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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

FABIAN ABARCA SALAS,

Defendant and Appellant.

C066371

(Super. Ct. No.
CRF080005273)

This is the second time this case has come before us. In *People v. Salas* (June 9, 2010, C062523 [nonpub.opn.]) a jury convicted defendant of transportation of methamphetamine, two counts of possession of methamphetamine, possession of drug paraphernalia, driving without a driver's license, and falsely representing his identity to a law enforcement officer. The court sentenced defendant to 12 years eight months in prison.

Defendant appealed, contending that both during trial and at sentencing the court had misinformed him of his rights

regarding a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We agreed and remanded the matter to the trial court solely for the purpose of recalculation of his custody credits and to afford him a *Marsden* hearing consistent with procedures set forth in *People v. Smith* (1993) 6 Cal.4th 684. On September 27, 2010, the court conducted the *Marsden* hearing and on October 1 the court denied the motion.

Defendant appeals, again contending the trial court erred in denying his *Marsden* motion. We disagree.

FACTS AND PROCEEDINGS

On July 23, 2008, a police officer stopped a Ford Explorer for running a red light. Defendant, the driver and sole occupant of the Explorer, had a white flakey substance on his lips, moustache and beard. Among items scattered on the floorboard of the passenger's side of the Explorer were additional white flakes and a torn baggie with white flakes in it. The white flakey substance found on the floorboard and in the baggie was methamphetamine and weighed approximately 0.6 grams. Defendant admitted swallowing a \$10 bag of methamphetamine just before being stopped. Defendant started getting ill, medical personnel were called and defendant was taken to a hospital.

On November 4, 2008, officers were conducting an investigation at the residence of Esteban Gonzalez when defendant walked in. Defendant admitted to an officer that he had a methamphetamine pipe in his possession. The officer

removed the pipe from defendant's jacket and a baggie of methamphetamine from a coin pocket of defendant's pants.

Gonzalez testified that on November 4, 2008, defendant was helping him move into Gonzalez's residence. Because defendant's clothes got dirty, Gonzalez gave defendant a change of clothing, including a jacket and pants. According to Gonzalez, he had left a methamphetamine pipe in the jacket and a baggie of methamphetamine in the pants. Gonzalez admitted that on November 4 he was arrested for possession of methamphetamine and that he was under the influence of that drug.

DISCUSSION

Marsden Hearing

At the *Marsden* hearing conducted on remand, defendant set forth his complaints about his trial counsel, who was a deputy public defender at the time of trial but had since gone into private practice.

Defendant's First Complaint

Defendant said he had been in custody eight months during which time counsel had only come "to see [him] two or three times."

Counsel replied that outside of speaking with defendant in court he had spoken with defendant at least two times and thought "it was more than that." And during court dates they spoke at least "six if not more" times.

The court found that counsel had stated he had seen defendant six or more times during court appearances, he had

done the preliminary hearing, he read the police reports, he had witnesses under subpoena, and he had his investigator try to speak with the truck's owners but they would not talk to him. The court concluded that counsel had "quite a bit of contact with you" and that counsel's investigation was "sufficient."

Defendant's Second Complaint

Referring to the drug charges arising from the stop of the Explorer defendant was driving on July 23, 2008, defendant claimed that counsel had refused his request to review his hospital records made after his arrest. These records, according to defendant, would show that he was so severely under the influence that he was unable to remember what happened when he was arrested while driving the truck, and that neither the truck nor the drugs found therein were his.

Counsel responded that he was aware of records from having read the police report, but did not believe they were relevant to whether defendant was driving when stopped or whether the drugs were in his possession. Moreover, counsel thought the records could actually hurt defendant because the defense was that the evidence was insufficient to show defendant was aware of the methamphetamine on the floorboard and the hospital records would show that he had methamphetamine in his system. And as to defendant's not owning the Explorer or possessing the methamphetamine found therein, counsel had sent an investigator to talk to the owners but they refused to speak to him.

The court accepted counsel's representation that he was aware of defendant's hospital records. Since counsel had argued that the evidence was insufficient to show that defendant was aware of the methamphetamine flakes gathered from the floorboard of the Explorer, records which showed defendant had been medically determined to be under the influence would have undermined this argument. The court concluded that counsel's failure to bring the hospital records to the jury's attention was a "reasonable tactical decision."

Defendant's Third Complaint

Referring to the charges arising from the drugs found on defendant on November 4, 2008, at Gonzalez's residence, defendant said that counsel had not called a witness, Hector Olivera, who had seen defendant borrow clothes from Gonzalez.

Counsel explained that he had subpoenaed Olivera, but he did not call him to testify because he learned from the prosecutor that Olivera had been visiting defendant in jail and had put money into defendant's account, thereby demonstrating Olivera was not an impartial witness.

As to the drugs found on defendant at Gonzalez's residence, the court explained to defendant that counsel's not calling Olivera as a witness was a reasonable "tactic" because Olivera's having placed money in defendant's jail account rendered him a noncredible witness.

Defendant's Fourth Complaint

Defendant stated that he had told counsel during the trial that jurors had seen that he was wearing handcuffs and chains during jury selection.

Counsel said he did not recall defendant making this complaint during trial, but defendant did so after trial. Counsel spoke to "several" jurors after trial, many of whom asked whether defendant was in custody, which led counsel to believe they were unaware of defendant's custodial status.

The court concluded that defendant had failed to establish that any jurors had seen him in handcuffs. The court noted, "we were very careful with regard to bringing you into the courtroom, having you seated and bringing the jury in." The court also cited statements by Allison Zuvela, who was trial counsel's supervisor and was assisting him at trial, that she was present when the jurors came in and the bailiff directed them to leave.

Defendant's Fifth Complaint

Defendant claimed that a member of the jury was a friend of counsel's family.

Counsel acknowledged that during jury selection he became aware that he knew one of the jurors, but stated he had not seen or had contact with that juror for at least "20 plus years." Counsel did not believe the juror's having known him would be a negative for defendant's case.

As to counsel's having known a member of the jury, the court observed that counsel had known him from "many years ago" and had not had any contact with the juror "for more than 20 years." The court concluded "there was no reason to think [the juror] would be adverse to either [trial counsel] or to you, which again is a question of trial tactics."

"[S]ubstitute 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 failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation" (*People v. Smith, supra*, 6 Cal.4th at p. 696.) "'To the extent there [is] a credibility question between defendant and counsel at the hearing, the court [is] "entitled to accept counsel's explanation.'" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) "We review a trial court's decision declining to relieve appointed counsel under the deferential abuse of discretion standard." (*Ibid.*)

Defendant was afforded a full opportunity to express all of his complaints. His counsel's replies, which addressed each complaint and were accepted by the court, demonstrated adequate investigation and reasonable tactical decisions. Consequently, we find no abuse of discretion by the trial court in denying the *Marsden* motion.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ MAURO _____, J.