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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

IGOR SMIRNOV,

Defendant and Appellant.

D060330

(Super. Ct. No. SCD198853)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen and Michael T. Smyth, Judges. Affirmed.

On September 11, 2006, the San Diego County District Attorney charged Igor Smirnov with grand theft of personal property (Pen. Code,¹ § 487, subd. (a); count 1); burglary (§ 459; counts 2, 4, 20, 24, 30, 58 and 59); and forgery of documents and items

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

(§ 470, subd. (d); counts 3, 5, 21, 25 and 31). As to count 1, it was further alleged that the loss to the victims exceeded \$50,000 (§ 12022.6, subd. (a)(1)).

On January 11, 2007, pursuant to a negotiated plea agreement, Smirnov pled guilty to three counts of second degree burglary (counts 2, 20 and 24) and the People dismissed the balance of the charges. The trial court sentenced Smirnov to 379 days in custody and granted felony probation for a period of three years.

On June 20, 2011, after Smirnov's probation expired, he filed a motion to vacate the judgment and withdraw his plea pursuant to section 1016.5. On July 6, 2011, the People filed their opposition to the motion to withdraw the plea. On July 13, 2011, after a hearing on the motions, the trial court denied Smirnov's motion to withdraw his guilty plea.

On appeal, Smirnov claims that the trial court abused its discretion when it denied his motion to vacate his guilty plea pursuant to section 1016.5. As we explain, we conclude that the trial court did not abuse its discretion. Judgment affirmed.

FACTUAL AND PROCEDURAL BACKGROUND²

Igor Smirnov, a non-citizen, was involved in a scheme of conducting fraudulent merchandise returns to department stores. On January 11, 2007, when he pled guilty to three counts of second degree burglary, he initialed the following statement on a

² We view the evidence in the light most favorable to the judgment. (*See People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Smirnov's claim of alleged error are discussed *post*, in connection with those issues.

*Boykin*³/*Tahl*⁴ guilty plea form: "I understand that if I am not a U.S. citizen, the plea of Guilty will result in my remove/deportation, exclusion from admission to the U.S. and denial of naturalization. Additionally, if this plea is an 'Aggravated Felony' listed on the back of this form, then I **will** be deported, excluded from admission to the U.S. and denied naturalization."

Smirnov went on to further initial the following statement on the *Boykin/Tahl* form: "My attorney has explained to me that other possible consequences for this plea may be . . . (16) Other: DEPORTED FROM UNITED STATES."

Smirnov also initialed that he understood a conviction for burglary was an "aggravated felony" defined under title 8, United States Code section 1101(a)(43), which "will result in removal/deportation, exclusion, and denial of naturalization."

During the trial court's discussion of the *Boykin/Tahl* form with Smirnov, the court stated: "Mr. Smirnov, I don't know what your situation is. I don't know what your citizenship is. But if in fact you are not a United States Citizen, you're subject to deportation. And with this record I believe that you will be deported. Do you understand that?" Smirnov responded, "Yes, your honor."

³ *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709].

⁴ *People v. Tahl* (1967) 65 Cal.2d 719.

DISCUSSION

On appeal, Smirnov claims that the trial court abused its discretion when it denied his motion to vacate his guilty plea pursuant to section 1016.5.⁵ More specifically, he alleges that section requires substantial compliance and although the sentencing court advised him of the immigration consequence of deportation, it failed to inform him of the consequences of exclusion and denial of naturalization.

We review a trial court's ruling denying a motion to vacate the judgment on an abuse of discretion standard. (*People v. Chien* (2008) 159 Cal.App.4th 1283, 1287; *People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518.) In the context of a ruling on a motion brought under section 1016.5, the reviewing court may not disturb the trial court's order in the absence of an abuse of discretion. (*People v. Suon* (1999) 76 Cal.App.4th 1, 4.) An abuse of discretion occurs if the court acted in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (*Ibid.*) The defendant must establish by clear and convincing evidence the grounds for withdrawing a guilty plea. (*Ibid.*)

⁵ Section 1016.5 provides in relevant part as follows: "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime 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."

In enacting section 1016.5, the Legislature demonstrated concern that "those who plead guilty or no contest to criminal charges are aware of the immigration consequences." (*People v. Kim* (2009) 45 Cal.4th 1078, 1107; *People v. Dubon* (2001) 90 Cal.App.4th 944, 951.) In the absence of advisements on the record, subdivision (b) of section 1016.5 presumes no advisement was given. Subdivision (b) also provides that the remedy for failing to give the advisement is to vacate the judgment which rests on the guilty plea.

Here, although the immigration advisement in the plea form contains all components of an adequate warning of the consequences a noncitizen faces for pleading guilty to a felony offense, Smirnov argues section 1016.5 nonetheless requires a verbal advisement by the trial court of the immigration consequences of his plea.

Our state Supreme Court has held a validly executed plea form is a proper substitute for verbal admonishment by the trial court. (*In re Ibarra* (1983) 34 Cal.3d 277, 285-286.) Particularly, in *Ibarra*, the court addressed constitutionally mandated advisements required under *Boykin v. Alabama*, *supra*, 395 U.S. 238 and *In re Tahl*, *supra*, 1 Cal.3d 122. It also stated in *Ibarra*: "A sufficient [plea] form can be a great aid to a defendant in outlining [a defendant's] rights. The defense attorney, who is already subject to a duty to explain the . . . rights outlined in a proper [plea] form to his client prior to the client's entering a plea, may even find it desirable to refer to such a form. Thus, a defendant who has signed a [plea] form upon competent advice of his attorney has little need to hear a ritual recitation of his rights by a trial judge. The judge need only

determine whether defendant had read and understood the contents of the form, and had discussed them with his attorney." (*In re Ibarra, supra*, at pp. 285-286.)

As the Third Appellate District noted in *People v. Quesada* (1991) 230 Cal.App.3d 525, the legislative 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. So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met. (*Id.* at pp. 535-536); (*see also People v. Ramirez* (1999) 71 Cal.App.4th 519.)

Here, Smirnov signed a *Boykin/Tahl* form containing a section 1016.5 advisement that precisely mirrored the statutory language and warned him of all three possible immigration consequences listed in section 1016.5. Smirnov also initialed next to the relevant paragraph. He then acknowledged to the trial court that he understood: (1) that he was subject to being deported; (2) that he had time to go over the *Boykin/Tahl* form carefully with his attorney; (3) that he read and understood the contents of the form; and (4) that he initialed and signed the form. Accordingly, the trial court found that Smirnov "understands the nature of the charges and understands the consequences of the plea." Therefore, the trial court was not required to provide a further oral advisement, "a validly executed waiver form is a proper substitute for verbal admonishment by the trial court."

(*People v. Ramirez, supra*, 71 Cal.App.4th at p. 521; *see also People v. Gutierrez* (2003) 106 Cal.App.4th 169, 175.)

The trial court's conclusion that section 1016.5 had been met by the sentencing court's discussion with Smirnov was not an abuse of discretion. We therefore reject Smirnov's contention to the contrary and affirm.

DISPOSITION

Judgment affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.