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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.

MANUEL AMAYA AGUIRRE,

Defendant and Appellant.

B265534

(Los Angeles County
Super. Ct. No. BA409899)

APPEAL from an order of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Maggie Shroul, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Manuel Amaya Aguirre agreed to a case settlement on December 10, 2013, in which he entered a plea of no contest to assault by means of force likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(4)¹. On April 25, 2014, following a 90 day diagnostic study pursuant to section 1203.03, the trial court sentenced defendant to two years in state prison.

On February 27, 2015, defendant filed a non-statutory motion to set aside the conviction and withdraw his no contest plea based on ineffective assistance of counsel in connection with the advice he received on the immigration consequences of his plea. Defendant's declaration in support of the motion stated he is facing deportation as a result of the conviction, and he had been advised by counsel that the plea would not affect his permanent resident status, but if he was detained by immigration authorities, he could ask for a pardon. The trial court denied the motion at a hearing on May 29, 2015, on the basis that a non-statutory motion to withdraw the plea was not an available remedy.

Defendant filed a timely notice of appeal from the order denying the motion. Counsel was appointed to represent defendant on appeal. On February 8, 2016, appointed counsel filed a brief raising no issues, but requesting this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Defendant was advised by letter of his right to file a supplemental brief within 30 days. Defendant has not responded with a supplemental brief, and the time for filing has passed.

We have completed our independent review of the record, and conclude that appointed counsel on appeal fulfilled her obligations under *Wende*. As a matter of law, defendant was not entitled to relief as he did not raise the issue of competence of counsel on direct appeal, he did not file a habeas corpus petition at a time when he was still in state custody, nor did he file a timely statutory motion to withdraw his plea under section 1016.5. Under these circumstances, a non-statutory motion to withdraw a plea cannot be

¹ Statutory references are to the Penal Code.

used to raise an issue of ineffective assistance of counsel based on an alleged failure to provide proper advise as to the immigration consequences of a plea. (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 68; *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1403; see *People v. Kim* (2009) 45 Cal.4th 1078, 1093-1096 [failure of defendant facing deportation to timely utilize other available remedies barred relief by non-statutory motion to vacate, which is akin to a *coram nobis* petition]; *People v. Villa* (2009) 45 Cal.4th 1063, 1066 [habeas corpus is not available to vacate plea of defendant facing deportation where defendant is not in California custody].)

The order is affirmed. (*Smith v. Robbins* (2000) 528 U.S. 259)

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KUMAR, J.*

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