

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ANTONIO CASTRO,

Defendant and Appellant.

H037086

(Santa Clara County

Super. Ct. No. 198937)

Defendant Javier Antonio Castro pleaded guilty in 1997 to one count of transporting, selling, or offering to sell marijuana. He was granted probation on the condition that he serve six months in county jail. Thirteen years later, federal proceedings were initiated to remove him from this country based upon his having been previously convicted of violating a law related to a controlled substance. In March 2011, defendant brought a motion to vacate the 1997 conviction, claiming that prior to pleading guilty to the drug offense, he had not been advised concerning the immigration consequences of that plea. The court denied the motion.

Defendant claims that the court abused its discretion in denying his motion to vacate the conviction. We conclude that the court did not abuse its discretion and will therefore affirm the order entered on the denial of the motion to vacate.

## FACTS<sup>1</sup>

In the early evening of August 12, 1997, San Jose Police Officer Steve Swenson was conducting undercover surveillance at the northeast corner of Story Road at Felipe Avenue, a commercial area bordering the freeway; the area is known for drug trafficking. Officer Swenson observed three men, one of them being defendant, sitting in the parking lot of a recycling center. The officer then saw two men in a white BMW arrive at the parking lot of a gas station across the street from the recycling center. They got out of the car, “looked around vigilantly in all directions,” and crossed the street. After the two spoke to defendant, the passenger knelt down near defendant. Defendant handed the man a small dark object, and the man handed defendant something in return. The passenger and driver then walked quickly across the street and drove away. Based upon his experience and training in drug trafficking as well as his knowledge of the area’s reputation, Officer Swenson believed that he had observed a drug sale. He radioed a description of the car and its passenger to other narcotics officers. Officer Alfonso Rodriguez and his partner, Officer Lundquist, initiated a traffic stop. The passenger told Officer Rodriguez that he had just bought some marijuana from a Hispanic male at Story Road and Felipe Avenue. The officers confiscated the marijuana.

Less than one-half hour later, Officer Swenson observed a second car pull up next to the gas station across the street from the recycling center. Two men got out of the car and approached defendant and his two companions. After the two men spoke with the three men outside the recycling center, one of defendant’s companions and the passenger walked a short distance to a red car. Defendant’s companion got into the car and closed the door. He then exited; he and the passenger of the other car knelt and defendant’s companion gave the passenger a “roundish-white object.” Officer Swenson radioed a

---

<sup>1</sup> The facts underlying the offense of which defendant was convicted are summarized from the transcript of the preliminary examination on September 4, 1997.

description of the car and passenger to other narcotics officers. A second traffic stop was made by Officers Lundquist and Rodriguez, and a quantity of marijuana was seized during that stop as well.

After observing these two transactions, Officer Swenson witnessed two more instances in which defendant made sales to walk-up buyers.

After Officer Swenson arrested defendant and advised him in Spanish of his *Miranda*<sup>2</sup> rights, defendant agreed to speak with the officer. He told Officer Swenson that he “had no proof. [Officer Swenson] did not find any marijuana on him. [He] did not find any money on him. [Officer Swenson] didn’t have anything to associate him with committing a crime.”

Jorge Fernandez Ramirez, one of defendant’s companions, was also arrested. He was searched and the police found \$357 in cash. The red car was searched by police and they found a pager, a cell phone, and \$357 in cash.

#### PROCEDURAL BACKGROUND

Defendant was charged by information filed September 12, 1997, with two felony counts of transporting, selling, or offering to sell marijuana (Health & Saf. Code, § 11360, subd. (a)). On October 29, 1997, defendant entered a plea of guilty to count 1. The second count was dismissed. The court suspended defendant’s sentence and granted probation for a period of three years, conditioned upon defendant’s serving six months in the county jail. The court also required that defendant complete a drug program and register as a narcotics offender.

On March 10, 2011, defendant filed a motion to vacate the conviction pursuant to Penal Code section 1016.5.<sup>3</sup> Attached to the motion was an e-mail from Gayle Alcones to defense counsel, Daniel Mayfield, indicating that a transcript requested by Mayfield in

---

<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>3</sup> All further statutory references are to the Penal Code unless otherwise stated.

this case could not be produced because the court reporter’s notes from proceedings more than 10 years old are destroyed. The motion was accompanied by defendant’s declaration in which he stated that he did not recall having been advised concerning his “[i]mmigration [r]ights” at the time he agreed to plead guilty. He declared that he “had a good defense in this case based on misidentification.” Defendant declared further that had he been told that pleading guilty to the drug offense of which he was charged would result in his being deported, denied naturalization, or denied reentry, he would have ended the plea bargaining process and proceeded to trial.

The People opposed the motion. The opposition included the declaration from Steven Fein, the prosecutor assigned to the 1997 case. He declared—based upon the existence of a checkmark he made on a form contemporaneously with the change of plea proceedings—that the court advised defendant of the potential immigration consequences at the time defendant pleaded guilty to count 1. After hearing argument and receiving supplemental briefing, the court denied defendant’s motion in a written decision.

Defendant filed a timely notice of appeal, noting that he was appealing the denial of the motion brought under section 1016.5 and was challenging the validity of the plea.<sup>4</sup> An order denying a motion to vacate under section 1016.5 is appealable under section 1237.5, subdivision (b) as “ ‘an order made after judgment, affecting the substantial rights of the party.’ ” (*People v. Totari* (2002) 28 Cal.4th 876, 887.)

---

<sup>4</sup> Defendant applied for and obtained a certificate of probable cause in connection with the notice of appeal in accordance with section 1237.5 and Rule 8.304(b) of the California Rules of Court.

## DISCUSSION

### I. *Motion to Vacate Judgment*

#### A. *Applicable Law*

Section 1016.5, subdivision (a) requires the court, prior to accepting a guilty or no contest plea, to advise the defendant as follows: “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.” If these advisements are not given by the court, “and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on [the] defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.” (§ 1016.5, subd. (b).) The requirement of advising a criminal defendant of immigration consequences associated with a guilty or no contest plea and the procedure allowing for the withdrawal of a plea in the absence of such advisements is based upon a finding of the Legislature that fairness dictates that noncitizen criminal defendants be advised that their admission of a crime may have an adverse impact upon them beyond the impact to citizen defendants. (§ 1016.5, subd. (d).)

There are three elements to a successful motion by a defendant to withdraw his or her plea based upon the absence of advisements required 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.]” (*People v. Totari, supra*, 28 Cal.4th at p. 884; see also

*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 199-200 (*Zamudio*.) As to the first element, there is a rebuttable presumption that the advisements were not given where there is no court record of them. (§ 1016.5, subd. (b).)<sup>5</sup> The presumption is one affecting the burden of proof (*People v. Dubon* (2001) 90 Cal.App.4th 944, 951-952; see Evid. Code, § 605), and the prosecution bears “the burden of proving by a preponderance of the evidence the nonexistence of the presumed fact, i.e., that the required advisements were given. [Citations.]” (*People v. Dubon*, at p. 954.) A defendant, as a second component of a successful motion to withdraw a plea under section 1016.5, must establish that he or she “actually faces one or more of the statutorily specified immigration consequences.” (*Zamudio*, at p. 200.)

The third element of prejudice—the issue of primary consideration in this appeal—involves a factual determination by the trial court as to “ ‘whether it is “reasonably probable” the defendant would not have pleaded guilty if properly advised.’ [Citations.]” (*Zamudio, supra*, 23 Cal.4th at p. 210.) Proof that it was reasonably probable that the defendant would have received a favorable outcome had he or she gone to trial is not required in establishing such prejudice. (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1245 (*Castro-Vasquez*); see also *People v. Akhile* (2008) 167 Cal.App.4th 558, 565.) The factual question of the extent of the defendant’s knowledge of potential immigration consequences at the time of the plea “may be a significant factor in determining prejudice . . . .” (*People v. Totari, supra*, 28 Cal.4th at p. 884.)

We review the trial court’s decision denying defendant’s motion to withdraw his plea under section 1016.5 for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 191; see also *People v. Chien* (2008) 159 Cal.App.4th 1283, 1287.) To establish an abuse of

---

<sup>5</sup> “Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.” (§ 1016.5, subd. (b).)

discretion, defendant must show that it was exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.) “Moreover, a reviewing court must adopt the trial court’s factual findings if substantial evidence supports them. [Citation.]” (*People v. Fairbanks* (1997) 16 Cal.4th 1223, 1254.) Thus, the court deciding whether the defendant has made a sufficient showing under section 1016.5 “is the trier of fact and . . . judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences. [Citation.]” (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533, superseded by statute on other grounds as stated in *People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207, fn 5.)

B. *Whether Denial of Motion to Vacate Was an Abuse of Discretion*

Defendant argues that the court abused its discretion in denying his motion to vacate judgment. He asserts that the court correctly held that the People had failed to rebut the presumption under section 1016.5, subdivision (b)—triggered by the absence of a court transcript—that defendant was not advised of the potential immigration consequences of pleading guilty. He contends further that the court erred in finding that he did not show prejudice—i.e., that it was reasonably probable that defendant would not have pleaded guilty had he been properly advised.<sup>6</sup>

The Attorney General responds that the People submitted sufficient evidence below to rebut the presumption that defendant was not advised of the possible immigration consequences of his plea. She argues further that even if the People did not rebut the presumption, the court did not err in concluding that defendant failed to show prejudice.

---

<sup>6</sup> Defendant also argues that he was diligent in bringing the motion to vacate judgment. The court below did not deny the motion due to any claimed lack of diligence, and the Attorney General does not argue lack of diligence on appeal. It is therefore unnecessary to address this conceded issue.

First, we reject the Attorney General’s contention that the order should be affirmed because the People successfully rebutted the presumption that defendant was not advised of the immigration consequences of his plea. The court below specifically held that the People had not rebutted this presumption. It concluded that the checkmark made by the prosecutor, Fein, on the form he used which he stated indicated that the court advised defendant of the immigration consequences of his plea, did “not suffice” to rebut the statutory presumption. There was substantial evidence to support the court’s factual finding that defendant did not receive the immigration advisements required under section 1016.5. (*People v. Fairbanks, supra*, 16 Cal.4th at p. 1254.) We therefore defer to the trial court on this finding of fact. (*People v. Quesada, supra*, 230 Cal.App.3d at p. 533.)

The second element—whether “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” (*People v. Totari, supra*, 28 Cal.4th at p. 884)—was satisfied by defendant in his motion, and the Attorney General makes no argument to the contrary. We defer to the trial court’s implied finding in favor of defendant on this issue.

The critical issue is whether defendant established the third element, prejudice. The court’s four-page opinion was devoted almost entirely to a discussion and resolution of this question. Defendant argues that “[t]he trial court abused its discretion by dismissing out of hand [defendant’s] declaration that, had he been properly warned in accordance with Penal Code section 1016.5, he would have exercised his trial rights.” He argues that rather than accepting his declaration, the court emphasized that “ ‘the District Attorney had an overwhelming case’ against [defendant], that [defendant’s] proposed defense against the charge ‘was so weak that it would not have led to a different plea offer,’ and that [defendant and his counsel] ‘would have known at the time that a jury would not buy it and they would not have taken it to trial.’ ” Defendant contends further that the court erred in finding no prejudice based upon allegedly faulty reasoning that

because he could not have obtained a better plea bargain from the prosecution, the lack of an immigration advisement did not prejudice defendant. He asserts that had defendant been apprised of the potential immigration consequences of pleading guilty, he could have negotiated a “ ‘plea up’ ” to a more serious charge that would not have carried adverse immigration consequences. In support of this position, defendant argues that there is nothing in the record to suggest that the prosecution wanted defendant to be deported and therefore it is reasonable to conclude that the People would have been willing to enter into a bargain under which defendant pleaded guilty to a different offense that would not subject him to deportation.

There is substantial evidence to support the court’s finding that defendant had not established prejudice. The proper test of prejudice is whether “it is reasonably probable [the defendant] would not have pleaded guilty or nolo contendere if properly advised.” (*People v. Totari, supra*, 28 Cal.4th at p. 884.) It is thus true that in order to show prejudice a defendant need not show a reasonable probability that he or she would have received a more favorable outcome at trial. (*Castro-Vasquez, supra*, 148 Cal.App.4th at p. 1245.) However, one factor that may be considered in determining whether prejudice has been shown is the probable outcome of the case had it gone to trial. (Cf., *In re Resendiz* (2001) 25 Cal.4th 230, 253-254, abrogated on another ground in *Padilla v. Kentucky* (2010) \_\_\_ U.S. \_\_\_ [130 S.Ct. 1473,1484] [in evaluation of ineffective assistance of counsel claim, probable consequences of proceeding to trial one factor to consider in determining whether defendant would have accepted or rejected plea offer, had he or she not been misadvised about immigration consequences].)

The court here concluded that “it appear[ed] the District Attorney had an overwhelming case [and t]he proposed defense was so weak that it would not have led to a different plea offer.” Based upon the record, this conclusion was justified. An undercover officer, Officer Swenson, had personally observed defendant engage in a drug transaction with a buyer (the passenger in the white BMW) in an area well known for

drug trafficking. Officer Swenson also observed two other transactions the same evening that involved defendant directly, and he observed the defendant's companion, Ramirez, conduct two transactions in defendant's presence. The BMW was stopped shortly after the transaction with defendant, the passenger was found in possession of marijuana, and he confirmed to police that he had just purchased the marijuana from a Hispanic male at Story Road and Felipe Avenue. And—contrary to defendant's assertions in his declaration and in the argument of his trial counsel—there was no issue concerning Officer Swenson's having misidentified defendant as having personally conducted three of the transactions. Defendant was wearing tan shorts and a white zippered sweatshirt, while Ramirez was wearing a brown patterned shirt, gray jeans, brown work boots, and a baseball cap. The record offers no support for the claim that Officer Swenson confused defendant with Ramirez or the third person in the recycling center parking lot.

The inconsistent positions taken by defendant provide further justification for the court's concluding that the defense was very weak. When he was interviewed after his arrest, defendant told Officer Swenson that he had no case because no marijuana or money was found on defendant's person. He further told Officer Swenson that he was there talking with an acquaintance, Ramirez, “and that people kept walking up to them. But he was unaware of what [Ramirez] was doing with them.” In contrast to these statements, in defendant's declaration filed in support of the motion to vacate, he indicated that “[t]he person I was with [Ramirez] did sell some marijuana but I was not involved in selling. I was there to buy.”

As noted, defendant argues on appeal that he could have negotiated a “ ‘plea up’ ” to a more serious charge that would not have carried a risk of deportation had he been properly advised under section 1016.5. This argument was not made below. In the context of the forfeiture of objections to evidence due to the failure to raise them at trial, the high court has explained that the requirement under Evidence Code section 353 that a party must make a timely and specific objection to the erroneous admission of evidence

in order to preserve the error for appeal “serves important purposes,” such as giving the prosecution the opportunity to cure the defect and permits the trial judge to consider the admissibility of the evidence. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) “If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.” (*Id.* at p. 435.) By parity of reasoning, defendant cannot justifiably find fault in the court’s reasoning here in failing to consider that defendant, if properly advised, may have negotiated a plea to a different offense that would not have adverse immigration consequences, since he did not raise the argument below.

Moreover, even were we to consider defendant’s contention, it would not affect our conclusion that the court did not err in its finding of no prejudice. Defendant’s claim that, had he been advised of the potential immigration consequences of pleading guilty, he might have been able to negotiate a plea that would not have subjected him to deportation is mere speculation not supported by the record. While it is true that there is nothing in the record to suggest that the People desired defendant deported, there is also nothing in the record to suggest that the People would have offered a plea bargain other than the one accepted by defendant. In fact, the prosecutor in his declaration (1) indicated that he felt that he had a very strong case and that defendant would have been convicted of at least one count of selling marijuana; (2) opined that the defense of misidentification was unsupported and not credible; and (3) specifically stated that he “would not have offered the defendant any other charge.” We reject defendant’s claim that the court erred in concluding that defendant had not shown prejudice, in part, based upon reasoning that it did not appear that he could have received a more lenient plea bargain. The court was not required to speculate that defendant might have negotiated a “plea up” where there was no support in the record for that assertion.

Defendant's argument is founded on the premise that the court dismissed the assertion in his declaration that he would not have pleaded guilty had he been advised of the potential immigration consequences of that plea. But the court was not required to accept at face value the bare, self-serving statement by defendant that he would not have pleaded guilty had he been properly advised under section 1016.5. As a general rule, self-serving declarations lack trustworthiness. (*People v. Duarte* (2000) 24 Cal.4th 603, 613.) The court considered defendant's declaration, but did so—as it should have done (cf. *In re Resendiz, supra*, 25 Cal.4th at pp. 253-254)—in the context of evaluating the entire record, including the charges against defendant and the strength of the case against him to the extent such an evaluation could be made, in reaching its conclusion concerning prejudice. (See *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 174, fn. 4 [motion to vacate properly denied because defendant failed to show prejudice; record “reveals the court at least impliedly disbelieved” the defendant's claim that he would not have pleaded guilty had he been given proper advisements].) “Whether defendant was prejudiced by the trial court's incomplete advisements is a factual question, appropriate for decision by the trial court in the first instance. [Citations.]” (*Zamudio, supra*, 23 Cal.4th at p. 210.) There was substantial evidence supporting the court's conclusion that defendant was not prejudiced by the absence of advisements required by section 1016.5.

Accordingly, since there was no error in the court's conclusion that defendant failed to make the required showing of prejudice, we find no abuse of discretion in the court's denial of the motion to vacate judgment.

DISPOSITION

The order denying the motion to vacate the conviction is affirmed.

---

Duffy, J.\*

WE CONCUR:

---

Bamattre-Manoukian, Acting P.J.

---

Mihara, J.

---

\* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.