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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

RAMIRO CARDENAS MORALES,

Defendant and Respondent.

E053762

(Super.Ct.No. INF048902)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Johnson, Judge.

Order reversed.

Paul E. Zellerbach, District Attorney and Gregory R. Albright, Deputy District Attorney for Plaintiff and Appellant.

Correen Ferrentino, under appointment by the Court of Appeal, for Defendant and Respondent.

The trial court granted defendant's motion under Penal Code section 1016.5 and vacated his judgment of conviction and the imposition of probation, set aside his guilty

plea and returned his case to the active case list. The People appeal the granting of his motion. We reverse the trial court's order.

Defendant is a Mexican national and citizen lawfully residing in the United States since December 15, 1989 as a permanent resident. On April 27, 2004, he was convicted of possessing methamphetamine. In October 2004, defendant was charged, in the instant case, with possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and possessing paraphernalia to ingest a controlled substance (Health & Saf. Code, § 11364) both crimes occurring on October 10, 2004. In December 2005, the Department of Homeland Security began removal proceedings due to the April 2004 conviction. On February 6, 2006, cancellation of the removal proceedings was ordered. On March 29, 2006, defendant signed a change of plea form in the instant case in which he agreed to plead guilty to possessing methamphetamine in exchange for a grant of probation, with local time. On the form, defendant initialed a statement that provided, in pertinent part, "If I am not a citizen of the United States, I understand that this conviction may have the consequence . . . of deportation" Defendant also initialed the following statement, "All the promises made to me are written on this form, or stated in open court." No further mention was made on the form about the immigration consequences of his plea nor were they mentioned during the taking of his plea. However, defendant acknowledged in open court that all the initials on the form and the signature at the bottom were his and that he had an opportunity to go over the form with his attorney. On that same day, defendant's plea was accepted, imposition of sentence was suspended and he was placed on formal probation for three years. Probation was set to expire on

November 27, 2009.¹ On August 24, 2010, a Record of Deportable/Inadmissible Alien was filed by the Department of Homeland Security after defendant was interviewed at the local jail, noting that defendant had been convicted in the instant case. According to defendant's moving papers, the same month, the Department began removal proceedings against him based on the instant conviction.² Also according to defendant's moving papers, he was foreclosed from obtaining cancellation of the removal and he was in the process of appealing his removal order when he filed his moving papers. According to defendant's declaration under penalty of perjury, he was "almost deported" at the time. Also, at that point, he was in federal custody in Arizona.

In April 2011, defendant filed, inter alia, a motion to vacate his plea of guilty in the instant case pursuant to Penal Code section 1016.5. That section provides, in pertinent part, "Prior to acceptance of a plea of guilty . . . , 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 [¶] If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty . . . may have the consequences for the defendant of

¹ This was according to the Allegation of Violation of Probation filed in 2009. However, according to the People's response to defendant's moving papers, defendant's probation actually expired on September 17, 2010.

² In his moving papers, defendant refers to Exhibit 9 as evidencing this proceeding, however, that exhibit was not made part of the record before this court.

deportation . . . , the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty . . . and enter a plea of not guilty.”

In his motion, defense counsel represented that defendant would be deported due to the instant conviction. In a declaration under penalty of perjury attached to the motion, defendant stated that at the time he entered the instant plea, he told his then-attorney (hereinafter, “trial counsel”) that he had almost been deported for a previous conviction of the same crime and he asked the latter if it would be safe to plead guilty to the same offense in this case. He said trial counsel told him it would not “be a problem because ‘the violation date [of the instant offense] occurred before the . . . [February 2006] cancellation of removal, so [the] D[e]partment of H[omeland] S[ecurity] can’t deport [defendant] if [he] plead guilty.’” Defendant asserted that trial counsel added, “‘We can always back-date the conviction anyway.’” Defendant stated that he did not know if this was true or not, but he trusted trial counsel and he believed what the latter had said. Defendant further stated that because he did not believe there would be any immigration consequences to his pleading guilty in the instant case, he did so, but had he known the truth, he would not have.

At the hearing on the motion, the prosecutor represented to the court, inter alia, that defendant's trial counsel was available and willing to come to the court to deny that he gave the advisement defendant alleged he did. The prosecutor explained that he did not bring trial counsel to court with him because it was the People's position that Penal Code section 1016.5 did not authorize the vacating of a judgment and the withdrawal of a plea on the basis of incompetency of counsel. The trial court granted the motion,

concluding that defendant's declaration was sufficient, that the assertions therein were reasonable and, therefore, believable,³ and that it stated that defendant was misadvised of the immigration consequences of his plea, which the court deemed incompetency of counsel, which the court equated with not being advised pursuant to Penal Code section 1016.5. The court further noted that the written advisement in the change of plea form was sufficient to fulfill the duty imposed by Penal Code section 1016.5 on the court accepting defendant's plea.⁴ However, the court cited *People v. Quesada* (1991) 230 Cal.App.3d 525 (*Quesada*), and pointed out that the legislative purpose of Penal Code section 1016.5 in "ensuring a defendant knows the possible immigration consequences of a plea and has time to consider his choices [is] best served by pursuing the court in the tribunal in which the defendant appears. Which in the case here, I view [trial counsel] as an officer of the court or within that purview [¶] . . . [¶] [*Quesada*] looks to the

³ The court made this finding before the prosecutor represented that trial counsel was available and willing to come to court and testify that he did not say to defendant what defendant asserted he had. However, the trial court did not change its proposed ruling or specifically comment about this representation after it had been made. The court, did, however, after hearing the prosecutor's representation, state that defendant's declaration was "unrebutted."

⁴ This was, no doubt, in response to the allegation in defendant's moving papers that he "was never advised by the court [that accepted his plea] that a guilty plea would lead to immigration consequences." [¶] The court transcripts are clear the advisements were not given by the court."

Defendant's assertion that "the evidence and argument at the hearing on his motion did not satisfy the [trial] court that the requisite immigration advisements were given by the court [that accepted defendant's plea]" is belied by the record, as is defendant's assertion in his brief that the trial court's ruling was actually based on a finding that it "reasonably conclude[ed] that the legislative intent of [Penal Code] section 1016.5 was not satisfied by the immigration warning . . . [on the] written plea form"

entire tribunal of a counsel sitting there, and this is what I have accepted, and [counsel] has given . . . some legal advice that really fills in the blanks from the [words of the written advisement,] ‘may be deported.’ And . . . we know [that advice was] incorrect because . . . [defendant] is now facing potential deportation. I don’t think he’s been properly advised under 1016.5”

The People assert that the trial court abused its discretion in vacating the judgment and withdrawing defendant’s guilty plea pursuant to Penal Code Section 1016.5. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517, 1518.) Discretion is abused where the trial court’s ruling rests on an error of law. (*People v. Superior Court (Humberto)* (2008) 43 Cal.4th 737, 742; *People v. Ibanez* (1999) 76 Cal.App.4th 537, 549.) We agree with the People that the trial court here committed such an error.

As stated in Penal Code section 1016.5, the purpose of the statute is as follows: “. . . [I]n many instances, . . . a plea of guilty . . . is entered without the defendant knowing that a conviction of such offense is grounds for deportation Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea . . . be proceeded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is also the intent of the Legislature that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant’s counsel was unaware of the possibility of deportation” As the People correctly assert, Penal Code section

1016.5 is aimed at making the defendant aware of the possibility that a guilty plea may result in deportation.

Quesada, supra, 230 Cal.App.3d 525, which the trial court relied on in equating defense counsel's asserted misdirection concerning the immigration consequences of the defendant's plea with the trial court's as mandated by Penal Code section 1016.5, dealt with whether the written advisement on a change of plea form was sufficient to fulfill the trial court's duty or if an oral advisement was required. (*Quesada*, at pp. 528-529, 533.) *Quesada* argued that Penal Code section 1016.5's numerous references to the obligation of "the court" to give the advisement meant that *the court* must orally deliver the advisement and the written advisement in the change of plea form was insufficient. (*Quesada*, at pp. 533-534.) *Quesada* concluded that the "court" as referred to in Penal Code section 1016.5 mean "the tribunal in which [the] defendant enters his plea." (*Quesada*, at p. 535.) *Quesada* went on to hold, "Under this construction, the advisement referred to [in Penal Codes section 1016.5] may be given through any of the numerous individuals acting on behalf of that tribunal, including the judge, counsel, the court reporter, or the clerk. So long as the legislative purpose is advanced by having some person acting on behalf of the tribunal actually advise [the] defendant of the immigration consequences of his plea and that advice is reflected 'on the record,' the actual adviser is immaterial. Indeed, it is common practice for the prosecutor or defense counsel, rather than the judge, to advise the defendant of his rights and the consequences of a guilty plea, including the immigration consequences, and to elicit the necessary waivers of those rights. [Citations.] The construction advanced by [the] defendant, on the other hand,

would exalt form over substance and would place an unnecessary restrictive burden on our trial courts. After all, the dispositive question is whether the defendant has been advised of the immigration consequences of his plea as required by the statute, not who gave the admonition. . . . [Citations.] [¶] Nor need the statutory admonition be given orally.” (*Id.* at pp. 535-536.)

As is apparent from the foregoing, the trial court here erroneously interpreted *Quesada* as supportive of its conclusion that defense counsel’s asserted failure to correctly advise defendant of immigration consequences of the plea is attributable to the trial court for purposes of Penal Code section 1016.5 Further language in *Quesada* makes this abundantly clear: “Defendant also contends ‘[t]he failure of the court to verbally advise [him] of the consequences of his plea relative to immigration was compounded by’ his former counsel’s [incorrect] statement that he was not aware of any immigration consequences of the plea. Because defendant was actually advised of the immigration consequences of his plea [by the inclusion of the advisement set forth in Penal Code section 1016.5 in the change of plea form, which defendant signed, signifying that his attorney had explained its contents to him and he understood them, Penal Code] section 1016.5 has no application and thus provides no authority to allow defendant to withdraw his guilty plea. (*Id.* at pp. 537-538, italics added.)

In *People v. Chien* (2008) 159 Cal.App.4th 1283, 1285 (*Chien*), the defendant moved to vacate his conviction and set aside his plea pursuant to Penal Code section 1016.5 on the ground that his attorney was incompetent, in that the latter failed to apprise

defendant of and defend against the adverse immigration consequences of the plea.⁵ The appellate court concluded, “. . . 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.” (*Ibid.*)

The *Chien* court further concluded that the trial court lacked jurisdiction to entertain defendant’s allegations under Penal Code section 1016.5. (*Chien, supra*, 159 Cal.App.4th at p. 1287.) It reasoned, “[t]he broad statement of intent in section 1016.5, subdivision (d), and its concern with fairness to the accused, does not override the section’s narrow requirements and precise remedy. Section 1016.5 addresses only the trial court’s duty to advise, not counsel’s, and provides a specific remedy for that particular failure. Defendant nevertheless posits that section 1016.5, subdivision (c)⁶ empowers a trial court to grant relief whenever it will further the goals of subdivision (d). Defendant points, in particular, to the provision [in subdivision (c)] that states: ‘Nothing

⁵ Specifically, defendant asserted that his attorney never investigated the actual immigration consequences of his plea, never advised him of those consequences and never defended his case with knowledge of the actual immigration consequences. (*Chien*, at p. 1287.)

⁶ Penal Code, section 1016.5, subdivision (c) states: “With respect to pleas accepted prior to January 1, 1978, it is not the intent of the Legislature that a court’s failure to provide the advisement required by subdivision (a) of Section 1016.5 should require the vacation of judgment and withdrawal of the plea or constitute grounds for filing a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.”

in this section . . . shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.’ (§ 1016.5, subd. (c).) Defendant contends that the cited provision applies to the entirety of section 1016.5, not just to subdivision (c), and thus ‘allows a court to vacate a judgment on grounds other than the court’s failure to give the proper advisement.’ Even if the provision refers to the entirety of section 1016.5, which is doubtful given its placement in the statute, it does not empower the court as defendant suggests. The mere statement that a statute does not interfere with any other applicable authority or discretion does not grant additional authority or discretion.” (*Chien, supra*, 159 Cal.App.4th at pp. 1288-1289, footnote omitted.)

The holding of *Chien* was endorsed by the California Supreme Court in *People v. Kim* (2009) 45 Cal.4th 1078. Therein, defendant asserted that his trial attorney was incompetent for failing to investigate the immigration consequences of his plea and for failing to negotiate a plea to a crime that had no such immigration consequences. (*Id.* at p. 1102.) The California Supreme Court concluded, “[w]e . . . reject defendant’s contention that in light of the Legislature’s enactment of section 1016.5, which necessarily reflects that body’s assessment of the need for a remedy when pleading defendants are unaware of the immigration consequences of their pleas, we should expand the scope of that statutory motion to vacate to provide some form of relief for defendant here. We note the trial court properly admonished defendant regarding the possible immigration consequences of his plea, and his further claim that his trial attorney

was somehow ineffective is not a wrong encompassed by the statute. [Citation.]” (*Kim*, at p. 1107, fn. 20.)

Under the above-discussed authorities, the trial court committed legal error in concluding that defendant was entitled to relief under Penal Code section 1016.5 for his attorney’s failings. Thus, the trial court abused its discretion.

Defendant also sought relief, inter alia, under Penal Code section 1385. The trial court set aside consideration of that ground. Defendant here contends that we must remand the case for the trial court to consider that ground. This is the People’s appeal. They ask only that we examine the trial court’s ruling on defendant’s motion under Penal Code section 1016.5. Anything beyond this is outside the bounds of this appeal. If defendant wishes to proceed under Penal Code section 1385, he must press his motion in the trial court.

DISPOSITION

The order vacating the judgment and setting aside defendant’s guilty plea is reversed.

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RAMIREZ
P.J.

We concur:

KING
J.

CODRINGTON
J.