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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT E. WILLIAMS,

Defendant and Appellant.

D061286

(Super. Ct. No. SCD228297)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

Robert E. Williams entered into a plea agreement under which he pled guilty to assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1)) and admitted that he personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). The remaining charges and allegations were dismissed. At the time of the plea the trial judge indicated he would accept a "lid" on the sentence of five years and that he would consider any lesser sentences including probation.

¹ All further statutory references are to the Penal Code unless otherwise specified.

Prior to sentencing, defense counsel (George Osper) informed the court that Williams wished to withdraw his plea and that there would be a conflict of interest if Osper was to bring the motion. The court then held a "*Marsden* type motion," referring to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Following the *Marsden* hearing the trial judge relieved Mr. Osper and Ms. Stacie Patterson was appointed to represent Williams.

Approximately two months later, Ms. Patterson advised the court that she could not, in good faith, file a motion to withdraw the guilty plea as Williams had requested. The court again held a *Marsden* type hearing. After hearing from Patterson and Williams, the court denied Williams's request for new counsel and denied Williams's request to withdraw his guilty plea. Williams was then sentenced to a determinate term of five years in prison.

Williams ultimately obtained a certificate of probable cause from the trial court. (§ 1237.5.) He appeals contending that Ms. Patterson abandoned him by failing to file a motion to withdraw his guilty plea as he argues she was required to do. Williams asks that his case be remanded to the trial court, with new counsel, so that he can bring a motion to withdraw his guilty plea.

Based on this record we find that Ms. Patterson was not required to bring a frivolous motion as requested by her client and that the trial court properly denied the motions to relieve counsel and to withdraw the guilty plea. To the extent there may be some basis not made known to the trial court that might justify a motion to withdraw the guilty plea, Williams's remedy is by way of a petition for writ of habeas corpus filed in

the superior court. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*)). Accordingly, we will affirm the judgment.²

DISCUSSION

Williams was represented at the preliminary hearing by the Public Defender's office. Prior to trial his trial counsel, Kenneth Kaminski, declared a conflict because his office had represented a witness in the case. Kaminski was replaced by Mr. Osper from the Alternate Public Defender's office. Osper represented Williams through the plea negotiation and guilty plea process. When Williams wished to withdraw his guilty plea, Osper declared a conflict, which was explored by the court in a *Marsden* hearing. Thereafter, Osper was replaced by a conflict panel attorney, Ms. Patterson. As we have noted above, Ms. Patterson after consultation with Williams and prior counsel declined to bring a motion to withdraw Williams's guilty plea, stating she could not in good faith bring such motion. The trial court thoroughly explored Ms. Patterson's views and Williams's requests in another *Marsden* hearing. The court denied Williams's motions to relieve counsel and to withdraw his guilty plea.

Williams, essentially contends Ms. Patterson provided deficient representation in several respects. First, he argues she was required by *People v. Brown* (1986) 179 Cal.App.3d 207 (*Brown*) to bring his motion, even if she did not believe there was a legal basis for it. Williams further complains counsel should not have told the court about Williams's statements to her regarding the basis of his request. He asks this court

² Since this appeal does not involve any issue regarding the facts of the offense, we omit the traditional statement of facts. Suffice that Williams admitted stabbing the victim.

to remand the case to the trial court, provide new counsel and direct that a different trial judge be assigned to hear a new motion to withdraw his guilty plea. We find no basis in this record to grant the relief requested by Williams.

A. Counsel Was Not Required to File a Meritless Motion

As we have noted, Williams argues that Ms. Patterson was obligated to file a motion to withdraw the guilty plea. Relying on *Brown, supra*, 179 Cal.App.3d 207, Williams argues the motion to withdraw the guilty plea is personal and thus overrides the general principle that counsel are in charge of tactical decisions in the trial court. We do not believe the *Brown* decision requires counsel to file a frivolous motion, simply because the defendant demands such action.

In *People v. Brown (Orione)* (2009) 175 Cal.App.4th 1469 the court held: "That is, as long as [a] defendant is represented by counsel, the decision on whether to file a motion to withdraw his plea is left with counsel." (*Id.* at p. 1472.) Where counsel has been appointed to investigate a motion to withdraw a plea, "[w]hether, after such appointment, any particular motion should actually be made will, of course, be determined by the new attorney." (*People v. Smith* (1993) 6 Cal.4th 684, 695-696.)

Where a defense counsel makes a good faith determination that a proposed motion would be frivolous, counsel will not be deemed ineffective. (*People v. Makabali* (1993) 14 Cal.App.4th 847, 853 (*Makabali*)). In our view the opinion in *Brown, supra*, 179 Cal.App.3d 207 does not compel a different analysis here.

In *Brown* the defendant requested appointment of counsel to investigate filing a motion to withdraw his guilty plea, since trial counsel had declined to do so. The trial

court fairly abruptly denied the request and the defendant's personal motion to withdraw the plea. On that record the Sixth District held the defendant was entitled to an attorney to file his motion. Later, in *People v. Garcia* (1991) 227 Cal.App.3d 1369, 1377, the court reached a different result when it approved a procedure where, as in the present case, the court did appoint an attorney specifically to review whether such a motion should be filed. In that case the Sixth District recognized a distinction from its holding in *Brown, supra*, 179 Cal.App.3d 207.

In *Makabali, supra*, 14 Cal.App.4th at pages 851 through 853, the First District reviewed *Brown, supra*, 179 Cal.App.3d 207 and the cases that followed it. The court in *Makabali*, concluded that counsel who determines there is no basis on which to file a motion, is not required to file a legally unsupported motion. *People v. Brown (Orione), supra*, 175 Cal.App.4th at page 1473, reaches the same conclusion.

We agree with the analysis of both *Makabali, supra*, 14 Cal.App.4th 847 and *People v. Brown (Orione), supra*, 175 Cal.App.4th 1469, and hold that Ms. Patterson was not required to file a motion that she believed was not legally supportable.

B. There Was No Basis for a Motion to Withdraw the Plea in This Case

When Ms. Patterson advised the court she would not file what she believed to be a frivolous motion, the trial court conducted an in camera hearing with Williams and counsel. Patterson, who had been appointed specifically to investigate a motion to withdraw the guilty plea, explained the reasons she believed the motion would be meritless. The court also inquired of Williams to learn his reasons for wanting to withdraw his plea.

Williams essentially offered two grounds for withdrawing his plea. The first was he was told he would get probation and would thus be able to get out of custody in time to save his belongings, which were in storage and about to be auctioned. His second ground was that he would not have pled guilty if he had known the victim had a criminal record.

Counsel advised the court she had talked with prior counsel and had reviewed the record to see if there was a basis for a motion. She indicated that Mr. Kaminski had declared a conflict because the Public Defender had previously represented a witness and that Kaminski's practice was that he would have advised Williams of the criminal record. She also advised that Mr. Osper had gone beyond normal representation and obtained money from the Alternate Public Defender's office in order to try to save Williams's property. Osper attended the auction and bid, however, he did not have enough funds to acquire the property at the auction. In any event, Williams was aware that he was not going to be released from custody in time for an auction, even if ultimately granted probation, because the court denied presentence release and sentencing was scheduled for a date after the auction. Finally, counsel had reviewed the record and was aware the trial court had not promised probation as part of the plea discussions. The court was also aware that Mr. Osper stated at the time he was relieved from representing Williams that he had not told Williams he would get probation, and Williams did not raise the issue of an alleged promise for early release when he learned after his plea that he would not be released in a timely fashion.

When a defendant moves to withdraw a guilty plea, that person must demonstrate good cause. (§ 1018.) "It is the defendant's burden to produce evidence of good cause by clear and convincing evidence." (*People v. Wharton* (1991) 53 Cal.3d 522, 585; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

The transcript of the change of plea demonstrates the trial court carefully questioned Williams as to his understanding of his rights and the potential outcome of the conviction. The court did not promise probation or early release. Mr. Osper denied that he told Williams that he would get out of custody in time to deal with his property. In short, there is nothing in this record to create an inference, let alone establish by clear and convincing evidence, that Williams had any basis for a change of plea, based on promises. Nor did anything in counsel's investigation support an inference that Williams was unaware of the witness's criminal record since Kaminski declared a conflict specifically because of prior representation by his office.

This case is much like *People v. Garcia, supra*, 227 Cal.App.3d at page 1377 and *Makabali, supra*, 14 Cal.App.4th at pages 851 through 853. In those cases counsel was appointed for the purpose of investigating a motion to withdraw a guilty plea and had declined to make such motion. In both cases the courts found no reversible error. We reach the same result in this case. There is nothing in the record to support an argument that there was a potentially meritorious basis for a motion to withdraw the plea. Counsel was entitled to make the appropriate decision on how to proceed and there is nothing in the record that might support a finding that counsel was ineffective.

In *People v. Johnson* (2009) 47 Cal.4th 668, 684, the court declined to decide whether the decision in *Brown, supra*, 179 Cal.App.3d 207 was correct. However, even assuming *Brown* was correctly decided, the court observed that a defendant must still show prejudice in counsel's refusal to file a motion to withdraw a plea. The court also observed that it may not be possible to determine prejudice based upon the appellate record alone. Thus, a defendant, like the appellant in this case, is left to pursue the remedy of a habeas corpus petition filed in the trial court in order to develop any basis of prejudice. (*Johnson, supra*, at p. 684; *Mendoza Tello, supra*, 15 Cal.4th at pp. 266-267.)

In sum, like the court in *People v. Johnson, supra*, 47 Cal.4th 668, we find no basis in the appellate record to demonstrate prejudice in counsel's refusal to file a motion and therefore reject his contentions without prejudice to any subsequent habeas proceeding.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.