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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.

FRANCISCO VELASQUEZ DELGADO,

Defendant and Respondent.

E054445

(Super.Ct.No. INF032843)

OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos, Judge. Reversed.

Paul E. Zellerbach, District Attorney, and Matt D. Reilly, Deputy District Attorney, for Plaintiff and Appellant.

Jerry D. Whatley and Beatrice C. Tillman, under appointment by the Court of Appeal, for Defendant and Respondent.

Defendant and respondent Francisco Velasquez Delgado moved below to vacate his guilty plea, on the ground that he had not properly been advised of the immigration

consequences of the plea before the trial court accepted the plea of guilty. The trial court granted the motion, in reliance on *People v. Akhile* (2008) 167 Cal.App.4th 558. The People now appeal, contending that the court in fact complied with the statutory obligation to advise defendant of the immigration consequences of his plea, because defendant was given written warning of the immigration consequences of his plea when he signed the plea agreement, and 15 days later he confirmed that he had understood the plea agreement form. We agree with the People and reverse the lower court's order.

#### FACTS AND PROCEDURAL HISTORY

Defendant is a citizen of Mexico, living in the United States as a lawful resident since 1968. Defendant's mother is a United States citizen, defendant's daughter is a United States citizen, and defendant's two grandchildren are United States citizens. Defendant also suffers from a condition of the eyes, retinitis pigmentosa, which renders him legally blind. Defendant also lacks formal education and cannot read.

In 1999, the Riverside County District Attorney filed a complaint charging defendant with two drug-related offenses: felony possession of methamphetamine for sale, and misdemeanor possession of marijuana. Defendant was arraigned on August 31, 1999; at that time the court admonished defendant orally that conviction could result in deportation, exclusion from admission, or denial of naturalization, if defendant was not a citizen. Defendant pleaded not guilty.

The following day, September 1, 1999, defendant signed and initialed a preprinted change-of-plea form. Defendant apparently has some minimal residual visual acuity;

despite handwriting anomalies, defendant was able to see well enough to initial and to sign appropriately on the change-of-plea form. The form stated, “If I am not a citizen of the United States, I understand that this conviction ~~may~~ will have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” The printed word “may” was lined through, and the word “will” was handwritten above it. The matter was continued for 15 days, until September 16, 1999.

On September 16, 1999, the change-of-plea hearing took place. Defendant’s attorney told the court that defendant wished to plead guilty with the disposition of “proceedings suspended, three years summary probation, [and] credit [for] time served.” The court asked defendant whether he understood the nature of the charges; defendant stated that he did. The court explained the consequences of a violation of probation, and any parole period should defendant’s probation be revoked and he be sentenced to state prison. Defendant indicated that he understood.

The court inquired, “Understanding everything that I just said, as to count 1, possession of methamphetamine, a felony; how do you plead?” Defendant responded, “Guilty.” Immediately thereafter, the court asked whether defendant had understood the plea form, with its advisement of rights and the consequences of the plea. Defendant again assented, and affirmed that the form had been read to him, and that he understood its terms. Defendant had no questions about the form he had signed.

At that point, the prosecutor interrupted to inquire whether the court had taken defendant's plea to simple possession of methamphetamine, or possession of methamphetamine for sale, as had been charged in the complaint. The court corrected itself, and then inquired again of defendant, how he desired to plead to count 1, a charge of possession of methamphetamine for sale. Defendant repeated his plea of guilty, as well as his agreement that the plea form had been read to him, that he understood the form, and that he had no questions concerning the form.

Following the guilty plea, defendant was admitted to probation on certain terms and conditions.

In June of 2000, the court held a hearing on an alleged violation of probation. Defendant admitted the violation. The court reinstated probation, with some modification to the probation conditions (principally, that defendant serve additional jail time).

Over 10 years later, on May 11, 2011, defendant filed a motion to withdraw his plea and to vacate his conviction, pursuant to Penal Code section 1016.5. Defendant brought the motion on the ground that, "he was not effectively advised of the potential immigration consequences of his guilty plea **at the time of his plea**, as the statute requires." (Bold in original.)

Defendant argued that the plea proceedings failed to comply with Penal Code section 1016.5 because, even though the trial court attempted to advise defendant on the day of arraignment (by oral statement) and the day after arraignment (by printed

provision on the change-of-plea form) about immigration consequences of a guilty plea, the advisements were premature, in that they were given about two weeks before the court actually took defendant's plea. In addition, because defendant was legally blind, he did not read the written advisement on the plea form for himself, and "was . . . unable to understand the advisement of rights form that he [had] signed . . . ."

Defendant relied on *People v. Akhile*, *supra*, 167 Cal.App.4th 558, for the proposition that, if the court advises a defendant of immigration consequences at the time of arraignment, but not at the time of the actual plea, the advisement fails to comply with the statute. (*Id.* at p. 564.) Further, defendant's declaration averred that he, "remember[ed] meeting with the public defender in court, a couple of times, before deciding to plead guilty based on his advice. I also remember signing some forms that the public defender tried to explain to me, but I was never able to read these forms. I was told where to initial and sign and I don't really know what was on the Forms."

Defendant's motion indicated that, "[a]t the present time, I am unable to renew my lawful permanent resident card because of my guilty plea in this case, and I have now learned that my guilty plea in this case will almost certainly result in my removal to Mexico. No one said anything about this on the day that I pled guilty in court.

"Had I known that my guilty plea in this case could result in my removal from the United States and permanent banishment from this country, I never would have pled guilty but would instead have taken my case to trial or at a minimum I would have sought some way to resolve my case without entering a plea."

The People opposed the motion, arguing that the required advisement under Penal Code section 1016.5 was not required to be given orally, and was not required to be given at the time of the plea, as long as it was given before the guilty plea was accepted. *People v. Akhile, supra*, 167 Cal.App.4th 558, was not to the contrary; rather, it required that the advisement be given in the context of a guilty plea, not in the context of arraignment. Here, defendant was orally advised of immigration consequences at his arraignment, but also in the context of a guilty plea—indeed, in contemplation of a guilty plea—on the change-of-plea form, which defendant duly initialed. The People further argued that defendant was not prejudiced by the timing of the advisement (two weeks before he pleaded guilty in open court).

On August 22, 2011, the trial court granted defendant’s motion, and entered the withdrawal of defendant’s guilty plea.

The People promptly filed a notice of appeal.

## ANALYSIS

### I. Standard of Review

Penal Code section 1016.5 requires the trial court, “[p]rior to acceptance of a plea of guilty or nolo contendere,” to give a specified advisement to noncitizen defendants as to the immigration consequences of a guilty plea. (Pen. Code, § 1016.5, subd. (a).) The statute also provides a specific remedy if the court fails to give the statutory advisement: vacation of the judgment to permit the defendant to withdraw the plea. (Pen. Code, § 1016.5, subd. (b).)

“To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.” (*People v. Totari* (2002) 28 Cal.4th 876, 884.) If the trial court denies the statutory motion to vacate, that ruling is reviewed for abuse of discretion. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.) Presumably, at least at first blush, the same standard would apply when the trial court grants the motion.

However, the issue faced by the trial court was whether defendant presented sufficient factual circumstances to support his showing of the elements required for relief: (1) the failure to give the statutory admonition, (2) pendency of actual immigration consequences, and (3) prejudice from the failure to give the advisement. Defendant presented his own declaration, and the court had before it the transcript of the 1999 plea hearing. These items constituted the sole evidence in support of defendant’s motion. When a ruling under review is based upon undisputed evidence, the appellate court undertakes an independent, rather than a deferential, review. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 675.)

Further, “Mixed questions of fact and law ‘are those “in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law

as applied to the established facts is or is not violated.” [Citation.]’ [Citations.] The review of mixed questions thus involves a two-step process of first determining the facts relevant to the issue being decided and then applying the law to those established facts. [Citation.] Deference is given to the trial court in considering the relevant factual findings: “[T]he power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court’s findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.” [Citations.] In the second step—application of the law to the historical facts—the trial court’s decision is generally reviewed independently. [Citation.]” (*People v. Uribe* (2011) 199 Cal.App.4th 836, 855-856.)

It is clear that, in this case, the trial court based its ruling on the ground, as a factual matter, that no specific immigration advisement was given on the date that the guilty plea was actually taken in open court. The court indicated that, although the written plea form did contain an express advisement of immigration consequences, the two-week delay between the written advisement and the oral taking of the plea amounted to a failure to give the admonition within the meaning of the statute. The court was also concerned by defendant’s vision problems, but based its ruling on the finding that defendant “was not specifically advised on the date of his plea on September 16th, 1999 . . . of the possible immigration consequences.”

The court’s ruling was ultimately rested, not merely on a factual matter (i.e., that there was no specific oral or written mention of immigration consequences on the date of the actual taking of the plea), but also on its interpretation of the meaning of the statute. Penal Code section 1016.5 provides that the advisement must be given “[p]rior to acceptance of a plea of guilty or nolo contendere.” Under the trial court’s interpretation, that language means that the admonition must be given on the date the plea is taken in court, and not at some earlier time. Viewed in this manner, the point at issue requires a construction of the statutory language. The proper interpretation of a statute presents an issue of law, which we review de novo. (*People v. Akhile, supra*, 167 Cal.App.4th 558, 562-563.)

Accordingly, we review the issue independently, to determine whether the trial court’s ruling was proper.

II. Defendant Was Given a Proper Advisement of Immigration Consequences in the Context of His Guilty Plea, “Prior to [the] Acceptance of [His] Plea of Guilty”

“When construing a statute, we must “ascertain the intent of the lawmakers so as to effectuate the purpose of the law.” [Citations.] We begin by examining the language of the statute, giving the words their ordinary meaning. [Citation.] “The words, however, must be read in context, considering the nature and purpose of the statutory enactment.” [Citation.] In this regard, sentences are not to be viewed in isolation but in light of the statutory scheme. [Citation.]’ [Citation.]” (*Board of Trustees of California State University v. Public Employment Relations Bd.* (2007) 155 Cal.App.4th 866, 876.)

Penal Code section 1016.5, subdivision (a), provides that “[p]rior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions 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.” A defendant is “presumed not to have received” the advisement unless it appears in the record. (Pen. Code, § 1016.5, subd. (b).)

As we have already noted, a defendant who wishes to withdraw a guilty plea under the statute is required to show that, “(1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.” (*People v. Totari, supra*, 28 Cal.4th 876, 884.)

The first hurdle is whether defendant established that he was not properly advised of the immigration consequences of his plea. “The statutory language at issue requires a trial court to administer the advisement ‘[p]rior to acceptance of a plea of guilty.’ ([Pen. Code,] § 1016.5, subd. (a).)” (*People v. Akhile, supra*, 167 Cal.App.4th 558, 563.) The *Akhile* court found that phrase ambiguous because it is reasonably susceptible to more than one interpretation. (*Ibid.*) There, the court noted that the statutory phrase “can be

read to require either that the advisement be given at the time of the plea or that the advisement be given at any time during the criminal proceedings before the plea.” (*Ibid.*)

The *Akhile* court resolved that ambiguity by holding that, “[t]he more reasonable interpretation of [Penal Code] section 1016.5 is that the advisement must occur within the context of the taking of the plea.” (*People v. Akhile, supra*, 167 Cal.App.4th 558, 564.) Here, the evidence shows that the advisement did take place “within the context of the taking of the plea.” (*Ibid.*) The change-of-plea form has no other context. It meets the concerns, expressed in *Akhile*, that “a defendant is likely to give the advisement more attention and significance at the plea stage than at the arraignment stage,” and that “a defendant may plead guilty to a different charge or charges than those involved at the arraignment, and some defendants may be confused as to whether the advisement continues to apply.” (*Ibid.*) Defendant received his immigration consequences advisement at a stage when it deserved the utmost attention and significance. He knew which charges he was pleading guilty to and which would be dismissed. He was expressly advised, in the context of his guilty plea, not merely that immigration consequences “may” continue to apply in his case, but that they “will” apply.

It is uncontradicted that defendant initialed and signed the change-of-plea form, which contained a proper immigration consequences admonition. Among the statements that defendant initialed were: “CONSEQUENCES OF PLEA: [¶] . . . [¶] 5. If I am not a citizen of the United States, I understand that this conviction will have the consequences of deportation, exclusion from admission to the United States, or denial of

naturalization pursuant to the laws of the United States.” Defendant placed his initials next to the following averment: “*I have read and understand each of the above listed consequences.*” (Original italics.) Defendant also signed below the statement: “The initials that appear above and on the back of this form are my own. I have read and understand each statement that I have initialed.” Defendant separately initialed statements on the form that recited: “No one has made any threats to me or anyone close to me, or placed any pressure of any kind on me in order to make me plead guilty,” “I understand the terms of the plea agreement,” and “I have had an adequate time to discuss my case with my attorney, including time to discuss 1) my constitutional rights, 2) the consequences of any guilty plea, and 3) any defense I may have to the charges against me.” Finally, defendant’s attorney certified that, “I am the attorney for the above named defendant. I am satisfied that 1) the defendant understands his/her constitutional rights and understands that a guilty plea would be a waiver of those rights; 2) that the defendant has had an adequate opportunity to discuss his/her case with me, including any defense he/she may have to the charges; 3) that the defendant understands the consequences of his/her guilty plea. . . .” Defendant’s attorney signed the attorney statement as recited above.

Defendant’s declaration in support of the motion to vacate the judgment and withdraw the plea does not actually contradict the recitations in the plea agreement form. That is, defendant averred that (1) he has vision problems and has been declared legally blind; (2) he has little formal education and he cannot read; (3) he remembered meeting

with the appointed attorney “a couple of times,” before deciding to plead guilty, on his counsel’s advice; (4) he remembered signing some forms; (5) the attorney “tried to explain” the forms to defendant; but (6) defendant was never able to read the forms himself. Finally, defendant states, vaguely, (7) “I don’t really know what was on the Forms.”

As to the hearing in court where the trial judge took defendant’s plea, defendant avers, (1) “neither the judge nor my lawyer mentioned anything about the immigration consequences,” at that time, and (2) “No one said anything to me about this on the day that I pled guilty in court.”

Defendant’s declaration is remarkable as much for what it does not say, as for what it does say. Defendant states, for example, that he was not able to read the forms, but he never states that his attorney failed to read the provisions of the plea form to him. He states that no one advised him of immigration consequences, “on the day that I pled guilty in court,” but never states that no one so advised him when he signed the guilty plea form. The statement, “I don’t really know what was on the Forms,” is, of course, a statement of defendant’s present knowledge, made a dozen years after the events in question took place. It does not actually demonstrate that defendant did not know the contents of the plea form at the time he executed it, or at the time of the plea hearing. Defendant’s present declaration purports to impugn the integrity of both defendant’s and his attorney’s signed statements on the plea form, but does so in an entirely oblique

manner, without making any direct or explicit averment in contradiction to the plain declarations that both made at the time.

Also notably absent from defendant's motion is any declaration from the former attorney, to attest that the provisions of the plea agreement form were not read to defendant, that the consequences were not discussed with defendant, that defendant had difficulties understanding what the terms of the agreement were, et cetera.

Defendant's insinuation that his attorney did not, in fact, read the statutory admonition to him, flies in the face of his statements to the court at the time the plea was taken. Even though there was no specific mention of immigration consequences at the plea hearing, the court asked defendant directly whether he had had time to discuss everything with his attorney. Defendant responded that he had. The court had asked defendant, "was the advisement of rights, consequences of plea form read to you?" Defendant replied, "Yes." Defendant stated that he understood the form, that he had had an opportunity to discuss the case with his attorney, that he had no questions about the plea form, and that he did not need any additional time for further discussion with his attorney. Unless defendant lied to the court at the time of the plea hearing, the record demonstrates that the plea form was read to him when he signed it. Manifestly, among the provisions that defendant expressly initialed, was an explicit warning about the immigration consequences of the plea. In fact, the wording of the immigration consequences advisement was interlineated to indicate that the plea "will" incur immigration consequences, not merely that it "may" do so.

In short, defendant's declaration a dozen years after the fact contained nothing to contradict the plea form, signed and initialed by defendant, and also signed by defense counsel, expressly showing that defendant did receive a substantive advisement as to the immigration consequences of his guilty plea. Defendant's motion therefore failed to establish the first element in support of his motion, that he did not receive a proper advisement.

The trial court below found otherwise, based primarily on the issue of timing: Defendant had signed the plea agreement two weeks before the guilty plea was actually taken in open court. Defendant points again to *Akhile*. There, the defendant was advised of potential immigration consequences at the time of arraignment, but there was nothing in the record to show that he was re-advised of the immigration consequences when he pleaded guilty. The defendant was arraigned in December 1991, and pleaded guilty in February 1992, two months later. There was no surviving change-of-plea form or reporter's transcript of the proceedings to demonstrate that the immigration advisement had been given in connection with the defendant's guilty plea. One of the concerns that led the *Akhile* court to hold that the immigration admonition must be given in the context of taking the plea was the possibility that, "significant time may pass before a guilty plea is entered." (*People v. Akhile, supra*, 167 Cal.App.4th 558, 564.)

Here, however, the plea form and the reporter's transcript survive. The record therefore does affirmatively show that defendant was given a proper admonition in the context of his guilty plea. The *Akhile* court also noted that its conclusion, that the

defendant had not been given an immigration advisement in the context of a plea, did “not require a trial court to ignore the obviously material fact of an earlier advisement. Instead it simply shifts the court’s consideration of this factor to the prejudice determination.” (*People v. Akhile, supra*, 167 Cal.App.4th 558, 565.) Thus, “[w]hether [a] defendant knew of the potential immigration consequences, despite inadequate advisements at the time of the plea, may be a significant factor in determining prejudice or untimeliness. [Citation.]” (*Ibid.*) The factual issue of knowledge may therefore be important in determining the third element required to be shown by the motion: the issue of prejudice. The fact of prior advisements, “may be a significant factor in determining prejudice.” (*Ibid.*) “[A]n advisement at the arraignment [or other earlier stage of the proceedings] becomes a factor that the trial court should consider in deciding if prejudice has been established.” (*Ibid.*) Here, defendant was advised of the immigration consequences of his conviction, both at arraignment, and in connection with his plea. He told the court that the provisions of the plea form had been read to him, and he initialed the plea consequences advisement in the knowledge that he was pleading guilty to a specified crime and with an agreed disposition. Defendant had that knowledge approximately two weeks before the taking of the plea in open court; defendant told the court that he remembered the plea form, with the advisement of rights and the consequences of the plea, having been read to him.

Although defendant, in his declaration in support of the motion, states that, “Had I known that my guilty plea in this case could result in my removal from the United States

and permanent banishment from this country, I never would have pled guilty,” that statement is belied by the record of the plea, which expressly states: “If I am not a citizen of the United States, I understand that this conviction *will* have the consequences of *deportation, exclusion from admission* to the United States, or denial of naturalization pursuant to the laws of the United States.” (Italics added.) Defendant explicitly acknowledged on the form that he had read and understood that consequence; his attorney also attested that defendant understood the consequences of his plea. Defendant nevertheless proceeded with his guilty plea.

The purposes of Penal Code section 1016.5, as explicated in *Akhile*, were satisfied by the procedure employed here. Defendant was given a proper advisement of the immigration consequences of his plea in the context of the taking of that plea. Substantial compliance with Penal Code section 1016.5 is all that is required (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174), and an advisement in writing is adequate (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-522). (See also *People v. Quesada* (1991) 230 Cal.App.3d 525, 535-536.)

The trial court below erred in finding that defendant had demonstrated that no admonition had been given (the first element to be proved), because defendant had in fact been given the required admonition in the context of his guilty plea. The court’s reliance on *Akhile* was thus misplaced. The order vacating the judgment and allowing defendant to withdraw his plea is therefore reversed.

DISPOSITION

The order vacating the judgment below is reversed. The record shows that defendant was given an express written advisement of immigration consequences (Pen. Code, § 1016.5) when he initialed the plea consequences provisions and signed the plea agreement form; that advisement therefore took place “in the context” of the guilty plea proceedings, as required under *People v. Akhile, supra*, 167 Cal.App.4th 558.

Defendant’s motion to withdraw his plea therefore failed to establish that he was not properly advised under the statute, and the motion should have been denied.

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MCKINSTER  
Acting P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.