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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.

JUAN BETANCOURT,

Defendant and Appellant.

2d Crim. No. B258183
(Super. Ct. No. PA027799)
(Los Angeles County)

Juan Betancourt appeals from a postjudgment order denying his Penal Code¹ section 1016.5 motion to vacate his 1997 conviction following his no contest plea to selling, transporting, or offering to sell a controlled substance (cocaine) (Health & Saf. Code, § 11352, subd. (a)). Appellant contends he was not adequately advised of the immigration consequences of his plea as required by section 1016.5. We affirm.

Appellant's motion alleged he "was not given proper warning by the court" that his conviction could result in his deportation. In an attached declaration, he claimed that he first learned of this potential consequence when he was taken into custody by Immigration and Customs Enforcement (ICE). He also offered that "[i]f prior counsel or

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

the Court had advised me of the immigration consequences triggered by my plea, I would not have pled guilty.^[2] I would have gone to trial or negotiated another plea."

At the hearing on the motion, the court found that the minute order and reporter's transcript of appellant's sentencing proceedings affirmatively reflected that the sentencing court had fully advised him of the potential immigration consequences of his plea. The court noted that the minute order states, "If you are not a citizen, you are hereby advised that a 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." Defense counsel acknowledged the advisement, yet asserted "it was not fully apprising [appellant] of the severe immigration consequences of his pleading guilty to a controlled substance violation, which has caused him prejudice right now as he is in immigration removal proceedings."

The prosecutor countered that a proper and full advisement was also reflected on page seven of the reporter's transcript of the sentencing hearing. Anticipating that the motion would be denied, defense counsel asked the court to do so without prejudice "in case we were able to further investigate the matter and something would come up in the future where it is a possibility to vacate the conviction." The court denied the motion with prejudice on the ground that the record affirmatively established appellant had received the necessary advisements.

DISCUSSION

Appellant contends the court erred in denying his section 1016.5 motion to vacate his conviction and withdraw his plea because he was not adequately advised of the immigration consequences of the plea. We disagree.

² Although the distinction is substantively irrelevant for purposes of the appeal, appellant's declaration, moving papers, and opening brief erroneously state he pled guilty rather than no contest.

Section 1016.5, subdivision (a) states: "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." If the court fails to give the admonition required by subdivision (a), upon defendant's motion, it must vacate the judgment and allow the defendant to withdraw his or her plea and enter a plea of not guilty if the defendant can show that the conviction or offense to which he or she pleaded guilty or nolo contendere might result in his or her deportation, exclusion from admission to the United States, or in denial of naturalization. (§ 1016.5, subd. (b).)

"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." (*People v. Totari* (2002) 28 Cal.4th 876, 884; *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) The purpose of section 1016.5 is to ensure that a defendant has both actual knowledge of the possible adverse immigration consequences of a guilty or no contest plea and a chance to make an intelligent choice whether to plead guilty or no contest. (*Zamudio*, at pp. 193–194.) A trial court's denial of a motion to vacate under section 1016.5 is typically reviewed for abuse of discretion. (*Id.* at p. 192.) To the extent the court's denial is based on statutory interpretation, it is an issue of law which we review de novo. (*People v. Akhile* (2008) 167 Cal.App.4th 558, 562–563.)

Appellant asserts that both the court and trial counsel failed to advise him that his no contest plea to selling, transporting, or offering to sell a controlled substance could have negative immigration consequences. With regard to the court's advisement, he cites *People v. Dubon* (2001) 90 Cal.App.4th 944, 955, for the proposition that a minute order is insufficient to establish that the proper advisements were given. Here, however, the court based its finding on both a minute order and a reporter's transcript of the sentencing proceedings. Although neither of these documents are part of the record on appeal, appellant's failure to include them compels us to presume they support the court's ruling. (See *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 ["It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal"].)

To the extent appellant's motion and appeal claim that his trial attorney failed to adequately advise him of the immigration consequences of his plea, he is not entitled to relief on this ground. "[S]ection 1016.5 allows a court to vacate a conviction only if the *trial court* has failed to advise the defendant of potential adverse immigration consequences at the time of the plea. The statutory motion cannot be used to assert *defense counsel's* failure to provide adequate representation relating to immigration consequences." (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1285.) Although such a claim may be raised in a petition for a writ of habeas corpus, appellant's motion did not satisfy the pleading requirements of such a petition. In any event, his self-serving assertions that counsel did not properly advise him and that he otherwise would not have pled as he did are plainly insufficient to establish ineffective assistance. (*In re Alvernaz* (1992) 2 Cal.4th 924, 938 [defendant's self-serving statement that he would have acted differently but for counsel's ineffective assistance "must be corroborated independently

by objective evidence"].)

The order denying appellant's section 1016.5 motion to vacate the judgment and to withdraw his plea is affirmed.

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PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Cynthia L. Ulfig, Judge

Superior Court County of Los Angeles

Law Office of Zulu Ali, Zulu Ali, for Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan J. Kline, Jonathan M. Krauss, Deputy Attorneys General, for Respondent.