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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.

SERGIO GONZALEZ,

Defendant and Appellant.

B253793

(Los Angeles County
Super. Ct. No. A034052)

APPEAL from a judgment of the Superior Court of Los Angeles County,
James. D. Otto, Judge. Affirmed.

Eduardo Paredes for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Paul M.
Roadarmel, Jr., and Steven D. Matthews, Deputy Attorneys General, for Plaintiff
and Respondent.

Sergio Gonzalez pled guilty in 1986 to a violation of Health and Safety Code section 11352. In 2013, he moved to vacate the plea pursuant to Penal Code section 1016.5,¹ arguing that he had not been advised of the immigration consequences of his plea. The trial court denied the motion, and he now appeals. We conclude that appellant has failed to establish prejudice from the failure to receive the immigration advisements. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1986, appellant was charged with the sale or transportation of a controlled substance in violation of Health and Safety Code section 11352. Appellant entered a no contest plea and was sentenced to three years of probation and six months in jail.² There is no transcript available of the 1986 plea hearing.

In August 2013, appellant moved to vacate his conviction on the basis that he was not advised of the immigration consequences of his plea, pursuant to section 1016.5. He attached a declaration, in which he averred that he did not remember the judge at the plea hearing asking about his immigration status. Appellant did not know that the guilty plea would affect his immigration status. He further stated, “I . . . thought that if I declared myself guilty I would be given less charges and if I fought the case I thought that I would have to spend more time in jail.”

¹ All further statutory references are to the Penal Code unless otherwise specified.

² In 2001, the trial court granted appellant’s request to set aside his guilty plea and dismiss the case pursuant to section 1203.4 upon his completion of probation. The expungement of appellant’s conviction from his record “has no effect on the federal immigration consequences of his conviction. [Citation.]” (*People v. Martinez* (2013) 57 Cal.4th 555, 560 (*Martinez*).

The trial court conducted a hearing on appellant’s section 1016.5 motion. Appellant testified that, when he entered his plea, the judge did not tell him he might be subject to deportation as a result of the plea. He also testified that he pled guilty because he thought he would “be given less time.” Appellant acknowledged that, although he did not have any documents conferring legal immigration status, he was not facing deportation at the time of the hearing. He had been deported to Mexico in 1999.

The trial court denied the motion, finding that appellant had failed to sustain his burden of establishing that he was not advised of the immigration consequences of his plea pursuant to section 1016.5. The trial court granted appellant’s request for a certificate of probable cause.³

DISCUSSION

“Section 1016.5(a) requires a trial court, before accepting a plea of guilty or no contest, to explain to a defendant that if the defendant is not a citizen of this country, conviction of the charged offense ‘may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization’ Section 1016.5(b) provides a remedy for a noncitizen defendant who is not advised of these consequences: ‘If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which [the] 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 . . . the court, on [the] defendant’s motion, shall vacate the judgment and permit the defendant to

³ The California Supreme Court has since held that a certificate of probable cause is not required to appeal a trial court’s order denying a motion to vacate a conviction under section 1016.5. (*People v. Arriaga* (2014) 58 Cal.4th 950, 958-960 (*Arriaga*).

withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.’ To prevail on a section 1016.5 motion, a defendant must establish (1) that the advisements were not given; (2) that the conviction may result in adverse immigration consequences; and (3) that the defendant would not have pled guilty or no contest had proper advisements been given. [Citation.]” (*Arriaga, supra*, 58 Cal.4th at pp. 957-958.)

The trial court’s denial of a section 1016.5 motion is reviewed for abuse of discretion. (*People v. Akhile* (2008) 167 Cal.App.4th 558, 562.)

Section 1016.5, subdivision (b) provides a rebuttable presumption in favor of the defendant: “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.” The prosecutor may rebut the presumption that the defendant was not told of the immigration consequences of his plea by proving by a preponderance of the evidence that the immigration advisements were given. (*Arriaga, supra*, 58 Cal.4th at p. 962.)

Here, it is undisputed that there is no record that the court provided the advisement required by section 1016.5. Respondent thus concedes, as it must, that the rebuttable presumption – that appellant was not advised of the immigration consequences – applies. Moreover, unlike *Arriaga*, in which the prosecutor “recited in detail his oft-given advisement of immigration consequences,” and the minute order of the plea hearing indicated the defendant was advised of immigration consequences, respondent here did not present any evidence to rebut the presumption. (*Arriaga, supra*, 58 Cal.4th at p. 964.) We therefore presume that appellant has satisfied his initial burden of establishing that the advisements were not given.

In order to prevail on his motion, appellant further must establish that his conviction may result in adverse immigration consequences and he must establish prejudice, which is shown if he establishes that he would not have pled guilty had proper advisements been given. (*Arriaga, supra*, 58 Cal.4th at p. 958; *Martinez, supra*, 57 Cal.4th at p. 559.) We conclude that appellant has failed to satisfy his burden of establishing prejudice.

As to the requirement that appellant's conviction may result in adverse immigration consequences, appellant conceded at the hearing that he was not facing deportation at that time. He had been deported to Mexico in 1999, but there was no evidence or indication that this deportation was a result of his conviction. Appellant therefore presented no evidence to establish that his conviction may result in adverse immigration consequences.

Appellant contended below and contends on appeal that his drug trafficking offense is a deportable offense under federal immigration law. However, we need not consider appellant's contentions because "[r]elief will be granted . . . only if the defendant establishes prejudice. [Citation.] . . . [P]rejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty if properly advised. [Citation.]" (*Martinez, supra*, 57 Cal.4th at p. 559.)

Appellant has not established that he would not have pled guilty had proper advisements been given. He stated in his declaration that he entered the guilty plea in order to avoid "more time in jail." At the hearing, the prosecutor asked appellant if he would have pled guilty even if advised of the immigration consequences, in order to receive a lesser sentence, and appellant replied, "yes." Appellant thus has failed to establish that it was reasonably probable that he would not have pleaded guilty if properly advised of the immigration consequences of his plea. (*Martinez, supra*, 57 Cal.4th at p. 559.) The trial court therefore did not

abuse its discretion in denying appellant's motion to vacate his plea under section 1016.5.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

EDMON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.