

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW ALEXANDER MOLINA,

Defendant and Appellant.

C070801

(Super. Ct. No. 11F01850)

Defendant Matthew Alexander Molina pleaded no contest to robbery (Pen. Code, § 211) felon in possession of a firearm (former Pen. Code, § 12021), felony evading an officer (Veh. Code, § 2800.2) and admitted a strike allegation (Pen. Code, §§ 667, subs. (b)-(i), 1170.12). After denying defendant's motion to withdraw the plea, the trial court imposed a stipulated term of 12 years eight months in state prison.

The trial court granted defendant's request for a certificate of probable cause. On appeal, defendant contends the trial court violated defendant's attorney-client privilege by requiring counsel give evidence against defendant's motion to withdraw his plea. We affirm the judgment.

## FACTS AND PROCEEDINGS

We dispense with the facts of defendant's crimes as they are unnecessary to resolve this appeal.

During the colloquy for defendant's no contest plea, the trial court asked defendant: "Are you under the influence of alcohol/drugs/or medication right now?" Defendant answered: "I wish." The court replied: "But you are not?" Defendant responded: "No."

At the sentencing hearing, defendant told the trial court he wanted to make a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and to set aside his plea "cause I'm on psychotropic medication and impairing my judgment." The trial court then heard and denied defendant's *Marsden* motion, a ruling he does not contest here. Turning to defendant's motion to withdraw his plea, the trial court asked defendant if there was anything about his plea that he wanted the court to consider other than his medication. Defendant replied, "No."

Defendant told the trial court he had been taking the drug Strattera for "ADHD" for about five months, including the day of his plea. He also took Adderall, Ritalin, and Risperdal since he was 14.

The trial court remarked that nothing from its memory of the plea proceedings or from the transcript "jumped out to the Court as being cause for concern, or that this defendant wasn't aware of what he was doing." The prosecutor agreed with the court's recollection, and remarked that defendant's motion was no more than "buyer's remorse which is not a legal ground to withdraw a plea."

The trial court asked defense counsel if there was anything he wanted to add regarding his perception of matters at the change of plea hearing. Counsel replied that he did not. The court and defense counsel then engaged in the following exchange:

“[The Court]: And you did not raise a [Penal Code section] 1368 at that time; is that correct?

“[Counsel]: That’s correct.

“[The Court]: And you certainly understand what’s required under [Penal Code section] 1368 as to when to declare a doubt; is that correct?

“[Counsel]: I’ve declared many doubts in my career. If I thought the case was what I saw that that was appropriate.

“[The Court]: And you spent about two years in Mental Health court assignment; is that right?

“[Counsel]: That’s correct.”

The trial court noted defense counsel had “a level of expertise on mental health issues,” and remarked it had seen him interact with defendant on several occasions. Continuing, the court found no basis for allowing defendant to withdraw his plea, agreeing with the prosecutor’s description of the motion as “buyer’s remorse.”

## DISCUSSION

Defendant’s sole contention on appeal is that the trial court violated his attorney/client privilege by requiring his defense counsel to give evidence against his motion to withdraw his plea. His claim is based on the exchange described above, where, in response to the court’s questions, defense counsel stated that he had not filed a declaration raising doubts about defendant’s competency to stand trial (Pen. Code, § 1368, hereafter § 1368), understood what was required under section 1368, and previously had done so when appropriate.

Based on this innocuous exchange, defendant contends the trial court “called for [trial counsel] to opine about the mental condition of his client based upon his contact and conversations with him over the course of his representation.” He claims the trial court’s allegedly improper inquiry prejudiced his motion to withdraw his plea as it

allowed the court to rule upon the motion based on trial counsel's " 'expertise' " rather than on its observations of defendant. Defendant asks us to reverse the trial court's ruling and remand the case for another judge to evaluate his motion.

The trial court first elicited from trial counsel a matter of public record, whether counsel filed a section 1368 declaration. Since it is a matter of public record, the information was not covered by the attorney/client privilege. (*Green & Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 537.) Next, the court elicited information establishing trial counsel's competence to make a section 1368 declaration--trial counsel understood the standard and had, and would file such a declaration when appropriate. From this the trial court could infer that counsel did not think his client was incompetent. Even assuming that this involved an inference from privileged material, defendant's claim still fails. It has been long established that counsel's observations regarding a client's mental health are not protected by the attorney/client privilege, even if counsel's conclusions are drawn from privileged communications. (*People v. Bolden* (1979) 99 Cal.App.3d 375, 378; *Oliver v. Warren* (1911) 16 Cal.App. 164, 168; The New Wigmore, A Treatise on Evidence, Evidentiary Privileges (2d. ed. 2010) § 6.7.1, p. 738, fn. 48.)

Since the trial court did not elicit any privileged communications, defendant's contention fails.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.