

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY VENEGAS,

Defendant and Appellant.

D058808

(Super. Ct. No. SCD225232)

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

I.

INTRODUCTION

Defendant Michael Anthony Venegas appeals from a judgment of conviction and sentence after he pled guilty to selling methamphetamine and possession of methamphetamine for sale. Venegas contends that the trial court abused its discretion

and violated Venegas's right to counsel by failing to hold a *Marsden*¹ hearing and by informing Venegas that he would be held without bail in the interim if the court were to grant Venegas's motion to continue the trial to allow Venegas time to retain counsel. Venegas further contends that the trial court abused its discretion in failing to strike both of his strike priors for purposes of sentencing.

Neither of Venegas's claims has merit. We therefore affirm the judgment of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*²

On January 16, 2010, undercover police detective Arturo Swadner called the telephone number of a woman who he had been informed was selling narcotics. Venegas, identifying himself as "Boo Boo," answered the call but hung up when Swadner asked to buy some methamphetamine. Venegas called Swadner back a few minutes later and told Swadner that the cost of a "teener" of methamphetamine would be \$120.³ Venegas instructed Swadner to meet him in the parking lot of a Burger King in the City Heights area of San Diego.

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

² These facts are taken from the evidence presented at the preliminary hearing, which Venegas stipulated would provide the factual basis for his guilty plea.

³ According to Swadner, a "teener" of methamphetamine is "street slang" for "a 16th of a gram" of methamphetamine.

Approximately 45 minutes later, Swadner arrived at the agreed upon location and watched Venegas and codefendant Debra Perez⁴ as they sat in a booth inside the Burger King. Swadner called the telephone number again and informed Venegas that he was in the parking lot. Venegas told Swadner to meet him in the bathroom of the restaurant. Swadner walked inside the restaurant, approached the bathroom and tried to turn the handle on the bathroom door, but it was locked. Swadner walked back outside.

Perez then made a telephone call, and Venegas came out of the bathroom. Venegas approached Swadner and identified himself as Boo Boo. Venegas followed Swadner to Swadner's unmarked car. Once the two were in the car, Swadner gave Venegas \$120 in premarked bills, and Venegas handed Swadner a package that was later determined to contain 1.36 grams of methamphetamine. Uniformed officers then arrested Venegas and Perez.

B. *Procedural background*

The San Diego County District Attorney charged Venegas with selling methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1) and possession of methamphetamine for sale (Health & Saf. Code, § 11378, subd. (a); count 2). The information also alleged that Venegas had suffered a prior conviction for a Health and Safety Code violation, and that he had suffered five prison priors (Pen. Code, § 667.5, subd. (a)) and two strike priors (§§ 667, subds. (b)-(i), 1170.12).

⁴ Perez is not a party to this appeal.

Venegas pled guilty to both counts and admitted the prior conviction allegations. The trial court sentenced Venegas to a total term of six years in state prison. Venegas filed a timely notice of appeal, and the trial court issued a certificate of probable cause on December 16, 2010.

III.

DISCUSSION

A. *There was no error with respect to Venegas's right to counsel*

1. *Additional background*

Venegas contends that the trial court "abused its discretion and violated appellant's constitutional right to counsel of his choice when it failed to hold a *Marsden* hearing and coerced appellant into withdrawing his request [for a continuance to allow him to retain other counsel] by threatening to hold him without bail during any continuance of sentencing despite appellant's serious medical condition."

On the date set for Venegas's sentencing hearing, appointed defense counsel informed the court that Venegas had just handed her a declaration requesting that she be relieved as counsel. In the declaration, Venegas stated that he wished to relieve his attorney and requested a continuance so that he could retain new counsel. Venegas also stated that had been consulting with attorney James M. V. Fitzpatrick, and that his reason for wanting a new attorney was that he believed his appointed attorney had not been diligent in gathering medical documents to present to the court.

Defense counsel explained to the court that Venegas felt she had not sufficiently presented to the court information concerning the severity of Venegas's health issues, or

the fact that he would like to continue receiving treatment from his own doctors before being sent to prison. When the trial court asked to see Venegas's declaration, Venegas explained, "I'm just trying to get my medical things so I can take care of these medical things. And then after that, you know—."

The trial court reviewed Venegas's declaration and then attempted to confirm with Venegas that he wanted the court to relieve his current attorney and that he wanted to hire Attorney Fitzpatrick to represent him. Venegas responded, "Yes. I can further my follow-ups with the doctors." The court attempted to clarify with Venegas that the questions of who would represent Venegas and how Venegas's medical problems would be handled were separate issues. The trial court then asked Venegas if he wanted a continuance to allow him to retain Attorney Fitzpatrick. When Venegas responded that he did want a continuance in order to retain Attorney Fitzpatrick, the court asked Venegas whether he wanted the court to relieve his current attorney immediately, or instead, wanted the court to wait to relieve his attorney until Venegas had retained Attorney Fitzpatrick.⁵

Venegas's mother then requested the opportunity to address the court, and the court allowed her to do so. Venegas's mother said, "Okay. If you allow him the six months before he has to come to court, that would give him plenty of time to—." At this point, the court interrupted her and said, "No. I didn't say anything about six months before he comes to court. He's staying with me today." In response to Venegas's

⁵ The trial court indicated that it would be willing to grant Venegas a continuance of up to six months to allow Venegas to retain Attorney Fitzpatrick.

mother's request that the court reconsider, the court reiterated that Venegas would remain in custody pending sentencing, and noted that the jail has medical facilities.

Venegas asked, "Is there a way I could get sentenced but turn myself in after I get—?" The court interrupted Venegas and stated, "No. You're staying with me."

Venegas then wondered aloud how he could obtain the money he would need to retain Attorney Fitzpatrick if he was in custody. In response to this comment, the court said:

"You got your mom and these other folks here. You're staying with me until you get sentenced.

"So when would you like to get sentenced? Six months from now, that would be fine. Usually, look at, let me tell you something. When people get convicted by a jury, I put them in jail without bail. And you convicted yourself without a jury. Today's the date set for sentencing. You have all kinds of reasons why you shouldn't be sentenced. And they may be righteous. They may not. I don't know. But I'm not going to let you walk out the door."

Defense counsel told the court that Venegas was concerned that he would not be able to get his "very serious medical issues" addressed in jail or in prison. The court, in response, noted Venegas's lengthy criminal history and the fact that the recommendation in the probation report was a sentence of 33 years to life. The court reiterated its intention to remand Venegas that day, without bail. Defense counsel acknowledged that Venegas was aware of the possible sentence that he was facing, but said, "[I]t really does appear to be [an] . . . attempt to get medical care outside of the Department of Corrections, rather than inside." The court agreed, stating, "I think it's a desperate attempt, when he has you representing him—it's a two-pronged attack. Putting off the inevitable"

Defense counsel requested an opportunity to talk with Venegas regarding what he wanted to do, given the court's expressed intention to remand Venegas to custody that day. The prosecutor then raised a concern about the fact that Venegas had expressed some displeasure with his attorney's representation. In response to this remark the court said, "I understand. Well, that's his choice, though. If he chooses to keep her, he chooses to keep her. And if he chooses to keep her and then changes his mind while he's sitting in jail and hires a fancy guy like James Fitzpatrick, then he can make that change later. You see a problem? I don't know if there is a problem there." The court then allowed Venegas to confer with family members who were present.

After Venegas conferred with his family members, defense counsel informed the court that Venegas was ready to "go forward with sentencing today." The court confirmed with Venegas that this was what he wanted to do, and that he wished to proceed with sentencing with his appointed counsel rather than having the court continue the sentencing hearing in order to allow Venegas time to retain Attorney Fitzpatrick.

The court indicated that it also regarded Venegas's request for a continuance as being made for medical reasons, and denied the request. Before sentencing Venegas to a total term of six years, the court reconfirmed with Venegas that he wanted to proceed with sentencing that day, with his court-appointed attorney representing him.

2. *The trial court did not err by proceeding to sentence Venegas without holding a Marsden hearing*

Pursuant to *Marsden, supra*, 2 Cal.3d at page 124, the trial court must give a defendant an opportunity to specify the reasons for his request to discharge appointed

counsel and have another attorney appointed to represent him. According to Venegas, the trial court's failure to hold a *Marsden* hearing requires remand.

In a criminal case, when a defendant requests to substitute new *appointed* counsel for previously appointed counsel, the trial court must permit the defendant to explain the specific reasons why the defendant believes his current appointed counsel is not adequately representing him. (*Marsden, supra*, 2 Cal.3d at pp. 123–124; see also *People v. Smith* (1993) 6 Cal.4th 684, 690 ["The seminal case regarding the *appointment of substitute* counsel is *Marsden* . . ." (italics added)].) The legal principles that govern a *Marsden* motion are well settled: " 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] 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].' [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 204.)

A defendant who makes a *Marsden* motion must show good cause for replacing appointed counsel because a defendant's right to appointed counsel does not include the right to demand *appointment* of more than one counsel. (*People v. Ortiz*, (1990) 51 Cal.3d 975, 980.) Substitution of appointed counsel threatens to waste public resources by creating "duplicative representation and repetitive investigation at taxpayer expense." (*Id.* at p. 986.) Free substitution as a matter of right would present an "undesirable

opportunity to 'delay trials and otherwise embarrass effective prosecution' of crime." (*Ibid.*, quoting *People v. Williams* (1970) 2 Cal. 3d 894, 906.)

Venegas was seeking a continuance in order to replace appointed counsel with *retained* counsel. Under these circumstances, no *Marsden* hearing was necessary. (See *People v. Courts* (1985) 37 Cal.3d 784, 790 (*Courts*).) Again, *Marsden* involved the substitution of appointed counsel for different appointed counsel. "The standards for evaluating such requests [to substitute one appointed counsel for another appointed counsel] are quite different than those used in the retained counsel context." (*Courts*, *supra*, at p. 795, fn. 9.)

Contrary to Venegas's contention in his reply brief, it is clear from the record that he was seeking a continuance so that he could retain a different attorney, and that he was not requesting that the court *appoint* a new attorney. Venegas specifically mentioned the name of the attorney with whom he had consulted, and he asked for a continuance so that he could "retain new counsel." It is clear from Venegas's discussion with the court that he intended to retain Attorney Fitzpatrick; Venegas even asked the court how he would be able to obtain the funds necessary to do so if he remained in custody pending any continued sentencing hearing.

2. *The trial court did not violate Venegas's Sixth Amendment right to counsel*

Venegas also complains that the trial court denied him his Sixth Amendment right to counsel in its handling of this matter. According to Venegas, the court's "refusal to provide appellant with a *Marsden* hearing, and its chastisement of appellant at wanting to retain counsel, taken together with its refusal to continue appellant on bail pending

sentencing, forced appellant to go forward without changing counsel and, acted in effect as an erroneous denial of appellant's right to have counsel of his choosing handle his sentencing in this case in denial of his Sixth Amendment right to counsel."

On the facts of this case, there was no violation of Venegas's right to counsel. As we have already explained, no *Marsden* hearing was required. Further, the court did not chastise Venegas for wanting to retain a different attorney. Venegas does not specifically identify what it is that the trial court said that he believes constituted the claimed "chastisement." Our review of the transcript reveals that the court did ask Venegas a number of times about his desire to hire Attorney Fitzpatrick, and referred to Attorney Fitzpatrick as a "very fancy lawyer."⁶ The court also later said, "I can either sentence him today or put him in jail and he can get Mr. Fitzpatrick. And Mr. Fitzpatrick is going to cost him a lot of money. And he's not going to be able to change the facts of the case. So whatever you want to do. I'm happy to throw business to struggling lawyers."

None of these remarks amounts to chastising Venegas for wanting to hire Attorney Fitzpatrick. Rather, it appears that the trial court was simply stating some basic truths about the situation, albeit in a somewhat inelegant manner—i.e., that if Venegas were to retain counsel at this point in time, he would be paying money to hire a new attorney at a late stage in the litigation, when there might be little that a new attorney could do to alter the outcome of his case.

⁶ The court also referred to Venegas's appointed attorney as "great lawyer" and a "fancy lawyer."

With respect to the trial court's refusal to allow Venegas to remain out on bail during any continuance of the sentencing hearing, Venegas has not demonstrated that he had any right *not* to be remanded to custody during the continuance he was seeking, or that the trial court was in any way obligated to release him on bail during any continuance. Venegas was facing a potential sentence of 33 year to life. The court explained that it intended to treat Venegas in the same manner as it treated other defendants who are either found guilty or who have pled guilty and request a continuance of their sentencing hearing—i.e., Venegas would be held in custody.

For these reasons, we reject Venegas's contention that the court "forced" him go forward with sentencing while continuing to be represented by his appointed attorney. Rather, the record demonstrates that Venegas decided to proceed with sentencing after having consulted with his attorney and with family members. He was free to choose another option, since the court had indicated that it was willing to grant him a six-month continuance in order to give him the opportunity to retain counsel. What Venegas wanted, however, was something to which he was not entitled—i.e., a six-month continuance of his sentencing hearing *and* to be allowed to remain out on bail for that six months. The fact that the court would not agree to do what Venegas wanted the court to do in no way amounted to a violation of Venegas's Sixth Amendment right to counsel.

B. *The trial court did not abuse its discretion by striking only one of Venegas's two strike priors*

Venegas contends that the trial court abused its discretion in striking only one of his two strike priors. Venegas points out that the trial court had suggested at an earlier

point in the proceedings that it might consider striking both strike priors. Venegas argues that the trial court should have done so because his strikes were remote in time, and he had not committed any other serious or violent felonies since those strike offenses.

At the time Venegas entered his guilty plea on July 8, 2010, the trial court indicated that it would "seriously entertain" a motion made pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and specifically, that the court would consider striking "both priors." The trial court stated, "I can't promise initially, but if I don't do the right, just and proper thing, I'll let you withdraw your plea. But I'm going to read the probation report. If I have the power to strike both priors, but—and they're old. They're '91 and '93? Something like that?" After confirming the dates, the court continued, "And they were burglaries. Nobody was hurt. That's a long time ago. I'll look at everything. Judge Lewis thought that the facts of this case and everything merited potentially a minimum, a minimum of six years. And I'm thinking she has pretty good judgment."

At the sentencing hearing, the trial court struck one of Venegas's two strikes and selected the midterm of three years on count 1, which was doubled as a result of the remaining strike, for a total term of six years.

The law that governs a trial court's consideration of whether to dismiss a prior strike conviction is well established:

"[A trial court] must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he

had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*.)

A trial court's decision not to dismiss or strike a prior conviction allegation under Penal Code section 1385 is reviewed for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.]" (*Id.* at pp. 376-377.)

"Following *Williams, supra*, 17 Cal.4th 148, the overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career." (*People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

The trial court did not abuse its discretion in determining that Venegas's criminal history and the nature and circumstances of his current crime did not support dismissing both of his prior strikes. Venegas has a lengthy criminal history. In 1975, Venegas was declared a ward of the court after he committed a battery. In 1980, he was convicted of receiving stolen property, for which he received a sentence of six years' probation and

one year in a county jail. In 1984, Venegas was convicted of petty theft, and in 1985 he was convicted of being an accessory to a crime. In 1986, Venegas was convicted of burglary. For each of these crimes, Venegas was sentenced to three years' probation. In 1988, Venegas was convicted of petty theft with a prior conviction and was sentenced to two years in state prison. That same year, he was convicted of possession of a controlled substance in prison and was sentenced to an additional three years in prison.

In 1992, Venegas was convicted of attempted residential burglary and of giving false information to a police officer, for which he received a sentence of three years in prison. In 1993, he was convicted of residential burglary and sentenced to six years in state prison. In 1998, Venegas was convicted of selling a controlled substance and was sentenced to nine years in state prison. He committed the offenses for which he was sentenced in this case in January 2010. It is clear that Venegas has repeatedly failed to perform well on either probation or parole. It is equally clear that the trial court acted well within its discretion in not dismissing both of Venegas's prior strikes based on evidence of Venegas's recidivist tendencies.

Further, the trial court ultimately sentenced Venegas to the sentence that it had indicated it believed would be an appropriate sentence at the change of plea hearing. Venegas thus was given the sentence that the court indicated it was inclined to give him at the time he decided to proceed with pleading guilty to the charges. The six-year sentence that Venegas received was significantly less than the sentence of 33 years to life that the probation report recommended. Given these circumstances, we conclude that the

trial court did not abuse its discretion in not dismissing both of Venegas's prior strike convictions.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.