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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ANTONIO RIOS, Defendant and Appellant.	H036574 (Santa Cruz County Super. Ct. No. WF00788)

Defendant Jose Antonio Rios, a citizen of Mexico and a lawful permanent resident of the United States, pleaded no contest to felony active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)[1] [count 1]), shooting at an occupied motor vehicle (§ 246 [count 2]), and assault with a semiautomatic firearm (§ 245, subd. (b) [count 3]). He also admitted allegations that he personally used a firearm in the commission of count 3 (§§ 12022.5, subds. (a) & (d), 1192.7, subd. (c)(8)) and committed counts 2 and 3 for the benefit of a criminal street gang (§ 186.22, subd. (b)). Before sentencing, he moved to withdraw his pleas (§ 1018), asserting that he "did not understand the actual immigration consequences." The court denied the motion and sentenced him to 10 years in prison.

[1] Further statutory references are to the Penal Code unless otherwise noted.

On appeal, defendant challenges the denial of his motion as a prejudicial abuse of discretion. He argues that his pleas and admissions were not freely or intelligently entered because neither the court nor his counsel adequately advised him that his convictions could cause him to be deported. We affirm.

I. Background[2]

Around noon on August 10, 2009, Watsonville police responded to reports of a shooting outside the Super Taqueria on Main Street. Witness Gary Peters reported that as he walked from the taqueria to his car, he heard a man say, "I am not disrespecting you." Peters saw the man who had spoken walking toward Main Street and a green Honda leaving the parking lot. The man raised a black pistol and fired five to eight shots at the Honda. Peters described him as "a short Hispanic male, wearing a New York Yankees hat backwards, a blue Pendleton, and very baggy, dark blue jeans." The shooter and another Hispanic male fled in a tan Mercury. Peters gave police the license number.

Witness Juan Santos was having lunch at the taqueria with his girlfriend when two Hispanic men who were seated a few tables away left and got into "a pretty heated argument" with three men who were about to enter the restaurant. Two of the three arriving men walked inside, and one of the departing men walked to a car, but the remaining two continued to argue. The argument occurred "right out on the walkway out in front, about 15 feet outside the window" table at which Santos and his girlfriend were seated.

The two men eventually separated, still exchanging words. One went to a Honda in the parking lot while the other "hung out there in front," and it "looked like he was talking on a phone." As the Honda left the lot and stopped at a red light, the man on the

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[2] Since defendant pleaded no contest, we take the facts from the preliminary examination transcript, which the parties stipulated provided a factual basis for his pleas and admissions.

phone "started running towards the Main Street . . . . [A]nd then he came out with a handgun, and he started pointing at the car and firing." Santos heard five or six shots. He described the shooter as "a Hispanic male; 18 to 20 years old; approximately five foot five; thin, 145 pounds," wearing "a blue baseball cap with a W on the front, a blue checkered shirt, with baggy pants." The shooter got into the driver's seat of a gold Mercury and drove away. Santos gave police the Mercury's license number.

Santos's girlfriend Betriz Lisarde described the shooter as a "Hispanic male, 18 to 20 years old; five five; thin, approximately 145," and wearing "a blue baseball hat with writing on the front, a blue checkered shirt, [and] baggy blue pants." "She said she saw the guy when he was there and running back after the shooting . . . and she described his eyes and his face." "He ran out towards the roadway, and then he fired five times." The shots were "pointed towards the blue Honda" that was "out in the roadway, waiting for the light to change." Then he "came running back, and he was ducking down." He ran to an "American-made, . . . four-door, . . . gold or brownish" car and got into the driver's seat.

A few minutes after the shooting, a police officer in an unmarked car spotted a "brownish" Mercury parked in the driveway of a house less than half a mile from the taqueria. Three males were about to get into the car. An officer in a marked patrol car happened to be driving behind the unmarked police vehicle, and when the three suspects noticed the marked vehicle, "[t]hey quickly turned around and frantically began jumping over a fence" at the end of the driveway. All three were detained; one was defendant.

Police arranged a showup. Santos "couldn't be a hundred percent" sure any of the three was the shooter, but he was "absolutely sure" the Mercury was the getaway car. Lisarde, driven separately to the showup, identified defendant as the shooter. She "was sure of it," saying she would "never forget his face," and she was also "sure" the Mercury was the shooter's car.

Carlos Iglesias was one of the three detained. He told police that defendant and a friend named Juan or Jose picked him up in the Mercury "a little before noon" that day, and they stopped at the taqueria for some food. Defendant was wearing a New York Yankees baseball cap. At the taqueria, Iglesias saw "a bluish Honda" with two male occupants, and he heard "popping sounds that sounded like shots." He and his companions got back into the Mercury and drove to the friend's house where police spotted the Mercury.

Police conducted a probation search of the house where the Mercury was spotted and found a semiautomatic weapon wrapped in a sweater on the top shelf of a closet. They later determined that shell casings found outside the taqueria had been fired from that weapon.

Police obtained the keys to the Mercury from defendant and searched it. They found a spent .22-caliber shell casing and a letter to defendant from Fernando Sanguino, a Santa Cruz County jail inmate. A search of defendant's cell phone discovered a text message sent from it at 11:54 a.m. that day. The text said, "Scrapas here in Super Taqueria."

Detective Morgan Chappell testified at the preliminary examination as an expert in Watsonville area criminal street gangs. He explained that "scrapas" is a derogatory term used by Norteño gang members to describe their Sureño gang rivals. Chappell opined that on August 10, 2009, defendant was an active participant in a Norteño criminal street gang. Chappell based that opinion on his prior contacts with defendant and on the text message sent from defendant's phone just before the shooting since, in Chappell's experience, "only a Norteño would use that terminology in sending a text message to one of his associates or fellow gang members." Chappell also noted defendant's request for housing in the Norteño section of the jail and his statement that he "could not be housed with Sureños."

Chappell also relied on the letter found in defendant's car. He knew Sanguino to be a Norteño gang member. In his letter, Sanguino reported hearing that defendant wanted a City Hall Norteños gang tattoo. Chappell explained that gang tattoos must be earned, "almost exclusively through assaults on rival gang members." "[T]he only way somebody could get a Norteño tattoo put on their leg is if they are an active Norteño gang member currently putting in work for the gang." Shooting at a gang rival would "absolutely" earn a tattoo. A shooting committed in broad daylight in a public place by a gang member would also benefit the gang by "drastically" enhancing its reputation.

Chappell acknowledged that defendant was wearing blue, the color Sureños associate with, on the day of the shooting. That was "definitely strange," because Norteños associate with the color red. But it was not necessarily "out and out disrespecting the gang." Defendant was on his way to work, Chappell noted, and "maybe they don't allow people to come flamed up to work, wearing a bunch of red." In Chappell's opinion, defendant's blue clothing indicated that the shooting "was not a planned thing." "He saw somebody at the Super Taqueria who he clearly identified as an enemy. He had a gun on him, because he's a gang member and gang members carry weapons, and he chose to shoot at this person. [¶] He wasn't going to go change his clothing."

Charged by information with the aforementioned crimes, defendant pleaded no contest to all of the charges and admitted the enhancement allegations. Before accepting defendant's pleas, the court advised him that "if you are not a citizen, the plea could affect your ability to remain within the United States. If you leave the United States or for any reason you were to be deported, it could affect your ability to return. And if you apply to become a naturalized citizen, it could affect that application. [¶] Is that clear?" Defendant said it was. He told the court no one had threatened him, and he responded affirmatively when asked if he was "doing this - that is, giving up your rights and entering these pleas at this point, after speaking to [his trial counsel] Mr. Wallraff -

because this is what you believe you should do and you want to do that." The court accepted his pleas and admissions and granted the district attorney's request to have the record reflect that "the plea agreement between the Court and the defendant is . . . over the People's objection."

On the date set for sentencing, defendant waived time, the court relieved alternate public defender Wallraff, and the clerk noted in the minutes that defendant and his new counsel would determine whether to file a motion to withdraw the plea.

Defendant subsequently filed the motion. In it, he argued that he "did not understand the actual immigration consequences" and "felt coerced by his defense attorney into entering the plea." In a supporting declaration, he asserted that Wallraff "never made any inquiry into how my plea in this case would affect my immigration status," "never asked me if I was a United States [c]itizen," "never discussed with me how my plea would affect my immigration status," and "never informed me that I would be deported as a result of my plea." Defendant further asserted that "[w]hen the judge took my plea he did not advise me that I would be deported as a result of my plea." "When I entered my plea," defendant declared, "I was unaware that I would be deported as a result of this conviction." "I would not have entered my pleas of no contest in this case if I had known that it would result in my deportation."

Defendant and Wallraff testified at the hearing on the motion. Wallraff told the court he "was aware that a conviction of any of those [charges] would result in [defendant's] deportation and exclusion," and he so advised him. "[T]his was part of a much larger discussion -- that if he were to plead to these and he was not a citizen, it would result in his deportation and his being prevented from ever coming into the country legally." "I indicated to [defendant] prior to [his] entering the plea that if he did take this deal and was not here legally, he would be deported and he would not be allowed to reenter the country." "But I didn't read that off of any document."

Wallraff did not question defendant about his immigration status because he has "for years and years" made it his practice to advise every client about possible immigration consequences. He explained that "25 years ago I had a Canadian for a client that I did not advise and he got immigration consequences, so I've learned not to make any assumptions. I've also learned that sometimes my clients aren't straight with me about . . . their immigration status, so I try to be thorough with everyone." Wallraff "didn't ask after every question whether [defendant] understood. I asked him if he had any questions and, as I recall, he had some but not about the deportation."

Wallraff recalled that "from the first time I met him, [defendant] was unhappy with the charges against him and reluctant to enter pleas to them." "He indicated that he didn't think he was guilty of all the things he was charged with." There was "a lot of discussion" about how many strikes the plea agreement contemplated. Defendant "was very concerned about pleading to more than one strike. That was his primary concern . . . ." "That was a sticking point . . . ." Defendant's concerns about multiple strikes were "relatively sophisticated," Wallraff noted, but at other times, defendant "had difficulty coming to grips with his situation." "[T]here was a fair amount of denial in our discussions."

Wallraff told defendant that his case was a serious one. He discussed the evidence likely to be presented at trial and advised defendant that based on the section 246 charge with a gang enhancement, he could be facing 15 years to life. Wallraff "mentioned" but "didn't dwell on" the fact that some persons "with a life tail never get out of prison." He told the court defendant was "very concerned" about possible sentences, "including a life top." "He didn't want to go to prison at all."

Asked about the plea negotiations, Wallraff testified, "I don't believe the People were willing to give him anything basically." "I think we were talking 17 years . . . ." Defendant was "not happy" about the prospect of 17 years in prison. Wallraff conferred with the trial judge, who offered 10 years if defendant pleaded to all of the charges.

Defendant was "unhappy about all the choices. There were no good choices." Wallraff advised defendant it was his choice to enter a plea. He did not "force" defendant to enter a plea. He told him there were "two bad choices here and you've got to pick."

Wallraff testified about the plea negotiations. "[Defendant] talked to me. I believe his father was there. He talked to his father and, quite frankly, was not at all sure what he wanted to do, and it took some time before he made a final decision." "We talked a long time about the various facets of his plea." At one point, defendant told Wallraff he was not going to take the deal. Wallraff at no point indicated to defendant that he would withdraw from representing him if defendant did not accept the plea agreement. "No, that never happened." Nor did Wallraff indicate to defendant that his plea could later be withdrawn. "[W]e never discussed withdrawing the plea. I said the *offer* would be withdrawn upon the retirement of Judge Barton." (Italics added.)

Defendant testified that "they never told me that I was going to do, like, a lot of time" if convicted. "[I]f anything it was like a year in County, five years felony probation." Asked if Wallraff had advised him about his maximum exposure, he replied, "From what I believe, the max would be 21 years, no life, no nothing." "I think someone did say 21, but he's like but you shouldn't worry because that does not apply to you." Defendant did not believe the court's immigration advisement applied to him. He did not understand what the advisement meant. Without referring to any specific statement, his new trial counsel asked him, "Did you rely on what Mr. Wallraff had told you?" Defendant responded, "Yes."

The court heard argument from the parties. Before announcing its ruling, the court noted that it had presided over the case "since at least prelim" and "knew what the exposures were." There was "overwhelming evidence" to convict defendant "of each and every charge and allegation . . . ." Plea negotiations had been ongoing "easily for a month before [defendant entered his pleas], with gives and takes" from all involved.

Ultimately, the court offered a 10-year prison term "based on who [defendant] was and based on his lack of prior criminality."

The court denied defendant's motion to withdraw his pleas. The court credited Wallraff's testimony, noting that "there were discussions about immigration and the consequences of the plea . . . before the 29th, when I took the plea." "And I accept that Mr. Wallraff advised." Regarding its own immigration advisement, the court acknowledged, "[Y]ou're right: In the first line, I did not use the word 'deportation.' [¶] But in the second line, I indicated, 'If you leave or are deported, you can't come back.' [¶] So I believe that the deportation aspect is there."

The court emphasized that the taking of defendant's pleas had not been rushed. "My recollection is that it took some time during that day when Mr. Wallraff was available to talk to [defendant]." "During the plea, when [defendant] had a question, we stopped. He talked to Mr. Wallraff. They conferred. He then continued on with the plea." The court also noted defendant's express acknowledgment that his pleas were free and voluntary.

The court found that Wallraff had adequately advised defendant about the immigration consequences of his pleas and that defendant "in fact knew what was happening and in fact chose to do what he ultimately did." "Based on the evidence that has been presented to this Court, based upon the cases that I've seen and read, based upon the testimony . . . , I will deny the motion."

The court sentenced defendant to a 10-year prison term as follows: selecting count 3 (§ 245, subd. (b)) as the principal term, it imposed the six-year midterm and added a consecutive four-year term for the personal use enhancement. It imposed a concurrent two-year term for count 1 (§186.22, subd. (a)) and the five-year midterm for count 2 (§ 246), then stayed the latter pursuant to section 654. The court struck the gang enhancements. Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

III. Discussion

A. Standard of Review

Section 1018 provides that "[o]n application of the defendant at any time before judgment . . . , the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." (§ 1018.) Good cause to withdraw a guilty plea includes mistake, ignorance, inadvertence, or any other factor overreaching the defendant's free and clear judgment, and it must be shown by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Wharton* (1991) 53 Cal.3d 522, 585 (*Wharton*).) Ignorance that deportation may be a collateral consequence of a guilty plea can constitute good cause under section 1018. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796 (*Giron*).) While section 1018 is to be liberally construed, that "does not relieve the applicant from coming forward with the requisite proof that the ends of justice will be subserved by permitting him to change his plea from guilty to not guilty." (*People v. Brotherton* (1966) 239 Cal.App.2d 195, 201.) These principles apply to no contest as well as to guilty pleas. (See *People v. Superior Court (Barke)* (1976) 64 Cal.App.3d 710, 715-716.)

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion, adopting the court's factual findings if supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *Giron*, *supra*, 11 Cal.3d at p. 796.) "An abuse of discretion is found if the court exercise[d] discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. [Citation.]" (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496 (*Shaw*).)

B. Analysis

Defendant argues that the trial court and Wallraff both failed him, the court by giving an inadequate section 1016.5 advisement and Wallraff by giving him "affirmative" and "gross" misadvice. He contends that he was ignorant of the immigration

consequences of his pleas, and the denial of his motion was therefore a prejudicial abuse of discretion. We disagree.

Section 1016.5 provides in pertinent part that before the court accepts a plea of guilty or no contest, it "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." (§ 1016.5, subd. (a).) "The exact language of the warning given by the court is not crucial." (*People v. Soriano* (1987) 194 Cal.App.3d 1470, 1475.) "[S]ubstantial compliance [with the statutory advisement] 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.)" (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244-1246.)

Here, the court advised defendant, "if you are not a citizen, the plea could affect your ability to remain within the United States. If you leave the United States or for any reason you were to be deported, it could affect your ability to return. And if you apply to become a naturalized citizen, it could affect that application." We agree with defendant's contention that this language did not adequately convey that he could be *deported* as a result of his pleas.

Unlike the statutory advisement, which begins with the clear warning that a conviction by plea "may have the consequences of deportation," (§ 1016.5, subd. (a)), the first (or "deportation") prong of the advisement the court gave here stated only that defendant's plea "could affect" his "ability to remain" in the United States. It did not use the word "deportation." Nor was it anything like the advisement given in *People v. Valenciano* (1985) 165 Cal.App.3d 604 (*Valenciano*), which the court held was "clearly" appropriate notwithstanding the absence of the word "deportation" because it warned the

defendant that his plea "could cause [him] to be *excluded* from the United States—*residency*— . . . ." (*Valenciano*, at p. 605, italics added.)

We do not agree that the court's mention of "deportation" in the second (or "exclusion") prong of the advisement cured the error in the first prong. Deportation and exclusion are "distinct consequences" of a noncitizen's guilty or no contest plea. (*People* v. *Gontiz* (1997) 58 Cal.App.4th 1309, 1317 (*Gontiz*), disapproved on another ground in *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 200, fn. 8.) The advisement that "[i]f . . . *for any reason* you were to be deported, [the plea] could affect your ability to return" did not state or even suggest that deportation could be a consequence of defendant's plea. The deportation advisement given here was inadequate, and that constituted a failure to comply with section 1016.5.[3] (*Gontiz*, at p. 1317 ["An admonishment lacking in any one of these three possible immigration consequences constitutes a failure to comply with section 1016.5."].)

The court's failure to comply with section 1016.5 does not establish, however, that it abused its discretion in denying defendant's section 1018 motion. To establish "good cause" within the meaning of section 1018, defendant needed to show by clear and convincing evidence (*Wharton*, *supra*, 53 Cal.3d at p. 585) that he was ignorant of the immigration consequences of his pleas. (*People v. Flores* (1974) 38 Cal.App.3d 484,

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[3] To the extent defendant claims the second prong of the advisement was inadequate, we disagree. The advisement warned him that if he left the country or if he were to be deported, his plea "could affect [his] ability to return." This statement was certainly not as clear as the statutory advisement, which warns about the "consequences of . . . exclusion from admission to the United States" (§ 1016.5, subd. (a)), nor was it as precise as the advisement given in *People v. Gutierrez* (2003) 106 Cal.App.4th 169 (*Gutierrez*), which was held to substantially comply with the language of the statute. (*Gutierrez*, at p. 171 ["you will be deported from the United States, *denied re-entry*, and denied amnesty or naturalization"], italics added.) But it was at least as clear as the advisement in *People v. Dubon* (2001) 90 Cal.App.4th 944 that the defendant's plea "could result" in his being "denied admission to the United States" (*id.* at p. 949), and we think it sufficiently warned defendant that his conviction by plea could cause him to encounter difficulties if he left the country and later tried to return.

487-488 [no abuse of discretion in denying motion where "Flores was made aware of the possibility of deportation by his attorney before he entered the guilty plea."].) The evidence was highly conflicting on this point. Defendant declared that Wallraff "*never* discussed with me how my plea would affect my immigration status" and "*never* informed me that I would be deported as a result of my plea." (Italics added.)

But Wallraff testified to the contrary. He was aware that a conviction could result in deportation, and he so advised defendant. "[T]his was part of a much larger discussion," Wallraff told the court, "that if he were to plead to these *and he was not a citizen, it would result in his deportation* and his being prevented from ever coming into this country legally." (Italics added.) The trial court was entitled to credit Wallraff's testimony and discount defendant's; thus, substantial evidence supported the court's finding that "there were discussions about immigration and the consequences of the plea . . . before the 29th, when I took the plea." (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*) ["it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."].) Substantial evidence also supported the court's finding, based on its own observations at the hearing and on defendant's acknowledgment that his pleas were free and voluntary, that defendant "in fact knew what was happening and in fact chose to do what he ultimately did." (*Fairbank*, *supra*, 16 Cal.4th at p. 1254 [a trial court's own observations are properly included in the substantial evidence supporting a conclusion that a plea was knowingly, intelligently, and voluntarily made].)

Defendant does not challenge the court's findings as unsupported by substantial evidence. (See *People v. Curl* (2009) 46 Cal.4th 339, 342, fn. 3 ["defendant's decision not to attack the judgment as unsupported by substantial evidence amounts to a concession that it is supported by such evidence."].) In his reply brief, he acknowledges that Wallraff *correctly* advised him "that if he were to plead to these [charges] and he was

not a citizen, it would result in his deportation and his being prevented from ever coming into the country legally."

He argues, however, that Wallraff also affirmatively *mis*advised him that " 'if he was not here legally,' " he could be deported as a consequence of his pleas. "[A]ny reasonable lawful permanent resident" given that advice, he asserts, "would assume that conviction for the instant offenses would *not* subject him to adverse immigration consequences . . . ." (Italics added.) We cannot agree with this reasoning, because the conclusion follows only if Wallraff's incomplete statement is considered in a vacuum.

It cannot be viewed in a vacuum but must instead be considered in the context of Wallraff's testimony that it was "part of a much larger discussion" in which he advised defendant "that if he were to plead to these and he was not a citizen, it would result in his deportation and his being prevented from ever coming into the country legally." It must be viewed in the context of the trial court's observation that the taking of the pleas was not rushed but instead "took some time." Wallraff "was available to talk to [defendant]," and proceedings stopped whenever defendant had a question. He conferred with Wallraff before continuing. As Wallraff testified, he and defendant "talked a long time about the various facets of his plea." Defendant's father was also present at the taking of the pleas, and defendant consulted with him before he entered them. "[I]t took some time before [defendant] made a final decision." The court could reasonably have concluded from all of this evidence that defendant was not ignorant of the immigration consequences of his pleas when he entered them but instead made what he believed at that time was the best decision under the circumstances.

The trial court, which not only held an evidentiary hearing but also had "an advantage" in having presided over the case "since at least prelim," was in the best position to determine whether defendant was, in fact, misled by the inconsistent advice he received. (*Maury*, *supra*, 30 Cal.4th at p. 403.) "We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." (*Ibid*.) Given Wallraff's

testimony and its own observations, the court could reasonably have disbelieved defendant's declarations that Wallraff "never" discussed how his pleas would affect his immigration status and "never" told him he would be deported as a result of his pleas. The trial court could reasonably have concluded that defendant "in fact knew what was happening and in fact chose to do what he ultimately did." We discern no abuse of discretion here. (*Shaw*, *supra*, 64 Cal.App.4th at p. 496.)

IV. Disposition

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Walsh, J.*

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.