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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIANA ASTORGA,

Defendant and Appellant.

D059763

(Super. Ct. No. SF135757)

APPEAL from an order of the Superior Court of San Diego County,
Stephanie Sontag, Judge. Affirmed.

Adriana Astorga appeals from an order denying her motion to vacate a guilty plea entered in 1999 to felony marijuana possession for sale. Astorga contends:

(1) the court erred in denying her motion as untimely because the six-month time limitation in Penal Code section 1018 (undesigned statutory references are to the Penal Code) was directory rather than mandatory; and (2) the trial court failed to adequately advise her of the consequences of her plea, as required by section 1016.5.

We reject Astorga's arguments and affirm the order.

FACTUAL AND PROCEDURAL HISTORY

In 1999, Astorga pleaded guilty to felony possession of marijuana for sale after attempting to smuggle 55 pounds of marijuana across the San Ysidro border. On her plea form, Astorga initialed the statement: "I understand that if I am not a citizen of the United States a plea of Guilty or No Contest could result in deportation, exclusion from admission to this country, and/or denial of naturalization." She also declared under penalty of perjury that she had read and understood each of the items on the plea form and that they were "true and correct." Astorga's attorney attested that he "personally read and explained the contents of the [plea form] to [Astorga]" and concurred in her plea and waiver of constitutional rights. The court suspended a sentence of 90 days in custody and granted Astorga three years probation.

In 2010, Astorga moved to vacate her guilty plea, asserting the immigration advisement of the plea form was insufficient under section 1016.5 and left her inadequately informed about the immigration ramifications of her plea. Specifically, Astorga alleged that she was unaware that her guilty plea barred her from renewing her residency status in the United States and subjected her to deportation. The court denied the motion, finding that it was untimely. This appeal followed.

DISCUSSION

I. *Timeliness of Motion to Vacate*

Astorga argues the trial court abused its discretion in denying her motion to vacate her guilty plea on the basis that it was untimely. Specifically, she contends

the time limitation set forth in section 1018 should be "liberally construed" as directory rather than mandatory in the interest of justice. We reject Astorga's argument.

As a general rule, a postjudgment motion to change a plea must be seasonably made. (*People v. Schwarz* (1927) 201 Cal. 309, 314.) Absent a timely objection, a defendant forfeits his right to complain on grounds that he was not advised of the collateral consequences of a guilty plea, such as immigration consequences. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 203.) The trial court's denial of a motion to vacate a guilty plea will not be disturbed unless an abuse of discretion is clearly demonstrated. (*People v. Francis* (1954) 42 Cal.2d 335, 338; *People v. McMillan* (1971) 15 Cal.App.3d 576, 581.)

Section 1018 authorizes the court to permit a defendant to withdraw his or her guilty plea "at any time before judgment or *within six months after an order granting probation is made if entry of judgment is suspended.*" (Emphasis added.) The statute provides that it shall be "liberally construed" to "promote justice." (§ 1018.)

In *People v. Miranda* (2004) 123 Cal.App.4th 1124 (*Miranda*), the court considered whether section 1018's six-month limitation period was directory or mandatory. It determined that the limitation period was mandatory in light of the legislative purpose "'to eliminate late withdrawal of pleas and the resultant jeopardy to the prosecution caused by the passage of time.'" (*Id.* at p. 1131 [citing Sen. Com. on Judiciary, analysis of Assem. Bill No. 2174 (1991–1992 Reg. Sess.) as amended

May 30, 1991]; see also *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618 ["it would be a mockery of justice to permit the defendant to change his plea after 12 years, after material witnesses may have died or disappeared"].) Thus, after expiration of the six-month time period, the trial court lacks jurisdiction to consider defendant's motion to vacate his guilty plea. (*Miranda, supra*, at p. 1134.)

Here, almost 12 years have passed between Astorga's guilty plea and her motion to withdraw it. We see no reason in this case to depart from the rationale and conclusion in *Miranda* that section 1018's time limitation is mandatory rather than directory. Extending the statutory period would prejudice the People and interfere with section 1018's stated purpose to "promote justice." Accordingly, we conclude the trial court properly denied Astorga's motion to vacate her guilty plea because it did not have jurisdiction to grant her motion beyond the six-month statutory limit.

II. *Notice of Immigration Consequences*

Even if Astorga timely moved to vacate her guilty plea, we reject her argument on the merits that the trial court failed to adequately advise her of the consequences of her guilty plea because section 1016.5 required a verbal advisement by the trial court to supplement the notice provided in her written plea form. We conclude that the plea form satisfied the statute's notice requirements.

Section 1016.5, subdivision (a), requires courts to inform noncitizens pleading guilty to certain felonies that a conviction "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." This advisement shall be given on the record. (*Ibid.*) If the court fails to advise the defendant of the possible immigration consequences, it must vacate the judgment and permit the defendant to enter a plea of not guilty. (§ 1016.5, subd. (b).)

Our Supreme Court has held a validly executed written plea form is a proper substitute for verbal admonishment by the trial court and satisfies a knowing and intelligent waiver of constitutional rights. (*In re Ibarra* (1983) 34 Cal.3d 277, 281, disapproved on another ground in *People v. Howard* (1992) 1 Cal.4th 1132, 1175-1178.) "[A] defendant who has signed a waiver form upon competent advice of his attorney has little need to hear a ritual recitation of his rights by a trial judge [¶] . . . So long as the waiver form contains sufficient information, and both the defendant and his counsel attest to its valid execution, the judge may, in his discretion, dispense with further explanation to the defendant of his rights." (*Id.* at p. 286.) The rule applies to constitutional rights as well as statutory rights. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522 (*Ramirez*).)

In *Ramirez*, the immigration advisement required by section 1016.5 appeared in defendant's plea form but was not orally recited at the plea hearing. (*Ramirez, supra*, 71 Cal.App.4th at pp. 520-521.) The court rejected defendant's claim that he should have been advised of the immigration consequences orally by the court, noting the statute contains "no language which states the advisements must be verbal, only that they must appear on the record and must be given by the court." (*Id.* at p. 521; see also *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174-175

[written notice of immigration consequences can cure deficiencies in oral advisement].) The purpose of section 1016.5 "is to ensure a defendant is advised of the immigration consequences of his plea and given an opportunity to consider them." (*Ramirez, supra*, at p. 522.)

Here, as in *Ramirez*, Astorga was advised of the possible immigration consequences through her plea form. She acknowledged on the form that she understood that her plea could result in deportation, exclusion from the United States and denial of naturalization. Further, Astorga's attorney attested that he explained the contents of the plea form to her. The plea form along with Astorga's acknowledgment of its contents and her attorney's attestation satisfied section 1016.5's purpose to ensure that Astorga was advised of the consequences of her plea and had an opportunity to consider them. Under these circumstances, there was no need for oral advisement from the court.

Astorga further discusses recent changes in immigration laws and alleges that the plea form was inadequate because it failed to capture the "virtual certainty" of her deportation from the country. However, as Astorga acknowledges, the plea form "mirror[ed] the language of [] section 1016.5, subdivision (a)" which only requires an advisement that a conviction "may" have immigration consequences. We note that the trial court did not have control over Astorga's immigration status and thus could not advise her that she would certainly be deported. Under the circumstances of this case, section 1016.5's requirements were satisfied because Astorga was put on notice of the possible consequences of her plea.

DISPOSITION

The order is affirmed.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.