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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MUHAMMED HAMAWI,

Defendant and Appellant.

D060996

(Super. Ct. No. CR120122,
CR99761)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Appeal dismissed.

Twenty-two and twenty years respectively after his guilty pleas to voluntary manslaughter and to possession of drugs for sale, Muhammed Hamawi asked the superior court to set aside his guilty pleas so he could avoid deportation. The court denied his motions and his requests for certificates of probable cause. Hamawi appeals contending he is not required to have a certificate of probable cause, that the court abused its discretion in denying his motions and that his convictions should be set aside because his

attorneys were ineffective. As we will discuss, this appeal is not properly before us as a challenge to guilty pleas without compliance with Penal Code¹ section 1237.5. Even if we were to consider his issues on the merits we would affirm the trial court's orders.

PROCEDURAL BACKGROUND

Since the facts of the underlying offenses are not material to the issues on appeal we will focus solely on the procedural events in the trial court.

On January 6, 1989, Hamawi pleaded guilty to voluntary manslaughter with the use of a firearm in San Diego Superior Court case no. CR99761 as a lesser included offense of murder. As part of a plea agreement Hamawi was granted probation subject to local custody. Hamawi did not appeal from this conviction.

On April 3, 1991, Hamawi pleaded guilty in San Diego Superior Court case no. CR120122 to possession of a significant quantity of methamphetamine for sale and was sentenced to a two-year term in prison. Hamawi did not appeal from this conviction.

On July 22, 2011, Hamawi filed separate motions to vacate his guilty pleas in order to avoid deportation. He contended he had not been advised of the immigration consequences of his guilty pleas as required by section 1016.5.

On November 29, 2011, the trial court denied Hamawi's requests for certificates of probable cause in the 1989 and 1991 cases.

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

DISCUSSION

I

REQUIREMENT OF A CERTIFICATE OF PROBABLE CAUSE

Hamawi recognizes that ordinarily one cannot appeal from a denial of a challenge to a plea of guilty without first obtaining a certificate of probable cause from the trial court. (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) Relying on *People v. Totari* (2002) 28 Cal.4th 876, 881-882 (*Totari*), he argues that appeals from motions to vacate guilty pleas pursuant to section 1016.5 do not require certificates of probable cause. We disagree and dismiss this appeal.

Section 1237.5 provides that a defendant may not appeal from a judgment of conviction based on a guilty plea without first obtaining a certificate of probable cause. A person may, however, appeal from postconviction issues without obtaining a certificate of probable cause, as long as the appeal does not challenge the validity of the plea itself. (*People v. Johnson, supra*, 47 Cal.4th at pp. 678-679; *People v. Mendez* (1999) 19 Cal.4th 1084, 1096; *People v. Panizzon* (1996) 13 Cal.4th 68, 75-76.)

As Hamawi argues, section 1016.5 not only requires appropriate advisement of the potential impact of a guilty plea on a defendant's immigration status, it also provides that a defendant may bring a motion to vacate the plea based on an alleged failure to comply with section 1016.5.

In order to avoid the consequences of the trial court's denial of his request for certificates of probable cause, Hamawi contends *Totari, supra*, 28 Cal.4th at pages 881-882, creates an exception to the requirements of section 1237.5.

The court in *Totari, supra*, 28 Cal.4th 876, dealt with the question of whether the denial of a motion under section 1016.5 was an appealable order. The defendant in *Totari* had obtained a certificate of probable cause, thus the court did not address the issue which is before us. Rather, the court concluded that the denial of the motion was an order after the plea affecting the substantial rights of the parties under section 1237, subdivision (b), in a case where a certificate of probable cause had been obtained by the defendant.

The Court of Appeal in *People v. Placencia* (2011) 194 Cal.App.4th 489, 493-495 (*Placencia*), specifically addressed the issue before us. In that case the court held that a defendant cannot challenge the denial of a motion to vacate a guilty plea under section 1016.5 without first complying with the requirements of section 1237.5. The court noted that *Totari, supra*, 28 Cal.4th 876 did not address the relationship of section 1237.5 to appeals from denials of motions to vacate guilty pleas under section 1016.5.

Hamawi argues that *Placencia, supra*, 194 Cal.App.4th 489 was wrongly decided. We disagree. The court in *Placencia* applied clear direction from the Supreme Court that guilty pleas cannot be challenged on appeal without complying with section 1237.5. The high court has directed that that section should be strictly enforced. (*People v. Mendez, supra*, 19 Cal.4th at p. 1098.) It is certainly clear that the appeal from the denial of a motion to vacate a guilty plea is as much of a challenge to the guilty plea as is an appeal from the denial of a motion to withdraw a guilty plea, which clearly requires a certificate of probable cause. (*People v. Johnson, supra*, 47 Cal.4th at p. 678.) We agree with the reasoning of the court in *Placencia* and find the current appeal is not properly before us.

We are also aware that a different appellate court took a contrary position on this issue and that the Supreme Court has granted review in that case (*People v. Arriaga* (2011) 201 Cal.App.4th 429, rev. granted Feb. 22, 2012, S199339). While we are aware that review has been denied in *Placencia, supra*, 194 Cal.App.4th 489 (S193103, July 20, 2011), we will not speculate as to the significance of the two actions.

However, in an abundance of caution, we will address Hamawi's remaining issues.

II

APPELLANT WAS PROPERLY WARNED ABOUT IMMIGRATION CONSEQUENCES

Because Hamawi waited two decades to first challenge either of his guilty pleas, the records surrounding those pleas are limited. Hamawi did not appeal from either conviction and by the time of the present challenges the court reporter's notes for the 1989 plea had been destroyed and the court reporter had died. In addition, his public defender has since died and the file of the Public Defender's Office has been purged. We do, however, have the change of plea forms for each of the pleas. In each instance Hamawi signed the forms and initialed the specific immigration warning:

"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."

We know from review of the transcript of the 1991 plea, the court did not verbally inform Hamawi of immigration consequences, however the court did satisfy itself the defendant had read and understood the change of plea form and the provisions of it. As we have noted there is no transcript of the 1989 plea available.

There is no legislative or case law requirement that the defendant be verbally warned in compliance with section 1016.5. The required warning may be provided in written form. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-522; *People v. Quesada* (1991) 230 Cal.App.3d 525, 535-536.) Certainly, the record would be improved by a verbal warning, in addition to the written advisement in the change of plea form, however, it is clear that the written version is sufficient.

Thus, this record, infirmities notwithstanding, provides us with a clear showing that Hamawi was properly advised pursuant to section 1016.5. Accordingly, the trial court in this proceeding correctly concluded that Hamawi had not carried his burden to justify vacating his guilty pleas.

III

HAMAWI HAS NOT SHOWN THAT COUNSEL WAS INEFFECTIVE

Finally, Hamawi contends his counsel was ineffective in 1989 and in 1991 in failing to adequately advise him of the potential that 20 years later he may be subject to deportation. Forgetting for the moment that the court advised Hamawi of immigration consequences on both occasions, there is nothing in this record to show that Hamawi would have received a better outcome in the absence of the alleged failure.

In order for a defendant to demonstrate that he or she has been denied the Sixth Amendment right to effective assistance of counsel, the person must show that counsel not only failed to adequately perform, but that in the absence of the error it is reasonably likely the defendant would have received a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668.) Even if the issue of ineffective assistance is

cognizable on this appeal, Hamawi has failed to meet his burden of showing a different result would have been likely.

In the 1989 case Hamawi was charged with murder. The plea agreement allowed him to plead to voluntary manslaughter and to receive probation. In 1991 while still on probation, he was charged with the illegal possession of a significant quantity of drugs. Although he could have been given a significant sentence for both the drug offense and the probation violation, counsel was able to obtain a two-year prison sentence for Hamawi, far less than would otherwise have been likely. In short, Hamawi, having been twice informed of the possible immigration consequences, took advantage of very favorable plea bargains. It would be utter speculation on this record to believe further immigration advice from counsel would have lead to any better outcome in Hamawi's criminal cases.

Hamawi relies heavily on *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, to support his contention he was denied effective assistance of counsel. *Padilla* does not assist him. In *Padilla*, the court held that trial counsel's failure to inform the client of immigration consequences could rise to the level of ineffective assistance of counsel under the Sixth Amendment in an appropriate case. The court did not find the assistance of counsel in that case to be ineffective, rather the court remanded the case to the lower courts to explore the issue of prejudice. In this case, as we have determined, Hamawi was informed by the court of possible immigration consequences at the time of his guilty pleas. He entered those guilty pleas, fully aware that he was not a citizen of this country and that the convictions could adversely impact his status. The fact that some 20 years

later he did face adverse consequences under the current state of federal immigration law, does not demonstrate, or even reasonably hint that Hamawi was denied effective assistance of counsel during the plea bargaining process.

DISPOSITION

The appeal is dismissed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.