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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO CARLOS ROSALES,

Defendant and Appellant.

F069499

(Super. Ct. No. VCM 091027-02)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Tulare County. Walter L. Gorelick, Judge.

Jacob M. Weisberg for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Kane, Acting P.J., Detjen, J. and Smith, J.

Appellant Roberto Carlos Rosales appeals from the denial of his motion to vacate his plea pursuant to Penal Code section 1016.5.<sup>1</sup> We affirm.

### **FACTS**

On May 1, 2002, the district attorney filed a complaint charging Rosales with possession of a controlled substance, (count 1/Health & Saf. Code, § 11377, subd. (a)) and being under the influence of a controlled substance (count 2/Health & Saf. Code, § 11550, subd. (a)).

On May 9, 2002, Rosales pled guilty to both counts in exchange for an indicated sentence that included a referral to recovery court. During the plea colloquy the court advised Rosales regarding the immigration consequences of his plea as follows: “If you are not a citizen of the United States your plea of guilty or no contest could result in you being deported from the United States, *denied readmission*, naturalization or permanent residence.” (Italics added.) During the hearing, the public defender who represented Rosales acknowledged that he advised Rosales of the consequences of his plea. Afterwards, Rosales acknowledged he did not have questions regarding these consequences and was satisfied with the service and advice of his counsel.

On May 24, 2002, the court placed Rosales on probation for three years and referred him to recovery court. Rosales’s probation was subsequently revoked and reinstated twice.

On July 1, 2008, attorney Weisberg filed a “motion to vacate judgment or, in the alternative, a writ of habeas corpus or, in the alternative, a writ of error coram nobis.”<sup>2</sup> (Original all in capital letters.) Rosales also filed several supporting documents including a June 30, 2004, decision by the United States Department of Homeland Security on

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

<sup>2</sup> Rosales did not argue as a basis for relief that in 2002 the trial court did not comply with section 1016.5.

Rosales's application for status of permanent resident. The decision stated that Rosales's application was denied based on his convictions on May 24, 2002, for possession of methamphetamine and being under the influence of methamphetamine.<sup>3</sup>

In an attached supporting declaration executed on June 18, 2008, Rosales alleged under penalty of perjury that even though "the attorneys [he] spoke to" knew he was a citizen of Mexico, no one from the public defender's office advised him of the immigration consequences of his plea or that his plea to the two drug charges would make him deportable. He also alleged that he would not have risked being deported and permanently separated from his parents, sibling, wife and two children by pleading to the drug charges if he had known that a conviction for both offenses would subject him to deportation and removal. The reference in this last statement to his wife and children appears to be contradicted by a declaration executed on July 30, 2012, in which Rosales stated under penalty of perjury that he had been married for seven years and that he had two children who were seven years old and five years old at the time.<sup>4</sup>

On October 30, 2008, the court denied Rosales's motion and alternative petitions.

On February 4, 2014, Rosales filed a motion to vacate judgment pursuant to section 1016.5. In the moving papers, Rosales contended that in 2002 the court did not properly advise him of the immigration consequences of his plea because instead of advising him in the language of section 1016.5 that if he was not a United States citizen his plea could result in his "exclusion from admission to the United States," the court stated that it could result in Rosales being "denied readmission." (Underline omitted.) In

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<sup>3</sup> The application also cited Rosales's conviction on June 13, 2001, for being an accessory after the fact (§ 32) as a basis for its decision. However, in the moving papers Rosales's attorney cited *Navarro-Lopez v. Gonzales* (2007) 503 F.3d 1063 to contend that the offense of being an accessory after the fact is not a crime of moral turpitude and has no immigration consequences.

<sup>4</sup> On August 23, 2012, Rosales filed a petition to have his 2002 felony possession of methamphetamine conviction reduced to a misdemeanor and dismissed, which the court granted on September 13, 2012. The declaration was filed in support of this motion.

an attached declaration executed under penalty of perjury on January 31, 2014, Rosales stated:

“I would not risk being deported and permanently separated from my entire family, including my parents, sibling, *wife and two children* and the life I have created in the United States, by pleading guilty to both possession of a controlled substance and being under the influence of a controlled substance if I had known that a conviction for both offenses would subject me to deportation and removal or inadmissibility for admission into the United States. Under these circumstances I would have attempted to negotiate a plea that would not result in my deportation, and if that alternative was not available, I would not have accepted the plea and gone to trial.” (Italics added.)

On April 14, 2014, in denying the motion, the court found that the immigration advisement given to Rosales in 2002 substantially complied with the requirements of section 1016.5. In finding Rosales was not prejudiced by the variance between the language of the statute and the advisement given, the court stated it was not convinced Rosales would not have entered his plea if he had been advised of the immigration consequences of his plea in the language of section 1016.5.

### **DISCUSSION**

#### ***Rosales was Properly Advised of the Immigration Consequences of his 2002 Plea***

Section 1016.5, in pertinent part, provides:

“(a) Prior to acceptance of a plea of guilty or nolo contendere 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.*

“(b) ... 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 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. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.” (Italics added.)

“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.)

Rosales challenges only the advisement regarding exclusion from admission to the United States. He contends that in 2002 the trial court’s oral advisement of immigration consequences was inadequate because it did not give the necessary advisement that Rosales’s conviction could have the consequence of “exclusion from admission to the United States.” (Italics omitted.) Thus, he implicitly contends that the court abused its discretion when it denied his February 4, 2014, motion to vacate plea pursuant to section 1016.5. We disagree.

The immigration advisement pursuant to section 1016.5 need not be in the statutory language; substantial compliance is all that is required, “as long as the defendant is specifically advised of all three separate immigration consequences of his plea.” (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174 (*Gutierrez*).

In *Gutierrez, supra*, 106 Cal.App.4th 169, the prosecutor advised the defendant: “If you are not a United States citizen, you will be deported from the United States, denied re-entry and denied amnesty or naturalization.” (*Id.* at p. 171, italics added.) In rejecting the appellant’s contention that the immigration advisement was deficient because the prosecutor used the phrase, “denied re-entry,” the *Gutierrez* court stated,

“[B]oth [*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183 (*Zamudio*)] and [*People v. Gontiz* (1997) 58 Cal.App.4th 1309 (*Gontiz*)] make clear that the words used by the prosecutor here were the equivalent of the statutory language. “Exclusion” is “being barred from entry to the United States.” [Citation.]’ (*Zamudio, supra*, 23 Cal.4th at p. 207.)

‘Deportation is to be distinguished from exclusion, which is the denial of entry to the United States. [Citation.]’ (*Gontiz, supra*, 58 Cal.App.4th at p. 1317.) We hold here that only substantial compliance is required under section 1016.5 as long as the defendant is specifically advised of all three separate immigration consequences of his plea. Appellant was expressly told that one of the immigration consequences of his conviction was that he would be denied reentry into the United States; in other words, *under the statute, he would be excluded from the United States*. The trial court, thus, substantially complied with the statute, and, hence, committed no error in the manner in which it took appellant’s plea.” (*Gutierrez, supra*, 106 Cal.App.4th at p. 174, italics added.)

The court, here, expressly told Rosales during the 2002 plea colloquy that his plea could result in Rosales being “denied readmission.” Like the advisement at issue in *Gutierrez*, this advisement informed Rosales he would be excluded from the United States. Additionally, during the 1991 change of plea proceedings Rosales did not exhibit any signs of confusion and he acknowledged that he did not have any questions regarding the consequences of his plea. In accord with *Gutierrez*, we conclude that the court substantially complied with section 1016.5 when it advised Rosales of the immigration consequences of his plea and that Rosales understood that being “denied readmission” meant he would be “excluded from the United States.”

Rosales contends *Gutierrez* is distinguishable because, in that case, the defendant executed a written waiver form that contained the three required immigration advisements. Although this further step was taken in *Gutierrez*, the court cited it as an alternative basis for its decision: “Even if we were to consider the variance in language used by the prosecutor as reversible error in a vacuum, there was no such void, as any error was concurrently cured by the written waiver of rights form utilized by the trial judge in accepting the plea.” (*Gutierrez, supra*, 106 Cal.App.4th at pp. 174-175.)

In *Gutierrez*, the court also stated,

“Appellant also contends there are actually three components to exclusion: reentry, rescission of resident status, and ineligibility to adjust one’s status, and further that the trial court erred when it admonished appellant only as to reentry. He cites no authority for the proposition that

there are three components under federal immigration law, or that there is any obligation to advise on such additional matters; thus, we may treat the issue as waived.” (*Gutierrez, supra*, 106 Cal.App.4th 169, 174, fn. 4.)

Rosales cites the above quote to contend *Gutierrez* is distinguishable because here “there is specific evidence put into the record about the different components of [in]admissibility[,][i.e., exclusion from admission].”<sup>5</sup> He contends that being denied readmission and being deemed ineligible for an adjustment of status are both elements of “inadmissibility.” Thus, he appears to argue that the court’s 2002 immigration advisement did not comply with section 1016.5 because it did not advise him of this latter element of “inadmissibility,” which was ““pertinent to his situation.”” These contentions, however, are not persuasive because they ignore the *Gutierrez* court’s statement immediately following the above quote that “[i]n any event, a trial court does not have an obligation to advise on those immigration consequences that appellant may suffer other than the ones listed in section 1016.5. (*People v. Barocio* (1989) 216 Cal.App.3d 99, 105, ... [no obligation to advise on right to request a ‘recommendation against deportation’ under 8 U.S.C. § 1251(b)(2)].)” (*Gutierrez, supra*, 106 Cal.App.4th at p. 174, fn. 4, italics added.)

***Rosales Failed to Show He was Prejudiced by the Alleged Misadvisement of the Immigration Consequences of his 2002 Plea***

“[W]hen the only error is a failure to advise of the consequences of the plea ... the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is “reasonably probable” the defendant would not have pleaded guilty if

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<sup>5</sup> This evidence apparently consists of the following statement by attorney Weisberg in his declaration in support of Rosales’s motion to vacate: “The concept of inadmissibility arises in a number of contexts. It is an issue when the visa application is made and when the foreign national seeks entry to the US. It also comes up when a person in deportation proceedings is alleged to have been inadmissible at the time of entry or was not inspected at their entry. It can also be a factor if a permanent resident is alleged to have abandoned their permanent residency.”

properly advised.” (Zamudio, 23 Cal.4th 183, 210.) “[T]he defendant bears the burden of establishing prejudice. [Citation.] To that end, the defendant must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant’s assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances.” (People v. Martinez (2013) 57 Cal.4th 555, 565.) Additionally, a defendant’s “assertion he would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence.’” (In re Resendiz (2001) 25 Cal.4th 230, 253.)

The trial court found not credible Rosales’s assertion that he would not have entered into his 2002 plea if he had been advised of its immigration consequences in the language of section 1016.5. This finding is supported by Rosales’s failure to provide any objective evidence to corroborate this assertion and his lack of candor in twice asserting under penalty of perjury that separation from his wife and children would have caused him to reject the 2002 plea if he had been properly advised. Additionally, the court could have found from the 2002 plea colloquy that Rosales was advised of and understood that his plea could result in his deportation. Rosales’s willingness to accept such a severe immigration consequence provides further support for the court’s finding that Rosales would have entered his plea even if he had been advised of its immigration consequences in the language of section 1016.5. Thus, we conclude that Rosales also failed to show he was prejudiced by the alleged misadvisement of the immigration consequences of his 2002 plea.

***Rosales did not Exercise Due Diligence in Moving to Vacate his 2002 Plea Pursuant to Section 1016.5***

“[T]he trial court may properly consider the defendant’s delay in making his application, [pursuant to section 1016.5] and if ‘considerable time’ has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay.

[Citation.] The reason for requiring due diligence is obvious. Substantial prejudice to the People may result if the case must proceed to trial after a long delay.” (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618 (*Castaneda*).

Rosales did not exercise due diligence in seeking relief pursuant to section 1016.5, because even though he knew since at least 2004 that his plea had serious immigration consequences, he waited almost 10 years to move to vacate his plea pursuant to that section. (Cf. *Castaneda, supra*, 37 Cal.App.4th at p. 1618 [defendant who waited seven years to seek relief, pursuant to section 1016.5, did not exercise due diligence].)

Rosales contends he acted with due diligence in this matter because he filed a motion and alternative petitions in 2008 seeking relief based on a claim that he received ineffective assistance in entering his 2002 plea. However, he does not explain why he did not move in 2008 to vacate the judgment pursuant to section 1016.5 or why he waited almost 10 years to file a motion to vacate judgment pursuant to this section. Accordingly, for all the reasons discussed above, we conclude that the court did not abuse its discretion when it denied Rosales’s 2014 motion to vacate judgment.

#### **DISPOSITION**

The judgment is affirmed.