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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

IGNACIO GALLEGOS,

Defendant and Appellant.

B257672

(Los Angeles County Super. Ct.
Nos. A588988 & A593091)

APPEAL from the orders of the Superior Court of Los Angeles County, Dorothy L. Shubin, Judge. Affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Corey J. Robins, Deputy Attorney General, for Plaintiff and Respondent.

In 1982, a jury found defendant and appellant Ignacio Gallegos guilty of residential burglary in Los Angeles Superior Court Case No. A588988. (Pen. Code, §459.) Imposition of sentence was suspended, and Gallegos was placed on formal probation conditioned on service of one year in county jail. In 1987, Gallegos pled no contest in Los Angeles Superior Court Case No. A593091 to grand theft from the person, which placed him in violation of his probation in the residential burglary case. (Former Pen. Code, § 487.2, now Pen. Code, § 487, subd. (c).) He was sentenced to two years in prison for the grand theft offense, and following the revocation of probation, he was ordered to serve a concurrent two-year sentence in the residential burglary case. Gallegos is a native and citizen of Mexico, and may be subject to adverse immigration consequences due to the convictions.

In May 2014, Gallegos filed motions to vacate the residential burglary conviction pursuant to Welfare and Institutions Code section 603,¹ and to vacate the grand theft conviction pursuant to Penal Code section 1016.5. He appeals the trial court's denial of those motions, arguing that the court: (1) erred in denying the section 603 motion, because Gallegos was a minor at the time of the offense and the trial court either lacked jurisdiction, or acted in excess of its jurisdiction, when it failed to certify the case to the juvenile court for a determination of his age; and (2) erred in denying the Penal Code section 1016.5 motion, by applying an incorrect standard for prejudice and finding Gallegos had not been diligent in filing the motion.

We affirm.

PROCEDURAL HISTORY

Gallegos filed the motions to vacate on May 6, 2014. In the section 603 motion, Gallegos contended that he was under 16 years of age at the time he committed the

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

offense that gave rise to his 1982 conviction, and that the court lacked jurisdiction in his case. Pursuant to section 707, a minor must be at least 16 years old before he or she can be subject to a fitness hearing to determine whether he or she is a proper subject for adult prosecution. The motion states, “Mr. Gallegos advised the court and counsel that he was only 15 at the time of the offense, but no one believed him based on the stated reason that his co-defendant was clearly an adult.” Alternatively, Gallegos contended that his counsel was constitutionally ineffective for failing to ask the court for a judicial recommendation against deportation.² In the motion, Gallegos noted that court reporter’s transcripts are routinely destroyed after 10 years, and were not available for the proceedings. In support of the motion, Gallegos attached the Information, dated November 18, 1981; his reissued birth certificate, dated April 25, 2006, with an English translation; a copy of his consular identification card, issued August 24, 2012; a chronological index of court proceedings for the 1982 conviction from the Superior Court of California, County of Los Angeles; and a letter from the Superior Court of California, County of Los Angeles, dated April 30, 2014, certifying that transcripts from Gallegos’s 1982 hearing had been destroyed pursuant to Government Code section 69955, with supporting documentation. The chronological index of proceedings contained two entries relevant to the issue of his age: “11-25-81 MO to determine age of deft contd to 12-4-81 9/J” and “12-4-81 MO to determine age of deft O/C, PTC + trial remain as indicated.”

In the Penal Code section 1016.5 motion, Gallegos contended that he was not advised of the possible immigration consequences of his no contest plea, and would not have entered the plea if he had received the advisement. As with the 1982 conviction, no transcripts were available for the 1987 proceedings. The following exhibits were attached to the motion: (1) Gallegos’s Marriage License, dated April 2, 1990; (2) his children, Yesenia Gallegos and Sindy Helena Gallegos’s birth certificates; (3) a letter from the Superior Court of California, County of Los Angeles, dated April 30, 2014,

² Counsel withdrew this contention at the hearing, and did not raise it in the opening brief.

certifying that transcripts from Gallegos's 1987 hearing had been destroyed pursuant to Government Code section 69955; and (4) a record of his criminal convictions from the State of California Department of Justice, dated April 10, 2012.

In an extensive opposition to both motions, the People argued: (1) the trial court had no jurisdiction to grant the motions 26 and 32 years after the convictions; (2) defendant had not been on probation, and was not on probation at the time the motions were filed, such as to justify modifying the sentence; (3) dismissal would violate the judgment of the trial court and the bargain defendant received by taking the plea, given that he did not receive the maximum potential state prison time; (4) the defendant failed to exercise reasonable diligence in addressing these concerns as he was aware of his dilemma at least as of 2002, 12 years prior to filing the motions; (5) defendant could not seek relief in habeas corpus because he was not in custody; (6) defendant raised an improper coram nobis claim; (7) defendant was not legally prejudiced; (8) the People were prejudiced by the delay in filing the request; (9) granting relief would not serve the interests of justice, given the seriousness of the underlying crimes and convictions, and that the fact that defendant had engaged in further criminal activity; (10) granting the request would constitute a denial of equal protection to "all American citizens" because individuals subject to deportation would be allowed to withdraw their pleas years after they were entered, while those not subject to deportation could not; and (11) defendant sought to thwart the federal government's immigration determinations by having the state vacate his plea. The following exhibits were attached in support of the opposition: *People v. Paredes* (2008) 160 Cal.App.4th 496; and a series of Adult Case Management case searches evidencing Gallegos's numerous aliases.

At the hearing, Gallegos's counsel argued that the 1982 court was required to certify the case to the juvenile court for a determination of Gallegos's age pursuant to section 603 once it was suggested that he may have been under 18 years of age at the time of the offense. She asserted that the court's minutes did not indicate the issue of age had been addressed. Counsel then stated that Gallegos raised the issue of his age on various occasions during the 1982 proceedings, but was not believed because he was

“stocky” and his codefendant was an adult. In response, the trial court asked counsel if the 1982 court considered the issue of Gallegos’s age, and she stated, “Well, it seems like they did in some fashion. I don’t know how formal of a fashion it was.”

The People responded that the trial court in the 1982 residential burglary case had jurisdiction to determine Gallegos’s age prior to deciding whether to certify the case to the juvenile court. The burden was on Gallegos, and not on the court, to prove his age by a preponderance of the evidence. The People asserted that the issue of age had been raised, and was decided against Gallegos.

The trial court did not allow Gallegos to testify as to his age at the time of the offense, finding that the question was “addressed. It was an issue that was raised and decided contrary to Mr. Gallegos’[s] position.” At the close of the hearing, the court explained that it was denying the motion to vacate under section 603 “because [the] matter was heard and information was presented at the time.” The court reasoned that the record indicated a motion to determine Gallegos’s age was made and that, beyond that, Gallegos had “an opportunity to appeal it later or bring it at a time prior to the passage of so many years.”

With respect to the Penal Code section 1016.5 motion, Gallegos testified that he would be harmed as a consequence of his no contest plea, because he had a wife and two children with United States citizenship, and had a pending application for permanent residency. Gallegos testified that between 1999 and 2009, he sought legal assistance from numerous attorneys with regard to his immigration status and his two criminal convictions. When the People questioned Gallegos as to whether he knew that his convictions would pose an obstacle to his immigration status in 1990, Gallegos answered “yes.” The People then rephrased the question and asked if Gallegos knew 24 years ago that his convictions would present a problem to becoming a citizen of the United States, and Gallegos once again answered “yes.” When asked whether the attorneys Gallegos sought legal advice from had informed him that his convictions would affect his ability to become a permanent resident, Gallegos answered, “Yes, they told me.” Gallegos later

testified that had he known the immigration consequences of his plea, he would not have accepted the plea and would have chosen to “fight it a little more.”

The People conceded that it could not be established that the immigration advisements were given, but argued that Gallegos had not met his burden of establishing prejudice and he had not yet suffered any adverse immigration consequences. Gallegos would not be prejudiced regardless, because he would have been unlikely to obtain a better result by proceeding to trial, a factor that may be considered when determining prejudice. Moreover, Gallegos was fluent in Spanish and had extended family in Mexico. Even if Gallegos had established prejudice, he had not acted with the requisite diligence. Gallegos had been consulting attorneys since 1999 and should have sought postconviction relief earlier. Had Gallegos acted with diligence, the reporter’s transcripts would not have been destroyed to the People’s detriment.

The trial court found that there could be adverse consequences “if Mr. Gallegos took further action on his seeking an enhanced status.” It denied the motion to vacate pursuant to Penal Code section 1016.5, however, because Gallegos had not established prejudice due to the lack of advisement. Gallegos was on probation in the residential burglary case, and it was “not reasonably probable that he would have obtained a better outcome.” The trial court did not find Gallegos’s testimony credible. “[T]he bald assertion [that he would have rejected the plea] now without some explanation as to why that’s the case . . . wasn’t convincing.” Also, Gallegos had not been diligent in seeking a remedy. He knew that there could be adverse consequences as a result of his plea as early as 1999, but did not “[begin] really being truly diligent [until] 2009.”

Gallegos timely appealed the trial court’s orders.

DISCUSSION

We review the trial court’s denial of a motion to vacate for abuse of discretion. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518.) “An exercise of a court’s

discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion. [Citation.]” (*Id.* at p. 1518.)

Motion to Vacate Pursuant to Welfare and Institutions Code Section 603

Section 603, subdivision (a) states in pertinent part, “ No court shall have jurisdiction to conduct a preliminary examination or to try the case of any person . . . when the person was under the age of 18 years at the time of the alleged commission thereof unless the matter has first been submitted to the juvenile court by petition.”

Section 604 sets forth the procedure the trial court must follow when the defendant makes the suggestion that he or she is under the age of 18 years. “Whenever a case is before any court upon an accusatory pleading and it is suggested or appears to the judge before whom the person is brought that the person charged was, at the date the offense is alleged to have been committed, under the age of 18 years, the judge shall immediately suspend all proceedings against the person on the charge. The judge shall examine into the age of the person, and if, from the examination, it appears to his or her satisfaction that the person was . . . under the age of 18 years, he or she shall immediately certify all of the following to the juvenile court of the county” (§ 604, subd. (a).) “[I]f the trial court is not satisfied the defendant was under 18, the suspension is lifted and the adult criminal proceedings go forward.” (*People v. Nguyen* (1990) 222 Cal.App.3d 1612, 1619 (*Nguyen*).

Gallegos contends that the trial court abused its discretion in denying the motion because the 1982 court lacked jurisdiction to try him as an adult. He argues that when the issue of his age was raised, the court was required to certify the case to the juvenile court for an age determination. This is not the law. (See *Nguyen, supra*, 222 Cal.App.3d at p. 1619.) If the court is satisfied that the defendant is not under the age of 18, it may lift the suspension and allow proceedings to go forward. Here, it appears that the court and parties were satisfied that defendant was 18 years of age or older because the pending

motion to determine his age was taken off calendar. We infer from this action that there was no merit to the motion.

Gallegos asserts that his age is corroborated by his birth certificate, which was reissued in 2006, and his 1990 Los Angeles County marriage license.³ Both documents reflect that his date of birth is January 1, 1966. These documents are not relevant to the issue presented here. They did not exist at the time of Gallegos's conviction, and were not presented to the court in the 1982 proceedings.

The question here is whether the court in 1982 considered Gallegos's claim that he was a minor. In the hearing on the motion, counsel conceded that the issue of age was addressed "in some fashion." The chronological index of court proceedings verifies that the issue of age was in fact before the court, having been calendared for November 25, 1981, continued to December 4, 1981, and then taken off calendar on December 4, 1981 without objection, with the pretrial conference and trial remained set to proceed.

The trial court did not abuse its discretion in finding that the issue had been addressed, and denying the motion to vacate.

Motion to Vacate Pursuant to Penal Code Section 1016.5

Penal Code section 1016.5 requires that before the acceptance of a plea of guilty or nolo contendere, the court must advise the defendant of the immigration consequences of the plea. (Pen. Code, § 1016.5, subd. (a).) If the court fails to give the advisement and "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

³ The opening brief also cites to Gallegos's North Carolina driver's license, which shows his date of birth as January 1, 1966, as proof of his age; however, the driver's license was not among the exhibits attached to the motion.

guilty.” (*Id.*, subd. (b).) The legislature’s intent in enacting this section was to promote fairness to accused individuals who are not citizens of the United States and who are unaware of the immigration consequences that a plea of guilty or nolo contendere entail. (*Id.*, subd. (d).)

A trial court ruling on a motion under Penal Code section 1016.5 engages in a three-part analysis. The trial court determines whether (1) “it formerly had failed to advise defendant as [Penal Code] section 1016.5 requires,” (2) as a result of the conviction the defendant may face “one or more of the statutorily specified immigration consequences,” and (3) the “defendant was prejudiced by the court’s having provided incomplete advisements.” (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 200 (*Zamudio*)). Although Penal Code section 1016.5 does not expressly state that a defendant must establish prejudice, the court in *Zamudio* interpreted the section “to require that defendants, in order to obtain relief under subdivision (b) of the statute, demonstrate they were prejudiced by any failure of the court to provide complete advisements under subdivision (a).” (*Id.* at pp. 199-200.)

Gallegos first contends that the trial court erred in denying his motion to vacate pursuant to Penal Code section 1016.5 because it applied an incorrect test when evaluating prejudice. Prejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty if properly advised. (*People v. Martinez* (2013) 57 Cal.4th 555, 558-559 (*Martinez*)). “[B]ecause the question is *what the defendant would have done*, relief should be granted if the court, after considering evidence offered by the parties relevant to that question, determines the defendant would have chosen not to plead guilty or nolo contendere, even if the court also finds it not reasonably probable the defendant would thereby have obtained a more favorable outcome.” (*Id.* at p. 559.) That is not to say, however, that the probability of a more favorable outcome were the defendant to reject the plea cannot be considered as a factor. “[T]hat a more favorable result was not reasonably probable is only one factor for the trial court to consider when assessing the credibility of a defendant’s claim that he or she would have rejected the plea bargain if properly advised.” (*Id.* at p. 564.) “[A]

defendant's assessment of the strength of the prosecution's case in relation to his or her own case is often a factor, and undoubtedly sometimes the determinative factor, in the decision to accept or reject a plea offer." (*Ibid.*) Because the defendant bears the burden of establishing prejudice, "the defendant must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances." (*Id.* at p. 565.) "Whether defendant was prejudiced by the trial court's incomplete advisements is a factual question, appropriate for decision by the trial court in the first instance. [Citations.]" (*Zamudio, supra*, 23 Cal.4th at p. 210.)

The circumstances in this case provide a reasonable basis for the trial court's rejection of Gallegos's uncorroborated declaration. Although Gallegos testified that he would have "fought it a little more" when asked if he would have risked more time in prison by rejecting the plea, the trial court did not find his testimony to be credible given that it was not "supported by an explanation or other corroborating circumstances."

The trial court also considered as a factor the probability of a more favorable outcome had Gallegos declined the plea. The court reasoned it was not probable that Gallegos would have been able to negotiate a more favorable plea because he had violated his probation in the 1982 burglary conviction.⁴ Although *Martinez* stands for the proposition that probability of a more favorable outcome cannot be the sole reason to reject a motion to vacate, it affirms that it is a relevant consideration in conjunction with other factors, and is "undoubtedly sometimes the determinative factor, in the decision to accept or reject a plea offer." (*Martinez, supra*, 57 Cal.4th at p. 564.) Given Gallegos's uncorroborated testimony and the improbability of obtaining a more favorable outcome,

⁴ Gallegos faced up to six years in state prison on the probation violation in the residential burglary case. It can reasonably be inferred that the concurrent two-year state prison sentences were negotiated to settle both matters, resulting in a favorable disposition Gallegos was highly unlikely to reject.

the trial court did not misapply the prejudice standard, and did not abuse its discretion in determining that Gallegos failed to carry his burden of establishing prejudice.

Gallegos next contends that the trial court erred in finding that he had not been diligent. Gallegos argues that he did not become aware of the immigration consequences of his plea until 2013, at which point he acted diligently by filing the motion to vacate.

“[T]he trial court may properly consider the defendant’s delay in making his application, and if ‘considerable time’ has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay.” (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618 (*Castaneda*), citing *People v. Caruso* (1959) 174 Cal.App.2d 624, 641-643; see also *People v. Totari* (2003) 111 Cal.App.4th 1202, 1208 [defendant bears the burden of proving his reasonable diligence].) “[T]he issue of diligence is particularly fact dependent . . . our evaluation of the record on appeal under an abuse of discretion standard requires us to determine whether the superior court’s finding was an exercise of discretion that was rationally based *on the record before it*.” (*People v. Totari, supra*, at p. 1208.) Because Penal Code section 1016.5 contains no express time bar, it is unfair to find a lack of reasonable diligence until the defendant had cause to become aware of the immigration consequences of his no contest plea. (*Zamudio, supra*, 23 Cal.4th at pp. 203-204.)

Although Gallegos contends that he did not become aware of the immigration consequences of his plea until 2013, at various times during the hearing Gallegos testified under oath that he sought legal help for his immigration status and the two criminal convictions beginning in 1999. In addition, Gallegos repeatedly affirmed that he was aware of the immigration consequences of the plea since 1990, 24 years from the time of the trial court hearing in 2014.

Gallegos argues that there was confusion between the years 1990 and 1999 at trial, whether due to faulty memory or improper translation. This is nothing more than a request to reweigh the evidence, which we will not do. Even if Gallegos became aware of the immigration consequences of the no contest plea in 1999, there would still be a significant delay of 14 years before he sought postconviction relief. The trial court’s

finding on this issue is not an abuse of discretion. (*Castaneda, supra*, 37 Cal.App.4th at p. 1618 [trial court did not abuse its discretion where defendant waited seven years to seek relief without offering any justification for his delay].)

DISPOSITION

The orders denying Gallegos's motions to vacate pursuant to Welfare and Institutions section 603 and Penal Code section 1016.5 are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.