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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MARTIN CARDOZA,

Defendant and Appellant.

C065685

(Super. Ct. No. 07f1209)

Defendant Joseph Cardoza was charged with sexual offenses involving two child victims. Thereafter, he entered a negotiated plea and the court sentenced him to state prison consistent with the negotiated resolution. Defendant contends that the trial court failed to conduct an adequate investigation of complaints concerning his counsel's representation that he raised after his plea. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Defendant was charged with 11 counts of sex offenses against one child victim and one count against a second child victim. Defendant was a foster parent to the two victims.

At a trial readiness conference in February 2010, the trial court granted the prosecutor's motion to add a charge of child endangerment of the second victim. Defendant then entered a negotiated plea of guilty to the new count and to one count of unlawful sexual intercourse with the first victim.¹ The trial court dismissed the remainder of the charges. The parties agreed that defendant would be sentenced to no more than four years in state prison. The trial court then ordered a probation report and scheduled the case for a sentencing hearing.

On April 30, 2010, the date set for the sentencing hearing, defense counsel requested an in camera hearing. During the hearing, defense counsel explained that defendant indicated a desire to withdraw his plea, and consequently counsel requested that the court conduct a *Marsden* hearing,² although counsel was unsure whether "it's simply a *Marsden* or if it's more of a withdrawal of plea." The court explained to defendant that a *Marsden* motion involves a determination of whether there is "a basis to change your court-appointed attorney," and added "if you want to change counsel because you don't believe that

¹ Defendant entered so-called *West* pleas where, to further his interests, he only consented to punishment without admitting any underlying facts. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 932; *People v. Manning* (2008) 165 Cal.App.4th 870, 879 [both of which mention *People v. West* (1970) 3 Cal.3d 595 as a basis for this type of plea, although *West* itself does not expressly describe it]; See also *North Carolina v. Alford* (1970) 400 U.S. 25 [27 L.Ed.2d 162].)

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

counsel is serving your best interest, we have to have what's called a . . . 'Marsden hearing' in which you would offer to me specific reasons demonstrating what [defense counsel] has or has not done that has been to your detriment." The court further stated that when a defendant wishes to withdraw his plea, "we have to start off by having a *Marsden* hearing, which sometimes is very awkward because the compliant [*sic*] may have absolutely no complaint of the services that he or she got from his or her attorney." The court told defendant, "So I'm a little, as I think [defense counsel] is, a little confused as to what your desires are. . . . [¶] . . . [¶] . . . So help me out by telling me what your needs would be at this moment or what your desires or what your thinking is."

Defendant's complaints were: (1) Defense counsel had not spent much time with him during the two years of representation; (2) Defense counsel did not subpoena any witnesses for "trial readiness"; (3) Defense counsel did not contact one of the witnesses who was to appear at the sentencing hearing; defendant contacted the witness, but the witness was unable to appear on short notice; and (4) Defendant never wanted to "take a plea," implying that he did so only because defense counsel said he would be committing suicide if he did not plead because it was such a good deal. Defendant said there were "a few other things," and that he could give the court a list. Defendant did not at any point say that he wanted a new attorney.

The court determined that defendant's complaints fell into two categories -- defense counsel's preparation for the

sentencing hearing and defendant's acceptance of the plea offer. The court observed that if the plea was withdrawn, there would be no need for a sentencing hearing. Consequently, the withdrawal of plea was the most important issue. Defendant agreed. The court deemed it appropriate to appoint conflict counsel to determine whether there were grounds for defendant to withdraw the plea and whether to do so would be in defendant's best interests. The court told defendant it would appoint counsel for that purpose unless defendant had a problem with proceeding that way. Defendant did not disagree with the court's plan.

On June 1, 2010, conflict counsel told the trial court that, after speaking with defendant and defense counsel and reviewing the file, including defendant's plea, he could not find any legal basis for withdrawing the plea. At that time, the court informed the parties that it felt obligated to appoint conflict counsel for all purposes. Therefore, counsel who represented defendant at the time of his plea was relieved and the conflict counsel who investigated and advised on the motion to withdraw the plea subsequently represented defendant at sentencing.

On July 23, 2010, the day set for the sentencing hearing, defendant's new attorney submitted sentencing on the probation report without witnesses. Defendant did not express a desire to call witnesses. The court sentenced defendant to a term of four years in state prison.

Defendant did not seek a certificate of probable cause in connection with his notice of appeal.

DISCUSSION

Defendant asserts that the trial court failed to conduct a sufficient inquiry into the basis for his claim that he received deficient representation, and defendant had a constitutional right to the substitution of counsel upon a showing of inadequate representation. Defendant further contends that appointing a new attorney did not cure the court's failure.

The People contend that defendant's argument is not cognizable on appeal because he failed to obtain a certificate of probable cause. We need not address the issues concerning the certificate of probable cause. Recent developments have clarified the procedure trial courts must follow when a defendant desires to withdraw a guilty or no contest plea. Reviewing this case in light of those developments, we conclude there is no error here.

In *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*), our high court held that "when a criminal defendant indicates a desire to withdraw a guilty or no contest plea on the ground that current counsel has provided ineffective assistance" (*Sanchez, supra*, at p. 84), "a trial court must conduct . . . a Marsden hearing only when there is at least some clear indication by the defendant, either personally or through counsel, that the defendant wants a substitute attorney. We additionally hold that, if a defendant requests substitute counsel and makes a showing during a Marsden hearing that the

right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. In so holding, we specifically disapprove of the procedure of appointing substitute or 'conflict' counsel solely to evaluate a defendant's complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea." (*Ibid.*, italics added.)

Here, the trial court need not have appointed conflict counsel because there was never a "clear indication by the defendant, either personally or through his current counsel" that he wanted a new attorney. (*Sanchez, supra*, 53 Cal.4th at p. 84; see *id.* at pp. 90, 91.) Thus, defendant was not entitled to a *Marsden* inquiry or substitution of counsel.

Defendant claims the trial court's *Marsden* inquiry was inadequate to determine whether defendant's right to counsel had been substantially impaired. Assuming, *arguendo*, the trial court had an obligation to engage in a *Marsden* inquiry and inquire further than reflected in the record or that defendant's complaints that led to appointment of conflict counsel implicitly required substitution of counsel for all purposes, there is no prejudice here.³ Had the court determined there had

³ Our high court seemed to equate the appointment of counsel to represent a defendant on a motion to withdraw a plea to granting a *Marsden* motion. (*Sanchez, supra*, 53 Cal.4th at p. 92 ["In the present case, the trial court appointed substitute counsel to represent defendant on a motion to withdraw his plea in lieu of conducting a *Marsden* hearing -- in effect, granting the

been an impairment of defendant's right to counsel, the end result would have been the same as what occurred here -- new counsel would have been appointed for all purposes.

Conflict counsel's determination that there were no grounds upon which to withdraw a plea -- a determination defendant expressly states he does not challenge in this appeal -- would not have been different had the court originally appointed conflict counsel for all purposes. After being appointed for all purposes, defendant's counsel submitted the sentencing matter on the probation report. No witnesses were called, and in the absence of a complaint by defendant, we must conclude that counsel and defendant decided the witnesses defendant previously thought might testify on his behalf would not be helpful. We conclude beyond a reasonable doubt that defendant was not denied effective assistance of counsel. (*Sanchez, supra*, 53 Cal.4th at p. 92; *Marsden, supra*, 2 Cal.3d at p. 126.)

DISPOSITION

The judgment is affirmed.

MURRAY, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

defendant's *Marsden* motion without conducting the required hearing."].)