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

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL MAGAÑA,

Defendant and Appellant.

H041372

(Santa Clara County

Super. Ct. No. 124533)

Defendant Miguel Magaña was born in México and entered the United States illegally in the early 1970's. He obtained lawful permanent resident status in 1990. Shortly before then, in 1988, he was convicted by plea of two counts of selling cocaine (Health & Saf. Code, § 11352). As a result of those convictions, defendant was deported to México in 1989 and again in 1995. He subsequently reentered the United States and renewed his green card in 2002. But when he tried to renew his green card ten years later in 2012, immigration authorities denied his application on the ground that his lawful permanent resident status had been terminated when he was deported in 1995. They also advised him that his green card had been issued in error in 2002.

In 2014, defendant filed a motion in the trial court pursuant to Penal Code section 1016.5 to vacate the judgment and withdraw his 1988 plea on the ground that he was not properly advised of the immigration consequences of that plea. (All further

statutory references are to the Penal Code, unless otherwise stated.) Thus, defendant attempted to challenge the validity of his 25-year-old, otherwise final convictions to eliminate them as a possible basis for removal from this country by federal immigration authorities. The trial court denied defendant's motion. Although the court agreed with defendant that the prosecution had not submitted sufficient evidence to rebut the statutory presumption that he was not properly advised of the immigration consequences of his plea (§ 1016.5, subd. (b)), the court denied the motion on the grounds that defendant (1) had not demonstrated due diligence in bringing the motion and (2) did not meet his burden of demonstrating prejudice.

We conclude the trial court did not err when it denied the motion on those grounds and we will therefore affirm the order.

FACTUAL & PROCEDURAL HISTORY

1988 Drug Offenses

In August 1988, the Sunnyvale Police Department "Narcotics/Vice Team" began investigating the sale of cocaine in the downtown area. During that investigation, Undercover Detective Tim Davis purchased cocaine from defendant on at least three occasions, as described below.

On August 26, 1988, Detective Davis met defendant at the parking lot of a downtown motel at 8:00 p.m. to purchase an "eight ball" of cocaine (one eighth of an ounce). Defendant asked Detective Davis how much he had charged him the "last time." Detective Davis said defendant had charged him \$50 for a gram. Defendant then sold Detective Davis a plastic baggie containing 3.87 grams for \$140. Detective Davis asked defendant how much he would charge for an ounce of cocaine; defendant said he would have to check with his boss, but it would be around \$600.

On September 2, 1988, defendant sold Detective Davis two baggies of cocaine, each of which contained an “eight ball” of cocaine, for \$250. The baggies and the cocaine weighed 9.7 grams.

On September 9, 1988, defendant sold Detective Davis three baggies of cocaine weighing a total of one ounce for \$600. After he accepted the baggies, Detective Davis gave a “bust signal.” Defendant was arrested by officers from the Sunnyvale narcotics team and the San Mateo County Narcotics Task Force.

That same day, officers searched defendant’s home pursuant to a warrant and recovered 15.1 grams of cocaine (approximately one half ounce), a gun, a scale, and \$150 in cash. While at defendant’s home, the officers arrested defendant’s wife, who had an outstanding warrant for possession of cocaine for sale (Health & Saf. Code, § 11351). The officers also arrested a 16-year-old male (Minor), who lived with defendant and was suspected of assisting defendant with the drug sales.

Complaint, Plea Agreement and Sentencing

Defendant was charged by complaint with three counts of selling cocaine (Health & Saf. Code, § 11352), one count for each of the aforementioned sales. On September 28, 1988, two weeks after the complaint was filed, the parties entered into a negotiated disposition of the case. In accordance with his plea agreement, defendant pleaded guilty to two counts of selling cocaine in exchange for “three years state prison top[s].”

Prior to sentencing, the probation officer reported that defendant, a citizen of México, had said he had lived in the United States illegally for 14 years and had “recently [filed] for federal amnesty” and was not sure whether this case would jeopardize his status with immigration authorities, since it was a felony. The probation officer reported that “immigration authorities have been advised of the defendant’s current Court case and in-custody status.” The probation officer also reported that Minor, defendant’s 16-year-old accomplice, was “an illegal alien” and “was pending deportation.” According to the

probation officer, defendant had also been charged in San Mateo County with one count of possession of cocaine for sale (Health & Saf. Code, § 11351). Defendant, who had previously worked as a machine operator, told the probation officer he did not use drugs. He said he was unemployed when he sold cocaine to the undercover officer and needed the money to support his family.

In October 1988, the court suspended imposition of sentence and granted three years of formal probation. The conditions of probation included that defendant serve one year in county jail. Pursuant to the plea agreement, count 1 of the complaint was dismissed.

Conduct on Probation, Deportations in 1989 and 1995, and Petitions to Modify Probation

Defendant was released from custody in Santa Clara County on May 12, 1989, to begin serving a six-month jail sentence in San Mateo County. In August 1989, defendant's probation officer filed a petition to modify the terms of defendant's probation. The probation officer reported that on June 30, 1989, defendant was released to immigration authorities, and on July 5, 1989, he was deported to México based on his plea and conviction for the drug offenses in this case. In light of those circumstances, the probation officer recommended that the court revoke defendant's probation and issue a bench warrant. The court agreed. It revoked defendant's probation on August 10, 1989.

Despite the convictions in this case, it appears defendant was granted lawful permanent resident status in 1990. The record contains a copy of his permanent resident card ("green card") issued in 2002, which states that he has been a "Resident since" June 1990.

Defendant returned to the United States at an unknown time. In May 1991, he was charged with a misdemeanor: providing false information to the Department of Motor Vehicles (DMV) (Veh. Code, § 20). While being arraigned on the new charge, defendant

was served with the bench warrant in this case and ordered to report to the probation department for an interview. Defendant's brother posted bail five days later, and shortly thereafter, defendant returned to México to care for their "sick and elderly father." After defendant failed to report to the probation department for his interview, he was charged with a probation violation for his failure to report. In October 1991, the court issued another bench warrant and ordered that probation remain revoked.

Defendant remained in México for one year, then returned to Santa Clara County. He worked for an electronics company, but he then left his family to seek work in San Diego County.

Defendant returned to México in early 1994 to care for his father. After defendant's father died in July 1994, defendant returned to Santa Clara County. He was arrested on the outstanding bench warrant on August 22, 1994, and charged with violating his probation. It appears defendant did not contact the probation department at any time between May 1991 and August 1994.

In September 1994, the probation department filed a petition to modify the terms of defendant's probation. Defendant told the probation officer that since he had no further responsibilities in México, he would like to be placed back on probation. The probation officer recommended the court impose a prison sentence of four years four months, suspend execution of the sentence, reinstate probation, impose additional jail time as a condition of probation, and extend defendant's probationary term to December 1996.

The record does not contain any court documents regarding the disposition of the petition to modify probation. According to defendant's section 1016.5 motion, in October 1994, the court found that defendant had violated probation "and his remaining prison sentence was imposed He has since completed his term and successfully completed probation/parole."

In September 1995, defendant was deported to México. In his section 1016.5 motion, defendant alleged that he was deported in 1995 “pursuant to 8 USC § 1227(a)(2)([B])(i)”¹ “[b]ecause of the plea in this case.”

Defendant’s Application to Renew his Green Card in 2012

Defendant reentered the United States at an unknown time. He renewed his green card in 2002, but that renewal expired ten years later on January 22, 2012. In March 2012, defendant applied to once again renew his green card using U.S. Citizenship and Immigration Services (USCIS) form “I-90, Application to Replace Permanent Resident Card.” His application was denied by USCIS in January 2013. The USCIS denial letter explained: “A search of USCIS records shows that you were ordered deported on August 21, 1995, by an Immigration Judge, and were, in fact, deported . . . on September 24, 1995. USCIS has no record showing that you subsequently regained lawful permanent resident status. . . . [¶] It should be noted that a prior I-90 was erroneously approved by the Service. This erroneous decision does not alter the fact that your Lawful Permanent Resident status was terminated in 1995.”

Defendant made a motion before USCIS to reopen and reconsider its decision. The motion was dismissed in March 2013 on the grounds that defendant had not provided any new evidence or established that the decision was legally incorrect.

¹ Title 8 United States Code section 1227(a)(2)(B)(i) provides: “Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”

Defendant's Section 1016.5 Motion to Withdraw His Plea

In March 2014, defendant filed a motion in the superior court pursuant to section 1016.5 to vacate the 1988 judgment of conviction and withdraw his plea on the ground that he was never properly advised of the immigration consequences of his plea. In his declaration in support of the motion, defendant—who was then 64 years old—stated that he had lived in the United States since 1975 and was admitted as a lawful permanent resident in 1990. He stated that in 1988, neither the trial court nor his attorney advised him of the immigration consequences of pleading guilty in this case. Defendant told the court he was deported in 1995 “[b]ecause of the plea in this case,” “was later readmitted as a lawful permanent resident, but USCIS ha[d] recently advised him that his admission was approved in error” at that time because his status had been revoked when he was deported in 1995. Defendant stated he did not know his status had been revoked in 1995 and was unaware of any additional immigration consequences of his conviction until the USCIS denied his request to renew his green card in 2013. Defendant told the court he was married and had five children, all of whom are United States citizens. He worked as an electrician at a technology company and his family depended on him for financial and emotional support. He stated that he had not committed any new crimes since 1988. And, he declared, “I currently have no immigration status and can be deported and separated from my family again at any time.”

Defendant’s evidence in support of the motion included (1) an e-mail from an employee of the superior court stating that she had no contact information for the court reporter who reported the change of plea hearing in 1988 and that “criminal notes are destroyed after 10 years”; (2) the clerk’s minutes of the change of plea hearing on a check-the-box form that did not have a place to record whether any immigration advisements were given; and (3) the USCIS decision dismissing defendant’s motion to reconsider its January 2013 decision.

The prosecution opposed defendant's motion, arguing that (1) defendant had been properly advised of the immigration consequences of his plea, (2) defendant was aware of the immigration consequences of his plea as evidenced by his statement to the probation officer and his subsequent deportation, (3) defendant's motion was untimely since he was deported in 1989, and (4) defendant had failed to demonstrate that he was prejudiced by the alleged failure to advise him of the immigration consequences of his plea.

The prosecution's evidence in opposition to the motion included the declaration of Michael Louie, the deputy district attorney who handled the change of plea hearing. Louie declared that although he did not specifically remember this case, his custom and practice was to ensure the each defendant was advised of the immigration consequences of a guilty or no contest plea, including the consequences of deportation, exclusion from admission to the United States, and denial of naturalization. Louie stated that the bench officer that took defendant's plea, Commissioner Harold Cole, used a script that included immigration consequences and that Louie's custom and practice was to ask defendants additional questions about immigration consequences when the court asked him (Louie) if he had any further voir dire. The prosecution's evidence also included police reports, the probation report from 1988, and the petitions to modify probation filed in 1989 and 1994.

The prosecutor challenged defendant's statement that he had lived in the United States since 1975, and offered to provide California Law Enforcement Telecommunication System and FBI records, which show that defendant was arrested by immigration authorities in 1973 and deported in 1975. According to the prosecutor, in addition to his felony convictions in this case, defendant's criminal history included misdemeanor drunk driving convictions in 1978 and 1981, a felony conviction for possession of cocaine in October 1988, and a misdemeanor conviction for providing false information to the DMV in 1991.

Hearing on Motion to Vacate & Supplemental Briefs

Counsel for both sides appeared at the hearing on the motion. Defense counsel advised the court that the USCIS decision denying lawful permanent resident status was final and the next step would be for the USCIS to place defendant in removal proceedings. The prosecutor objected that the record was unclear as to when defendant was granted permanent resident status, when he was deported and readmitted, and why his recent application was denied, facts that were all relevant to the timeliness of defendant's motion. The court heard extensive argument, and gave the parties an opportunity to file supplemental briefs on the issues presented.

Both sides filed supplemental briefs. Defendant's submission contained additional documentary evidence, including (1) his green card that had expired in January 2012, (2) his March 2012 "I-90, Application to Replace" his green card, (3) the USCIS decision denying his application, and (4) other forms relating to his application with USCIS.

Trial Court Order on Motion to Vacate

The trial court denied defendant's motion. The court concluded that attorney Louie's declaration alone was insufficient to rebut the presumption of non-advisement in section 1016.5, subdivision (b), but the court found that defendant had failed to show reasonable diligence in bringing his section 1016.5 motion. The court concluded that defendant was aware of the immigration consequences of his plea when he was deported in 1995. It said: "Had he brought this motion . . . within three years of that time[,] the transcript of his guilty plea would likely still have existed because court reporters are required to keep their notes for ten years. Defendant's motion now—25 years after conviction and 19 years after deportation—is untimely." The court also concluded that "even if timely, defendant has not shown prejudice."

DISCUSSION

Defendant argues that (1) his motion to vacate the judgment and withdraw his plea was timely, (2) he made a sufficient showing of prejudice, and (3) he otherwise meets the requirements for relief under section 1016.5. The Attorney General argues that there was sufficient evidence to support the trial court's findings on both the timeliness and prejudice issues.

I. Legal Principles Governing Section 1016.5 Motions

Section 1016.5, subdivision (a) requires the trial court, prior to accepting a plea of guilty or nolo contendere, to give the defendant the following advisement on the record: “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.” Upon receiving the advisements, “[t]he section contemplates a period during which the defendant, without risking the loss of the existing plea bargain, can reconsider its value in light of the immigration consequences that will result from it and attempt to negotiate a different bargain that will not have the same consequences.” (*People v. Martinez* (2013) 57 Cal.4th 555, 562 (*Martinez*), citing § 1016.5, subds. (b), (d).)

If a noncitizen defendant is not properly advised of the immigration consequences of his or her guilty or no contest plea, the statute provides a remedy: “[I]f . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense . . . 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 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(b).) “Relief will be granted, however, only if the defendant establishes prejudice. [Citation.]” (*Martinez, supra*, 57 Cal.4th at p. 559, citing *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210 (*Zamudio*).)

“[P]rejudice is shown if the defendant establishes it was reasonably probable he or she would not have pleaded guilty if properly advised. [Citation.]” (*Martinez, supra*, 57 Cal.4th at p. 559.) “The test for prejudice thus considers what the defendant would have done, not whether the defendant’s decision would have led to a more favorable result.” (*Id.* at p. 562.) Consequently, “a court ruling on a section 1016.5 motion may not deny relief simply by finding it not reasonably probable the defendant by rejecting the plea would have obtained a more favorable outcome.” (*Id.* at p. 564.) “[S]ection 1016.5 relief may be granted if the court is convinced the defendant, if properly advised, would have rejected an existing plea offer in the hope or expectation that he or she might thereby negotiate a different bargain or, failing in that, go to trial.” (*Id.* at p. 567.)

II. Standard of Review

An order denying a motion to withdraw plea under section 1016.5 is reviewed for an abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 191.) “The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712 (*Haraguchi*), fns. omitted.)

III. The Trial Court Did Not Err When It Denied the Motion on the Ground that Defendant Had Not Demonstrated Due Diligence

A defendant must show due diligence when seeking the relief afforded under section 1016.5. (*Zamudio, supra*, 23 Cal.4th at pp. 203-207 [section 1016.5 motion to

vacate plea]; *People v. Kim* (2009) 45 Cal.4th 1078, 1096-1098 (*Kim*) [recognizing that *Zamudio* requires diligence in bringing motion under section 1016.5].) “The diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state’s interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated.” (*Kim, supra*, 45 Cal.4th at p. 1097.) Collateral attacks on a plea, including the remedy provided by section 1016.5, “ ‘properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments.’ ” (*Ibid.*)

In *Zamudio*, the California Supreme Court stated that the relief afforded by a section 1016.5 motion “implies that such a motion is timely if brought within a reasonable time after the conviction actually ‘may have’ such consequences.” (*Zamudio, supra*, 23 Cal.4th at p. 204.) A defendant who seeks to withdraw his or her plea has the burden to prove reasonable diligence in bringing a motion to vacate under section 1016.5. (*People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207 (*Totari*).

People v. Castaneda (1995) 37 Cal.App.4th 1612 is instructive. In that case, the defendant pleaded no contest to driving under the influence in 1987. He waited seven years after entering his plea to seek relief under section 1016.5. The defendant had also been placed on an INS hold in 1987 as a result of his 1983 conviction for assault with a deadly weapon in another case. Although drunk driving is not a deportable offense, the defendant moved to vacate his drunk driving conviction in 1994 because it affected his defenses in the immigration proceedings. (*Castaneda, supra*, 37 Cal.App.4th at pp. 1614-1616.) He offered no justification for his seven-year delay. The court observed that the defendant had “been facing deportation for his 1983 assault conviction since 1988,” and that he did not allege “when he first became aware of the effect of his drunk driving conviction upon his defense of good moral character, . . . why he could not have

discovered the effect earlier or why he waited until 1994 to seek relief.” (*Id.* at pp. 1618, 1619.) The court held that the defendant failed to establish diligence, and that his section 1016.5 motion was properly denied on that ground alone. (*Ibid.*; see also *Kim, supra*, 45 Cal.4th at pp. 1098-1099, 1101, 1108 [coram nobis petition to withdraw plea based on failure to advise of immigration consequences “was not diligently filed” where the defendant filed his petition almost seven years after immigration authorities attempted to deport him].)

In this case, defendant’s conviction actually resulted in the immigration consequence of deportation in July 1989 and again in September 1995. Defendant filed his motion for section 1016.5 relief in March 2014, more than 18 years after he was deported the second time. Moreover, defendant has alleged that he was deported in 1995 based on the convictions in this case. Since defendant was deported based on his convictions in this case more than 18 years before he filed his section 1016.5 motion, we conclude he did not file his motion within a reasonable time and that he therefore has not demonstrated the diligence required for relief under section 1016.5. (*Zamudio*, at p. 204.)

Defendant argues that “even *Zamudio* recognizes that a defendant needs to know that there are immigration consequences as a result of his plea.” Defendant concedes that he “may have suspected there were immigration consequences when he was deported in 1995,” but argues that “since he was able to re-enter the United States as a lawful permanent resident (LPR) shortly thereafter, he very reasonably assumed that he was not suffering ‘exclusion from admission.’ ” We disagree.

Defendant was deported in 1995. He returned at an unknown time thereafter and the record shows he has remained in the United States. The USCIS denied his 2012 request to renew his green card and he is once again subject to deportation, the same immigration consequence he suffered in 1995. Defendant does not cite any legal authority that supports the conclusion that the requirement of diligence was waived or that the timeliness clock was somehow reset when he reentered the country illegally after

he was deported in 1995 or when the USCIS issued him a green card in error in 2002. By 1995, defendant knew he was subject to deportation based on his 1988 felony convictions, since he had actually been deported twice because of those convictions. In our view, it is also significant that when defendant was deported in 1995, he had already acquired permanent resident status in 1990. The more-than-18-year delay between defendant's 1995 deportation and the filing of his section 1016.5 motion to vacate his conviction supports the trial court's conclusion that defendant's section 1016.5 motion was not timely filed. Thus, we conclude the trial court did not err when it denied the section 1016.5 motion based on defendant's lack of diligence in bringing the motion.

IV. The Trial Court Did Not Err When It Denied the Motion on the Ground that Defendant Had Not Demonstrated Prejudice

“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.” (*Totari, supra*, 28 Cal.4th at p. 884, citing *Zamudio, supra*, 23 Cal.4th at pp. 192, 199-200.) “On the question of prejudice, [the] defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised.” (*Totari*, at p. 884, citing *Zamudio*, at pp. 209-210.) The defendant bears the burden of establishing prejudice. (*Martinez, supra*, 57 Cal.4th at p. 565.)

“[I]n determining the credibility of a defendant's claim, the court in its discretion may consider factors presented to it by the parties, such as the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe

that the charges would allow an immigration-neutral bargain that a court would accept.” (*Martinez, supra*, 57 Cal.4th at p. 568.) The court may also consider the “defendant’s assessment of the strength of the prosecution’s case in relation to his or her own case.” (*Id.* at p. 564.) “But because the test for prejudice considers what the defendant would have done, that a more favorable result was not reasonably probable is only one factor for the trial court to consider when assessing the credibility of a defendant’s claim that he or she would have rejected the plea bargain if properly advised.” (*Ibid.*)

In his motion to vacate his plea, defendant argued that he had been “prejudiced in that he is now unable to obtain lawful permanent resident status and may be subject to deportation and banishment from his family” He also argued that he was “substantially prejudiced to the extent that he cannot re-apply for lawful permanent resident status or eventual citizenship and is currently subject to deportation.” But neither argument addresses the prejudice prong of the analysis. Instead, these arguments address the second prong: whether the conviction will have one or more of the specified adverse immigration consequences. (*Totari, supra*, 28 Cal.4th at p. 884.)

In his moving papers below, defendant also argued that he had “been prejudiced because his guilty plea is considered an admission of possessing a ‘controlled substance.’ Had [defendant] been advised of the disastrous consequence of such a plea, it is at least reasonably probable that he would have held out for a more immigration neutral result, or gone to trial.” In his declaration in support of the motion, defendant stated: “Had I known I would be subject to deportation and separation from my wife and family, I would never have voluntarily pled [*sic*] to the charge . . . instead [I would have] negotiated with the district attorney for an immigration neutral plea.”

Defendant did not present any declarations from the defense attorney or the prosecutor who handled this case in 1988, or any other evidence, that addressed the prejudice prong or discussed any of the factors set forth in *Martinez*: the “presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain,

the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept." (*Martinez, supra*, 57 Cal.4th at p. 568.) Nor did defendant's motion discuss "the basis or depth of defendant's aversion to the immigration consequences of the plea he entered." (*Ibid.*)

Defendant argues that "the Court's rationale in its analysis of each of these factors is missing from the Court's decision." But the trial court quoted the passage from *Martinez* setting forth the factors to consider in evaluating prejudice and specifically stated that it had considered those factors. No more was required.

Defendant also presents argument regarding the second *Martinez* factor: "the seriousness of the charges in relation to the plea bargain." (*Martinez, supra*, 57 Cal.4th at p. 568.) He essentially argues there was no difference between the seriousness of the charges and the plea, "except that one of the three charges was apparently dismissed." He also asserts: "There is no information as to why it was dismissed in the record; therefore it cannot be assumed to be part of the plea bargain." (Footnote omitted.)

Contrary to defendant's assertions, the record reflects that the terms of the plea bargain included the dismissal of count 1 and count 1 was dismissed pursuant to that agreement. At the time of the plea, as is the case today, violations of Health and Safety Code section 11352 were punishable by three, four, or five years in prison. Thus, defendant's maximum exposure was seven years eight months in prison. The plea bargain provided for a sentence of "three years tops," less than half of defendant's maximum exposure. Thus, contrary to defendant's assertions, this factor does not weigh in favor of finding prejudice.

Defendant also argues about alternative ways in which his offenses could have been charged in the complaint to avoid the immigration consequences of his plea. But

defendant did not make this argument below and it is not one of the factors listed in *Martinez*.

Defendant had the burden to demonstrate prejudice and his showing consisted only of the conclusory statement that if he had been advised of the immigration consequences of his plea, it is “reasonably probable that he would have held out for a more immigration neutral result, or gone to trial.” In our view, defendant’s conclusory statement in his moving papers was insufficient to meet his burden to demonstrate prejudice. We therefore conclude the trial court did not err when it found that defendant had not shown prejudice.

DISPOSITION

The order denying defendant’s section 1016.5 motion to vacate the judgment and withdraw his plea is affirmed.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Grover, J.