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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.

JUAN CARLOS HERRERA,

Defendant and Appellant.

E057948

(Super.Ct.No. RIF117829)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Dismissed.

Cavazos Law Firm and Hector A. Cavazos, Jr. 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 Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Juan Herrera purports to appeal from the superior court's November 2012 order denying his motion to reconsider its February 2011 order denying his motion to vacate his 2004 guilty plea on the ground he was not advised of the immigration

consequences as required by Penal Code section 1016.5.<sup>1</sup> We conclude that no appeal lies from the November 2012 order because the superior court had no authority to grant the motion to reconsider. In addition, the time for appealing the February 2011 order has passed. Therefore, we dismiss the appeal.

### **PROCEDURAL HISTORY**

Defendant was born in Mexico in 1977, but has been a lawful permanent resident of the United States since 1989. He is married and has two teenage children who are United States citizens. On August 27, 2004, defendant entered guilty pleas in two separate cases. In case number 117829, which is the subject of this appeal, defendant pled guilty to operating a chop shop (Veh. Code, § 10801) and two counts of possessing stolen property (Pen. Code, §§ 496d, subd. (a), and 496, subd. (a)). In case number 118666, defendant pled guilty to possessing an unlawful weapon (Pen. Code, § 12020, subd. (a)(1)). The parties agreed that defendant would be placed on probation in both cases on condition that he would serve 270 days in jail in case number 117829 and 84 days in jail on case number 118666, for a total of 364 days.

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<sup>1</sup> Penal Code section 1016.5 provides in part “(a) Prior to acceptance of a plea of guilty . . . 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.”

On April 9, 2010, the court in case number 117829 reduced the three felonies to misdemeanors pursuant to Penal Code section 17, subdivision (b), and then vacated the guilty pleas and dismissed the charges pursuant to Penal Code, section 1203.4.

Defendant is currently subject to deportation, after having been detained by Immigration and Customs Enforcement (ICE) while returning to the United States at Los Angeles International Airport in May 2010. ICE paroled defendant and allowed him to enter the country, but did not formally admit him. In October 2010, defendant received a “Notice to Appear” from the U.S. Department of Homeland Security (DHS). The notice cited the three convictions set forth above as grounds for exclusion from the United States and stated the intention of DHS to initiate deportation proceedings.

On February 1, 2011, defendant filed a motion to set aside and vacate the judgment in case number 117829,<sup>2</sup> pursuant to Penal Code section 1016.5. The court<sup>3</sup> held an evidentiary hearing on the motion on February 14, 2011, at which defendant’s trial attorney, who was also co-counsel on the motions, testified. The attorney testified that he had “no recollection of ever explaining his immigration consequences as to this case.” However, he also testified that it was normally his practice to go over every line of the form, which included the notice of immigration consequences.

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<sup>2</sup> The People’s responsive brief describes this motion as requesting vacation of the judgment in both cases. We could find no mention of case number 118666 in the motion to vacate that is part of the clerk’s transcript. However, in the transcript of the hearing counsel refers to two separate motions, one for each case.

<sup>3</sup> The Honorable James T. Warren presiding.

The plea form for case number 117829 contains a heading “Consequences of Plea” and then a place for defendant’s initials next to nine separate items describing these consequences. Each of the items has a check mark next to it. All but one of the items is initialed by defendant. However, next to item number 6 there is a check mark but no initials. Number six reads “If I am not a citizen of the United States, I understand that this 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.” The plea form for case number 11866 is not part of the record on appeal, but the parties discuss that defendant did initial item number six on that form. The parties also discuss, and the record of the plea hearing shows, that the trial court did not specifically advise the defendant that he faced possible immigration consequences. However, the court did ask him whether he had any questions about the rights he was waiving and found that defendant understood the rights he was giving up.

The court took the matter under submission. The minute order dated February 18, 2011, reflects the court’s one-line order: “Motion denied.” Defendant did not appeal this ruling.

On November 14, 2012, defendant filed a “Motion to Reconsider Motion to Withdraw Plea of Guilty Pursuant to Penal Code Section 1016.5” as to case number 117829 only. The court<sup>4</sup> heard this motion on November 27, 2012. The court noted that the previous court had ruled after holding a full evidentiary hearing and taking the matter

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<sup>4</sup> The Honorable Becky L. Dugan presiding.

under submission. The court asked defense counsel why defendant had not appealed the adverse ruling or filed a motion for reconsideration “in front of that judge in the time proscribed by law.” Defense counsel asserted that at the previous hearing on the motion counsel did not raise the issue of the colloquy between the court, defendant and defense counsel at the plea hearing, and “so we are presenting it now.” Defense counsel argues this new argument constituted a “new fact, a new set of circumstances, new law that applies to this case. And that is essentially the factor that shows that the relief should be granted.” The prosecutor countered that the issue of the plea colloquy had been considered at the motion to vacate hearing in 2011 and that defense counsel was not raising a new issue. The court denied the motion to reconsider with prejudice, reasoning that defendant had presented no new facts, the matter had already been fully litigated in front of another judge, no writ or appeal had been taken, and no motion for reconsideration had been timely filed in front of the previous judge. The minute order for that date states “Motion Denied WITH prejudice.”

This appeal followed. The court granted a certificate of probable cause.

#### **DISCUSSION**

Defendant appeals from the superior court’s order dated November 27, 2012. As described above, the court denied his motion to reconsider his 2011 motion to vacate his guilty plea based on Penal Code section 10165. We conclude that no appeal lies from the 2012 order because, although it was an order made after judgment, it did not affect the substantial rights of defendant. The 2012 order was a second, extraneous denial of defendant’s 2011 motion to vacate.

In *People v. DeLouize* (2004) 32 Cal.4th 1223 (*DeLouize*), our Supreme Court stated that “[o]rders and judgments are deemed final in the superior court, and not subject to reconsideration by that court, to preserve confidence in the integrity of judicial procedures and to avoid the delays and inefficiencies associated with repeated examination and relitigation of the same facts and issues. [Citation.] The concept of finality ‘rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.’ [Citations.] This court has recognized that ‘[e]ndless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice . . . .’ [Citations.]” (*DeLouize* at p. 1232.)

Here, the 2011 order denying defendant’s motion to vacate was a final, appealable order. (*People v. Totari* (2002) 28 Cal.4th 876.) It was not an interim ruling made in a case subject to additional, pending proceedings. Instead, the 2011 order disposed of defendant’s claim that challenged the validity of the criminal judgment and thus was immediately appealable under Penal Code section 1237, subdivision (b), as an “order made after judgment, affecting the substantial rights of a party.”

Because the 2011 order was final rather than interim, the superior court had no jurisdiction to grant the 2012 motion to reconsider the 2011 motion. As such, the 2012 order is not appealable. It is not an order made after judgment affecting the substantial rights of the defendant. This is because it is in fact a second, unnecessary, denial of

defendant's 2011 motion to vacate pursuant to Penal Code section 1016.5. For this reason, we dismiss the appeal.

To the extent defendant raises ineffective assistance of counsel, this is not the proper forum for that claim, as defendant does not challenge the performance of counsel in the 2012 motion for reconsideration proceeding that is the purported subject of this appeal.

**DISPOSITION**

The appeal is dismissed.

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RAMIREZ  
P. J.

We concur:

HOLLENHORST  
J.

McKINSTER  
J.