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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ADAM RAMSEY, Defendant and Appellant.	C067822 (Super. Ct. No. 09F06854)

Defendant Adam Ramsey pled no contest to attempted escape from a jail facility by force and admitted both a firearm enhancement and a strike offense. In exchange for his plea, a second strike offense and a separate charge of firing at an inhabited building were dismissed. The prosecution also agreed not to file any charges in an unrelated incident as part of the plea agreement. Defendant was sentenced to a negotiated term of six years in prison, doubled to 12 years for the strike, plus an additional year for the firearm enhancement, bringing the entire term of imprisonment to 13 years.

On appeal, defendant raises two issues. First, he argues the trial court erred in denying his *Marsden*[1] motion for new appointed counsel and that this error is cognizable on appeal even after his no contest plea pursuant to the plea agreement. Second, he contends the abstract of judgment must be amended to reflect the $40 court security fee the trial court actually imposed instead of the $80 fee shown in the abstract.

We agree with the People that defendant's arguments regarding his *Marsden* motion are not cognizable on appeal absent a claim that his plea was not voluntarily and intelligently entered. We find merit in the second contention, however, and conclude the $80 security fee recorded in the abstract of judgment is the result of a clerical error. Accordingly, we affirm the judgment but order the trial court to correct the abstract to reflect a $40 court security fee.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of the underlying offense are not relevant to this appeal.

Defense counsel Clemente Jimenez was appointed to represent defendant. Jimenez had represented him before, in a recent case procedurally isolated from this one. When defendant made a *Marsden* motion in this case, the trial court held the required hearing and inquired into his reasons for requesting new appointed counsel.

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

Defendant articulated two reasons for his request: first, Jimenez had failed to file a notice of appeal in his previous case and, second, there had been "a severe breakdown in communication" between them. The trial court found defense counsel had represented defendant properly and denied the motion.

Ten days later, defendant entered into a plea agreement with a negotiated prison term. During sentencing, the court ordered defendant to pay a court security fee of $40. The abstract of judgment, however, shows an $80 court security fee.

Defendant timely filed a notice of appeal and obtained a certificate of probable cause.

DISCUSSION

I

Denial Of Marsden Motion

Defendant argues the trial court abused its discretion by "denying [his] Marsden request for a new attorney." Specifically, defendant asserts the court erred in "focus[ing] on counsel's experience rather than the concerns of [defendant]; . . . [and] limit[ing] the scope of the review to trial [the] attorney's performance in the present case." Defendant also contends "[t]he Marsden inquiry in this case appeared very limited, with the court making little effort to get to the heart of the dispute and determine whether a true conflict existed or [defendant] was being deprived of competent counsel." Without reaching the merit of these arguments, we conclude defendant

waived the right to assert them on appeal when he entered into the plea agreement.

A defendant's guilty or no contest plea "concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt." (*People v. Turner* (1985) 171 Cal.App.3d 116, 125.) A guilty or no contest plea "also waives any irregularity in the proceedings which would not preclude a conviction." (*Id*. at p. 126, citing *People v. Nooner* (1962) 205 Cal.App.2d 723, 726.) "[B]y pleading guilty the defendant admits that he did that which he is accused of doing and he thereby obviates the procedural necessity of establishing that he committed the crime charged. In short, a guilty plea 'admits all matters essential to the conviction.' [Citation.] A defendant thereafter can raise only those questions which go to the power of the state to try him despite his guilt." (*Turner*, at p. 126, quoting *People v. DeVaughn* (1977) 18 Cal.3d 889, 895.) According to *Turner*, this is what Penal Code section 1237.5 means when it provides that "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" can be raised on appeal following a guilty or no contest plea;[2] those grounds

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[2] In full, Penal Code section 1237.5 provides as follows:

"No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

challenge the court's right to put a defendant on trial regardless of whether he or she actually committed the crime. (*Turner*, at pp. 125-126.)

As defendant correctly points out, *Turner* identified denial of the right to counsel as a claim that survives a guilty plea. (*People v. Turner*, *supra*, 171 Cal.App.3d at p. 127, citing *People v. Holland* (1978) 23 Cal.3d 77, 85.) Defendant's attempt to extend this argument to any and all denials of *Marsden* motions, however, is unpersuasive.

Holland, the case on which *Turner* relied for its assertion that the denial of the right to counsel survives a guilty plea, addressed the right to retain counsel of one's choice if a defendant has the means. (*People v. Holland*, *supra*, 23 Cal.3d at p. 89.) In *Holland*, the police seized the defendant's life savings. (*Id*. at p. 81.) He asserted numerous times in court that he needed the money returned in order to retain counsel of his choice. (*Id*. at pp. 81-82.) When his funds were not returned and he was faced with an impending trial represented by appointed counsel, he pled guilty to the charges. (*Id*. at p. 82.) On appeal, he argued he had been denied the right to retain counsel of his choice when he had the means to do so.

"(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

"(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

(*Id*. at p. 83.) Our Supreme Court reversed his conviction because "[h]e was entitled to use his own resources to secure counsel of his choice . . . [and] the trial court failed to intervene to permit [him] to exercise his constitutional right to counsel . . . ." (*Id*. at p. 89.)

Defendant argues *Holland* supports the proposition that a *Marsden* claim always survives a no contest plea because "a *Marsden* hearing is simply one means of securing the constitutional right to effective assistance of counsel during all stages of the criminal proceedings." (Italics added.) This mischaracterizes *Holland*'s holding. *Holland* did not concern a *Marsden* motion, nor did it concern the right to effective appointed counsel. *Holland* held a court must assure a defendant can retain counsel when he or she has the means to do so, which is not equivalent to an unfettered right to counsel of choice. (*People v. Holland*, *supra*, 23 Cal.3d at p. 89 ["The state's refusal to return [the defendant]'s life savings effectively blocked [the defendant]'s exercise of his constitutional right to retain counsel of his choice. He was not merely prevented from securing the assistance of a particular attorney . . . but precluded from using his own resources to retain any private counsel"].)

The purpose of a *Marsden* motion is to give a defendant an opportunity to seek new appointed counsel because he or she is receiving ineffective assistance from current appointed counsel. (See *People v. Crandell* (1988) 46 Cal.3d 833, 854; *People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) It is not an opportunity

to select counsel of a defendant's choice, as is possible in the open legal market, where a client can terminate representation for any reason or no reason. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1122 ["To the extent defendant claims a violation of the right to counsel of choice, that right is not applicable here because it applies only to retained counsel"].) In order to succeed on a *Marsden* motion, however, a defendant must demonstrate actual instances of ineffective assistance, a severe breakdown in communication that amounts to ineffective assistance, or both. (*Crandell*, at p. 854 ["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]"].) *Holland* did not address this standard because it concerned only the right to retain counsel of one's choice if a defendant has the means to do so, and is therefore inapplicable here. (*People v. Holland*, *supra*, 23 Cal.3d at p. 89.)

Defendant seeks further support for his argument that a *Marsden* claim must survive a no contest plea in *People v. Ribero* (1971) 4 Cal.3d 55. *Ribero* simply lists ineffective assistance of counsel as one of the claims that can survive a guilty plea. (*Id.* at p. 63, citing *People v. Natividad* (1963) 222 Cal.App.2d 438, 441, citing *People v. Wein* (1958) 50 Cal.2d 383, 410 [which states, "[t]he handling of the defense by counsel of the accused's own choice will not be declared inadequate except in

those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a ‘farce or a sham[,]’” quoted language originated in *U. S. ex rel. Feeley v. Ragen* (7th Cir. 1948) 166 F.2d 976, 981].) Like *Holland*, *Ribero* did not concern a *Marsden* motion or the right to effective appointed counsel. In fact, *Ribero* did not even concern the right to effective assistance of counsel: “we are now concerned only with the issue of whether section 1237.5 is applicable when a defendant seeks review of an order denying a motion to withdraw a guilty plea even though the motion relates to the validity of the plea.” (*Ribero*, at p. 62.) Because *Ribero* does not address the issue in this case, it is also inapplicable.

Defendant first ignores and then attempts to distinguish or call into question the two cases most relevant here, *People v. Lobaugh* (1987) 188 Cal.App.3d 780 and *People v. Lovings* (2004) 118 Cal.App.4th 1305, but they are controlling.

In *Lobaugh*, the defendant argued the trial court had abused its discretion in denying his *Marsden* motion. Without reaching the merits of his argument, this court held the issue was not cognizable on appeal absent a contention the defendant’s subsequent guilty plea was involuntary or unintelligent. (*People v. Lobaugh*, *supra*, 188 Cal.App.3d at p. 786.) We relied on *DeVaughn* and *Turner*, discussed above, to conclude that a *Marsden* argument on appeal following a guilty plea must include a contention the *Marsden* error was related to the plea itself; i.e., the plea was rendered involuntary or unintentional due to ineffective assistance of counsel, as a result of denial of the

Marsden motion. (*Lobaugh*, at p. 786 [“Nor does defendant urge that the advice he received from counsel was inappropriate concerning his plea resulting in the plea not being intelligently and voluntarily made”].) We concluded the argument was foreclosed for purposes of appeal because the “error d[id] not go to the legality of the proceedings resulting in the plea” (*Lobaugh*, at p. 786), again linking back to *Turner*’s requirement that an appeal following a guilty plea “can raise only those questions which go to the power of the state to try [a defendant] despite his guilt” (*People v. Turner*, 171 Cal.App.3d at p. 126).

Although ineffective assistance of counsel is one such question -- as pointed out in *Turner* -- *Lobaugh* and other cases (described below) effectively hold that asserting erroneous denial of a *Marsden* motion is not the same as asserting ineffective assistance of counsel. (*People v. Lobaugh*, *supra*, 188 Cal.App.3d at p. 786; *People v. Turner*, *supra*, 171 Cal.App.3d at pp. 125-127.) A claim of ineffective assistance of counsel is cognizable on appeal following a guilty plea because the circumstances of the plea must be examined to determine whether the plea was the product of inadequate advice. (*People v. Everett* (1986) 186 Cal.App.3d 274, 279, citing *People v. Pope* (1979) 23 Cal.3d 412, 425–426 [“First, we consider the appealability of [the defendant]’s claim he was denied the effective assistance of counsel before he entered his guilty pleas. . . . Such claims are cognizable on appeal where there is an adequate record for review”].) A claim of erroneous

denial of a *Marsden* motion, on the other hand, must include a contention the plea was involuntary or unintelligent to be cognizable on appeal. (*Lobaugh*, at p. 786.) Without this additional contention, it is merely a claim the trial court should have examined the attorney's effectiveness or the attorney-client relationship more closely, not necessarily a claim there were actual instances of ineffective assistance that rendered the plea involuntary or unintelligent. (See *People v. Crandell*, *supra*, 46 Cal.3d at p. 854.)

Lovings supports this analysis. In *Lovings*, the defendant filed two separate unsuccessful *Marsden* motions, then pled guilty against counsel's advice when trial was beginning. (*People v. Lovings*, *supra*, 118 Cal.App.4th at pp. 1307-1309.) The defendant later moved to withdraw his plea in a letter to the court, stating, "'I wasn't in my right frame of mind nor did I have legal representation at that time.'" (*Id*. at p. 1309.) The court held a separate trial to determine his competency when he entered the plea. (*Id.* at p. 1310.) A jury found he was competent and the court denied his motion to withdraw his plea. (*Ibid.*) On appeal, the defendant attempted to distinguish *Lobaugh* on several different grounds. (*Lovings*, at pp. 1311-1312.)

First, he argued his appeal was cognizable because he had obtained a certificate of probable cause, unlike the defendant in *Lobaugh*, who had not obtained one. (*People v. Lovings*, *supra*, 118 Cal.App.4th at p. 1311.) The court rejected this argument, stating, "the lack of a certificate of probable cause

played no part in *Lobaugh*'s resolution of the *Marsden* issue. Waiver by the plea was the 'rule' the court used to decide that issue [citation] and was the holding of the case on that issue. Further, a certificate of probable cause only perfects an appeal; it does not expand or limit the cognizable issues." (*Lovings*, at p. 1311, citing *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178.)

Second, he argued the plea was entered against the advice of counsel and did not benefit him. (*People v. Lovings*, *supra*, 118 Cal.App.4th at p. 1311.) Regarding the plea being entered against the advice of counsel, the court noted, "[the defendant] does not and could not contend that he received inappropriate legal advice concerning his plea, because the plea was entered over counsel's objection. . . . [¶] . . . [¶] . . . [C]ounsel's objection to the plea in this case is a fact that hurts rather than helps [the defendant]." (*Ibid.*) The court also rejected the defendant's argument the benefits of the plea (or lack thereof) were relevant, stating, "The merits of the bargain are irrelevant in any event; the issues as to the plea are whether it was involuntary, unintelligent, or the product of inappropriate advice from counsel [citation], and none of those problems are present here." (*Id.* at p. 1312.)

The court also addressed and rejected the defendant's potential argument he felt coerced into entering a no contest plea because the trial court had denied his *Marsden* motions. (*People v. Lovings*, *supra*, 118 Cal.App.4th at p. 1312.) The court reasoned "[the defendant]'s no contest plea was a very

pronounced ‘break in the chain of events’ involving the attorney-client relationship in this case. The animosity and poor communications previously suggested or alleged were not in evidence at the plea hearing, where [his attorney] made it clear what he thought of the plea, and [the defendant] confirmed that [his attorney] had ‘been very good’ and tried to dissuade him. [The defendant’s attorney] appears to have been prepared for trial when it began, and [the defendant]’s previous concerns with [his attorney]’s trial preparation and attention to the case were in any event obviated by the no contest plea eliminating guilt as an issue.” (*Ibid*.) The court concluded “the *Lobaugh* test for waiver--whether the plea itself was involuntary or the product of poor legal advice--is especially persuasive [here].” (*Lovings*, at p. 1312.)

The defendant’s last argument was based on his letter to the trial court attempting to withdraw his plea, in which he stated he “did not ‘have legal representation’ when the plea was entered.” (*People v. Lovings*, *supra*, 118 Cal.App.4th at p. 1312.) The defendant argued the letter demonstrated “he ‘viewed representation by [his attoney] as being no representation at all,’ and that their relationship was ‘so poor by the time the trial started that he opted to reject [his attorney]’s advice and just plead nolo contendere to everything.’” (*Ibid*.) The court rejected this argument as well, concluding, “he was in fact represented when he entered the plea, and the record establishes that advice of counsel had no bearing on his decision to do so. Accordingly, the prior

Marsden rulings cannot be deemed to have had any abiding impact that tainted the plea, and the plea waived any error in connection with those rulings." (*Ibid*.)

In his reply brief here, defendant asserts "reliance on [*Lobaugh* and *Lovings*] is misplaced," implicitly arguing the holding in *Lobaugh* is unsupported. Specifically, he contends "the validity of the principle that denial of a Marsden motion is an issue not cognizable on appeal, after a guilty plea, rests upon whatever force the reasoning of *Lobaugh* has, since *Lovings* simply relied on *Lobaugh*. *Lobaugh* cited two cases to support its conclusion, and these cases must be examined carefully to determine if they support *Lobaugh'*s conclusion." After discussing a number of related cases, defendant concludes his analysis by stating, "the improper denial of this right is cognizable on appeal, despite a guilty plea." In support of this assertion, he relies on *Ribero* and *Holland*. As explained above, however, neither *Ribero* nor *Holland* is relevant to this case. *Holland* concerned only the right to retain counsel of one's choice if a defendant has the means to do so, and *Ribero* did not concern the right to effective assistance of counsel. (*People v. Holland*, *supra*, 23 Cal.3d at p. 89; *People v. Ribero*, *supra*, 4 Cal.3d at p. 62.) Defendant's attempts to distinguish *Lobaugh* and *Lovings* based on *Holland* and *Ribero* are unavailing; the similarities between this case and *Lovings* in particular cannot be disregarded.

Moreover, *Lovings* did not "simply rel[y] on *Lobaugh*" as defendant argues. As outlined above, *Lovings* addressed each of

the defendant's arguments in detail and reached an independently well-reasoned conclusion based on the rule set out in *Lobaugh*. (*People v. Lovings*, *supra*, 118 Cal.App.4th at p. 1311-1312.) Defendant's attempt to dismiss *Lovings* is unpersuasive, as *Lovings* is, in fact, analogous to this case.

In *Lovings*, the defendant filed two unsuccessful *Marsden* motions, then pled guilty against counsel's advice. (*People v. Lovings*, *supra*, 118 Cal.App.4th at pp. 1307-1309.) Here, defendant filed a *Marsden* motion and then entered into a plea agreement 10 days later with the assistance of counsel. The defendant in *Lovings* and defendant here both obtained certificates of probable cause, which, according to the analysis in *Lovings*, "does not expand or limit the cognizable issues." (*Lovings*, at p. 1311, citing *People v. Hoffard*, *supra*, 10 Cal.4th at p. 1178.)

Like the defendant in *Lovings*, defendant here argues it was error to deny his *Marsden* motion, but also like the defendant in *Lovings*, defendant does not offer any argument his plea was in any way involuntary, unintelligent, or the product of inadequate advice. (See *People v. Lovings*, *supra*, 118 Cal.App.4th at p. 1312.) As in *Lovings*, "[t]he animosity and poor communications previously suggested or alleged were not in evidence at the plea hearing" in this case either, and "[defendant]'s previous concerns with [his attorney's] trial preparation and attention to the case were in any event obviated by the no contest plea eliminating guilt as an issue" in this case as well. (*Ibid*.) Due to the similarities between *Lovings*

and this case, we are compelled to apply *Lovings*'s conclusion that "the prior *Marsden* ruling[] cannot be deemed to have had any abiding impact that tainted the plea, and the plea waived any error in connection with th[at] ruling[]." (*Ibid*.)

Defendant's argument that we are free to conclude otherwise not only ignores the precedential value of *Lobaugh* and *Lovings*, it also disregards additional case law that supports their holdings. For example, *U.S. v. Foreman* (9th Cir. 2003) 329 F.3d 1037, 1039 held that failure to make a full inquiry into the basis for a defendant's *Marsden* motion is waived by an unconditional guilty plea. *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1027 referred to an erroneous denial of a *Marsden* motion as a "non-structural constitutional error." To seek redress for this type of error, a defendant "may only attack the voluntary and intelligent character of the guilty plea." (*Tollett v. Henderson* (1973) 411 U.S. 258, 267 [36 L.Ed.2d 235, 243].) *Foreman* stated explicitly that "[f]ailure to substitute counsel does not by itself render a plea involuntary," and, as discussed above, defendant does not present any other argument that his plea was involuntary or unintelligent. (*Foreman,* at p. 1039.)

When defendant accepted the plea agreement 10 days after his *Marsden* motion was denied, his trial attorney confirmed he had discussed the charges and defenses with defendant, as well as his rights, and defendant affirmed he understood and voluntarily waived each of those rights. Defendant also affirmed he was entering his plea freely and voluntarily. There

is nothing in the record to suggest that defendant's plea was affected by a breakdown in communication with his attorney or the result of ineffective assistance of counsel. Because defendant does not assert his plea was unintelligent, involuntary, or the product of substandard advice, the claim of *Marsden* error is waived and not cognizable on appeal.

II

Court Security Fee

Defendant contends "the abstract of judgment must be corrected because it does not reflect the oral pronouncement of judgment." The People concede the error. We agree and order the trial court to correct the abstract.

Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) Here, during the sentencing hearing, defendant was ordered to pay a $40 court security fee. The abstract of judgment, however, shows that defendant was ordered to pay $80. Because the abstract of judgment is not consistent with the oral pronouncement made during the sentencing hearing, we conclude the $80 security fee is the result of a clerical error and order the abstract of judgment corrected to reflect a $40 fee.

DISPOSITION

The judgment is affirmed. The trial court is ordered to correct the abstract of judgment to reflect a $40 court security

fee and to forward a certified copy of the corrected abstract to the Department of Corrections and Rehabilitation.

ROBIE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.