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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DINO CARDELLI,

Defendant and Appellant.

A138800

(Humboldt County
Super. Ct. Nos. CR1005536,
CR1100227)

Defendant originally pleaded guilty to two counts of sexual abuse against two of his adopted children, and to the separate offense of attempting to dissuade one of the victims from testifying. He was sentenced to 16 years in prison for the sexual offenses, and to a consecutive sentence of two years for the dissuasion offense. Defendant appealed claiming the trial court erroneously believed it lacked discretion to impose a concurrent term for dissuasion and sought a remand for resentencing. We agreed, and remanded the matter to the trial court for resentencing solely to exercise its discretion to impose either the consecutive or concurrent term on defendant's conviction for dissuading a witness. (*People v. Cardelli* (Oct. 31, 2012, A133794) [nonpub. opn.].) The trial court resentenced defendant to the same 18-year sentence it had originally imposed. Now, in his second appeal defendant contends the trial court's failure to hold a *Marsden*¹ hearing upon remand constitutes reversible error. We agree and remand the matter to the trial court with directions to hold a *Marsden* hearing.

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

I. BACKGROUND

At the beginning of the resentencing hearing on April 29, 2013, defendant's appointed counsel, M.C. Bruce, told the court he had "received a letter from Mr. Cardelli indicating that his appellate attorney has informed him that he believes that there were things that I should have done in the sentencing—objections I should have made in the sentencing that have impacted his sentence." "Because of that," defense counsel explained, "I think I have an ethical duty at least to make a motion to ask to conflict off. . . . I think I have to ask the Court for permission to do that. But I know that ethically I have a responsibility to at least make that motion. So at this time I do."

After reviewing the Rules of Professional Conduct governing mandatory withdrawal and permissive withdrawal, the court observed, "So here we would have the assumed argument that counsel failed to adequately represent the defendant at the prior sentencing proceeding or with the circumstances of the case." Without questioning either defendant or counsel about the basis for the claimed inadequacy, however, the court declined counsel's request to withdraw because of the limited scope of the remand to impose either a concurrent or consecutive sentence.

Thereafter, the court allowed the victim to testify and heard arguments from the district attorney and defense counsel. Defense counsel vigorously argued for a two-year concurrent sentence emphasizing that when defendant contacted the victim, "There was no threat of violence. No threat of punching or kicking or killing or any of this other stuff."

The trial court found the crimes involved separate acts which were "predominately independent of each other" and accordingly resentenced defendant to a two-year term for dissuading a witness consecutive to the 16-year term imposed for the continuous sexual abuse convictions for a total of 18 years.

Immediately after the court imposed the 18-year sentence, defendant asked the court for an opportunity to comment. The court asked him what he would like to say, to which defendant responded, "Well, I'd like to know—I thought that I would have an opportunity to at least meet with an attorney before coming to court for being re-

sentenced, number one. Two, I don't know if the letter from my appellate attorney, Mark Shinfield, ever made it to Mr. Bruce or not. [¶] Mr. Bruce's body language made known that he's not happy about being here, so the whole thing about not getting, you know, the *opportunity to have another attorney* to address those issues is something that I thought, you know, should have at least been looked at a little closer." (Italics added.) The trial court failed, however, to address defendant's comments about the "opportunity to have another attorney."

II. DISCUSSION

Defendant contends the trial court erred by failing to hold a *Marsden* hearing.

The Attorney General counters the trial court did not have jurisdiction at resentencing to consider defendant's request for a *Marsden* hearing because this court's remand order "limited the trial court's jurisdiction only to considering whether to impose a consecutive or concurrent term on appellant's conviction for dissuasion of a witness." Because the trial court had limited jurisdiction, according to the Attorney General, defendant's request at remand for a hearing on his alleged conflict with defense counsel did not fall within the ambit of the remand order.

While it is true a trial court's jurisdiction on remand is limited as defined by the terms of the disposition (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655), our remand is not as limited as the Attorney General characterizes it because "[a] criminal defendant is entitled to assistance of counsel at all critical stages of the proceeding." (*People v. Lara* (2001) 86 Cal.App.4th 139, 149.) Sentencing or pronouncement of judgment is a critical stage of the proceeding and a defendant has the right to be present with counsel at this proceeding. (*People v. Rodriguez* (1988) 17 Cal.4th 253, 257.) Thus defendant had a right to raise *Marsden* at the resentencing hearing following remand from the appellate court.

Having found defendant was entitled to make a *Marsden* motion at resentencing, we turn to his claim that he clearly expressed his desire for a substitute attorney.² “ ‘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].’ ” (*People v. Fierro* (1991) 1 Cal.4th 173, 204, disapproved on another ground as stated in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 205–207.)

In *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*), the Supreme Court addressed the common practice of appointing “conflict” counsel. The defendant in *Sanchez* had entered into a change of plea pursuant to a negotiated disposition. (*Id.* at pp. 83–84.) At the sentencing hearing, appointed counsel advised the trial court the defendant “ ‘wishe[d]’ ” to have the public defender “ ‘explore having his plea withdrawn.’ ” (*Id.* at p. 85.) The trial court asked if this was something counsel could do, or whether it had to appoint “conflict” counsel. (*Ibid.*) Appointed counsel responded “conflict” counsel could not be appointed until the court held a *Marsden* hearing, found the public defender “ ‘did not give competent advice’ ” and declared a “ ‘conflict.’ ” (*Sanchez*, at p. 85.) Counsel then asked for time to determine whether the public defender needed to withdraw. The trial court gave counsel a week to determine “ ‘whether or not conflict counsel needs to be appointed . . . or [whether] you need to file a motion on his behalf as his representative.’ ” (*Ibid.*) At the next hearing, the trial court appointed “conflict” counsel “ ‘for the sole purpose of looking into the motion to

² We note the Attorney General has failed to discuss the merits of defendant’s claim that he asked for a substitute attorney. However, we do not treat the failure to respond as an admission of error but independently review the record and reverse only if prejudicial error is found. (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1203.)

withdraw [defendant's] plea.' ” (*Ibid.*) When “conflict” counsel reported he found no basis for such a motion, the trial court confirmed the public defender’s continued representation of defendant and proceeded with sentencing. (*Ibid.*) The Court of Appeal reversed, finding *Marsden* error. (*Sanchez*, at p. 86.) The Supreme Court affirmed the appellate court’s judgment.

The Supreme Court reiterated that a *Marsden* hearing is required when “there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ ” (*Sanchez, supra*, 53 Cal.4th at pp. 89–90, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) The court then determined defense counsel had so indicated (*Sanchez*, at p. 92) by requesting the “ ‘appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on [defendant’s] behalf.’ ” (*Id.* at p. 86.) “[D]efendant, through counsel, requested that a ‘conflict’ or substitute attorney be appointed immediately, and the obvious implicit ground for that request was the incompetency of defendant’s currently appointed counsel.” (*Id.* at p. 91.) Accordingly, the court agreed with the Court of Appeal that the trial court should have conducted a *Marsden* hearing to determine whether or not appointed counsel should be relieved and substitute counsel appointed. (*Sanchez*, at pp. 92–93.)

As we have recited in the factual background, defendant in this matter clearly indicated he wanted his counsel relieved and substitute counsel appointed. As in *Sanchez*, defense counsel here requested to “conflict off,” based on the letter he received from defendant regarding objections counsel should have made at sentencing. The trial court also understood defendant was concerned with the adequacy of defense counsel’s representation at sentencing when it observed, “So here we would have the assumed argument that counsel failed to adequately represent the defendant at the prior sentencing proceeding or within the circumstances of the case.” Even assuming counsel’s request to conflict out was insufficient to implicate *Marsden*, defendant’s desire for new counsel was reiterated when following imposition of sentence, he spoke about the “opportunity to have *another attorney* to address those issues.” (Italics added.) All of these factors

together triggered the trial court's duty to hold a *Marsden* hearing to determine if current appointed counsel was providing adequate representation or the attorney-client relationship had become embroiled in such an irreconcilable conflict that ineffective representation was likely to result.³

III. DISPOSITION

The judgment is conditionally reversed. The matter is remanded with the following directions: (1) the court shall hold a hearing on defendant's *Marsden* motion concerning his representation by appointed counsel; (2) if the court finds defendant has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make, including a request for resentencing; and (3) if newly appointed counsel makes no motions, any motions made are denied, or defendant's *Marsden* motion is denied, the court shall reinstate the judgment.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.

³ Our opinion should not be read to suggest that defendant's *Marsden* motion should be granted or that we think defendant has made, or will make, a colorable claim for ineffective assistance of counsel justifying appointment of substitute counsel. That decision rests in the sound discretion of the trial court and will obviously depend upon what information the trial court elicits from defendant and his trial counsel during the hearing. (See *People v. Smith* (1993) 6 Cal.4th 684, 696.)