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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD A. GOLDBAUM,

Defendant and Appellant.

E054285

(Super.Ct.No. RIF10002553)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas Kelly, Judge.

(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.

VI, § 6 of the Cal. Const.) Affirmed with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles Ragland, and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Richard A. Goldbaum was an inmate at the California Rehabilitation Center. He pleaded guilty to several charges arising from a scheme to smuggle marijuana into the facility. He appeals, contending that the trial court should have held a *Marsden* hearing when he indicated to the court that he wanted to withdraw his plea. He also points out an error in the minutes, repeated in the abstract of judgment, which does not correctly reflect the sentence pronounced by the court. We affirm the judgment, but order the sentencing minutes and the abstract of judgment corrected.

FACTS AND PROCEDURAL HISTORY

In July 2009, defendant was an inmate at the California Rehabilitation Center (CRC) in Norco. He was housed in one of the dormitories with approximately 100 other inmates. Inmates are assigned a bunk bed and a locker within the dormitory unit. Between July 16 and July 23, 2009, defendant made a number of telephone calls to his daughter. These calls were monitored by correctional officers. Defendant and his daughter discussed an ongoing plan to bring drugs into the CRC. They talked about Western Union money transfers, the quality of the drugs, and precautions such as limiting their conversation unless defendant was able to use a cell phone.

On July 25, 2009, defendant's daughter and other family members came to the CRC for a visit. Officers took defendant's daughter aside to their office, where she was searched. She was carrying two bindles of marijuana on her person, weighing a total of 57 grams. She admitted that she had brought the drugs to the facility for defendant, her father. Defendant invoked his constitutional rights and refused to speak with the

authorities. However, a search of his locker turned up pay/owe sheets with names and numbers, as well as Western Union money transfer numbers.

Defendant was charged with one count of bringing a controlled substance into a correctional facility (Pen. Code, § 4573), one count of conspiracy to bring controlled substances into a prison facility (Pen. Code, §§ 182, subd. (a)(1), 4573), one count of possession of marijuana for sale (Health & Saf. Code, § 11359), and one count of conspiracy to possess marijuana for sale (Pen. Code, § 182, subd. (a)(1); Health & Saf. Code, § 11359). The information also alleged six prior prison term enhancements and three strike priors.

Defendant eventually pleaded guilty to all the charged offenses and admitted the prison term priors. The court had indicated in chambers its inclination to dismiss two of the strike priors so that defendant would be sentenced as a second-striker. The specification of the plea was for an overall sentence of 15 years four months.

Two months after defendant's guilty plea, the matter came on for sentencing. At that time, May 16, 2011, defense counsel advised the trial court that defendant wanted to file a motion to withdraw his guilty plea. The court remarked that the request appeared to reference "issues with your relationship with your attorney," and then appointed conflict defense counsel to discuss the matter with defendant, and then to decide whether a motion should be filed.

Conflict counsel reported to the court that "I don't think [defendant] has any legal grounds for a motion to withdraw a plea. . . . It's more of a buyer's remorse sort of thing,

I think.” No withdrawal motion was therefore filed, and the court discharged conflict counsel.

The court proceeded to sentencing at the next hearing and sentenced defendant to a total prison term of 14 years four months (four years on the principal count, doubled to eight years as a second strike, conspiracy count stayed under Penal Code section 654, eight months on the subordinate count of possession for sale, doubled to 16 months, conspiracy count for that offense also stayed under Penal Code section 654, plus five years for the prior prison terms—the court deemed two of the six alleged prison term priors as essentially one prison commitment).

On appeal, defendant contends that the trial court erred in appointing conflict counsel on the issue of whether a motion to withdraw the plea should be filed. Instead, because the court seemed to suggest that some of defendant’s issues related to the performance of his trial counsel, such that counsel declared a conflict, the court should have held a *Marsden*-style¹ hearing. He also contends that the abstract of judgment does not correctly reflect the sentence and must be corrected.

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

ANALYSIS

I. Defendant Did Not Move to Withdraw His Plea, and Never Clearly Indicated That He Wanted Substitute Counsel

A. Factual Background

At the date originally set for sentencing, it appears that some discussion took place in chambers concerning defendant's desire to withdraw his guilty plea. Defendant apparently wrote a letter to the court,² asking for "another chance of a plead [*sic*]." The following colloquy took place on the record:

"THE COURT: All right. I was told in chambers that your client wishes to make a motion to withdraw his plea.

"MR. HARDMAN [DEFENSE COUNSEL]: That's correct, Your Honor.

"THE DEFENDANT: Yes.

"THE COURT: All right. So we're going to need to appoint a conflict counsel for that purpose because I saw the letter that you submitted, and there's issues with your relationship with your attorney. So I'll appoint the alternate firm of -- [¶] . . . [¶]

² The discussion and hearing took place on May 16, 2011. Defendant's handwritten letter is included in the record in a supplemental clerk's transcript. The letter itself bears no date, but a stamp indicates that it was filed in the superior court on June 28, 2011, and it bears another date stamp of July 18, 2011. The parties nevertheless appear to agree that the handwritten letter, filed on June 28, 2011, is the letter which raised the substantive discussion on May 16, 2011, of defendant's desire to withdraw his plea.

“What will happen, basically, is this other firm will come in and talk with you and have a chance to talk with counsel. And then based on their discussion, you can tell me what you want to do on the next court date.

“THE DEFENDANT: Oh, okay.”

At the next court date, June 24, 2011, however, the court asked the conflict attorney, “With respect to that motion [i.e., a motion to withdraw the plea], what’s your position?” Conflict counsel responded that, “. . . I don’t think he has any legal grounds for a motion to withdraw a plea. I understand from the D.A.’s office they would agree to allow him to do that, but I don’t think there’s any legal grounds, so I don’t think there would be a formal motion. . . . It’s more of a buyer’s remorse sort of thing, I think.” The court thereupon discharged the conflict attorney, without making any inquiry of defendant himself, and proceeded to set the sentencing hearing.

B. *People v. Sanchez* Requires a Marsden Hearing Only When a Defendant Clearly Indicates That He or She Wants a New Attorney

Defendant, in a supplemental opening brief, points to a recent California Supreme Court case, *People v. Sanchez* (2011) 53 Cal.4th 80, which disapproved a procedure, like that employed here, of appointing conflict counsel to investigate the competence of appointed trial counsel, for purposes of deciding whether to proceed with a motion to withdraw a plea. (*Id.* at pp. 89-90.) Defendant’s reliance on *Sanchez* is misplaced, however, because the California Supreme Court also made clear that reversal to conduct a *Marsden* hearing is required “only when there is ‘at least some clear indication by

defendant,' either personally or through his current counsel, that defendant 'wants a substitute attorney.' [Citation.]" (*Id.* at p. 90.) Here, defendant made no request, and gave no indication that he desired, appointment of a new or substitute attorney. Rather, the trial court declared a conflict; the court stated, "I saw the letter that you submitted, and there's issues with your relationship with your attorney." In fact, however, defendant's letter elucidated no such issues. Defendant wrote to the court to ask for "mercy" and "leninecy [*sic*]," because his girlfriend of many years, and the mother of defendant's children, had recently died, thus leaving the children effectively without either a mother or a father. Defendant wanted the court to reconsider the length of his sentence so that he could act as a father to his children. Nothing in the letter criticized the conduct of trial counsel in negotiating the plea, nor did defendant ask for another attorney. There was no indication, clear or otherwise, that defendant desired another attorney, or that his wish to withdraw his plea was related in any way to the conduct of trial counsel. There was, therefore, no conflict with trial counsel to justify the appointment of another attorney for purposes of evaluating a possible motion to withdraw defendant's plea.

C. Defendant Never Made a Motion to Withdraw His Plea

Defendant contends that "the trial court improperly denied [his] motion to withdraw his pleas without giving him the opportunity to explain on the record his issues with trial counsel" (Formatting omitted.) Defendant's framing of the contention is mistaken. The court did not "improperly den[y] [defendant's] motion to withdraw his

pleas,” inasmuch as no such motion was ever made. Defendant complains that the trial court never allowed him “to explain the issues he had with his attorney.” As we noted earlier, however, despite the trial court’s remarks about “issues with your relationship with your attorney,” defendant’s letter to the court gave no indication that any such issues existed.

Appellate counsel complains that any deficiencies in the record to show that defendant had any “issues” with his trial counsel, or that defendant wanted to discharge his trial counsel, are “the fault of the trial court, not [defendant]. The trial court failed to undertake its obligations under *Marsden* to allow [defendant] to explain on the record his ‘issues’ with counsel. This failure is the very reason remand is necessary. [Defendant] must be given the opportunity to explain his dissatisfaction with his attorney.”

The problem is that defendant never gave any indication that he was, in fact, dissatisfied with his trial counsel or, more particularly, that he wanted substitute counsel. Appellate counsel urges, however, that “the trial court was told that [defendant] wanted to withdraw his plea based in part on ‘issues’ with counsel.” This is a misinterpretation of the record. The court was the only person who mentioned any possible “issues” with defendant’s trial counsel. The court’s remark was tied to its reading of defendant’s letter. It elected to appoint conflict counsel, “*because I saw the letter that you submitted, and there’s issues with your relationship with your attorney.*” (Italics added.) The letter, however, did not actually reference or raise any issues between defendant and his trial attorney. There was no clear indication that defendant wanted another attorney, and thus

the duty to conduct a *Marsden* inquiry was never triggered. (*People v. Sanchez, supra*, 53 Cal.4th 80, 89-90; see also *People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485.)

The failure to hold a *Marsden* hearing was not error; defendant's failure to file a motion to withdraw his plea precludes any claim of reversible trial court error in denying such a (nonexistent) motion. Reversal of the judgment is not required.

II. The Abstract of Judgment Must Be Corrected

Defendant next contends, and the People agree, that the abstract of judgment does not correctly reflect the sentence actually imposed by the court. The trial court found that two of the six alleged prison term priors constituted only one prison commitment, and thus could not both be counted for prior prison term enhancements. The trial court therefore imposed only five one-year terms for defendant's prior prison term allegations, rather than six. Thus, defendant's total prison term was 14 years four months, not 15 years four months. The court's minutes also reflect a sentence of 15 years four months, rather than the 14 years four months actually imposed orally on the record.

The oral pronouncement of judgment controls over the minute order and the abstract of judgment. (*People v. Farrell* (2002) 28 Cal.4th 381, 383, fn. 2.) This court has the power to correct such clerical errors. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) Accordingly, we order the minutes and the abstract of judgment corrected to reflect that one of the prison term priors was stricken, only five one-year enhancements were imposed, and the total sentence was 14 years four months.

DISPOSITION

The judgment is affirmed. The sentencing minutes and the abstract of judgment should be corrected to reflect a sentence of 14 years four months. The trial court is also ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

KING
J.