

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL LITTLE BEAR ANDREAS,

Defendant and Appellant.

E054349

(Super.Ct.Nos. SICRF-09-48645  
& SICRF-10-51112)

OPINION

APPEAL from the Superior Court of Inyo County. Brian Lamb, Judge. Affirmed as modified.

James M. Crawford, 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, and A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Paul Little Bear Andreas appeals his judgment of conviction following a guilty plea, denial of a motion to withdraw that guilty plea, and issuance of a certificate

of probable cause. He contends the trial court (1) erred when appointing defense counsel without holding a *Marsden*<sup>1</sup> hearing, (2) abused its discretion when it denied defendant's motion to withdraw his guilty pleas, and (3) improperly imposed the restitution fines.

## I. PROCEDURAL BACKGROUND AND FACTS<sup>2</sup>

On June 14, 2009, defendant entered the Bishop Creek Chevron store and took two beers without paying for them. On January 22, 2010, he pled guilty to petty theft with a prior and admitted four prior prison term enhancement allegations in case No. SICRF-09-48645 (Case 1). (Pen. Code,<sup>3</sup> §§ 484, subd. (a), 666, 667.5, subd. (b).) The trial court imposed a seven-year suspended sentence and placed defendant on five years of formal probation.

On October 10, 2010, defendant unlawfully drove and/or took George Chezum's 2002 Ford Explorer without Chezum's consent and with the intent to either permanently or temporarily deprive him of the vehicle. On December 21, defendant admitted he had violated the terms of his probation in Case 1. That same day, he pled no contest to unlawful driving and taking of a vehicle (Veh. Code, § 10851), unlawful use of methamphetamine (Health & Saf. Code, § 11550, subd. (a)), possession of paraphernalia (Health & Saf. Code, § 11364, subd. (a)), and possession of less than one ounce of

---

<sup>1</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

<sup>2</sup> The brief statement of facts is taken from the police report, defendant's plea on January 22, 2010, in Case 1, and the amended complaint and defendant's plea on December 21, 2010, in Case 2.

<sup>3</sup> All further statutory references are to the Penal Code unless otherwise indicated.

marijuana (Health & Saf. Code, § 11357, subd. (b)) in case No. SICRF-10-51112 (Case 2). Defendant admitted four prison priors within the meaning of section 667.5, subdivision (b). The court dismissed the remaining counts in the probation revocation petition in Case 1 and released defendant on his own recognizance.

On January 5, 2011, defendant failed to appear in court for a scheduled hearing, and a petition to revoke his probation was filed. On May 20, he moved to withdraw his no contest pleas in both cases on the grounds that he received ineffective assistance of counsel and the pleas were entered as a result of mistake or ignorance. The motion was denied, and on June 14 the court revoked defendant's probation in Case 1, imposing the earlier suspended seven-year sentence. Additionally, the court ordered defendant to pay certain fines, including a \$1,400 state restitution fine pursuant to section 1202.4, a \$1,400 probation revocation fine pursuant to section 1202.44, and an additional \$1,400 parole revocation fine pursuant to section 1202.45, which would be suspended upon successful completion of parole. Also on June 14, the court sentenced defendant in Case 2 to eight months on the unlawful driving and taking of a vehicle charge and ordered the sentence to run consecutive to the sentence in Case 1. In addition, the court sentenced defendant to 180 days in jail for the misdemeanor counts and ordered the sentence to run concurrent with defendant's state prison commitment. The court imposed fines, including a \$600 state restitution fine pursuant to section 1202.4, and an additional \$600 parole revocation fine pursuant to section 1202.45, which would be suspended upon successful completion of parole.

## II. APPOINTMENT OF DEFENSE COUNSEL

On July 7, 2009, at defendant's arraignment in Case 1, the trial court indicated it would appoint Attorney Elizabeth Corpora to represent defendant. Corpora advised the court of a conflict and suggested the court appoint other counsel. She explained that when she was last appointed to represent defendant, his *Marsden* motion was granted. The trial court replied: "The grant of a *Marsden* motion is fact-specific, and I intend to appoint you, and if [defendant] is of the opinion that you're not providing him with competent representation, then the court will consider his motion in due course."

On August 4, 2009, defendant pled guilty to petty theft with a prior in Case 1 and admitted he had three prison priors. At the sentencing hearing on November 24, Corpora informed the court that defendant wanted to substitute counsel. Following a *Marsden* hearing, the court denied the motion; however, it appointed Tariq Gazipura "to consult with and represent [defendant] for the limited purposes of considering and perhaps filing a motion to withdraw his plea."

On appeal, defendant contends that because Corpora previously had been relieved under *Marsden*, the trial court committed reversible error by reappointing her without making any inquiry into the basis for the earlier substitution of counsel.

A criminal defendant's right to effective assistance of counsel is guaranteed by both the state and federal Constitutions and includes the right to representation free from conflicts of interest. (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) "When a trial court knows or should know that defense counsel has a possible conflict of interest with his client, it must inquire into the matter [citations] and act in response to what its inquiry

discovers [citation].” (*People v. Jones* (1991) 53 Cal.3d 1115, 1136-1137.) “Could there . . . have existed a potential conflict requiring the trial court to conduct an inquiry, or take remedial action? We look to whether facts known to the trial court raised the possibility of a conflict of interest obliging it to inquire further. [Citation.]” (*People v. Dunkle* (2005) 36 Cal.4th 861, 916, overruled in part by *People v. Doolin*, *supra*, 45 Cal.4th 390, 421, fn. 22.)

In this case, defendant faults the trial court for failing to “ascertain whether the reason for previously relieving counsel under *Marsden* was due to counsel not providing adequate representation or if there had been an irreconcilable conflict causing ineffective representation to result.” However, after reviewing the record before this court, we note that when the trial court appointed Corpora, defendant failed to raise any objection or request substitution of counsel. Instead, he remained silent. Where defendant fails to complain about his counsel, the trial court has no duty to inquire further. (*People v. Mendoza* (2000) 24 Cal.4th 130, 157 [“Although no formal motion is necessary, there must be ‘at least some clear indication by defendant that he wants a substitute attorney’”]; *People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485 [defendant must, at the very least, indicate that he wants substitute counsel].) We reject defense counsel’s suggestion that “[a]fter Corpora’s on the record request was denied, [defendant] would reasonably conclude that making the same request, but not through counsel, was futile.” Defendant is no stranger to the criminal justice system, and he previously sought and was granted a *Marsden* motion. If defendant objected to Corpora’s representation, he should have stated such objection to the trial court.

More importantly, Corpora's comments were insufficient to trigger the trial court's duty for further inquiry. "[T]he duty to inquire is not triggered merely because of 'a vague, unspecified possibility of conflict.'" (*People v. Cornwell* (2005) 37 Cal.4th 50, 75, overruled in part by *People v. Doolin, supra*, 45 Cal.4th 390, 421, fn. 22.) While Corpora noted that when she was last appointed to represent defendant his *Marsden* motion had been granted, there was nothing to suggest her current appointment suffered from a fundamental breakdown in the attorney-client relationship that warranted replacement of counsel. (See *People v. Eastman* (2007) 146 Cal.App.4th 688, 696.)

In sum, defendant fails to demonstrate that Corpora had a potential conflict of interest into which the trial court had a duty to inquire.

### III. DENIAL OF MOTION TO WITHDRAW GUILTY PLEAS

On June 9, 2011, the trial court held a hearing on defendant's motion to withdraw his pleas in Case 1 and Case 2. At the time of his pleas, he was represented by Corpora; however, at the time of the hearing on his motion to withdraw, he was represented by Mark Johnson.

Defendant testified that Corpora "never advised [him] of any defense at all in either of the cases." Rather, he claimed she told him that he was guilty, and the "best thing for [him] to do would be to just take a deal." Defendant explained that, when he was interviewed by the probation department on March 31, 2011, he told the probation officer that regarding Case 2, he had no memory of the event. According to defendant, his lack of memory of the event was part of his drug addiction and that he had been a drug addict since he was 14 years old. Defendant testified that he "never had any

conversation with” Corpora about his drug use and how it affected his memory.

Defendant also stated that Corpora never told him that voluntary intoxication could be a defense to one element of the crime of driving a vehicle without the owner’s consent. He claimed that if he had known about the defense, he would have asked to go to trial.

Regarding Case 1, defendant also blamed his commission of petty theft on being “in a drug or alcoholic blackout,” but Corpora never asked him about the circumstances under which he stole the beer. He faulted her for never telling him that voluntary intoxication could be a defense to one of the elements of his theft charge. If she had told him, he would have gone to trial.

In response, Corpora testified that she represented defendant in Case 1 and Case 2. She had previously represented him in a case where he was charged with the theft of a bicycle. Corpora had discussed the defense of voluntary intoxication in defendant’s previous case, but regarding Case 1, Corpora explained that voluntary intoxication was “not so obvious of a defense,” because the store’s surveillance tape showed defendant committing the crime and “an inference of intent could be more readily made . . . .” While she did not have a specific recollection of a conversation with defendant regarding voluntary intoxication as to Case 2, Corpora “must have discussed” the defense with defendant because she “discussed it with [her] investigator.” She also testified that it was her practice to advise defendants of potential defenses before they entered a plea.

Defense counsel argued that defendant entered his guilty pleas as a product of mistake, inadvertence, or duress. Also, defendant was unaware of any possible defenses, but had he been advised of possible defenses, he would have taken advantage of them. In

response, the prosecution argued defendant did not “race to the courthouse with a motion to withdraw” his plea until “the probation report was out, his attorney had had a chance to read it, and the consequences of his own purposeful failure with the drug court system became known to him.” Because he did not like the consequence, he decided to move to withdraw his plea.

On June 14, 2011, the trial court denied defendant’s motion. The court found that Corpora did discuss the defense of voluntary intoxication with the defendant, and the plea agreement that was negotiated for defendant “was extremely favorable.” Defendant was “deemed to be potentially eligible for drug court,” and his custodial control situation was “put at liberty pursuant to an O.R. [own recognizance] release.” However, because defendant subsequently committed a crime and failed to appear at court while on O.R., “the matter came back before the court.”

On appeal, defendant contends the trial court abused its discretion in denying his motion to withdraw his guilty pleas on the ground that his counsel failed to discuss the defense of voluntary intoxication with him.

“[S]ection 1018 provides that a trial court ‘must’ allow the withdrawal of a guilty plea only in the case of a defendant who entered a guilty plea without counsel, and in other cases the court ‘may . . . for good cause shown, permit a plea of guilty to be withdrawn . . . .’ [Citation.]” (*People v. Watts* (1977) 67 Cal.App.3d 173, 184.) Good cause is shown by “mistake, ignorance or inadvertence or any other factor overreaching defendant’s free and clear judgment,” and the defendant has the burden of showing good cause by clear and convincing evidence. (*People v. Superior Court (Giron)* (1974) 11

Cal.3d 793, 797.) “When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. . . .’ [Citation.]” (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.) “Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.’ [Citation.]” (*Ibid.*) On review of a trial court’s denial of a motion to withdraw a guilty plea, the facts found by the trial court must be adopted by the reviewing court if they are supported by substantial evidence. (*People v. Suon* (1999) 76 Cal.App.4th 1, 4.) Therefore, the trial court’s denial must be arbitrary, capricious or exceed the bounds of reason to be disturbed on appeal. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

According to defendant, he presented “substantial uncontroverted evidence that [Corpora] failed to discuss with [him] a viable and strongly supported affirmative defense to both charges before having [him] waive his constitutional rights and plead guilty.” We disagree. Based on the record before this court, neither defendant nor Corpora had a specific recollection of a discussion regarding the defense of voluntary intoxication. While defendant testified that Corpora never advised him of his potential defenses, Corpora testified that it was her practice to go over all relevant defenses and that the legal issues in Case 2 were similar to the legal issues she faced during her prior representation of defendant involving a charge of stealing a bicycle. She testified that Case 2 was “potentially defensible and [she was] sure [she] told him that.” She recalled discussing the defense with the investigator, and thus, she “must have discussed it with [defendant].” Corpora noted that “the greater part of [defendant’s] jeopardy [if they had taken Case 2 to

trial] was from the violation of probation . . . .” At the time, because defendant “wanted to go to drug court,” Corpora opined that the plea bargain was “a reasonable trade-off.” Other than claiming that Corpora failed to advise him of the defense of involuntary intoxication, defendant could not recall any specific details of his conversation with Corpora.

Given this record, the trial court found that Corpora was aware of the defense of voluntary intoxication and that she did discuss it with defendant. Although defendant denied such discussion, his testimony “was very vague and non-specific. He couldn’t remember any specific conversations with Miss Corpora discussing the elements of the offense to which he was pleading.” The court observed that Corpora’s “perception was that [defendant] was aware of this issue[, i.e., the defense,] because he had prior cases of theft or other crimes where [his] position was that he didn’t know what he was doing as a result of voluntary intoxication.” Also, the court found that Corpora’s practice of discussing the elements of the offense and available defenses, coupled with her specific recollection of discussing the defense of voluntary intoxication with her investigator, show that “defendant was competently represented with respect to his entry of a plea . . . .” Moreover, given the circumstances of the case, the court found defendant’s plea agreement to be “extremely favorable.” The only problem was defendant’s commission of another criminal act and his failure to appear in court while on O.R. The trial court did not abuse its discretion when it denied defendant’s motion.

Alternatively, defendant claims that Corpora rendered constitutionally ineffective assistance by failing to discuss the defense of voluntary intoxication with him. Regarding

a motion to withdraw a plea, a defendant may show good cause by demonstrating that he received ineffective assistance at an important stage of the proceedings, such as plea bargaining and pleading. “It is well settled that where ineffective assistance of counsel results in the defendant’s decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.’ [Citations.] [¶] To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel’s deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel’s failings, the result would have been more favorable to the defendant. [Citations.]” (*In re Resendiz* (2001) 25 Cal.4th 230, 239, fn. omitted (*Resendiz*), abrogated on another ground in *Padilla v. Kentucky* (2010) 559 U.S. \_\_\_, \_\_\_ [130 S.Ct. 1473, 1484, 176 L.Ed.2d 284].)

As discussed above, we, like the trial court, conclude that defendant has failed to establish the performance prong of his ineffective assistance claim. Moreover, defendant has not demonstrated prejudice. “[A] defendant who pled guilty demonstrates prejudice caused by counsel’s incompetent performance in advising him to enter the plea by establishing that a reasonable probability exists that, but for counsel’s incompetence, he would not have pled guilty and would have insisted . . . on proceeding to trial. [Citations.]” (*Resendiz, supra*, 25 Cal.4th at p. 253.) A defendant’s “assertion he would not have pled guilty if given competent advice ‘must be corroborated independently by

objective evidence.’ [Citations.]” (*Ibid.*) The record before this court fails to disclose any.

As the People aptly note, the plea bargain that Corpora negotiated in Case 1 was advantageous in that it gave defendant the opportunity to apply for drug court. According to Corpora, defendant was interested in getting back on probation as quickly as possible, and the only way he could do that was through the drug court program. The plea bargain gave defendant “probation in a case where he normally wouldn’t have been eligible.” The only evidence that defendant would not have accepted the plea had Corpora adequately performed was his own self-serving testimony.<sup>4</sup> However, such evidence is insufficient to establish prejudice. (*Resendiz, supra*, 25 Cal.4th at p. 253.)

Regarding Case 2, in addition to the vehicle theft, defendant was charged with various drug offenses, to which the defense of voluntary intoxication would not have applied because they are general intent crimes. Moreover, defendant’s probation in Case 1 had been revoked as a result of Case 2, and he had stipulated to a seven-year prison sentence if he violated his probation. Pursuant to his plea, defendant was sentenced to state prison for a term of seven years eight months. However, if he had gone to trial, he would have had to prevail on all of the charges, not just the vehicle theft.

---

<sup>4</sup> We reject defendant’s contention that Corpora’s recollection of discussing the defense with the investigator, but not defendant, provided independent corroboration. Corpora testified that it is her practice to discuss all defenses available with defendants, and while she cannot specifically recall the details of her discussion with defendant, she believes that she did.

Thus, we conclude that even if Corpora had discussed the defense of voluntary intoxication, it is not reasonably probable that defendant would have rejected the plea bargains and insisted on going to trial.

#### IV. IMPOSITION OF FINES

In sentencing defendant in Case 1, the trial court imposed a \$1,400 state restitution fine pursuant to section 1202.4, and an additional \$1,400 parole revocation fine pursuant to section 1202.45, which was stayed pending successful completion of parole. In case 2, the trial court imposed a \$600 state restitution fine pursuant to section 1202.4, and an additional \$600 parole revocation fine pursuant to section 1202.45, which was stayed pending successful completion of parole. On appeal, defendant contends these fines were not agreed upon in the plea agreement and should be reduced to the statutory minimum of \$200.

Regarding Case 1, the People concede the need to reduce the fines to the statutory minimum pursuant to *People v. Walker* (1991) 54 Cal.3d 1013 (*Walker*), overruled in part by *People v. Villalobos* (2012) 54 Cal.4th 177, 183. The *Walker* case addressed the issue of whether the plea agreement has been violated when a restitution fine is imposed.

“When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.” (*Walker, supra*, at p. 1024.) Where a defendant has not received the admonition pursuant to section 1192.5, a defendant’s failure to affirmatively request a change of plea should not be deemed a waiver of his or her right to do so.

When the defendant is not advised of his rights pursuant to section 1192.5, he cannot be held to have waived them. “A violation of a plea bargain is not subject to harmless error analysis.” (*Walker, supra*, at p. 1026.) As in *Walker*, defendant was not advised of the \$1,400 fines, and the imposition of such fines was a significant deviation from his plea agreement. Accordingly, the fines violated his plea agreement and must be reduced to the statutory minimum of \$200.

Regarding Case 2, the People argue the restitution fines were properly imposed. (*People v. Crandell* (2007) 40 Cal.4th 1301 (*Crandell*)). In *Crandell*, the prosecutor did not mention a restitution fine when he recited the plea agreement; however, in advising the defendant of the consequences of the plea, the trial court informed him that he would have to pay a restitution fine of a minimum of \$ 200 and a maximum of up to \$10,000. The defendant acknowledged this consequence and indicated no other promises had been made. (*Id.* at p. 1305.) The court imposed a \$2,600 restitution fine. (*Id.* at p. 1306.) Our Supreme Court held that the imposition of the fine did not breach the plea agreement, because the trial court accurately advised the defendant that he would be required to pay restitution. (*Id.* at p. 1310.) Thus, in entering his plea, the defendant “could not reasonably have understood his negotiated disposition to signify that no substantial restitution fine would be imposed.” (*Ibid.*) Here, defendant’s plea agreement referenced the fines. As in *Crandell*, at the time that defendant entered his plea in Case 2, the trial court told him that the maximum amount for each fine would be \$10,000 and the minimum would be \$200. At sentencing, the court imposed two \$600 fines but stayed one. Defendant did not object. Thus, the record shows the parties agreed that the trial

court could set the amount of the fines within the statutory range. As such, defendant is not entitled to relief. (*Id.* at p. 1309.)

In a separate but related argument, defendant contends, and the People concede, that the court orally imposed a \$200 restitution fine in Case 1 when it imposed and stayed a seven-year prison sentence; however, the minute order indicates that the court imposed a \$1,400 restitution fine, an increase from \$200 previously imposed. The oral pronouncement controls. (*People v. Martinez* (1980) 109 Cal.App.3d 851, 855.) Thus, we will order the restitution fine and the corresponding probation revocation fine reduced to \$200.

#### V. DISPOSITION

In Case 1 (No. SICRF-09-48645) the amounts of the restitution fine, the parole revocation fine, and the probation revocation fine are all reduced to \$200 each. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.