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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL GARCIA RODRIGUEZ,

Defendant and Appellant.

F067527

(Super. Ct. No. BF146196D)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Eduardo Paredes, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J., and Chittick, J.†

† Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

INTRODUCTION

On March 8, 2013, appellant, Gabriel Garcia Rodriguez, pled no contest pursuant to a plea agreement to transportation or sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 1), possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 2), and being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1), count 3).¹ Appellant also admitted a drug weight/quantity enhancement (Health & Saf. Code, § 11370.4, subd. (b)(1)).² The plea bargain included a stipulated prison term of five years.

On May 24, 2013, the trial court denied appellant's motion to withdraw his plea on the ground that he was adequately advised of the immigration consequences of his plea pursuant to section 1016.5. The court sentenced appellant to prison for a stipulated term of five years pursuant to the plea agreement. On count 1, the court sentenced appellant to a term of two years for the substantive offense plus a consecutive term of three years for the quantity enhancement.³

Appellant obtained a certificate of probable cause. Appellant contends the trial court erred in denying his motion to withdraw his plea. We find no error and affirm the judgment.

¹ Unless otherwise designated, all statutory references are to the Penal Code.

² Appellant executed a felony advisement of rights, waiver, and plea form (plea form) acknowledging and waiving his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122. The parties stipulated to a factual basis for the plea.

³ The court stayed appellant's sentence on count 2 pursuant to section 654 and imposed a concurrent sentence of 16 months on count 3. The abstract of judgment incorrectly indicates that appellant's sentence on count 3 was stayed pursuant to section 654. This is clerical error that can be corrected at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *In re Candelario* (1970) 3 Cal.3d 702, 705.)

MOTION TO WITHDRAW PLEA

The plea form executed by appellant listed a series of consequences of a guilty or no contest plea. The second paragraph states:

“ALIEN STATUS: I understand that if I am not a Citizen of the United States, my guilty or no contest plea will result in my deportation, exclusion from admission to the United States, and denial of naturalization under the laws of the United States. **Deportation is mandatory for some offenses. I have fully discussed this matter with my attorney and understand the serious immigration consequences of my plea.”** (Original Emphasis.)

Appellant initialed the paragraph, executed the plea form, acknowledged during the change of plea hearing that he read the form, understood it, understood his rights and the consequences of his plea, intended to waive his rights to enter into the plea, and intended to initial and sign the plea form. Appellant’s trial counsel, Clayton Campbell, signed a statement indicating, inter alia, that he reviewed the form with his client, explained each of appellant’s rights to him, explained the direct consequences of appellant’s plea to him, was satisfied appellant understood these things, concurred in appellant’s waiver of his constitutional rights, and believed there was a factual basis for the plea.

Appellant filed a motion to vacate his plea pursuant to sections 1018 and 1016.5.⁴ Appellant filed a declaration stating that he entered into the change of plea because he was confused, fearful, and desperate.⁵ Appellant stated that his counsel never

⁴ Appellant was originally represented by Mr. Campbell who was substituted with appellant’s current counsel, Eduardo Paredes. Mr. Paredes filed appellant’s motion to withdraw his plea.

⁵ Appellant’s original declaration was written in Spanish and translated by an interpreter. The original declaration was signed, but not the translation. At the hearing, appellant’s counsel told the court that his client’s original declaration in Spanish was signed by appellant, but not under penalty of perjury.

interviewed him or spoke to him about his situation or what happened. According to appellant, his attorney gave him an offer from the prosecutor of five years eight months and told appellant that if they fought the case the prosecutor would only offer a prison term of nine years and if they fought the matter even further, appellant would receive a term of 14 years. Appellant stated he felt himself obligated to take the plea offer of five years.

Appellant further represented that the negotiations occurred in a few minutes and he did not have enough time to think things through. Appellant said his attorney made him sign his initials on the plea form, reading it to appellant very quickly. Appellant said his English was not very good, he did not understand very well what his attorney told him, nor did appellant understand all the rights he was giving up.

At the hearing, appellant testified that on the day he changed his plea he was accepting allegations he was not guilty of committing and was going to be deported. Appellant said that his attorney told him he would receive a sentence of five years eight months. Appellant said he got scared and asked if he could get a lower sentence. Counsel approached the prosecutor with an offer of eight months less and an admission by appellant that he sold narcotics. Appellant said he was innocent of sales.

According to appellant, he later learned that he would also be admitting the sales allegation, something he did not want to do. Appellant said he learned about the allegations he was admitting when his attorney told him to put his initials on the plea form. After changing his plea, appellant went back to his cell and began thinking he had accepted something that he was not guilty of committing.

Appellant claimed his attorney did not tell him that he would be deported until after he placed his initials on the plea form. Appellant said he told his attorney that he wanted to fight deportation. Appellant further claimed that he kept asking his attorney about whether he would be able to fight his deportation. According to appellant, his

attorney also told him that they were going to deport him anyway. Appellant asserted that even though he initialed and executed the plea form, he did not understand the rights he was waiving. Appellant also said he was unable to keep a long, extended conversation in English.

On cross-examination, appellant admitted he did not ask for an interpreter for the first four hearings he attended or during his change of plea hearing. Appellant admitted he spoke to the arresting police officers in English, though he said he spoke the “little bit that I could.” Appellant said he tried to speak with his attorney in English. Appellant admitted that he pled guilty to possession of methamphetamine with intent to sell rather than sale of methamphetamine and received a shorter sentence. Appellant insisted, however, that he was innocent of the offense he admitted.

Appellant’s original counsel, Clayton Campbell, testified that he remembered talking to appellant the day appellant changed his plea. Campbell recalled that the quantity enhancement for the amount of drugs appellant had would add a significant amount of time to appellant’s sentence if he were convicted at trial. Appellant was looking at a potential prison term of 13 or 14 years.

Campbell does not speak Spanish. Campbell explained he was able to carry on an intelligent conversation with appellant in English and appellant gave no indication that he needed an interpreter. Campbell described his general practice when beginning representation of a client. Campbell introduces himself to his clients and asks if they need an interpreter. When Campbell met appellant, they were in a courtroom that always had an interpreter and Campbell has never been in a situation where he was unable to get an interpreter when he needed one. Campbell did not need an interpreter for appellant at the hearing.

Campbell fully explained the terms of the plea bargain to appellant. The original offer from the prosecutor was seven years four months. When Campbell brought this

offer to appellant, appellant asked if there was a way for him to get less time. Ultimately, Campbell was able to negotiate a stipulated term of five years. This was achieved because the prosecutor wanted to have appellant admit both drug offenses so that if he reoffended, appellant would receive a longer future sentence. Campbell explained this to appellant.

Campbell specifically explained to appellant that pleading guilty or no contest to separate violations of Health and Safety Code sections 11379 and 11378 would be treated as an aggravated felony for immigration purposes. Appellant said he was a legal permanent resident. Campbell told appellant that his admission of these offenses would most certainly result in revocation of that status and deportation. Campbell had a specific recollection about this conversation because he was surprised by appellant's reaction. Campbell explained appellant said that he was not concerned about the immigration consequences of the plea agreement. Campbell's routine is to dictate notes about his cases immediately after returning to his office from court so he remembered details of events later.

Campbell was not surprised to learn about appellant's motion to withdraw his plea because if anyone else spoke to appellant about the immigration consequences of the plea, and convinced appellant the plea was a bad idea, appellant would likely bring this motion. Campbell dictated notes about appellant's plea agreement and was surprised that appellant was not concerned "a bit about immigration consequences." It was remarkable to Campbell at the time and was still fresh in his mind.

Campbell reviewed his notes from the change of plea hearing prior to giving his testimony. There was no doubt in Campbell's mind that appellant intentionally entered into the plea agreement on the condition that he only receive five years in prison. Campbell further told appellant that he could contest his immigration status in an

immigration court, but an effort would be made to revoke his status and deport him and appellant's efforts to stop deportation would be fruitless.

In denying appellant's motion to withdraw his plea, the trial court first noted that it read but did not fully consider appellant's declaration as evidence because it was not made under penalty of perjury. The court found that appellant had failed to meet the required burden to show his plea was not voluntary. The court also found that to the extent there were differences in the testimony of appellant and Mr. Campbell, the court credited Mr. Campbell's testimony over appellant's testimony. The court noted that the plea form set forth the immigration consequences of the plea, appellant initialed the form, and appellant's initials were not wavering but written decisively. The court further noted it was the court's custom to take a change of plea slowly and that appellant showed no hesitation during his no contest plea.⁶

SECTION 1016.5

Appellant contends that defense counsel's advisement concerning the immigration consequences of his plea was deficient because counsel's advice "casts doubt as to whether [appellant] was specifically advised that there was no relief possible from removal." According to appellant, his trial attorney's advice gave him "the hope" that he could contest the charge of removability to avoid deportation. We reject appellant's argument because it mischaracterizes his trial counsel's advice and also because appellant has failed to demonstrate that he would not have entered the change of plea with proper advice concerning the immigration consequences of his plea.

⁶ Because the only issue on appeal concerns the trial court's denial of appellant's motion to withdraw his plea, we do not recount the underlying facts of appellant's offenses.

Section 1016.5 requires an advisement that as a result of a criminal defendant's plea, he or she could possibly be deported, be denied naturalization, or could be excluded from admission into the United States.⁷

Appellant's argument that his counsel gave him false hope he could challenge the immigration consequences of his plea in immigration court is incorrect. Mr. Campbell made the simple assertion that appellant could go to an immigration court to contest deportation, but explained to appellant that such an effort would be "fruitless." There is nothing in the use of the word fruitless that would give someone the false hope they could prevail in an immigration court after entering into the plea agreement and admitting felony allegations which would disqualify him from residency and/or citizenship. Campbell further advised appellant that he would lose his permanent resident status after changing his plea and would be deported.

⁷ Section 1016.5, provides in relevant part:

"(a) Prior 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.

"(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, 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 or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty...."

The advisement appellant received in the plea form complied with the requirements of section 1016.5. Despite appellant's protests to the contrary, Mr. Campbell unequivocally stated that appellant understood English and did not require a translator. Mr. Campbell further testified that appellant was far more concerned with the length of his prison sentence than with the immigration consequences of his plea. The trial court found Mr. Campbell's testimony more credible than appellant's testimony. We find that appellant was properly advised by his trial counsel, and in the plea form, of the immigration consequences of his plea. Appellant has also failed to demonstrate prejudice from the alleged deficiency in counsel's advice.

In *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183 (*Zamudio*), our Supreme Court held that for a defendant to prevail on a motion to vacate a judgment pursuant to section 1016.5, the defendant must establish that: he or she was improperly advised of the immigration consequences of the plea as provided by the statute, there exists more than a remote possibility that the conviction will have one or more of the specified immigration consequences at the time of the motion, and he or she was prejudiced by the non-advisement. (*Zamudio, supra*, at pp. 192-193, 201-203, 209-210.) The standard for the trial court to follow is whether the court, after examination of the evidence and the entire action, is of the opinion that it is reasonably probable a result more favorable to the defendant would have been reached in absence of the error. (*Id.* at p. 210, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) When the only error is failure to advise the defendant of the consequences of the plea, the trial court must determine whether the error prejudiced the defendant, i.e., whether it is reasonably probable the defendant would not have entered a guilty plea if properly advised.⁸ (*Zamudio, supra*, at p. 210.)

⁸ Using the exact words of the statutory advisement is not necessary. Substantial compliance with the statute, however, is achieved when all three advisements are given.

The case of *In re Resendiz* (2001) 25 Cal.4th 230 (*Resendiz*), abrogated on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356, is instructive. There, defense counsel misadvised appellant his plea would not cause him problems with immigration authorities but he would not be able to become a citizen. (*Resendiz, supra*, 25 Cal.4th at p. 236.) Rather than analyzing whether defense counsel’s conduct was objectively deficient, *Resendiz* analyzed whether the defendant had shown prejudice. (*Id.* at pp. 248-254.) *Resendiz* found that the defendant has the burden “to prove by a preponderance of the evidence his entitlement to relief.” (*Id.* at p. 254.)

Here, appellant failed to clearly state, either in his defective declaration or during his testimony, that he would not have entered into the plea bargain. Even if we were to construe appellant’s testimony as an assertion that he would not have entered into the plea bargain, the assertion that he would not have pled guilty if given competent advice must be corroborated independently by objective evidence. (*Resendiz, supra*, 25 Cal.4th at p. 253.) *Resendiz* noted that the defendant’s declaration failed to show how he may have avoided a conviction or what specific defenses might have been available to him at trial. (*Id.* at p. 254.) Appellant’s defective declaration and testimony suffer from the identical deficiencies.

“In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and

(See *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173-174.) Substantial compliance may also be achieved where there is a factual record showing that one or more of the advisements does not apply to a defendant’s case. (See *Zamudio, supra*, 23 Cal.4th at pp. 207-208.)

whether the defendant indicated he or she was amenable to negotiating a plea bargain.”
(*In re Alvernaz* (1992) 2 Cal.4th 924, 938.)

Appellant was given great leniency by the plea bargain. Facing a maximum sentence of 14 years, appellant received a prison term of only five years. Although appellant may have escaped conviction at a trial, if convicted he would have been subject to the same immigration consequences. There is nothing in the record indicating how appellant might have been able to avoid a conviction had he proceeded to trial other than his general, uncorroborated assertion during the hearing to withdraw his plea that he did not commit the alleged offenses.

Appellant has failed to show that it is reasonably probable he would have “forgone the distinctly favorable outcome he obtained by pleading, and instead insisted on proceeding to trial, had trial counsel not misadvised [or failed to advise] him about the immigration consequences of pleading guilty.” (*In re Resendiz, supra*, 25 Cal.4th at p. 254.) The trial court did not err in denying appellant’s motion to withdraw his plea.

DISPOSITION

The case is remanded for the trial court to amend the abstract of judgment to reflect that appellant’s sentence on count 3 was to be served concurrently, not stayed pursuant to section 654. The court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is affirmed.