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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.

PAUL HYUNPYO LEE,

Defendant and Appellant.

G046173

(Super. Ct. No. 04WF2245)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, M. Marc Kelly, Judge. Dismissed.

Law Offices of Michael S. Cabrera, Michael S. Cabrera and Kristen M. Hart 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.

Paul Hyunpyo Lee appeals from the denial of his August 2011 motion to vacate the judgment following his 2004 guilty plea to two felony counts (domestic battery with corporal injury and making criminal threats) and two misdemeanor counts (possession of controlled substance paraphernalia and child abuse). Lee argues his guilty plea should be set aside because he was not properly advised of the immigration consequences of his conviction. Lee failed to obtain a certificate of probable cause (Pen. Code, § 1237.5),<sup>1</sup> and we dismiss his appeal.

### FACTS AND PROCEDURE

In August 2004, Lee was charged with two felonies: domestic battery with corporal injury on his wife (§ 273.5, subd. (a)), and making criminal threats (§ 422). He was also charged with two misdemeanors: possession of controlled substance paraphernalia (Health & Saf. Code, § 11364), and child abuse (§ 273a, subd. (b)). On December 3, 2004, Lee pled guilty to all charges. He faced a maximum term of four years, eight months. The trial court sentenced Lee to a total term of two years in state prison, suspended execution of sentence, and placed him on three years' formal probation with 210 days of local custody credit. The court issued orders prohibiting Lee from contacting his wife or children.

The standard plea form, i.e., the *Tahl*<sup>2</sup> form, reflects Lee's initials in the appropriate boxes and his signature at the end of the document. Lee was represented by Attorney Robert P. Crawfis. Lee initialed the box that states, "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." Lee declared by his signature

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

<sup>2</sup> *In re Tahl* (1969) 1 Cal.3d 122.

he understood “each and every one” of his constitutional rights and desired to waive those rights to plead guilty, and he had “read, understood, and personally initialed each item above and discussed them with my attorney.” Crawfis declared, “I have explained each of the above rights to the defendant, and having explored the facts with him/her and studied his/her possible defenses to the charge(s), I concur in his/her decision to waive the above rights and to enter a plea of guilty.”

Before accepting Lee’s guilty plea, the trial court (before Commissioner Richard Pacheco) asked Lee if he had read the *Tahl* form in its entirety and if he understood everything in the document including his constitutional rights. Lee replied, “Yes.” The trial court asked Lee if he had placed his initials in all the boxes and signed the form. Lee replied, “Yes.” The court asked Lee if he understood the consequences, penalties, and punishments associated with the plea. Lee replied in the affirmative. The court found Lee entered the guilty plea of his own free will, made a knowing and intelligent waiver of his constitutional rights, and understood the consequences, penalties, and punishments associated with the plea.

On March 24, 2010, Lee filed a petition for dismissal of the criminal action under section 1203.4 on the grounds he had fulfilled the conditions of probation. But Lee had violated probation and had twice violated the court’s no contact orders. The motion was denied in June. Lee, who at that time was awaiting deportation to his native South Korea, filed two more section 1203.4 petitions for dismissal of the criminal action—one on August 24, 2010, and one on January 20, 2011—both were denied.

On August 25, 2011, Lee, who had been deported to South Korea, filed a combined petition for writ of *coram nobis* and section 1016.5 motion to vacate his 2004 guilty plea on the grounds he had not been properly advised of the immigration consequences of his conviction. Lee submitted his declaration stating that at the time he pled guilty, he asked his lawyer, Crawfis, “about my immigration status . . . but [Crawfis] told me not to worry about deportation because they wouldn’t deport me since I only did

four months in county jail.” Lee stated Crawfis never told him the conviction would result in deportation. Lee claimed that had he been aware he faced deportation, he would not have pled guilty, would have sought immigration advice, and would have either gone to trial or only accepted a plea that would not have endangered his immigration status.

Crawfis testified at the hearing on Lee’s motion. He denied telling Lee the convictions would not result in deportation because he only served a short time in county jail: “I know I would not have said that to him . . . [b]ecause I practice criminal law. I don’t practice immigration law.” Crawfis did not specifically say to Lee that he definitely was going to be deported as a result of the guilty plea, but he went over the immigration consequences language in the *Tahl* form and had Lee initial that box after reviewing it with him.

On October 14, 2011, the trial court denied Lee’s motion to vacate his 2004 guilty plea. It found Lee had been properly advised of his rights and the consequences of his plea. It found Lee’s declaration was self-serving and not corroborated by any other evidence. Lee filed a notice of appeal; he did not obtain a certificate of probable cause. (§ 1237.5.)

## DISCUSSION

Lee argues his 2004 guilty plea was obtained in violation of section 1016.5 and his federal constitutional rights because his trial counsel and the trial court did not adequately advise him of the immigration consequences of his guilty plea as required under *Padilla v. Kentucky* (2010) 559 U.S. \_\_\_\_ [130 S.Ct. 1473]. Lee asserts he was prejudiced because he would not have accepted the guilty plea had he been properly advised. The Attorney General responds we should dismiss the appeal because Lee did not obtain a certificate of probable cause. We agree with the Attorney General.

Section 1237.5 provides that a defendant may not appeal a judgment of conviction entered on a plea of guilty or nolo contendere without obtaining a certificate of probable cause from the trial court, unless the appeal is based solely upon grounds

occurring after entry of the plea and which do not challenge its validity. In *People v. Placencia* (2011) 194 Cal.App.4th 489, 494 (*Placencia*), the court held a defendant must obtain a certificate of probable cause to challenge whether the trial court failed its statutory duty to advise a defendant of the immigration consequences of a guilty plea<sup>3</sup> because “the immigration consequences of a plea of guilty or nolo contendere . . . necessarily precedes the entry of the plea and affects the validity of the plea.”

We are aware that the issue of whether a defendant must obtain a certificate of probable cause in order to appeal from a section 1016.5 motion is currently pending before the California Supreme Court in *People v. Arriaga* (2011) 201 Cal.App.4th 429 (*Arriaga*), review granted February 22, 2012, S199339, a case in which the majority disagreed with *Placencia* and found no probable cause certificate was required. But other published cases have followed *Placencia* (see *People v. Rodriguez* (2012) 208 Cal.App.4th 998, 1000), and we agree with *Placencia*'s reasoning.<sup>4</sup>

Lee argues he would not have pled guilty had he known the immigration consequences of his guilty plea. Clearly, Lee challenges the validity of his plea, and accordingly he was required to obtain a certificate of probable cause. The fact Lee argues his defense counsel was ineffective, or combined his statutory motion with a nonstatutory

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<sup>3</sup> Section 1016.5, subdivision (a), requires the trial court to advise a defendant a guilty plea may have immigration consequences.

<sup>4</sup> Although *People v. Totari* (2002) 28 Cal.4th 876, held an order denying a section 1016.5 motion is an appealable order, it did not discuss the applicability of section 1237.5 to such an appeal (in fact, the defendant in *Totari* had obtained a certificate of probable cause), and thus is not authority for a proposition a certificate of probable cause is not required. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198 [cases are not authority for propositions not considered].)

petition for a writ of *coram nobis*,<sup>5</sup> does not alter our conclusion. (*People v. Johnson* (2009) 47 Cal.4th 668, 683-685 [claim of ineffective assistance of counsel does not obviate need for certificate of probable cause]; (*People v. Chew* (1971) 16 Cal.App.3d 254, 256-258 [certificate of probable cause required on appeal from denial of petition for writ of error *coram nobis*].) “When a defendant has failed to comply with the requirements of section 1237.5 and [California Rules of Court,] rule [8.304(b)], the Court of Appeal ‘generally may not proceed to the merits of the appeal, but must order dismissal . . . .’ [Citations.]” (*In re Chavez* (2003) 30 Cal.4th 643, 651.)

Lee responds that he should not be required to obtain a certificate of probable cause because *Arriaga, supra*, 201 Cal.App.4th 429 [review granted February 22, 2012, S199339] a decision by the Second District, Division 2 that was originally published on December 1, 2011, held a certificate of probable cause was not required, and that decision was the “controlling” and “binding” law in effect when Lee filed his notice of appeal on December 6, 2011. Lee argues he cannot not be bound by the “change in law” resulting from the Supreme Court’s February 22, 2012, grant of review in *Arriaga*. Of course *Arriaga* was not binding precedent (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [bound by decisions of higher court]), and conspicuously absent from Lee’s argument is any mention of *Placencia*, filed April 18, 2011, which reached a contrary conclusion.

Lee argues in the alternative that we should permit him to amend his notice of appeal “to include a certificate of probable cause.” We cannot excuse defendant’s failure to request and obtain a certificate of probable cause. The law is clear. A “defendant may not obtain review of certificate issues unless he has complied with

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<sup>5</sup> Moreover, allegations a defendant would not have pled guilty had he known the possible immigration consequences or the possibility of entering a plea to a nondeportable offense do not state grounds for *coram nobis* relief. (*People v. Kim* (2009) 45 Cal.4th 1078, 1102-1103.)

section 1237.5 and [California Rules of Court, former] rule 31(d) [now rule 8.304(b)], first paragraph, fully, and, specifically, in a timely fashion . . . .” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099 (*Mendez*)). A defendant must file a statement of certificate grounds within 60 days after rendition of judgment (Cal. Rules of Court, rule 8.304(a) & (b), 8.308 (a)), and as our Supreme Court has explained, “Whether it would promote judicial economy or further other legitimate purposes to allow a defendant to comply beyond the period fixed by rule 31(d) [now rule 8.304(b)], first paragraph, is a consideration of which we may take no account. For to do so would entail amendment of the rule itself. And that is outside our power.” (*Mendez, supra*, 19 Cal.4th at p. 1104.)

#### DISPOSITION

The appeal is dismissed.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.