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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ANTONIO CONTRERAS,

Defendant and Appellant.

E057231

(Super.Ct.No. FVI020122)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Dismissed.

Brian D. Lerner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

In a case with essentially no defense,¹ defendant and appellant Jesus Antonio Contreras entered a plea of guilty to possession of a controlled substance for sale. (Health & Saf. Code, § 11378.) A weight enhancement (Health & Saf. Code, § 11370.4, subd. (b)(1)) was stricken and appellant received the agreed midterm of two years. Sentencing took place on March 18, 2005.

However, on July 11, 2012, appellant filed a “Notice of Motion; Motion to Withdraw Plea and Vacate Conviction” on the bases that the trial court had inadequately advised him of immigration consequences under Penal Code section 1016.5, and that trial counsel had similarly failed to advise him properly, thus rendering constitutionally ineffective assistance. Appellant also argued that the “interests of justice” required that his conviction be set aside due to the hardships he and his family would face if he were to be deported to Mexico.²

¹ On October 19, 2004, law enforcement personnel were conducting a surveillance at a motel in Victorville. Appellant had taken a room there for one night. He was observed in the parking lot talking on a cell phone and looking up and down the street. Shortly thereafter, appellant entered and then left his motel room and approached a vehicle, shaking hands with the occupant who was then using his own cell phone. Appellant walked with this individual over to a white pickup truck and appeared to show him something on the passenger side seat. Officers then swooped down; a package on the seat contained five bags of methamphetamine, comprising just over two kilograms.

² Rather ironically, given that appellant was convicted of serious drug trafficking, in his declaration he expresses his concerns about the current drug-related violence in Mexico.

In the motion, appellant asserted that he had been informed that his conviction “may” have undesirable immigration consequences, citing the language of the statute.³ Appellant admitted that the trial court told him to “forget the term ‘may.’ It will happen,” but took the position that the written advisals on the change of plea form controlled. The motion was supported by appellant’s declaration in which he asserted 1) that he had not really understood any of the proceedings, 2) that counsel did not discuss the case with him to any particular extent, and 3) that “[n]either my attorney nor the judge actually explained the immigration consequences of my plea. I think the judge said something about immigration because there were 2 other persons in the case and they were here in the country with no legal status.[⁴] But he did not specifically explain to me the consequences of my particular situation.” He then stated that he had “learned a lot from this bad experience.”⁵

³ Penal Code section 1016.5 provides in pertinent part that an appellant who may not be a citizen must be advised that the 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.”

⁴ Appellant has permanent resident status.

⁵ Appellant entered his plea along with two co-appellants, Corona and Herrera, and the trial court to some extent spoke separately to them, for example, with respect to bail or possible own recognizance (OR) release pending sentencing. The court elicited acknowledgments concerning the change of plea forms and their understanding of the agreements from appellant and Herrera, both facing incarceration, Corona having pleaded guilty to a misdemeanor and receiving probation. When it realized that Herrera might not be a citizen, the trial court said “I don’t know whether or not this has been made clear to you, but this form says may, and I am going to amend on each form Term No. 14. It occurs on Page 2. It should read as follows: I understand that if I am not a citizen of the United States, deportation, exclusion from admission to the United States or denial of

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The People responded to this motion primarily by arguing that there was no appropriate procedural basis sufficient to confer jurisdiction on the trial court to grant relief. That is, even if appellant's assertions were factually true, he had no remedy.

The trial court accepted the People's position. We conclude that the appeal must be dismissed, and appellant's position is without merit should we formally reach it.

DISCUSSION

The People's first argument is that we must dismiss the appeal because appellant failed to obtain a certificate of probable cause and the appeal essentially challenges the validity of his plea. (Pen. Code, § 1237.5; Cal. Court Rules, rule 8.304(b).) We agree. Appellant is directly challenging the validity of his plea, and therefore a certificate of probable cause is a prerequisite to appeal. (*People v. Panizzon* (1996) 13 Cal.4th 68, 78-79.) The rule applies both to statutory challenges under Penal Code section 1016.5 and nonstatutory challenges relying on deportation issues. (*People v. Rodriguez* (2012) 208 Cal.App.4th 998, 1000; *People v. Placencia* (2011) 194 Cal.App.4th 489, 493-494

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naturalization will result from a conviction of the offense to which I plead guilty.” It then asked Herrera if she understood, and she replied that she did. The court resumed “So in other words, I am saying forget the term ‘may.’ It will happen. You understand?” When Herrera again concurred, the court turned to appellant and said “Mr. Contreras, pardon me for asking this, but the same thing applies to you. Do you understand that?” Appellant replied “Yes.”

(*Placencia*.) Appellant’s reliance on *People v. Totari* (2002) 28 Cal.4th 876, 881-882 is misplaced, as that case only holds that the denial of a motion under Penal Code section 1016.5 is an appealable order; as the appellant there *did* have a certificate of probable cause, the issue of its necessity was not raised.

In his reply brief, appellant asserts that “this Court for years has not required certificates of probable cause in cases similar to Appellant’s” He does not refer to specific instances and we deny that we have any such practice. No certificate of probable cause having been obtained, the appeal must be dismissed. (See *Placencia, supra*, 194 Cal.App.4th 489 at p. 495.)

We are also aware, however, that the Supreme Court is considering a case that held that a challenge similar to appellant’s does *not* require a certificate of probable cause because it involves an “order made after judgment, affecting the substantial rights of the party” under Penal Code section 1237, subdivision (b), which, unlike subdivision (a), does not expressly reference the certificate of probable cause requirement. (*People v. Arriaga*, a 2011 case, formerly reported at 201 Cal.App.4th 429, rev. granted Feb 22, 2012, S199339. [The case is fully briefed, but no argument date has been set as of September 12, 2013.]) Accordingly, out of an excess of caution we will briefly explain why appellant could not prevail on the merits.

Appellant first argues that the trial court erroneously believed that it did not have jurisdiction. The term “jurisdiction” is used in several senses in the judicial system. In

its broadest sense it describes the scope of the court's essential power to act. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288-291 (*Abelleira*)). However, the term is also used to describe limitations on the court's power to act in a particular manner or to give a certain type of relief. (*Id.* at p. 288; see also *Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1410.) It is in the latter sense that the trial court correctly determined that it did not have jurisdiction to grant the relief requested by appellant.

First, although appellant referred to Penal Code section 1016.5, it is indisputable from the record that he was not only properly advised in the terms of the statute, but was given the more accurate information that he *would*, not *might*, face the serious specified immigration consequences. Thus, the court could not have granted the motion on the statutory basis. (See *People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.)

With respect to the claims made that appellant in fact misunderstood his position, directly on point is *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1407. In that case, the Court of Appeal affirmed the trial court's finding that there was no jurisdictional vehicle by which it could grant the relief requested. *Shokur* rejects the argument made here—that the roadblocks erected by the Supreme Court in *People v. Kim* (2009) 45

Cal.4th 1078 and *People v. Villa* (2009) 45 Cal.4th 1063⁶ were somehow swept away by later United States Supreme Court cases such as *Padilla v. Kentucky* (2012) 559 U.S. 356, which recognized the importance of accurate immigration consequences advice. We note that a trial court may also be said to act in excess of jurisdiction when it disregards binding precedent (*Abelleira, supra*, 17 Cal.2d 280 at p. 291), as the trial court would have done had it failed to follow the then recently decided *Shokur*.

Having concluded that there was no avenue of relief left to appellant given that he failed to diligently confirm his alleged understanding concerning his immigration status following his plea, we need not deal with the merits of his claim. However, we note that, in fact, he was clearly notified of the inevitable results of his conviction, and we certainly decline to hold that the explicit warnings were constitutionally inadequate. Appellant was told that he would be deported; his private unfounded belief that the rules did not apply to him does not undermine the validity of his conviction.⁷

⁶ *Villa* holds that habeas corpus is not available to seek to vacate a conviction if the defendant is no longer in custody; *Kim* rejects the use of *coram nobis* or a nonstatutory motion to vacate based on immigration consequences where there is no genuine “mistake of fact” that would have prevented rendition of the judgment and the defendant has failed to employ available legal remedies such as appeal or a motion under Penal Code section 1016.5.

⁷ We note that courts have historically taken a dim view of a defendant who solemnly confirms his understanding of the consequences of a plea bargain, and then later, in essence, pleads for relief saying that he lied to the court at the time of the plea! (See *Arelena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 571 at fn. 6 [Fourth Dist. Div. Two], citing *People v. Fratianno* (1970) 6 Cal.App.3d 211, 220.) We also note that, as the Attorney General cogently comments, “[a]ppellant is not facing deportation because he was not advised of the immigration consequences of his guilty plea. He is

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DISPOSITION

Thus, if we were to reach the legal issues raised in the appeal, we would affirm. However, due to appellant's failure to file a certificate of probable cause, the appeal is dismissed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.

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facing deportation because he was caught trying to sell five pounds of methamphetamine.”