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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FABIAN BARBOSA VALENZUELA,

Defendant and Appellant.

H037039

(Santa Clara County

Super. Ct. No. 155219)

Fabian Valenzuela appeals from the denial of his motion to vacate the judgment in a 1992 case in which he pleaded guilty to one count of possession of a controlled substance for sale (Health & Saf. Code, § 11351). Valenzuela brought his motion to vacate pursuant to Penal Code section 1016.5. Valenzuela contends that the trial court erred in denying his motion to vacate because he established reasonable diligence in pursuing his motion; he asserts that he brought his motion shortly after he learned from his immigration attorney that his conviction made him ineligible for legal residence.

Valenzuela filed his notice of appeal on June 17, 2011, and sought and was granted a certificate of probable cause.¹

¹ In *People v. Placencia* (2011) 194 Cal.App.4th 489, the Second District Court of Appeal held that a certificate of probable cause is required from the trial court in compliance with Penal Code section 1237.5 in order to appeal the denial of a motion to vacate after a guilty plea.

Appealability

In *People v. Totari* (2002) 28 Cal.4th 876 (*Totari*), the California Supreme Court held that the denial of a statutory motion to vacate a judgment, brought pursuant to Penal Code section 1016.5, is an appealable order under Penal Code section 1237, subdivision (b). This is so despite the general rule that no appeal lies from an order denying a motion to vacate a judgment of conviction on a ground that could have been reviewed on appeal from the judgment. (*Id.* at pp. 879, 881-882, 886-887.)

Factual and Procedural Background

In April 1992, Valenzuela pleaded no contest to one count of possession for sale of a controlled substance. (Health & Saf. Code, § 11351.) The court placed him on formal probation for three years and imposed a four month county jail sentence with some credit for time served. Thereafter, Valenzuela violated his probation. However, the court reinstated him on probation on the original terms and conditions.²

According to Valenzuela, in 2009 he applied for permanent resident status based on his mother's petition. On April, 2, 2009, the Department of Homeland Security, Immigration and Customs Enforcement (ICE),³ Office of Detention and Removal Operations, requested information from the Santa Clara County Superior Court relating to Valenzuela's criminal conviction in case No. 155219.

² It appears that Valenzuela was arrested in 2008 for possession of a controlled substance. However, in February 2009, the charges were dismissed for lack of evidence and Valenzuela was released to "INS OR BORDER." Since Valenzuela was in the United States without any legal immigration status, it is not surprising that the Department of Corrections released him to the Department of Homeland Security. However, that fact alone adds nothing to the issue of when Valenzuela first learned of the immigration consequences of his 1992 conviction.

³ The federal agency in charge of immigration matters, the "INS," has since been "reorganized into the Department of Homeland Security. Deportations are now prosecuted by United States Immigration and Customs Enforcement. (See *U.S. v. Garcia-Beltran* (9th Cir.2006) 443 F.3d 1126, 1129, fn. 2 ["The INS is now known as Immigration and Customs Enforcement (ICE)"].)" (*People v. Hyung Joon Kim* (2009) 45 Cal.4th 1078, 1087, fn. 2.)

Thereafter, Valenzuela requested record clearance of his offense pursuant to Penal Code section 1203.4, which the superior court granted on March 25, 2010.⁴

Subsequently, according to Valenzuela, in July 2010, his immigration attorney referred him to attorney Mark Davis to determine whether he had any other options for post-conviction relief. On September 27, 2010, Davis requested a copy of Valenzuela's file from the Santa Clara County Superior Court. On October 22, 2010, Davis was informed by letter that pursuant to Government Code sections 68152, subdivision (j)(7) and 69955, subdivision (e) all reporter's notes from Valenzuela's case had been destroyed.

On March 28, 2011, Davis filed a motion to vacate the judgment in Valenzuela's case on the ground that Valenzuela had not been advised, as required by Penal Code section 1016.5, of the potential immigration consequences of his plea of no contest.

On May 13, 2011, after hearing, the trial court denied Valenzuela's motion on the sole ground that he had not exercised reasonable diligence in bringing the motion. In so ruling, the court found that it was "abundantly clear[] from at least two of the probation reports that the discussion of deportation proceedings occurred with the defendant as early as months following his conviction in 1992."⁵ The court went on to say that even if Valenzuela did not know of the consequences of his plea in 1992, he was "advised of the immigration consequences" in 2009. Thus, "the diligence requirement commands that in 2009 he take action to pursue any legal remedies that he might have." Accordingly, the

⁴ In *Garcia-Gonzales v. Immigration & Nat. Service* (9th Cir.1965) 344 F.2d 804, 806, cert. den. 382 U.S. 840, the United States Court of Appeals held that Penal Code section 1203.4, which releases defendants who have fulfilled the terms of their probation "from all penalties and disabilities resulting from the offense" (Pen. Code, § 1203.4) for which they have been convicted does not "'wipe[] out' or 'expunge[]' " the conviction. The conviction may still be used against an alien in a deportation hearing.

⁵ It appears to this court that there is only one probation report in the record. An identical report, which is attached to the People's response to the motion to vacate, is a copy of the original probation report in the case.

court concluded that based on the record before the court, Valenzuela had failed to "establish diligence."

Discussion

As noted, Valenzuela contends that the court erred in finding that he had failed to establish reasonable diligence in bringing his motion. Specifically, he argues that the court erred in finding that there was evidence that he was put on notice of the immigration consequences of his plea by a note in the probation report, which stated "The Department of Immigration has been advised of the defendant's current court case and in-custody status." Alternatively, Valenzuela argues that the court erred in finding that he had failed to establish reasonable diligence where the motion to vacate was filed eight months after he was advised by his immigration attorney to seek post-conviction relief. Valenzuela asserts that the court used the wrong standard and did not consider relevant evidence explaining the delay.

Penal Code "[s]ection 1016.5, subdivision (a) provides: 'Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions 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.' Subdivision (b) directs the court to vacate any plea taken without the advisement when the defendant shows that the plea may have the adverse consequences described by the statute." (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 172-173.)

Thus, Penal Code section 1016.5, subdivision (b) requires the trial court to vacate a judgment and permits the defendant to withdraw a plea of guilty or no contest and to enter a not guilty plea if, " 'after January 1, 1978, the court fails to advise the defendant' " of the possible immigration consequences of the plea and the defendant shows that the

conviction may have immigration consequences. The section provides that absent a record that the advisements were provided, it is presumed that a defendant did not receive them. However, the statute "contains no provision indicating when a defendant must make a motion to vacate." (*People v. Totari* (2002) 28 Cal.4th 876, 881 (*Totari I*); *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 204.)

"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. [Citations.]" (*Totari I, supra*, 28 Cal.4th at p. 884.) We review the court's order denying a Penal Code section 1016.5 motion to withdraw a guilty plea for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.)

Since the superior court denied the motion to vacate solely on the ground that Valenzuela had not established reasonable diligence in bringing his motion, we review only that finding.

Although there is no time limit within which to bring a motion under Penal Code section 1016.5, it "is timely if brought within a reasonable time after the conviction actually 'may have' " one or more specified immigration consequences. (*Zamudio, supra*, 23 Cal.4th at p. 204.)

"[T]he trial court may properly consider the defendant's delay in making his application, 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; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1207 (*Totari II*)). Valenzuela bore the burden of proving his reasonable diligence,

and we review the superior court's finding for abuse of discretion. (*Totari II, supra*, 111 Cal.App.4th at p. 1208.)

Whether a defendant has shown the requisite diligence in bringing a Penal Code section 1016.5 motion is a factual question. (*Totari II, supra*, 111 Cal.App.4th at p. 1208.) However, absent evidence that a defendant had reason to question the accuracy of the immigration advisements, it would be unfair to hold that a defendant should have objected to them sooner. (*Id.* at pp. 1206–1207.)

As this court explained in *Totari II*, in *Zamudio*, "the California Supreme Court opined that there was no indication that 'the Legislature, when enacting section 1016.5, intended to depart from the *normal rules* . . . governing withdrawal of a plea for misadvisement regarding collateral consequences.' [Citation.] The 'normal rules' for withdrawal of a plea, when the strict time limits set forth in Penal Code section 1018 have expired, are identical to the rules for obtaining a writ of coram nobis. This is true because a 'motion to vacate' has long been equated in California with a petition for a writ of coram nobis. [Citations.] Indeed, the Legislature's 1991 amendment of Penal Code section 1018 verified that it intended for the rules governing writs of coram nobis to govern motions to vacate brought under Penal Code section 1016.5 after the expiration of the strict time limits in Penal Code section 1018. [Fn. omitted.] Hence, the rules for writs of coram nobis, including the burden on a defendant to prove reasonable diligence, *do* apply to defendant's motion to vacate his convictions under Penal Code section 1016.5." (*Totari II, supra*, at pp. 1206-1207.)

On the issue of reasonable diligence *Totari II, supra*, 111 Cal.App.4th 1202 is instructive. In *Totari II* the defendant was in the United States on a student visa when he pleaded guilty to narcotics-related offenses in 1985; he was not advised of the immigration consequences of his plea. After he entered his plea but before he was sentenced, the defendant learned that he was the subject of an immigration hold. INS documents that were introduced in this court—but not the trial court—established that

the basis of the 1986 deportation proceedings that followed, and which resulted in the deportation warrant, was not the convictions, but the fact that the defendant had overstayed his student visa. In 1987, following successful completion of his probation on the narcotics convictions, those convictions were expunged, which the defendant believed eliminated any adverse immigration consequences of his plea. The defendant maintained a "spotless criminal record" for the next several years. However, in 1998, the 1986 deportation warrant was executed and defendant was deported. He moved to vacate his conviction under section 1016.5. The trial court denied the motion, finding the defendant had not exercised reasonable diligence in bringing it. This court reversed and remanded for a new hearing. (*Totari II*, at pp. 1203–1205.) We reasoned that the INS records, which had not been introduced in the trial court, were highly relevant inasmuch as they undermined the only rational basis for finding no due diligence: that the 1986 deportation proceedings put the defendant on notice of the immigration consequences of his plea. (*Id.* at p. 1209.) We note that Totari was deported in March 1998 and filed his motion to vacate his plea pursuant to Penal Code section 1016.5 in August of that year, less than six months later. (*Id.* at p. 1204.)

In *People v. Gontiz* (1997) 58 Cal.App.4th 1309, the Third District Court of Appeal, in a footnote, overturned a trial court's rejection of the defendant's motion to vacate on the ground that it was untimely. The defendant had entered his pleas in 1991. He did not learn of potential immigration consequences until after his release from prison in 1995. The defendant filed his motion to vacate nine months later. (*Gontiz* at pp. 1312–1313, disapproved on another ground in *Zamudio*, *supra*, 23 Cal.4th at p. 200, fn. 8.) The Third District opined that the defendant's motion was not timely until he was "faced with the prospect that one of the adverse immigration consequences would occur." (*Gontiz* at p. 1313, fn. 2.) The court noted that although the trial court was not required to credit the defendant's declaration, there was no evidence in the record suggesting any other date upon which the defendant's ability to bring his motion was triggered. (*Ibid.*)

The superior court's first reason for holding that Valenzuela had not demonstrated reasonable diligence was that the 1992 probation officer's report, which had the notation "The Department of Immigration has been advised of the defendant's current court case and in-custody status" was sufficient to have put him on notice of the immigration consequences of his plea. However, as respondent concedes, there is no support in the record for the trial court's finding of a "discussion" between the probation officer and Valenzuela regarding the immigration consequences of Valenzuela's plea, such that he would have been put on notice. All that can be said of the notation in the probation officer's report is that even if we assume that the statement is accurate and that Valenzuela was given a copy of the report there is no evidence that immigration authorities did anything to move against Valenzuela at that time such that he would have been put on notice that his conviction was the trigger for immigration proceedings. (See, *Totari II, supra*, 111 Cal.App.4th at p. 1209.)

Nevertheless, there is support in the record for a conclusion that Valenzuela was put on notice as early as April 2009 that his criminal conviction had immigration consequences. According to the letter from ICE dated April 2, 2009, which was sent to the Santa Clara County Superior Court, Valenzuela was in custody and subject to deportation as a "criminal alien." Less than two years later, on March 28, 2011, Valenzuela filed his motion to vacate.⁶

In terms of how much time something should take, what constitutes reasonable diligence is an amorphous concept incapable of mechanical definition. Nevertheless, the term "[r]easonable diligence, often called 'due diligence' in case law, 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial

⁶ We reject Valenzuela's assertion that he did not know of the actual immigration consequences of his conviction until July 2010, when his immigration attorney put him in touch with Mark Davis. This contradicts his sworn affidavit that he first learned of his "immigration predicament" in 2009.

character." ' [Citation.]" (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.) Certainly, after Valenzuela was taken into custody around April 2009 he took steps to find out if there was any way to avoid deportation. According to Valenzuela he contacted an immigration attorney; and the record shows that he sought and was granted record clearance in March 2010. His immigration attorney then put him in contact with a criminal defense attorney who, the record shows, contacted the Santa Clara County Superior Court in September 2010 in order to investigate if Valenzuela had a viable claim that he was not advised of the immigration consequences of his plea. Upon finding that there was no record that showed that Valenzuela was advised of the immigration consequences of his plea, the attorney filed a motion to vacate Valenzuela's plea some five months later.

Here, the superior court found that reasonable diligence was not established because that requirement "commands that in 2009 he take action to pursue any legal remedies that he might have." Certainly, the evidence demonstrates that is exactly what Valenzuela did—contacted an immigration attorney, moved for record clearance, contacted a criminal defense attorney, who investigated his claim for relief and then filed his motion to vacate.

Respondent argues that this case is in sharp contrast to *Totari II*, where the defendant was able to file his motion within five months of being deported so that Valenzuela's "two year delay cannot simply be dismissed as the usual time it takes attorneys to do their business." We point out the obvious, Valenzuela was in federal custody and not as free to contact attorneys and work on his motion to vacate; in contrast Totari was out of custody albeit no longer in the country.

We are mindful however that Valenzuela is seeking to vacate a solemn judgment of conviction. Where a defendant has sought to do the same by way of writ of coram nobis, diligence was not shown where the facts upon which the defendant relied were known to him and his plea of guilty, which he sought to set aside, was entered more than

four years before applying for the writ. (*People v. Coates* (1949) 95 Cal.App.2d 78, 80.) A nearly eight year delay was held unreasonable in *People v. Martinez* (1948) 88 Cal.App.2d 767, 773, and more recently in *People v. Hyung Joon Kim, supra*, 45 Cal.4th 1078, 1096-1098, an almost seven year delay between the time the defendant first became aware of possible deportation and the filing of the writ was held unreasonable.

On the other hand, in *People v. Fritz* (1956) 140 Cal.App.2d 618, 620, 622, the court held that the superior court properly denied an application for a writ of error coram nobis by a defendant sentenced to state prison on a plea of guilty of kidnapping, where he offered no explanation for a two year delay in applying for the writ. In *People v. Shorts* (1948) 32 Cal.2d 502, the court held that the essential element of diligence was not established. In that case, an attorney discovered that the defendant, who was confined in San Quentin under sentence of death (*id.* at p. 510) was under the age of 18 when he committed murder. (*Id.* at p. 514.) However, the attorney waited eight months after discovering the defendant's true age until he filed a petition for a writ of coram nobis. (*Ibid.*) Since the papers the defendant filed in support of the writ provided no explanation for this delay the court held there was not the requisite showing of diligence and good faith to warrant the granting of the writ. (*Id.* at pp. 514-515; but see *Zamudio, supra*, 23 Cal.4th at p. 207 [delay of less than a year not untimely].)

When we look to similar methods seeking collateral relief, "[d]elay in seeking habeas corpus . . . has been measured from the time a petitioner becomes aware of the grounds on which he seeks relief. That time may be as early as the date of conviction. [Citations.] Although delayed presentation to enable the petitioner to file a habeas corpus petition with the opening brief on appeal has been permitted, a petition should be filed as promptly as the circumstances allow, and the petitioner '*must point to particular circumstances sufficient to justify substantial delay. . . .*' [Citation.]" (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5, italics added.) In *In re Nuñez* (2009) 173 Cal.App.4th 709, the Fourth District Court of Appeal held that a six month delay between the time the

petitioner personally knew of a legal basis for asserting his claims and the time he filed his petition did not constitute a significant delay, particularly where the Attorney General attributed no prejudice to that period or, indeed, to the timeliness of the petition generally. (*Id.* at p. 723.)

In this case, it was Valenzuela's burden to explain and justify the almost two year delay in filing the motion to vacate; he was required to offer and did offer a justification as to why it took the amount of time that it did. It appears to this court that as a person held in federal custody, Valenzuela did all he possibly could to get his case before the court as expeditiously as possible. We are cognizant that a person subject to an immigration proceeding "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." (8 U.S.C.A. § 1362.) Thus, although a person has a right to counsel, it is not a right to appointed counsel and the person must find their own representation. (*Michelson v. I.N.S.* (10th Cir. 1990) 897 F.2d 465, 467 [While the petitioner had the right to be represented by counsel in INS proceedings, the statute provides that it will not be at government expense; a deportation proceeding is civil in nature, not criminal, and various constitutional protections associated with criminal proceedings therefore are not required; no Sixth Amendment right to counsel in a deportation proceeding exists].)⁷

Accordingly, once Valenzuela was in custody he had to set about finding an immigration attorney to hire, if he had enough money, or find an attorney that would take the matter pro bono—not an easy task for someone in custody.

Once Valenzuela found an immigration attorney it was not just a simple matter of filing a motion to vacate. Investigations needed to be completed to determine if

⁷ The alien's right to counsel stems from the Fifth Amendment's due process guarantee. Consequently, immigration judges are required to inquire whether the petitioner wishes counsel, and determine a reasonable period for obtaining counsel. (*Franco-Gonzales v. Holder* (C.D. Cal 2011) 828 F.Supp.2d 1133, 1144-1145.)

Valenzuela had a viable claim; that involved obtaining the records from the superior court—not something that can be achieved immediately.

Once attorney Davis received the file and found that Valenzuela had a viable argument for withdrawing his plea, the attorney filed the motion approximately five months later.

This court does not believe that a delay of less than two years between the time that Valenzuela knew that his conviction may have immigration consequences and the time he filed his motion to vacate his conviction is an unreasonable delay given the steps that he had to go through to advance his claim and get the matter before the superior court. Valenzuela carried his burden of demonstrating reasonable diligence by the showing he made.

Accordingly, we find that the superior court abused its discretion in finding that Valenzuela had failed to establish reasonable diligence in bringing his motion.

Disposition

The May 13, 2011 order of the superior court denying Valenzuela's motion to vacate the judgment in his 1992 case (155219) is reversed and the matter is remanded to the superior court for further proceedings.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.