his 1990 conviction for possession of marijuana for sale, a felony. (Health & Saf. Code, § 11359.) We affirm.

We conclude, among other things, that: 1) substantial evidence supports the trial court's finding that Smith was advised of the immigration consequences of his plea, 2) Smith failed to show his counsel provided ineffective assistance, and 3) the court did not err by not holding an evidentiary hearing. We affirm.

FACTS

In 1990, the district attorney filed an information charging Smith with possession of marijuana for sale, a felony. (Health & Saf. Code, § 11359.) Pursuant to a negotiated plea agreement, Smith pled guilty and was placed on probation for three years on condition that he serve 180 days in county jail.

In 2011, Smith filed a "non-statutory motion to vacate" that conviction. In his declaration, Smith said, "I pled guilty in ignorance of immigration consequences." He said, "My defense attorney did not ask me my immigration status"; "Nor did I tell the attorney that I'm not a U.S. citizen because I didn't realize that the criminal conviction would prevent me from having permanent legal status." He said, "Prior to pleading guilty, there was no discussion about immigration consequences flowing directly from my plea." He claimed he "pled guilty in complete ignorance" of the consequences.

In 2011, an immigration attorney told Smith that "as a result of the conviction," he "will likely be deported."

At the hearing on the motion, Smith did not testify and he called no witnesses. His counsel requested the trial court to "submit" the matter on Smith's declaration.

The trial court denied the motion to vacate. It found Smith's "version" is "contrary to what is set forth in the court record" and that he received advisements on immigration consequences. It said even "assuming errors" by his counsel, Smith did not show "a reasonable probability" of a different result.

DISCUSSION

Substantial Evidence Regarding Immigration Advisements

"[W]e must view the evidence in the light most favorable" to the judgment and we "must presume in support of the judgment the existence of every fact the trier [of fact] could reasonably deduce from the evidence." (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

California law requires that all defendants who enter pleas must receive the following immigration consequences advisement: "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." (Pen. Code, § 1016.5, subd. (a).) "[S]ubstantial, not literal, compliance with section 1016.5 is sufficient." (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174.) The immigration advisement is sufficient if it warns "the defendant expressly of each of the three distinct possible immigration consequences of his conviction[]" (*Id.* at p. 173.)

In his declaration, Smith said he pled guilty "in complete ignorance" of the immigration consequences of his plea.

We granted the People's motion to augment the record to include Smith's 1990 negotiated plea agreement. In that document, Smith stated, "I understand that if I am not a citizen of the United States, the conviction for the offense 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." (Italics added.) This immigration advisement was sufficient. (*People v. Gutierrez, supra*, 106 Cal.App.4th at pp. 173-175; *People v. Panizzon* (1996) 13 Cal.4th 68, 83.) In addition, the June 28, 1990, minute order reflects that before the trial court accepted his plea it advised him of the "possible effects of plea" on his "alien/ citizenship" status. The court could reasonably infer that these documents refuted Smith's claim about his "complete ignorance" of the immigration consequences. (*Gutierrez*, at pp. 175-176.)

Ineffective Assistance

Smith claims the evidence establishes that his trial counsel did not advise him of the immigration consequences of his plea. He contends the trial court erred by not vacating his conviction based on ineffective assistance of counsel. We disagree.

To prove ineffective assistance, a defendant must meet a two-pronged test by showing that: 1) counsel's performance was inadequate, and 2) there is a reasonable likelihood the result would have been different absent the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 690-694.)

Smith relies on his declaration. But the trial court did not find Smith to be credible. We do not decide credibility. That is a matter for the trial court. (*People v. Gutierrez, supra*, 106 Cal.App.4th at pp. 175-176; *People v. Jones* (1968) 268 Cal.App.2d 161, 165.) The court found that Smith's "version" of facts was "contrary to what is set forth in the court record" This finding is supported by the record.

The plea agreement was signed by Smith and his trial counsel. Smith initialed the immigration consequences advisement box on the agreement and his trial counsel signed the following certification: "I am attorney of record and *I have explained* each of the above

rights to the defendant I further stipulate *this document may be received by the court as evidence of defendant's intelligent waiver of these rights*, and that it should be filed by the clerk as a permanent record of that waiver." (Italics added.) This supports the trial court's finding that Smith's declaration was impeached by the documents in the record and that he was advised of the consequences. (*People v. Gutierrez, supra*, 106 Cal.App.4th at pp. 175-176.)

Smith claims the prosecution did not challenge his declaration. He suggests the trial court consequently had to accept the statements he made in that document. But the court may reject the testimony or declaration of any party even if uncontradicted. (*People v. Surety Ins. Co.* (1978) 77 Cal.App.3d 533, 536-537 [court may reject uncontradicted declarations]; *People v. Anderson* (1966) 243 Cal.App.2d 243, 247; *Lohman v. Lohman* (1946) 29 Cal.2d 144, 149.) Here the trial court had substantial reasons to distrust Smith's declaration. It was contradicted by his statements in his plea agreement, by his counsel's certification in that document, and by the 1990 minute order.

In *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, 1484, the Supreme Court held, "It is quintessentially the duty of counsel to provide [the] client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" It noted that in 1996 Congress amended federal immigration law to eliminate "the Attorney General's authority to grant discretionary relief from deportation" for certain "removable" offenses. (*Id.* at p. 1480.) Consequently, "if a noncitizen has committed a removable offense *after the 1996 effective date* of these amendments, his removal is practically inevitable" (*Ibid.*, italics added.) But Smith's guilty plea was entered in 1990. At that time, his counsel could not have known that Congress would restrict the Attorney's General's authority to grant discretionary relief from deportation six years later.

The People note that several courts have held *Padilla* is not retroactive. (See, e.g., *United States v. Chang Hong* (10th Cir. 2011) 671 F.3d 1147, 1150.) True, but in *United States v. Orocio* (3d Cir. 2011) 645 F.3d 630, 641, the Third Circuit held it was retroactive. Both *Orocio* and *Padilla*, however, involved pleas that occurred *years after* the

1996 immigration law amendments. Smith's plea agreement was filed six years *before* the new immigration law. Moreover, one court has held that a claim of ineffective assistance for nonadvisement of immigration consequences may not be decided years after a final judgment in a "nonstatutory motion to vacate." (*People v. Shokur* (2012) 205 Cal.App.4th 1398, 1402-1406.) It must be raised in a habeas proceeding. (*Ibid.*) But even assuming *Padilla* is retroactive and that Smith's motion may be considered on the merits, the result does not change.

The trial court found that even if Smith had met the first *Strickland* prong, he did not meet his burden to present evidence to show prejudice. (*Padilla v. Kentucky, supra*, 130 S.Ct at pp. 1483-1485, 1487; *People v. Totari* (2002) 28 Cal.4th 876, 884.) The People correctly note that in his declaration Smith did not claim that he would not have pled guilty if he knew the immigration consequences. Yet even had he made such a statement, it would not be sufficient unless Smith proved "that a decision to reject the plea bargain would have been rational under the circumstances." (*Padilla v. Kentucky, supra*, 130 S.Ct. at pp. 1485, 1487; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 938 [defendant's self-serving claim about a plea bargain had to be "corroborated by objective evidence"].) But Smith presented no evidence about prejudice at the hearing. Smith did not testify; he relied on his declaration. But the court could find it did not contain sufficient facts on prejudice. The People note Smith did not state that he had any defenses to the charged offense. Smith's counsel told the court that she sent a letter to Clive Martin, Smith's former attorney. But she did not subpoena him to the hearing. Nor was there an offer of proof at that hearing about the strength of the prosecution's evidence or the probability of prevailing had the case gone to trial in 1990. There was no showing that Smith's former counsel had either said anything to undermine the immigration advisements in the plea agreement or that he had not carefully evaluated the risks of a conviction at trial.

Moreover, in the plea agreement, Smith said, "I am pleading guilty *to take advantage* of a plea bargain." (Italics added.) "I have discussed the charge[s], the facts and the possible defenses with my attorney." In that agreement, Smith's counsel said, "[H]aving explored the facts with him . . . and studied his . . . possible defenses to the charges(s), I

concur in his . . . decision to waive the above rights and to enter a plea of guilty." (Italics added.) That supported a finding that Smith made an intelligent and voluntary plea. The People note that his plea agreement was "a favorable deal," because instead of the possibility of a state prison sentence with "the same immigration consequences," he was placed on probation. The trial court could reasonably find that Smith did not meet his burden on the second *Strickland* prong. (*Padilla v. Kentucky, supra*, 130 S.Ct. at pp. 1483-1484; *Strickland v. Washington, supra*, 466 U.S. at pp. 687, 690-694; *People v. Totari, supra*, 28 Cal.4th at p. 884.)

Lack of an Evidentiary Hearing

Smith claims the trial court should have held an evidentiary hearing. But at the hearing on the motion to vacate, Smith did not request to testify. His counsel did not request permission to call witnesses or request an evidentiary hearing. Instead, Smith's counsel asked the court to "submit" the matter on his declaration. The court relied on this representation and took the motion under submission. Smith consequently is estopped to claim the court erred by not holding an evidentiary hearing. (*People v. Level* (2002) 97 Cal.App.4th 1208, 1213; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.)

We have reviewed Smith's remaining contentions and we conclude he has not shown error.

The order is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

James D. Otto, Judge
Superior Court County of Los Angeles

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