

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAHIM MUHAMMAD,

Defendant and Appellant.

A131389

(Solano County  
Super. Ct. No. VCR203037)

This is a second appeal concerning Rahim Muhammad’s attempt to substitute counsel at a probation revocation hearing. In the prior appeal, we found the trial court erred in denying appellant’s *Marsden*<sup>1</sup> motion without a hearing on the ground that it was untimely. On remand, after a hearing, the trial court denied the motion on the merits. Appellant here contends the trial court abused its discretion and thereby deprived him of his constitutional right to effective assistance of counsel. We affirm.

**STATEMENT OF THE CASE**

On May 5, 2009, appellant was charged in case VCR203037 with one count of stalking (Pen. Code, § 646.9, subd. (a)). On May 18, 2009, he was charged in case VCR203198 with one count of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), one count of evading an officer (Veh. Code, § 2800.2, subd. (a)), one

<sup>1</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

count of hit and run driving (Veh. Code, § 20002, subd. (a)), and one count of resisting a peace officer (Pen. Code, § 148, subd. (a)(1)).

On June 22, 2009, appellant pled nolo contendere to the stalking charge in VCR203037 and to the count of unlawful driving in VCR203198; the remaining charges in VCR203198 were dismissed. At sentencing on October 26, 2009, imposition of sentence was suspended and appellant was placed on three years' formal probation. Among other conditions, appellant was required to enter a treatment program and to have no uninvited contact with the stalking victim, S.P., who was protected by a civil restraining order.

Appellant's probation was summarily revoked on November 25, 2009. Appellant denied allegations that he failed to comply with the restraining order and failed to complete the treatment program.

At the probation revocation hearing on December 15, appellant made an oral *Marsden* motion which the court denied as untimely. At the conclusion of the hearing, the court found that appellant had not violated the restraining order but had violated probation by failing to complete the treatment program. On January 27, 2010, appellant was sentenced to the two-year middle term for the unlawful driving conviction in VCR203198 and a consecutive eight-month term for the stalking conviction in VCR203037. Appellant filed a timely notice of appeal on February 4, 2010. This court reversed the judgment, finding the trial court erred in denying the *Marsden* motion as untimely, and remanded for a hearing on the motion. (*People v. Muhammad* (Nov. 22, 2010) A127560.)

The trial court held a new *Marsden* hearing on February 1, 2011. The motion was denied and the judgment reinstated.

Appellant filed a timely notice of appeal on February 17, 2011.

## STATEMENT OF FACTS

### Probation revocation

At the probation revocation hearing on December 15, 2009, James Dickerson, an intake coordinator for the Salvation Army program in Oakland, testified that appellant entered the program on November 18, 2009, and was terminated on November 19. Dickerson picked appellant up from county jail on November 18. That day, Dickerson went over all the rules of the program with appellant in his office, “[t]he front desk went over rules step by step with him,” and appellant signed documents acknowledging that he had gone over the rules. Appellant was assigned to begin work in the warehouse at 7:30 a.m. the next day.

When Dickerson arrived on the morning of November 19, the mentor who had been assigned to appellant reported that appellant would not listen to him, telling him “ ‘I’m a grown man. You ain’t going to tell me nothing.’ ” Appellant also got a “write-up” for using profanity in the lobby and using the telephone at a time that was not permitted. That morning, the transportation supervisor told Dickerson that he was having trouble getting appellant to work and that appellant told him he was “ ‘a grown man’ ” and “ ‘You’re not going to disrespect me.’ ” When Dickerson asked appellant what was going on, appellant said, “ ‘These people here need to start respecting me.’ ” That same morning, appellant’s supervisors contacted Dickerson and said they did not know where appellant was. Dickerson went outside and found appellant around the corner, a place the program rules did not allow him to be. Appellant was hugging and kissing a woman, which violated program rules prohibiting contact with outside individuals for the first 30 days. Appellant followed Dickerson back to his office, where Dickerson informed appellant he was being terminated from the program because he was causing so many problems.

Jaimie Nichols, appellant's probation officer, testified that appellant was subject to a civil restraining order protecting S.P., which she reminded him of before he was placed into the Salvation Army program.

Appellant testified that Dickerson did not go over the program rules with him. Instead, "the guy from the counter" gave appellant and other individuals clipboards and told them to "fill everything out." He did not have any problems with anyone at the program. On November 19, he worked in the warehouse from 7 or 7:30 a.m. until 9:30, when there was a break. Appellant had previously told Dickerson he had to contact Nevada law enforcement and Dickerson had told him to do this on his break. He went to Dickerson's office and Dickerson made the call for him. Break time was not over when he finished the call, so he went out to the smoking area where people were hanging out. Not wanting to stand right next to a man who was smoking, appellant stood on the curb and a man yelled at him to get off the street. Appellant told him, " 'Listen. You don't address me that way. I'm not a child, just telling me, I'm supposed to be on the street.' "

Appellant testified that Dickerson told him it seemed like he was having adjustment problems and appellant said he was not, but twice that day someone was "very rude" in the way they told him how to do things. Dickerson told appellant to sit in the lobby, which he did for two hours. A few times during this period, appellant walked out to the smoking area, a place he had been told he could go. While he was outside, S.P. pulled up, gave him a bag and asked how he was doing. He thanked her and took the bag inside. Simultaneously, Dickerson walked up and appellant explained that S.P. had dropped off his "hygiene stuff." He had not asked her to do this.

Appellant testified that he did not believe he was violating any court order by his contact with S.P. because the probation order prohibited "uninvited contact" and it was S.P. who contacted him. He testified that Nichols did not show him the civil restraining order.

### Marsden hearing

At the *Marsden* hearing on remand, appellant told the trial court that he had been found guilty of a probation violation based on allegations from the Salvation Army that he felt were unfounded, and that if an investigation had been made into these allegations, it “would have been clear that there [were] some inconsistencies and some fabrication.” Appellant felt his attorney should have subpoenaed the people who worked in the Salvation Army warehouse and said he had refused to work, as well as people who said appellant was confrontational or threatening, to rebut what he said were lies by the prosecution witnesses. Appellant believed the probation revocation process had been expedited because his attorney was about to retire.

Appellant’s former attorney, who had in fact retired after the probation revocation hearing, stated that appellant came to talk to him the day appellant was terminated from the program. Appellant went to see his probation officer and was put in custody. He was in court on November 25 and the matter continued to December 8, when, according to counsel, appellant insisted he wanted a speedy probation violation hearing and the court set the hearing for December 15. Former counsel stated that this setting of the hearing one week later was “a little unusual” as hearings were usually set three or four weeks ahead. Counsel talked with appellant on the phone and met with him on December 14, at which time appellant indicated that he felt what had happened was unfair but did not indicate he wanted the matter continued. Appellant’s girlfriend was ordered to come to the hearing on December 15, so she could have testified at the hearing. Counsel said that after listening to and cross-examining the prosecution witnesses, he decided not to put appellant’s girlfriend on the stand because he did not think it would advance appellant’s case. Counsel stated, “And, of course, the problem that we had, and I explained this to Mr. Mohammad on the phone as well as on the 14th, the day before, is, that all the DA had to show was that he violated a term of probation by not being in the program.” Counsel further stated that the judge had given the defense “quite a bit of leeway as to

what happened and why that happened,” and that although counsel thought “really all that had to be shown was that he was terminated,” counsel questioned both the probation officer and Dickerson about what they believed appellant knew about the program rules. Counsel said he did not recall appellant giving him names of potential witnesses.

Appellant acknowledged that he had only been at the program a short time and did not know anyone’s name, but explained that this was why he felt an investigator should have been sent to question the people who were there. Appellant suggested that the names of the people who complained to Dickerson “were apparently in the reports of Dickerson because he said these guys approached him.” He also suggested that even without names, there was a supervisor and a sign-in sheet and cameras in the warehouse that could have shown appellant did not refuse to go to work.

Denying appellant’s *Marsden* motion, the court stated that it did not see a dispute between attorney and client. The court explained, “I can see that [counsel] made certain decisions, either to call your girlfriend as a witness, but that’s a tactical decision to make. He cross-examined the witnesses that were called by the People. You got to tell your story. [¶] The Court apparently believed the witnesses, and to me, investigating this kind of a case and talking to all those people down there, it would have not been a practical way to approach it. It just – it wouldn’t be practical. [¶] It’s sort of like hoping you’ll find a witness who might help you, and then the Court may not believe them.”

## **DISCUSSION**

Appellant argues that former counsel was ineffective at the probation revocation hearing in that he did not understand the relevant law, did not do any investigation into defense evidence and was unprepared for the hearing because he wanted to have the hearing prior to his imminent retirement. The trial court abused its discretion in denying the *Marsden* motion, appellant claims, because it did not perceive the magnitude of counsel’s unprofessional behavior and it wrongly concluded investigation into appellant’s defense was unnecessary and impractical.

“*Marsden* motions are subject to the following well-established rules. ‘ ‘ ‘When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].’ [Citations.]” ’ (*People v. Memro* (1995) 11 Cal.4th 786, 857.) Denials of *Marsden* motions are reviewed under an abuse of discretion standard. (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1070.) Denial ‘is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel. [Citations.]’ (*People v. Webster* (1991) 54 Cal.3d 411, 435.)” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)<sup>2</sup>

---

<sup>2</sup> Appellant’s suggestion of a more lenient standard for granting a motion to substitute counsel is not well taken. Quoting from *People v. Smith* (1993) 6 Cal.4th 684, 691-692, appellant urges that a *Marsden* motion must be granted “ ‘when the defendant presents a colorable claim that he was ineffectively represented at trial; that is, if he credibly establishes to the satisfaction of the court the *possibility* that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant *might* have resulted in the absence of counsel’s failings.’ ” (*Id.* at p. 691, quoting *People v. Stewart* (1985) 171 Cal.App.3d 388, 396-397 [emphasis added by appellant].) *Stewart* had adopted this standard for determining when new counsel must be appointed to present a motion for new trial based on ineffectiveness of counsel at trial. *Smith*, however, *rejected* this standard, holding that a defendant’s entitlement to substitution of counsel post-conviction must be determined under the same standard applicable to pre-conviction *Marsden* claims. (6 Cal.4th at p. 696.) *Smith* stated, “We thus hold that substitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel (*People v. Webster, supra*, 54 Cal.3d at p. 435), or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney

Appellant first contends that his attorney demonstrated ignorance of the law by stating at the revocation hearing that the prosecution only had to prove appellant violated a condition of his probation, indicating his unawareness of the requirement that probation can be revoked only for a *willful* violation of its terms and conditions. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982; *People v. Zaring* (1992) 8 Cal.App.4th 362, 375.)

As described above, when called upon to respond to appellant's complaints about his representation, former counsel stated that "the problem that we had" was that "all the DA had to show was that he violated a term of probation by not being in the program" and that "all that had to be shown was that he was terminated." Taken literally, because they do not refer to the requirement that the violation be willful, these comments suggest former counsel was not aware the prosecution had to prove appellant acted willfully. But this is not necessarily the case: Former counsel could have been speaking in "shorthand," assuming the court would realize the requirement that any violation be willful was implied. Former counsel's questioning of the witnesses at the probation revocation hearing addressed the willfulness requirement: His cross-examination of Dickerson included questioning about how and when appellant was informed of the program rules, and he elicited testimony from appellant that no one went over the rules with him and that when he was outside, he was in a place he was allowed to be. Questions about appellant's awareness and understanding of the program rules would have had no relevance if there was no requirement that his violation be willful.

---

have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result (*People v. Crandell* [(1988)] 46 Cal.3d [833,] 854). This is true *whenever* the motion for substitute counsel is made. There is no shifting standard for the trial court to apply, depending upon when the motion is made. We disapprove any suggestion in *Stewart, supra*, 171 Cal.App.3d 388, and any interpretation of that decision such as that of *People v. Garcia* [(1991)] 227 Cal.App.3d [1369,] 1377–1378, that is contrary to the views expressed herein." (*Smith, supra*, 6 Cal.4th at p. 696; see *People v. Barnett, supra*, 17 Cal.4th at p. 1112.)

Appellant further urges that former counsel's performance was ineffective in that he failed to perform any factual investigation into appellant's defense because he wanted to dispose of the case quickly, before his retirement date.<sup>3</sup> Appellant told the court that Dickerson lied about the behavior he claimed to justify terminating appellant from the program and that his attorney should have interviewed people who worked at the warehouse to rebut the testimony that he had refused to work and that he was threatening or confrontational with others at the Salvation Army. Appellant argues that the trial court erred in viewing such investigation as impractical.

“Counsel’s primary ‘duty is to investigate the facts of his client’s case and to research the law applicable to those facts.’ (*People v. Ledesma* (1987) 43 Cal.3d 171, 222.)” (*People v. Doolin* (2009) 45 Cal.4th 390, 423; *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1084.) “[C]ounsel has a duty to make reasonable investigations or to

---

<sup>3</sup> Appellant contends former counsel lied when he stated at the *Marsden* hearing that it was the judge and appellant who insisted on a speedy probation revocation hearing. Counsel stated, “It looks as though on the 25th of November, he was in Court. That was continued over to the 8th of December in this department, and I believe Judge Bowers, and Mr. Mohammad insisted that he wanted to have a speedy probation violation hearing.” As we read these remarks, counsel was not saying the *judge* insisted on a speedy hearing, only identifying which judge was presiding and stating that appellant wanted the speedy hearing. The record does confirm that the hearing was set for December 15 after former counsel asked, “because of my familiarity with Mr. Muhammad, if there is any way we can do that next week because that’s my last week.” There is no indication, however, that appellant had any objection to this. In fact, when appellant asked to address the court after the hearing had been scheduled for December 15 and the court had reiterated its denial of bail, the court assured appellant the revocation would happen expeditiously and appellant thanked the court. The court told appellant, “I think the people are trying to do it in a very expeditious fashion. [¶] In other words, setting it over for next week; so we’re going to move quickly here.” Appellant said that he wanted to thank the court for sending him to a program and he had tried to do the most responsible thing by turning himself in; the court told him “we’re moving” and appellant said, “Thank you.”

make a reasonable decision that makes particular investigations unnecessary.”

*(Strickland v. Washington (1984) 466 U.S. 668, 691.)*

Appellant views his case as analogous to *People v. Gayton* (2006) 137 Cal.App.4th 96, 103, in which defense counsel’s failure to review the defendant’s probation file before a revocation hearing was held to be prejudicial ineffective assistance of counsel. There, the defendant and his probation officer testified to radically different factual scenarios related to the alleged violation: The probation officer testified that the defendant never reported to him as required and never contacted him, while the defendant gave a detailed account of several meetings with the probation officer and of his efforts to comply with other conditions of probation. The probation file contradicted the probation officer’s testimony and supported the defendant’s. *Gayton* found there was no excuse for defense counsel’s failure to examine the probation file, which was the only evidence that could determine which of the diametrically opposed stories was correct. (*Ibid.*)

The present case is very different. Appellant claims that the warehouse supervisor or other individuals who worked at the warehouse that day would have stated that he did not refuse to work, but he offers no evidentiary support for this assertion. Dickerson’s testimony addressed both incidents reported to him by others at the program and his own observations of and interactions with appellant. According to Dickerson, appellant was terminated from the program because he left his assigned work location without permission, went to an unauthorized location, and had contact with S.P. in violation of program rules. Appellant’s argument on appeal focuses on the first of these reasons, claiming he never refused to work. He does not suggest Dickerson lied about his contact with S.P., only that he did not initiate that contact. The trial court apparently accepted that the prosecution had not proven appellant initiated the contact, as it did *not* find appellant had violated the restraining order prohibiting “uninvited” contact with S.P. But the contact itself — which appellant does not suggest he tried to avoid — was a violation of the program rules and part of the reason appellant was terminated from the program.

As for the contention that former counsel should have attempted to find witnesses to contradict Dickerson’s testimony, a claim that counsel *might* have been able to find a witness who *might* have caused the trial court to disbelieve this portion of Dickerson’s testimony, which in turn *might* have caused the court to find appellant did not willfully violate the program rules, is insufficient to “clearly show” former counsel did not provide adequate representation. (See, *People v. Barnett, supra*, 17 Cal.4th 1044, 1085.)

**DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_  
Kline, P.J.

We concur:

\_\_\_\_\_  
Lambden, J.

\_\_\_\_\_  
Richman, J.