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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PHONG THANH CAO,

Defendant and Appellant.

G045980

(Super. Ct. No. 01CF1365)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed.

Law Offices of Carol E. Lavacot and Carol E. Lavacot for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Ronald A. Jakob and Ifeolu Hassan, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant Phong Thanh Cao appeals from a postconviction order denying his statutory and nonstatutory motions to vacate his guilty plea to two counts of assault with a firearm and one count of obliterating the firearm's identification, and his admission of enhancements for use of a firearm. This plea was entered on November 30, 2001, more than 10 years ago. Defendant moved to vacate his plea on August 22, 2011.

The basis of Cao's motions was ineffective assistance of counsel. Cao, who is not a United States citizen, asserts his counsel mistakenly advised him that his guilty plea would not result in his being deported. Cao is, however, the subject of a deportation order, although one presently in abeyance. Had he known about the immigration implications of his plea, he asserts, he would not have accepted the plea deal and would have gone to trial.

The court denied both motions. It denied the statutory motion, under Penal Code section 1016.5,<sup>1</sup> because Cao received the required advice regarding the immigration consequences of pleading guilty and acknowledged his understanding of these consequences in open court and in writing. It denied the nonstatutory motion because it lacked jurisdiction to consider it.

We affirm the trial court's rulings in both respects.

## **FACTS**

Cao and a companion entered a Santa Ana auto body repair shop in April 2001 to retrieve Cao's car, which he had left with someone for repainting. When he did not immediately receive his car, he pulled a loaded revolver out of his pocket and pointed it at both the shop's owner and the owner's friend, threatening to shoot. An employee called police, and Cao and his companion were both arrested. Before the police arrived,

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<sup>1</sup> All further statutory references are to the Penal Code.

Cao gave the gun to his companion with instructions to hide it. The police recovered the gun, and its identification number was found to have been obliterated.

Facing a maximum sentence of 19 years, Cao accepted a plea bargain for considerably less than that amount of time in prison. Cao signed the guilty plea form admitting his assault and firearm offenses. The form included the following statement, initialed by Cao: "I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The form also stated, "I declare under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney . . . ." Cao's counsel also signed the form, attesting that he had explained the above rights to his client.

At the hearing when the plea was entered on November 30, 2001, the judge asked Cao whether he personally initialed and signed the guilty plea form and whether he read and understood each initialed paragraph. Cao stated that he had. The judge then asked the prosecutor to take over. After explaining the sentence to Cao, the prosecutor asked him whether he waived his rights to speedy trial, to cross-examine witnesses, and to testify or remain silent. Cao responded that he did. The prosecutor then said, "Do you understand if you are not a United States citizen, your guilty plea in this case will result in your being deported, excluded entry or denied amnesty or naturalization in the United States; do you understand that, sir?" Cao replied "Yes, sir." The prosecutor asked, "Have any promises other than those contained in the guilty form in front of you been made to you to encourage you to [plead] guilty . . .?" Cao responded, "No, sir." The judge then pronounced sentence according to the plea bargain.

On October 31, 2005, Cao was ordered deported to Vietnam. Apparently he cannot actually be deported, because the country has banned the repatriation of

political refugees. If this ban is lifted, Cao will be deported, but seven years after he was ordered deported, Cao remains in the United States.

In August 2011, Cao moved to vacate his guilty plea on the grounds of ineffective assistance of counsel. He maintained that, notwithstanding the form he initialed and signed and the representations he made in open court, he did not knowingly enter into the plea bargain. His attorney told him that he would not be deported if he pleaded guilty, that the questions asked of him by the judge and the prosecutor were mere formalities, and that he should just say “yes” to everything. In addition, he was not properly advised of the immigration consequences of his guilty plea because the prosecutor, not the judge, was the one who gave him this information in open court. Cao asked for statutory relief under section 1016.5 and for nonstatutory relief. The court denied both requests.

## **DISCUSSION**

### **I. Relief under section 1016.5, subdivision (b)**

Section 1016.5, subdivision (a), provides: “Prior to the 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 consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Failing to give this advisement is grounds for vacating the judgment and permitting the defendant to withdraw the guilty plea and enter a not-guilty plea. (*Id.*, subd. (b).) If the advisement was not given on the record, it was presumptively not given. (*Ibid.*) The Legislature enacted this statute after finding that many defendants agreed to plea bargains without being aware of their immigration consequences. Accordingly, defendants have to be warned before their pleas are accepted that “special consequences” could result. (*Id.*, subd. (d).)

Cao does not dispute that he was given the advisement. He asserts, however, that it was improperly given because the prosecutor, not the judge, gave it.

Cao was advised of the immigration implications of his guilty plea in two ways. First, he received a printed “Guilty Plea in the Superior Court” form specifically informing him that “conviction of the offense charged will have the consequence of deportation . . . pursuant to the laws of the United States.” Cao initialed that paragraph and signed the form, attesting under penalty of perjury that he had “read, understood and personally initialed each item above and discussed them with [his] attorney . . . .” Then, in open court, the prosecutor repeated the advice regarding deportation. Cao affirmed his understanding that his guilty plea “will result in [his] being deported” and that no other promises had been made to him to induce him to plead guilty. He also responded to the judge’s questions about his reading and understanding everything he initialed on the guilty plea form.

In *In re Ibarra* (1983) 34 Cal.3d 277, overruled on other grounds in *People v. Howard* (1992) 1 Cal.4th 1132, our Supreme Court held that use of waiver forms in felony cases where special circumstances do not indicate an involuntary plea satisfies the requirements of a knowing waiver of constitutional rights such as the privilege against self-incrimination. (*Id.* at pp. 284-285.) “So long as the waiver form contains sufficient information, and both the defendant and his counsel attest to its valid execution, the judge may, in his discretion, dispense with further explanation to the defendant of his rights.” (*Id.* at p. 286.) There was no need to have the judge “personally [] admonish a defendant of his or her constitutional rights before accepting a guilty plea.” (*Ibid.*)

The court in *People v. Ramirez* (1999) 71 Cal.App.4th 519, followed *Ibarra* in applying this principle to the advisement required under section 1016.5. The defendant in *Ramirez* signed a plea form explaining the immigration consequences of his plea and received additional advisements in open court. After completing his sentence, he moved to vacate the judgment because the judge did not advise him of the

immigration consequences of his plea. (*Id.* at pp. 520-521.) The court held, “[T]he legislative purpose of section 1016.5 is to ensure a defendant is advised of the immigration consequences of his plea and given an opportunity to consider them. So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met.” (*Id.* at p. 522; see also *People v. Quesada* (1991) 230 Cal.App.3d 525, 535-536, superseded by statute on other grounds [immigration advisement properly given by individuals acting on court’s behalf, not necessarily judge].)

In this case, Cao received the immigration advisement mandated by section 1016.5 not once, but twice. Both times he indicated that he understood what he had been told. Nothing in the record suggests that Cao’s command of English was inadequate to understand the information conveyed to him. His argument that the judge must also personally explain the immigration consequences of pleading guilty at the plea hearing is without merit.

As for the ineffective assistance of counsel argument made in connection with the motion under section 1016.5, this case is substantially similar to, and controlled by, *In re Resendiz* (2001) 25 Cal.4th 230.<sup>2</sup> In that case, the defendant, a legal resident, was arrested on drug charges. He was given the statutory advisement regarding the immigration consequences of pleading guilty. After serving his sentence, he was detained by immigration authorities and threatened with deportation. (*Id.* at pp. 235-236.) He then moved to withdraw his guilty plea, stating that his lawyer told him he

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<sup>2</sup> *Padilla v. Kentucky* (2010) 559 U.S. \_\_\_ [130 S.Ct. 1473], a recent United States Supreme Court case regarding legal advice to criminal defendants, includes *Resendiz* in a list of state-court decisions supporting the solicitor general’s argument that the petitioner’s ineffective assistance claim with respect to immigration advice in a plea bargain applied only to “affirmative misadvice,” not to failure to advise. The court rejected this distinction. (*Padilla, supra*, 130 S.Ct. at p. 1484.) In actuality, however, *Resendiz* did “not address whether a mere failure to advise could also constitute ineffective assistance.” (*Resendiz, supra*, 25 Cal.4th at p. 240.)

would go to jail for a much longer time if he did not plead guilty and he would not have so pleaded if he had known he could be deported as a result. (*Id.* at pp. 237-238.)

The Supreme Court held a valid claim for ineffective assistance of counsel could arise from incorrect immigration advice given in connection with section 1016.5. (*Resendiz, supra*, 25 Cal.4th at pp. 240, 251.) It was, however, the defendant's burden to show prejudice from this incorrect advice. "[Defendant's] assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.' [Citations.] '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 whether the defendant indicated he or she was amenable to negotiating a plea bargain.' [Citation.]" (*Id.* at p. 253.)

The *Resendiz* defendant presented no evidence that his lawyer had inaccurately presented the plea offer or that the prosecutor would have been willing to agree to a plea that would not entail adverse immigration consequences. Furthermore, the plea bargain permitted the defendant to avoid substantial jail time, and he presented no evidence to suggest how he might have avoided a conviction on the drug charges. Thus he might have been tried, convicted, and in the same spot as he was in, as far as his immigration status, had he declined the plea bargain. (*Resendiz, supra*, 25 Cal.4th at pp. 253-254.) In short, "petitioner fails, ultimately, to persuade us that it is reasonably probable he would have foregone the distinctly favorable outcome he obtained by pleading, and instead insisted on proceeding to trial, had trial counsel not misadvised him about the immigration consequences of pleading guilty." (*Id.* at p. 254.)

In this case likewise, Cao has failed to present evidence of prejudice stemming from improper immigration advice. The maximum sentence was 19 years; he

was sentenced to five years and parole. His lawyer accurately communicated the plea offer to him. He presented no evidence that the prosecution would have been willing to reduce the charges or any evidence indicating how he would have avoided conviction had he gone to trial. Unlike the defendant in *Resendiz*, who asserted his entire innocence (*Resendiz, supra*, 25 Cal.4th at p. 237), Cao has admitted threatening two people with a gun during the altercation at the car repair shop. It was Cao's burden to make a showing of prejudice. (*Id.* at p. 254.) He failed to do so.<sup>3</sup>

## **II. Nonstatutory Relief**

Cao argues that he should have been afforded nonstatutory relief on his ineffective assistance of counsel claim. We dealt with this issue earlier this year in *People v. Shokur* (2012) 205 Cal.App.4th 1398. In that case, as in this one, the defendant argued he was entitled to nonstatutory relief vacating his conviction after he pleaded guilty to a deportable offense. He claimed his counsel had not properly advised him regarding the immigration consequences of his plea, notwithstanding his signature on the plea form and the oral advisement in court at the plea hearing. (*Id.* at p. 1402.) The trial court denied his motion for lack of jurisdiction to consider it.

Relying on *People v. Kim* (2009) 45 Cal.4th 1078, we held that a noncitizen criminal defendant seeking to vacate a judgment for ineffective assistance of counsel is not eligible for nonstatutory relief after the time for his other remedies has expired. A noncitizen criminal defendant has an array of statutory vehicles for relief – a motion to withdraw his plea (§ 1018), a motion to vacate the judgment under section 1016.5, an appeal (§ 1237), or a petition for writ of habeas corpus (§ 1473). “““The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the

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<sup>3</sup> Cao argues he was prejudiced because, his counsel failed to recognize that the facts of the case could have led to a lesser charge, one under section 417, subdivision (a)(2), a misdemeanor. Such a failure, assuming one occurred, is not a failure to give proper immigration advice. Cao also speculates that, had he gone to trial, the jury would have convicted him of the lesser offense or the trial court would have reduced his felony conviction to a misdemeanor. Nothing in the record supports this speculation.

propriety of their convictions *ad infinitum*.” (*People v. Kim, supra*, 45 Cal.4th at p. 1094.) Neither is a nonstatutory motion to vacate the judgment.” (*Shokur, supra*, 205 Cal.App.4th at p. 1404.)

As we observed in *Shokur*, the recently decided *Padilla* case, on which Cao also relied heavily, does not mandate a different result. “Contrary to defendant’s interpretation, *Padilla* does not require states to provide an avenue for noncitizens to challenge their convictions based on an erroneous immigration advisement when no other remedy is presently available. That issue was not presented to the high court as Kentucky permits a motion to vacate a conviction by ‘[a] prisoner in custody under sentence or a defendant on probation, parole or conditional discharge.’ [Citations.] The Kentucky rule appears to serve the same function as . . . section 1473 [the habeas corpus statute].” (*Shokur, supra*, 205 Cal.App.4th at p. 1405.)

“Having failed to pursue any of the remedies provided by law, defendant may not now, years later, obtain relief via a nonstatutory motion to vacate the judgment. “‘The maxim, ‘for every wrong there is a remedy’ [citation] is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time – even though such failure accrued without fault or negligence on his part.” [Citations.]’ (*People v. Kim, supra*, 45 Cal.4th at p. 1099.) Accordingly, we find the superior court did not err in denying defendant’s motion for want of jurisdiction.” (*Shokur, supra*, 205 Cal.App.4th at pp. 1406-1407.)

In this case, as in *Shokur*, Cao seeks to vacate a conviction long after the statutory remedies have expired. Entertaining Cao’s motion “would mean a claim for ineffective assistance of counsel, or any other constitutional challenge for that matter, may be brought *at any time* after judgment. Under such an interpretation, the time restraints applicable to the various means of challenging the judgment are themselves meaningless: if a defendant has failed to pursue a remedy provided by statute – a remedy allowing the defendant to raise an alleged constitutional violation – it is of no moment

because the defendant may still raise the challenge as a nonstatutory motion to vacate the judgment after those time limits expire.” (*Shokur, supra*, 205 Cal.App.4th at p. 1406.) We again reject that view. The trial court properly denied Cao’s nonstatutory motion to vacate the judgment for ineffective assistance of counsel.

**DISPOSITION**

The order denying Cao’s statutory and nonstatutory motion to vacate the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.