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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RODRIGO MARTINEZ MARTINEZ, Defendant and Appellant.	H036687 (Santa Clara County Super. Ct. No. 156569)

An undercover officer, Frank Estrada standing about four feet away from Rodrigo Martinez-Martinez, saw him exchange a brown bindle for money with a Mr. Ryan. The officer detained Ryan and found the brown bindle in his hand. It was marijuana. Ryan gave appellant $8.00. About an hour later the officer saw appellant and arrested him. He was charged with a violation of Health and Safety Code section 11360, subdivision (a). He pled guilty to the charge and served 111 days in jail and was ordered to register as a narcotics offender. Fifteen years later he moves, pursuant to Penal Code section 1203.4, for a record clearance or in the alternative to have his charge reduced to a misdemeanor.

The motion for record clearance was granted. In January of this year appellant filed a motion to vacate the conviction based on the failure to advise him of the immigration consequences of his plea. Appellant asserted that he had never been advised of the immigration consequences either by the court or his attorney. He also claims that he did not learn of them until 2010 when he applied for an adjustment of status to lawful

permanent residency with the United States Citizenship and Immigration Service. That application was denied based on the drug conviction.

A record of his preliminary hearing of June 5, 1992, as well as his July 28, 1992 plea are gone. The minute order of the plea has boxes checked for the reading of rights, advisement of maximum time, probation and parole, stipulation to a factual basis and registration requirements, but not the box relating to advice of immigration status. His motion was denied and he appeals to us and says that the trial court abused its discretion in denying the order.

We find no abuse of discretion and no error. The trial court's denial of the motion was supported by written ruling which we set out at length.

"Defendant's motion under P.C. 1016.5 is DENIED.

"Defendant correctly lists the necessary concomitants for relief.

"(1) Defendant has established that he may rely on a rebuttable presumption that the advisement regarding immigration consequences was not given before he entered his plea.

"(2) Defendant must establish that at the time of this motion, there exists more than a remote possibility that the conviction will have one or more of the adverse immigration consequences specified in the statute.

"He has done that by declaration of his present counsel that defendant's conviction for sale of marijuana renders defendant inadmissible to the United States; renders him ineligible to naturalize to United States citizenship because the conviction precludes him from attempting to demonstrate 'good moral character.'

"(3) Defendant has attempted to demonstrate 'prejudice' by declaring that had he been aware of the immigration consequences of his plea he would not have entered it. Instead, defendant declares that he would have insisted upon a plea agreement 'that would have spared him such immigration damage' or he would have exercised his right to a jury trial.

"The plea agreement he agreed to on July 28, 1992 was: For a plea of guilty to Health & Safety Code section 11360 subdivision (a); he would be placed on formal probation for three years and would be given a time-served jail term of 111 days, a fine, counseling, and registration as a narcotics offender. This Court finds it highly improbable such a bargain would have been offered.

"Even more unlikely was a verdict of not guilty. The arresting officer testified at the preliminary hearing that he was only four feet away from the sale and saw defendant hand the buyer a baggie and saw the buyer hand defendant paper money. The officer immediately arrested the buyer and found on him a baggie of marijuana. Less than an hour later defendant was found without any contraband. Unless a jury found the officer to be a liar, it is hard to believe he could not see what he testified he witnessed at a distance of four feet: Defendant handing a baggie of marijuana to the buyer and concurrently being handed cash by the buyer. Nor would it be difficult for a jury to determine what defendant did with the money or additional contraband: He had an hour to dispose of it and he knew the police would be looking for him."

We agree with the trial court that the appellant's claim that he would have plead to a "greater offense," sale of unspecified controlled substance under Health and Safety Code section 11352, subdivision (a) is entirely speculative and it beggars the imagination to suppose that he would have had agreed to go to state prison for a term of three, four or five years had he known of the immigration consequences. The distinct problem with appellant's appeal is his inability to demonstrate prejudice. He says only that had he been aware of the immigration consequences of his plea, he would not have entered it and instead gone to jury trial. The jury trial would not have taken long. The observation of a hand to hand sale together with the money and the purchaser would not have offered any difficulty to a jury.

DISPOSITION

Judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.