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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ARZZIE HENDERSON,

Defendant and Appellant.

B237632

(Los Angeles County
Super. Ct. No. NA089501)

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

James C. Huber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Arzzie Henderson, also known as Ozzie Henderson, appeals from the judgment entered upon his conviction by jury of sale of cocaine base (Health & Saf. Code, § 11352).¹ The trial court found the allegation that appellant had suffered a prior felony strike within the meaning of Penal Code sections 1170.2, subdivisions (a) through (d) and 667, subdivisions (b) through (i) to be true, but dismissed the strike because it was remote. It sentenced appellant to state prison for the upper term of five years. Appellant contends that the trial court erred in denying his *Marsden*² motion, thereby depriving him of his right to counsel.

We affirm.

FACTUAL BACKGROUND³

On June 29, 2011, Long Beach Detective Jason Kirk investigated a possible narcotics operation in an apartment building on Alamitos Avenue in Long Beach (the building). He sent Earl Carter (Carter), a police assistant, to apartment C of the building with \$40 and a video recorder. In the building, Carter encountered James Mitchell (Mitchell) and appellant. He asked Mitchell, with whom he had dealt before, if he could buy marijuana and rock cocaine. Mitchell pointed to appellant, whom he said had rock cocaine. Appellant sold Carter a .28 gram piece of rock cocaine for \$20. The video recording of the transaction was played for the jury.

MARSDEN MOTION

Before trial, appellant requested a *Marsden* hearing, seeking to replace his appointed counsel. The trial court conducted an in camera proceeding, with the prosecutor excused. It asked appellant, “What’s happening?” Appellant responded:

¹ All further statutory references are to the Health and Safety Code unless otherwise indicated.

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

³ Because the issue raised by appellant does not depend upon the underlying facts of this case, we present only a truncated statement of facts.

“The problem I am having, from day one of this case, I feel that there has been a conflict of interest between me and my attorney. My attorney has done nothing for me.” When the court asked appellant what he wanted his attorney to do, appellant asked the court to “hear me out,” to which the court said, “okay.” Appellant then continued: “Since I have been coming to court, he has been my attorney. He has said nothing. He hasn’t spoken to me. . . . [H]e filed one motion. The only reason he filed that one motion is because I asked him.” The trial court then asked what motion he wanted his attorney to file. Appellant responded: “I am not sure because I didn’t bring the paperwork with me.”

The trial court then told appellant that he had a good lawyer who knew what he was doing. It stated: “This man here is a lawyer. He is not a magician. But he happens to be a very fine trial lawyer. I have presided over two or three trials that he has tried here in the last six or seven months. He walked one of his clients out of here not too long ago. He shouldn’t have, but he did because he is a good lawyer. He is not a magician. He is going to do the best he can to defend you. ¶¶ In chambers the other day I said is there any way of disposing of the case with [appellant]. He said absolutely not. He said [appellant] says he is not guilty and we are ready for trial. So there we have it. You haven’t told me one thing that he has failed to do that he should have done.”

Appellant responded: “The thing that I don’t understand is like every time I bring something to his attention he shoots me down. . . . I just feel that he is not working on my behalf. . . . I feel like he is working with the prosecutor. He is not working with me.” For example, appellant explained that he had informed counsel that people in the building could verify that he did not sell drugs. The trial court explained that their testimonies would be inadmissible because they were not present at the time of the drug sale. The trial court explained that the prosecutors and defense counsel maintain good relationships, but that defense counsel would do his best to win the case. Appellant said that he understood.

Appellant claimed that defense counsel had refused to show him the video recording of appellant selling narcotics, which the prosecution intended to use at trial. Defense counsel explained: “I called [appellant] yesterday at the number he left because

I told him I was going to be receiving a tape of the transaction. I called that number, left a message. I called it back several times because I thought it was important for him to see the video before coming to court today. This morning he just wanted to tell me about how I wasn't on his side. And he proceeded to simply argue with me. We had this discussion about these witnesses who would come in and say he is not a drug dealer. I have explained to him it was not going to be admissible unless they were present during this alleged transaction and can say no, he is not the person who did it." Appellant then told his attorney that he was "going to take this up with the judge because you are not representing my best interest. There was no point then to let him see any tape because he himself said I don't care what it shows. I want a trial."

The trial court then denied the *Marsden* motion, stating: "So your request under *Marsden* for another lawyer is denied. And I suggest that you [report] to his office as quickly as you can and you take a look at what's on that video. It may help you make a decision about your future. But don't go into this blind. Do not go into this blind."

After the ruling, defense counsel explained to the trial court that what precipitated appellant's belief that defense counsel was not advocating on his behalf was that the prosecutor had made a generous offer to settle the case, instead of 10 years in state prison appellant would get half that time in county jail, and defense counsel encouraged him to take it. The trial court suggested that appellant talk to defense counsel and make a decision on whether to enter a plea and that he needed to look at the video recording in order to make an appropriate decision.

DISCUSSION

I. Contention

Appellant's sole contention is that the trial court erred in denying his *Marsden* motion, thereby depriving him of his right to counsel. He argues that he made a timely motion, the court's inquiry into appellant's complaint was inadequate "because the court discounted appellant's statements regarding his attorney based on [the court's] experience with defense counsel on other cases and not the case at hand," and the conflict between

appellant and his counsel resulted in a complete breakdown in communication. This contention is without merit.

II. Standard of review

We review a trial court's denial of a *Marsden* motion for an abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1190.) A denial of a motion to substitute appointed counsel 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.'" (*People v. Hart* (1999) 20 Cal.4th 546, 603; *People v. Valdez* (2004) 32 Cal.4th 73, 95 (*Valdez*).

III. Marsden requirements

"A criminal defendant's appointed attorney should be the embodiment of the defendant's Sixth Amendment right to the effective assistance of counsel." (*People v. Vera* (2004) 122 Cal.App.4th 970, 978–979.) Consequently, "[a] defendant is entitled to [substitute appointed counsel] 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. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Welch* (1999) 20 Cal.4th 701, 728.) "In seeking discharge of a court appointed attorney the defendant must show more than the fact the attorney made a mistake, he must show lack of competence." (*People v. Lee* (2002) 95 Cal.App.4th 772, 779.)

There are various procedural requirements to ensure that a defendant's concern regarding the quality of his appointed counsel's representation is addressed. The trial court is required to hold a hearing on a defendant's request to discharge appointed counsel. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 753.) "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.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 681, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *Valdez, supra*, 32 Cal.4th

at p. 95.) This is because “[a] trial judge is unable to intelligently deal with a defendant’s request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. . . . A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention ‘is lacking in all the attributes of a judicial determination.’” (*Marsden, supra*, 2 Cal.3d at pp. 123–124.) After the hearing, “the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed attorney.” (*Marsden, supra*, 2 Cal.3d at p. 123.)

In determining whether a trial court properly exercised its discretion in denying a *Marsden* motion, the reviewing court should consider the circumstances of the particular case (*People v. Panah* (2005) 35 Cal.4th 395, 426), including (1) the timeliness of the motion, (2) the adequacy of the court’s inquiry into the defendant’s complaint, and (3) whether the conflict between the defendant and counsel was so great that it resulted in a total lack of communication preventing an adequate defense. (*People v. Smith* (2003) 30 Cal.4th 581, 606–607.) The “defendant bears a very heavy burden to prevail on [a *Marsden*] motion.” (*People v. Bills* (1995) 38 Cal.App.4th 953, 961.)

IV. Adequacy of the hearing

Here, the trial court accorded appellant an adequate *Marsden* hearing. In order for a defendant to be frank as to his complaints against his counsel, without risking revelation of information that may benefit the prosecution, an in camera hearing is required. (See *People v. Dennis* (1986) 177 Cal.App.3d 863, 871 [“the better practice [in a *Marsden* hearing] is to exclude the district attorney”].) Appellant received the required in camera hearing.

The hearing began by the trial court asking appellant an open-ended question as to what his reasons were for asking for a new attorney. At no time during the hearing did the trial court limit appellant’s responses or prevent him from fully explaining his

concerns. Appellant disclosed nothing at the hearing reflecting that his counsel was incompetent. The trial court obtained an explanation from defense counsel to the two specific claims made by appellant (failure to contact residents of the building who would say that appellant did not sell drugs and the purported refusal to allow appellant to view the video recording of the drug transaction). A careful review of the transcript from the in camera hearing convinces us that appellant was given a full and fair opportunity to express his concerns about his attorney.

V. Appellant fails to meet his burden of showing incompetence or conflict

In the course of the in camera hearing, appellant articulated several concerns he had with the representation he was receiving by his appointed counsel, including that his attorney (1) had not spoken to him, (2) had failed to file any motions, (3) had not followed up with people in appellant's building who appellant said could verify that he did not sell drugs, (4) "is not working on my behalf," (5) shoots appellant down every time appellant brings something to his attention, (6) is working with the prosecutor, and (7) would not let appellant see the video recording of the rock cocaine purchase.

None of these reasons satisfied appellant's heavy burden (*People v. Bills, supra*, 38 Cal.App.4th at p. 961) and justified replacing appointed counsel. They do not reflect incompetence by counsel nor did they "substantially impair[]" appellant's right to counsel. (*Valdez, supra*, 32 Cal.4th at p. 95.) Consequently, the trial court did not abuse its discretion in denying defendant's *Marsden* motion.

Some of appellant's reasons for seeking new counsel simply reflect general unhappiness with his counsel that do not bear on the adequacy of the representation. For example, appellant, only in general terms, claimed that counsel did not speak with him, was not working on his behalf, and "shot down" appellant each time appellant brought something to his attention. Appellant failed to provide concrete examples of these claims. To the extent these claims reflect that appellant felt that he and his case were not getting sufficient attention by his attorney, they are unsupported by any specification of how much time counsel had spent on the case or what more he could have done on it. "[T]he number of times one sees his attorney, and the way in which one relates with his

attorney, does not sufficiently establish incompetence” (*People v. Cole, supra*, 33 Cal.4th at p. 1192) or a conflict of interest.

With regard to appellant’s claim that his attorney failed to make all but one motion, the trial court asked what motion did counsel not make. Appellant was unable to indicate any.

Appellant claimed that his attorney was not working on his behalf but was working with the prosecutor. The trial court correctly pointed out that cooperation between counsel did not mean that appellant’s counsel was not protecting his interests. Defense counsel also indicated that the genesis of these complaints was that he encouraged appellant to accept a generous offer made by the prosecutor. This of course is within his obligation to his client if counsel believed that the offer was beneficial.

With regard to appellant’s claim that his counsel did not follow up with witnesses in his building who knew that he did not sell drugs, both the trial court and defense counsel indicated their belief that such evidence would have been inadmissible because those witnesses did not witness the charged transaction.

Finally, defense counsel explained that the reason that appellant did not have an opportunity to see the video recording was because he had just received it and calls to appellant to let him know about it were not returned.

Neither defendant’s growing dissatisfaction with his attorney over matters that do not establish a lack of competence or conflict of interest nor his expression in court of that dissatisfaction can justify replacing appointed counsel. Were that the case, a defendant could ensure the granting of a *Marsden* motion for virtually any reason, simply by claiming hostility between the defendant and his counsel created by the defendant’s expression of dissatisfaction. We conclude that none of the claims raised by appellant rise to the dignity of requiring new appointed counsel. The trial court therefore did not abuse its discretion in denying appellant’s *Marsden* motion.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ