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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK RIVAS,

Defendant and Appellant.

B229097

(Los Angeles County  
Super. Ct. No. A042525)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Judge. Dismissed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth C. Byrne and Julie A. Harris, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Frank Rivas appeals from the denial of his motion to vacate his 1989 conviction for possession of cocaine base (Health & Saf. Code, § 11351.5), which followed his plea of guilty. He contends he was not adequately advised of the immigration consequences of his plea as required by Penal Code section 1016.5.<sup>1</sup> We conclude that a motion to vacate a judgment for failure to give the Penal Code section 1016.5 advisements is an attack on the validity of a plea. As such, an appeal from the denial of such a motion requires the defendant to obtain a certificate of probable cause from the trial court in compliance with section 1237.5. Because defendant did not obtain the requisite certificate of probable cause, we dismiss the appeal.

### **FACTUAL AND PROCEDURAL HISTORY**

In March 1989, defendant pled guilty to violation of Health and Safety Code section 11351.5, an aggravated felony under immigration law. On September 13, 2010, he filed a section 1016.5 motion to vacate his conviction on the grounds that he had not

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<sup>1</sup> Penal Code section 1016.5 provides in part: “(a) 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. [¶] (b) . . . If . . . the court fails to advise the defendant as required by this section 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 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. 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.”

All further undesignated statutory references are to the Penal Code, unless otherwise stated.

been advised of the immigration consequences of his plea.<sup>2</sup> In a declaration submitted in support of that motion, defendant states that he was not an American citizen when he entered his plea. Nevertheless, he was not advised of the immigration consequences of his plea, namely that conviction of an aggravated felony would make him subject to mandatory exclusion from the United States. Defendant first learned of that consequence when he contacted an immigration attorney about an application for lawful permanent residency. Had he known that he was bargaining away his permanent resident status, defendant would not have agreed to plead guilty to an aggravated felony; he would have tried to negotiate a plea to some other offense or taken his chances with a jury trial.

On November 5, 2010, the trial court denied the section 1016.5 motion finding “there was no prejudice to the defendant and that he had not convinced the court by a preponderance of the evidence, but for the warning that defendant would not have entered the plea.”

Defendant filed a notice of appeal that day. Although he was represented by counsel at the hearing, he apparently filled out the form himself. The form indicates that it is an appeal from the November 5, 2010 order; the box stating that it was a challenge to a guilty plea, which the form states requires a certificate of probable cause, is also checked. Defendant attached a Request for Certificate of Probable Cause form with the handwritten notation: “See declaration attached.” There is no declaration attached to the form. Defendant did not obtain a certificate of probable cause and nothing in the record suggests that the trial court denied a request for one.

We appointed counsel to represent defendant on appeal. Appellate counsel filed a motion to amend the notice of appeal to specify that it is from the November 5, 2010 denial of the motion to vacate. We granted the motion.

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<sup>2</sup> A reporter’s transcript of the proceeding is not available because the reporter’s notes were destroyed pursuant to Government Code section 69955.

## DISCUSSION

### 1. *Appeal From Denial of a Section 1016.5 Motion to Vacate Requires a Certificate of Probable Cause*

Defendant maintains that the section 1237.5 requirement of a certificate of probable cause is inapplicable in this case because the appeal is from an order after judgment – the November 5, 2010 denial of the motion to vacate – and not an attack on the validity of the 1989 judgment. In support, he cites *People v. Totari* (2002) 28 Cal.4th 876, 887 (*Totari*). He argues that *People v. Placencia* (2011) 194 Cal.App.4th 489 (*Placencia*), a recent opinion from our colleagues in Division Six, was wrongly decided. We disagree.

Resolution of the issue requires harmonizing two statutes: section 1016.5 (advisements prior to guilty plea) and section 1237.5 (certificate of probable cause). Prior to accepting a guilty plea, section 1016.5, subdivision (a) requires the trial court to advise the defendant that conviction may have various immigration consequences, including deportation and exclusion from admission to the United States. If the trial court fails to so advise, and the defendant shows that the conviction may have the consequence of deportation or exclusion, “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, subd. (b).) In *Totari, supra*, 28 Cal.4th at page 887, the trial court held that denial of a section 1016.5 motion to vacate a guilty plea is an appealable order.

Generally, to appeal from a guilty plea, section 1237.5 requires a defendant to obtain from the trial court a certificate of probable cause.<sup>3</sup> Section 1237.5 “relates to the

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<sup>3</sup> Section 1237.5 reads: “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has

procedure in perfecting an appeal from a judgment based on a plea of guilty, and not to the grounds upon which an appeal may be taken.” (*People v. Ribero* (1971) 4 Cal.3d 55, 63, superceded by statute on another point as stated in *In re Chavez* (2003) 30 Cal.4th 643, 656.) It does not apply to errors that occur after a plea has been entered. (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) However, “[i]t has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.) In determining whether section 1237.5 applies, the critical inquiry is whether the issue on appeal is in substance a challenge to the validity of the plea, in which case the requirements of section 1237.5 must be met. (*Panizzon*, at p. 76.)

In *Totari, supra*, the defendant obtained a certificate of probable cause preliminary to appealing the denial of his section 1016.5 motion to vacate. The Court of Appeal dismissed the appeal on the grounds that the order was nonappealable. Our Supreme Court reversed, concluding that denial of a section 1016.5 motion to vacate was an appealable order. (*Totari, supra*, 28 Cal.4th at pp. 886-887.) But whether a certificate of probable cause is required to perfect an appeal from denial of a section 1016.5 motion to vacate was decidedly not at issue in *Totari*, since the opinion makes clear that the defendant had obtained one. “ ‘It is axiomatic that cases are not authority for propositions not considered.’ ” (*People v. Jennings* (2010) 50 Cal.4th 616, 684.) Thus, *Totari* does not stand for the proposition that a certificate of probable cause is or is not required to perfect an appeal from denial of a section 1016.5 motion.

Whether compliance with section 1237.5 is necessary to perfect an appeal from an order denying a section 1016.5 motion was exactly the issue before the court in

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executed and filed a certificate of probable cause for such appeal with the clerk of the court.”

*Placencia, supra*. The *Placencia* court concluded compliance was required, reasoning that an appeal from denial of a section 1016.5 motion to vacate is based on the claim that the trial court failed to give the requisite advisements “which necessarily precedes the entry of the plea and affects the validity of the plea.” (*Placencia, supra*, 194 Cal.App.4th at p. 494.) Requiring compliance does not impede the defendant’s right to appeal, the court explained, because if the trial court wrongfully refuses to issue a certificate, the defendant may obtain relief through a writ of mandate. (*Id.* at p. 495.) We find the reasoning of the court in *Placencia* persuasive and adopt it here. Because defendant did not obtain a certificate of probable cause, he failed to perfect his appeal.<sup>4</sup>

### DISPOSITION

Defendant’s appeal is dismissed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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<sup>4</sup> Defendant also argues that the trial court went outside the record and abused its discretion when it denied defendant’s motion at least in part on the following finding: “In my view, having served in my capacity as a judge in these criminal courtrooms, men like you who are addicted to drugs took whatever chances you could to get out of jail and you entered into these pleas.” We understand defendant’s concerns but these remarks go to the merits of defendant’s argument which, as we have discussed, he is not entitled to make without a certificate of probable cause.