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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.

IGNACIO RODRIGUEZ CAYETANO,

Defendant and Appellant.

G049254

(Super. Ct. No. 12NF3886)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Beatriz M. Gordon, Judge. Affirmed.

Law Office of Zulu Ali and Zulu Ali 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 Ignacio Rodriguez Cayetano appeals from the denial of a motion to vacate his conviction. The appeal purports to challenge his previously entered guilty plea on the ground his attorney failed to adequately advise him of the plea's immigration consequences. The Attorney General urges us to dismiss the appeal, claiming defendant waived his appeal rights as part of the guilty plea. We conclude the postjudgment ruling is appealable, but affirm the order denying defendant's motion.

FACTS AND PROCEDURAL BACKGROUND

The district attorney charged defendant with sale or transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and driving a vehicle without a valid license (Veh. Code, § 12500, subd. (a)). At a January 9, 2013 hearing, defendant appeared with retained counsel, Ray Alejandro Solis. The complaint was amended to add a charge of possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and defendant pleaded guilty to this count.

As part of the guilty plea, defendant and Solis completed an advisement and waiver of rights form. One paragraph defendant initialed stated that he waived the "right to appeal from any and all decisions and orders made in my case" Another initialed paragraph provided: "**Immigration consequences:** I understand if I am not a citizen of the United States, my 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." Above defendant's signature appeared a paragraph acknowledging he had "read, understood, and . . . ha[d] discussed . . . with my attorney" the initialed paragraphs. Solis signed the form below a paragraph that stated he had "discussed the possible sentence ranges and immigration consequences with defendant." The court accepted the guilty plea, dismissed the other two counts, and placed defendant on three years formal probation.

In June, represented by his current attorney, defendant filed a nonstatutory motion to vacate his conviction and reopen the case. Citing *Padilla v. Kentucky* (2010) 559 U.S. 356 [130 S.Ct. 1473, 176 L.Ed.2d 284] (attorney's failure to properly advise a defendant concerning the immigration consequences of a guilty plea may support an ineffective assistance of counsel claim), the motion asserted Solis failed to investigate the immigration consequences of the guilty plea or inform defendant of them.

The trial court conducted an evidentiary hearing on the motion. Defendant testified he was born in Mexico. He came to the United States when he was 12 years old, and has lived here for 18 years. He received four years of schooling in this country, is married to a United States citizen, and has three children, all born here.

Defendant claimed he is fluent only in the Spanish language. He was not provided with an interpreter at any of the court hearings before or at the time he entered his guilty plea and denied knowing that he could request the assistance of an interpreter. Defendant also denied seeing other persons receiving assistance from interpreters during those hearings. But he admitted using English when speaking to the police at the time of his arrest.

According to defendant, at the January 9 hearing Solis told him that if he entered a guilty plea defendant "would get out of jail on that day." Solis spoke to him in both Spanish and English, but defendant did "[n]ot clearly" understand Solis when he used English. Defendant also testified Solis did not interpret the advisement and waiver form for him. Defendant admitted responding "yes" to the court's questions during the change of plea hearing, but claimed Solis told him to do so. He also acknowledged he understood when Solis told him some of the charges were being dismissed, he would receive formal probation, he would have to report to a probation officer, and that he would be subject to search and seizure.

In denying the motion, the trial court concluded defendant lacked credibility. It noted, he had "a personal interest in the outcome of the case," "not

all of [his] statement[s] are consistent,” “some statements [did not] necessarily comport with common[]sense,” and “his statements [were] contradicted” by the paragraph in the advisement and waiver of rights form just above Solis’s signature declaring counsel “explained to the defendant each of the rights set forth” and “discussed the possible . . . immigration consequences with the defendant.”

DISCUSSION

1. The order is appealable.

The first issue is the Attorney General’s argument that defendant’s waiver of his right to appeal in the change of plea form bars him from maintaining this appeal. We disagree.

A defendant can appeal “[f]rom any order made after judgment, affecting the substantial rights of the party.” (Pen. Code, § 1237, subd. (b).) This right is subject to the qualification that “no appeal lies from an order denying a motion to vacate a judgment of conviction on a ground which could have been reviewed on appeal from the judgment” (*People v. Thomas* (1959) 52 Cal.2d 521, 527), but an order denying a defendant’s “motion . . . to request leave to withdraw his plea due to ineffective assistance of counsel,” has been held to be “appealable as an order after judgment.” (*People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1147.)

The Attorney General relies on the advisement and waiver of rights form which contains defendant’s waiver of the “right to appeal from any and all decisions and orders made in my case.” The Supreme Court has held, “[j]ust as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

Nonetheless, *Panizzon* recognized “a defendant’s waiver of ‘possible future error’ is outside the defendant’s contemplation and knowledge at the time the waiver is made” and thus, “a defendant’s general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of . . . errors occurring subsequent to the plea.” (*People v. Panizzon, supra*, 13 Cal.4th at p. 85, fn. omitted.) In *People v. Orozco* (2010) 180 Cal.App.4th 1279, the court held “justice dictates that a claim of ineffective assistance of counsel in connection with the making of the waiver agreement cannot be barred by the agreement that is the product of the alleged ineffectiveness.” (*Id.* at p. 1285.) Consequently, a waiver of the right to appeal applies to “error occurring before *but not after* the waiver.” (*Id.* at p. 1284.)

Defendant’s postjudgment motion to vacate his conviction and reopen the case is based on the assertion he failed to receive the effective assistance of counsel in entering his guilty plea. Thus, we conclude he is entitled to appeal the order denying the motion.

2. *The trial court properly denied defendant’s motion to vacate his conviction.*

While defendant is entitled to bring this appeal, we nonetheless affirm the trial court’s denial of his motion for several reasons.

First, defendant argues he is entitled to relief from the conviction based on his guilty plea because he “did not receive any warnings before the plea agreement was entered, and his attorney did not conduct a reasonable investigation or provide alternatives to a guilty plea” that would avoid adverse immigration consequences for him. This claim is contradicted by the record and ignores the scope of appellate review. The advisement and waiver of rights form defendant initialed and signed included an express statement that if defendant is “not a citizen . . . , [his] conviction for the offense charged *will* have the consequence[s] of deportation, exclusion from admission to the United States, or denial of naturalization” (Italics added.) The judge who accepted the

guilty plea also informed defendant of the potential adverse immigration consequences. In denying the motion to vacate the conviction, the trial judge expressly rejected defendant's claim he lacked sufficient comprehension of English to understand the contents of the advisement and waiver of rights form. "We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence," and "neither reweigh[the] evidence nor reevaluate[] a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*Ibid.*)

Second, as for defendant's claim Solis failed to adequately investigate the immigration consequences of his guilty plea, the record is bereft of any supporting evidence. Defendant did not obtain a declaration from Solis or call him as a witness at the hearing. Except for defendant's acknowledgement that he met with Solis on three occasions before entering his guilty plea, we have no information on what, if any, investigation Solis conducted on the immigration consequences of a guilty plea to possession of a controlled substance. "A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence," thereby imposing on "[d]efendant . . . the burden of establishing constitutionally inadequate assistance of counsel." (*People v. Brown* (2014) 59 Cal.4th 86, 109; *People v. Mbaabu, supra*, 213 Cal.App.4th at p. 1148.) Without any evidence on the scope of Solis's preparation, we have no basis to assume he failed to adequately investigate the immigration issue or to assume, contrary to the statement in the advisement and waiver of rights form, that Solis failed to discuss this issue with defendant before defendant entered the guilty plea.

Finally, defendant chose the wrong remedy. In *People v. Kim* (2009) 45 Cal.4th 1078, the defendant filed both a nonstatutory motion to vacate his conviction

and a motion for a writ of error *coram nobis*, both asserting he was denied the effective assistance of counsel in entering a guilty plea to a charge that subjected him to being deported. Recognizing “a nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for a writ of error *coram nobis*,” the Supreme Court “consider[ed] these claims together” (*id.* at p. 1096) and ruled they did not constitute a basis for granting relief. “[A] claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* Although an attorney has a constitutional duty at least not to affirmatively *misadvise* his or her client as to the immigration consequences of a plea [citation], any violation in this regard should be raised in a motion for a new trial or in a petition for a writ of habeas corpus.” (*Id.* at p. 1104.)

In *People v. Shokur* (2012) 205 Cal.App.4th 1398, this court followed *Kim* and affirmed the denial of a nonstatutory motion to vacate the defendant’s conviction that sought relief based on *Padilla v. Kentucky, supra*, 559 U.S. 356. “The noncitizen defendant who has not been advised of the immigration consequences of a guilty plea may move to withdraw his plea (Pen. Code, § 1018), make a statutory motion to vacate the judgment (Pen. Code, § 1016.5), appeal (Pen. Code, § 1237), or file a petition for a writ of habeas corpus raising the issue of ineffective assistance of counsel. [Citations.] “The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum*.” [Citation.] Neither is a nonstatutory motion to vacate the judgment.” (*People v. Shokur, supra*, 205 Cal.App.4th at p. 1404; see *People v. Aguilar* (2014) 227 Cal.App.4th 60, 72-73 [“a ‘post conviction nonstatutory motion,’ as authorized by . . . *Padilla* . . . is the legal equivalent of a petition for a writ of error *coram nobis*” and “provides . . . no remedy based on the circumstances”].)

Here, defendant failed to timely obtain a certificate of good cause and file a notice of appeal from the order placing him on probation. Since he received the

statutorily required advisement on the potential adverse immigration consequences of his guilty plea, relief under Penal Code section 1016.5 was also not available. (*People v. Martinez* (2013) 57 Cal.4th 555, 565.) Defendant's motion to vacate the conviction could have been brought under Penal Code section 1018. But even if we treat it as such, given defendant's burden of justifying relief by clear and convincing evidence and our obligation to accept the trial court's factual findings that are supported by the record, we would necessarily find the trial court did not abuse its discretion in denying the motion. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.)

Defendant is still on probation. Thus, the one avenue of relief that may still be available to him is a petition for a writ of habeas corpus based on a claim of ineffective assistance of counsel. We express no opinion on the possible merits of such a petition, but rather merely hold defendant's nonstatutory motion to vacate his conviction based on that ground is not a valid means of seeking relief.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.