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

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THE PEOPLE,

Plaintiff and Respondent,

v.

NANCY JO BEACH,

Defendant and Appellant.

C079722

(Super. Ct. No. NCR92885)

Defendant Nancy Jo Beach pleaded guilty to bringing a controlled substance into jail, possession of methamphetamine for sale, maintaining a place for the purpose of unlawfully selling, giving away, or using methamphetamine, and misdemeanor possession of a smoking device. She also admitted a prior strike conviction. The trial court sentenced her to an aggregate term of eight years in prison and granted her request for a certificate of probable cause.

Defendant now contends the trial court erred in denying her requests for substitution of counsel, the breakdown in communication with counsel resulted in a plea entered under duress, and new counsel should be appointed to move to withdraw

defendant's plea because her trial counsel provided ineffective assistance. Finding no merit in defendant's contentions, we will affirm the judgment.

### BACKGROUND

Officers served a search warrant at defendant's apartment on November 5, 2014. They found 1.86 ounces of marijuana, several methamphetamine pipes, hypodermic syringes, two digital scales, packaging material, and a baggie that had been thrown from the master bedroom window containing 0.56 grams of methamphetamine.

Defendant admitted smoking marijuana and methamphetamine in the apartment. She added that her son and his friends also used drugs in the apartment. Defendant said she previously sold methamphetamine from the apartment but had not done so in over three weeks.

Officers advised her she would face additional charges if she brought contraband into the jail. When asked at the jail if she had any contraband, defendant said she did not. When searched, however, an officer found two baggies containing 0.68 grams and 0.94 grams of methamphetamine in her bra.

On January 12, 2015, defendant signed a waiver of preliminary hearing form which informed her that an offer on the charge of maintaining a place for the purpose of unlawfully selling, giving away, or using methamphetamine (Health & Saf. Code, § 11366 -- count III) would remain open until the arraignment on the information. At a hearing on the same date, defendant orally waived her right to a preliminary hearing. The prosecutor reiterated that "an offer . . . has been made in this matter, it's a stipulated three-year term. It will remain open until the arraignment on the information."

At arraignment on the information on February 2, 2015, defense counsel informed the trial court that he had discussed the prosecutor's three-year offer with defendant "at length" and that she did not wish to accept it. The trial court addressed defendant directly, advising defendant that the offer had been made, the People were withdrawing the offer, defense counsel could do nothing to keep the offer open, and if the prosecutor

said “this is the way the offer is today and after today the ship sails, then that could be it.” Defendant said she understood and had discussed the matter with defense counsel. Defendant verbally confirmed that she was refusing the offer.

Defendant was present at the next pretrial conference on February 23, 2015. Defense counsel said the jury trial was set, they did not have a resolution, and he was confirming for trial.

At the third and final pretrial conference on March 27, 2015, defendant requested a hearing to substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). After excusing the prosecutor, the trial court queried why defendant felt appointed counsel was not adequately representing her. Defendant stated: “I just -- ever since he’s been my attorney, I feel like he’s not wanting to do anything for me. Um, it’s just -- it’s -- he’s not saying anything to the district attorney on these charges. Nothing. I’m just -- I’m not happy, Your Honor. I’m just not happy.” When asked what defense counsel should have done, defendant responded that defense counsel should have “talked to the district attorney a little more and tried to work something out a little more. He isn’t fighting for me, sir. I don’t feel like he’s doing anything for me. At my age -- I care about my life. I’m sorry.” She added, “I feel like he should have worked a little harder for me, sir.” Defendant had nothing more to add.

When asked to respond, defense counsel said he had been practicing law for over 30 years, the last 17 years in private practice as a criminal defense attorney. He said he spoke with the prosecutor on several occasions and the best offer he had negotiated was a three-year term with dismissal of the prior strike conviction allegation. The offer was made on February 2, 2015. When defense counsel communicated the offer to defendant, she rejected the offer. “[O]nce the offer was rejected it was explained to her that the district attorney may or may not renew that offer, it may be a different offer.” Defense counsel noted that the current offer was six years and he had explained to defendant her options (accepting the offer, going to trial, or pleading to the sheet with the trial court

possibly dismissing the prior strike). Defense counsel had discussed the case with defendant and whether she had made incriminating statements to officers. Defense counsel informed defendant he did not believe she had a defense for taking drugs into the jail. He explained to her the maximum term for that count with a prior strike. He said defendant did not like the current offer but he did not control the prosecutor's office and could only negotiate. Defendant had rejected the offers and he was "prepared to go to trial if that's what she wants."

Defendant responded that at the prior court hearing, defendant planned to ask for a new attorney but defense counsel said "no, give me a chance." She went to his office and defense counsel said, "let me see what I can do when we go to court." But defendant said "it's worse" and "he didn't get no better." She complained defense counsel was not doing her justice.

In denying defendant's *Marsden* motion, the trial court found defense counsel credible, having observed defense counsel's representation of defendant at the current pretrial conference, where he tried to get the prosecutor to reduce the number of years. The trial court determined defendant's complaint that defense counsel was not doing enough for her was not a valid reason to remove him. Contrary to defendant's claim, the trial court said it "sounds like you're communicating just fine." The trial court advised defendant that the prosecutor controlled the offer and that her "attorney is doing somewhat like that doctor [who tells you that you have cancer], telling you what he believes the truth is and what you may be looking at and it might be in your best interest to do a certain thing." The trial court said it was an option, it was made clear to her, and defendant did not have to take it. Defendant responded, "But it was supposed to be better, Your Honor." The trial court said defense counsel is not removed merely because the prosecutor does not make the desired offer.

Proceedings resumed and defense counsel informed the trial court and the prosecutor that defendant had rejected the six-year offer. The trial court informed

defendant that because it was the final pretrial conference, the court would not accept a subsequent plea agreement. Defendant said defense counsel had not explained that it was her last chance to accept an offer.<sup>1</sup> The trial court informed defendant that she had the lunch recess to discuss the offer with defense counsel and then to confirm for trial or accept the current offer.

After the lunch recess, defense counsel informed the trial court that defendant did not want to accept the six-year offer. Defense counsel said he had explained the options to defendant: accept the six-year offer; enter an open plea to the sheet and argue about the appropriate sentence; or confirm for trial. Defense counsel said defendant wanted to have her day in court, a court trial rather than a jury trial, to explain the circumstances of her offenses. Defendant waived her right to a jury trial and the trial court scheduled a court trial. The prosecutor advised that the six-year offer was revoked.

On April 9, 2015, defense counsel advised that defendant wished to enter a plea of guilty to all charges and admit the prior strike allegation. The trial court queried whether defendant had read the plea form, whether she had initialed, dated and signed it, whether she understood each and every part, whether she had sufficient time to discuss the plea with her attorney, and whether she understood the maximum consequences of her plea. Defendant answered affirmatively to each question and then orally entered her plea. Defendant pleaded guilty to bringing a controlled substance into jail (Pen. Code, § 4573, subd. (a) -- count I), possession of methamphetamine for sale (Health & Saf. Code, § 11378 -- count II), maintaining a place for the purpose of unlawfully selling, giving

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<sup>1</sup> Defendant stated, “When I went to visit -- when I went to [defense counsel’s] office, [he] didn’t say that it was going to be a final offer for the next time we went to court . . . .” Defendant also stated, “I’m not understanding all -- he’s not telling me all --” Defense counsel responded, “I believe her position is that I did not explain to her what her options were and I’ve--” Defendant interrupted, “That this was going to be the last thing . . . oh my God . . . .” On appeal, defendant claims this shows that defense counsel had not adequately prepared defendant for the hearing.

away, or using methamphetamine (Health & Saf. Code, § 11366 -- count III), and possession of a smoking device, a misdemeanor (Health & Saf. Code, former § 11364.1, subd. (a) -- count IV). She also admitted a prior strike conviction allegation (a 1990 Kansas robbery). (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) The trial court found that defendant's plea was voluntary, knowing, and intelligently entered.

Defense counsel sought to waive time for sentencing, explaining he planned to file a request to dismiss the prior strike conviction allegation pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Defense counsel asked that defendant remain at liberty pending sentencing; the prosecutor objected, noting defendant was late to court that morning. When the trial court indicated defendant would be remanded to custody, defendant personally asked for time because her belongings and her dog were in a motel room. The trial court said it was the day for trial and she knew the potential consequences. Defendant claimed she did not, however, saying, "What is going on" and "I don't understand why" and apologizing for being late. The trial court said she was not being remanded to custody for being late; she was being remanded to custody because she had pleaded guilty, was found guilty and was facing a potential 10-year sentence.<sup>2</sup>

On June 1, 2015, defense counsel informed the trial court that defendant wanted to withdraw her plea. According to defense counsel, defendant wanted another attorney to review the record and determine whether there was a basis to withdraw her plea.

The trial court held a *Marsden* hearing. Defendant said, "Your Honor, and I realize that he is the court appointed attorney, but he lies, Your Honor. He tells me one thing and does another. He -- I can't -- it's miscommunication. It took me -- I sat in jail for about a month before he came and talked to me. [¶] I was unaware, the first time that I had my offer on the table, that I had to give my answer right then and there. That -- he

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<sup>2</sup> Defendant now claims this further shows that defense counsel did not adequately prepare her for the hearing by explaining she would be taken into custody.

didn't tell me I needed to do that right then and there. That -- that's -- and then it's just ongoing, he tells me one thing and does another. It's been a conflict of interest from the word go. [¶] . . . But I'm serious when I tell you that he lies, he lies. He tells me one thing and then I see him the next time and it's -- he tells me he didn't say that. I just -- I -- I feel like -- I'm 60 years old, Your Honor, and my life matters to me and I don't think he's in my best interest. I'm sorry. [¶] But I just feel threatened by he says that he -- I have to take this or I'm going to make you mad and you're the judge. I have to take this offer or I'm going to make the judge mad? That's, to me, threatening me and I get scared because I'm 60 and I don't know if I'll make another prison term. I'm sorry."

Defense counsel outlined his experience as an attorney. In response to defendant's claims, defense counsel said he had advised defendant of what was contained on the plea form, that he had previously advised her of the two offers from the prosecutor, both of which she had rejected, and that on the eve of the court trial, he advised her that her option was to plead to the sheet. If she did so, he would file a request to dismiss the prior strike, that there were no promises, and that she was ineligible for probation unless unusual circumstances were shown which he would attempt to show.

Defendant disputed defense counsel's statements, claiming he had told her at the jail, "[A]re you ready to go home? . . . because I'm going to go for time served and five years probation." She claimed he said the probation report was "very good." She disagreed, commenting that the report had nothing positive in it. Defendant asked the trial court for a chance at probation as she was concerned about prison time given her poor health and the needs of her six-year-old granddaughter. Defendant complained defense counsel was not asking for drug court for her.

The trial court denied defendant's *Marsden* motion "to the extent that it's a request to relieve [defense counsel]." The trial court stated, "There aren't facts that would warrant appointing new counsel."

Proceedings resumed and defense counsel requested that the trial court dismiss the prior strike conviction allegation, noting that defendant had a drug problem, she was 60 years old, the amount possessed was small, and her prior strike conviction was 25 years old. In denying the *Romero* request, the trial court cited defendant's extensive criminal history since the prior strike conviction.

The prosecutor sought the maximum sentence of 10 years 8 months, while defense counsel argued for the low or midterm. The trial court noted the lack of mitigating factors, adding that defendant did not enter a plea at an early stage but had she accepted the three-year offer she would have been in a much better position. Defendant interrupted, stating she was confused and thought it was a plea for six years. After correcting defendant, the trial court sentenced her to state prison for an aggregate term of eight years (the upper term on count I, doubled for the prior strike, and concurrent terms on the remaining counts). The trial court granted defendant's request for a certificate of probable cause. (Pen. Code, § 1237.5.)

#### DISCUSSION

Defendant contends the trial court erred in denying her requests for substitution of counsel, the breakdown in communication with counsel resulted in a plea entered under duress, and new counsel should be appointed to move to withdraw defendant's plea because her trial counsel provided ineffective assistance.

We review a trial court's denial of a *Marsden* motion for abuse of discretion. (*People v. Streeter* (2012) 54 Cal.4th 205, 230 (*Streeter*)). "Denial is not an abuse of discretion 'unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 599.) A defendant is entitled to substitute his appointed counsel " 'if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*Ibid.*)

An attorney's representation is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674, 693-694].) “[T]actical disagreements between a defendant and his attorney or a defendant’s frustration with counsel are not sufficient cause for substitution of counsel.” (*Streeter, supra*, 54 Cal.4th at p. 231.) To the extent there was a credibility question between defendant and defense counsel at the hearing, the trial court is “ ‘entitled to accept counsel’s explanation.’ ” (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

The trial court did not abuse its discretion in denying defendant’s *Marsden* motions. It conducted an adequate inquiry prior to denying the motions, hearing defendant’s complaints about defense counsel and defense counsel’s responses. The trial court denied the motions, finding counsel credible and impliedly finding that counsel competently performed his duty in advising defendant of the prosecutor’s offers and the consequences of entering her plea. The trial court was entitled to make those determinations. (*People v. Smith, supra*, 6 Cal.4th at p. 696.)

Defendant complains of communication problems with her attorney but defense counsel’s explanation showed the opposite. The trial court rejected defendant’s assertions, saying they seemed to be communicating just fine. Any “asserted communication problems were not insoluble and had not given rise to such an irreconcilable conflict that ineffective representation was likely to result.” (*People v. Hines* (1997) 15 Cal.4th 997, 1026.)

Defendant complained she felt threatened into entering a plea because defense counsel said the judge would be mad otherwise. But her claim is refuted by her written plea form and the colloquy with the trial court.

She fails to show deficient performance or the likelihood of deficient performance by defense counsel. “ ‘[T]he way in which one relates with his attorney, does not sufficiently establish incompetence.’ ” (*Streeter, supra*, 54 Cal.4th at p. 230.) The record

