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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.

EDWARD CHARLES SAMUEL,

Defendant and Appellant.

E056762

(Super.Ct.No. FSB1104654)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

John N. Aquilina, 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, Melissa Mandel and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Edward Charles Samuel is serving eight years in prison after pleading guilty to selling drugs as a second striker. Defendant argues the trial court erred when it denied his request under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to appoint substitute counsel to argue a motion to withdraw his guilty plea. As discussed below, we find no error and so affirm the judgment.

### **FACTS AND PROCEDURE**

On September 28 and October 4, 2011, defendant sold small amounts of cocaine base to a confidential informant.

On October 24, 2012, the People filed an information charging defendant with three counts of selling a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) The People alleged as to each count that defendant had both a prior “strike” conviction and a prison prior. (Pen. Code, §§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i) & 667.5, subd. (b).)

On May 22, 2012, defendant pled guilty to all counts and admitted the strikes. He was to be sentenced on July 9, 2012, and the trial court was to dismiss the prison prior enhancements.

On July 9, 2012, as the sentencing hearing was about to begin, the trial court asked defendant if he “had some issues you wanted to talk about regarding your attorney; is that correct?” Defendant told the trial court that he wanted to “take my plea back,” and, when asked why, explained “The pressure I was under. I was—what he told me.” At that point, the trial court cleared the courtroom and held a *Marsden* hearing.

Defendant told the trial court that he would like to take back his plea and that he understood he could have different counsel appointed to represent him on that motion. He explained that the police officers who arrested him on the current charges had attacked him in February of 2010, and had committed officer misconduct in the current case by deciding to entrap him. He stated that he had told this to defense counsel. Defense counsel did not believe defendant had grounds for entrapment or outrageous police conduct. Further, counsel told defendant that the two prosecutors who had dealt with this case were influenced by the police, that he was not going to get a fair trial, and that they were going to “railroad” him. Defendant stated he felt threatened and pressured to take the plea deal offered because his defense counsel did not believe in his entrapment offense, and because of the statements counsel had made about him not being able to get a fair trial. Defendant also stated he was led to believe he would only have to serve half of the contemplated eight-year sentence instead of 80 percent.

Defense counsel responded that he had told defendant that the prosecutor rejected an early defense proposal for a plea agreement because the arresting officer indicated it would not be acceptable. He stated that defendant “took that with some distress.” Regarding the custody credit issue, defense counsel said that he “foresaw this might be a problem” and so he wrote on the plea agreement that defendant would have to serve 80 percent of the eight-year prison term, and so that was on the plea form when defendant signed it.

The trial court asked defense counsel to address whether he had told defendant he could not get a fair trial. Counsel responded that, had he felt defendant could not get a fair trial, he would have filed a “170.1 petition,” but that he did not because he had no such concerns. Counsel explained that he gave defendant his “independent legal assessment” of the claims and defenses defendant raised, and that he did not believe the elements of entrapment had been met or that there were any grounds for an egregious conduct motion. Defense counsel further stated that he had reviewed his notes and did not believe he had told defendant he would be “railroaded,” but rather told him there was a significant chance he could lose if he went to trial. Defense counsel concluded that he had given defendant an independent, honest assessment of his case.

Defendant countered that counsel had specifically told him over the telephone that he would be “railroaded” if he did not accept the plea bargain. Defendant asked the trial court to obtain the phone records of that conversation.

Defense counsel said that he had told defendant that if he withdrew his plea “they will likely pursue greater consequences. That they are going to try to get him, because throwing a plea back, in my experience, means that the prosecutor does not offer a lesser plea. That—I have not met yet a prosecutor, who would in response to a demand to do more work, has lessened the plea deal.”

The trial court concluded that obtaining telephone records would be unnecessary because, even if they existed and showed defense counsel had used the term “railroaded,” this could be an essentially accurate description of the consequences if defendant rejected

the plea deal. The trial court reasoned that, based on what it was hearing from defendant and defense counsel, and based on its observations of defense counsel and the motions he had filed, it could not conclude that defense counsel was ineffective. The trial court also stated that it found defense counsel to be credible.

Both defendant and defense counsel stated their understanding that defendant was entitled to an independent attorney to evaluate whether defense counsel had been ineffective. The trial court said that it had recently researched the issue and had found a California Supreme Court case holding that a defendant is not entitled to an independent attorney for that purpose. Finally, the court construed defendant's motion as a request to both withdraw his plea and have new counsel appointed. The court denied both requests and ordered the transcript of the hearing sealed.

Immediately thereafter, the court sentenced defendant on each count to four years, doubled to eight years for the strike prior, to be served concurrently, and struck the prison priors. This appeal followed.

## **DISCUSSION**

Defendant argues the trial court erred when it denied his *Marsden* motion to have new counsel appointed to independently investigate and argue a motion to withdraw his guilty plea on the ground that counsel had been ineffective in pressuring him to accept the plea. Defendant challenges this decision both on its merits and on the ground that the trial court failed to properly conduct a full and complete hearing.

1. *Marsden Hearing*

Defendant argues: (a) he established ineffective assistance of counsel because counsel pressured him to plead guilty; (b) he established an actual conflict of interest with defense counsel because his motion to withdraw his plea would involve an ineffective assistance of counsel claim; and (c) the *Marsden* hearing was constitutionally inadequate because the trial court declined to obtain from the jail any recordings that might exist of a telephone call in which defendant claims counsel told him he would be “railroaded” if he decided to proceed to trial.

“When a defendant seeks substitution of appointed counsel pursuant to . . . *Marsden*[,] “the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief 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.” [Citation.] ‘A trial court should grant a defendant’s *Marsden* motion only when the defendant has made “a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.” [Citation.]’ (*People v. Streeter* (2012) 54 Cal.4th 205, 230.) The trial court is “entitled to accept counsel’s explanation” when there is an issue of credibility between the defendant and counsel. (*People v. Webster* (1991) 54 Cal.3d 411, 436.) “We review the denial of a *Marsden* motion for abuse of discretion.’ [Citation.] ‘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.” [Citation.]” (*People v. Streeter* (2012) 54 Cal.4th 205, 230.)

(a) *Ineffective Assistance of Counsel*

Here, the record does not clearly show counsel was ineffective for being candid with defendant about his chances for receiving a better plea bargain or an acquittal if he rejected the offer of eight years. Although defendant told the trial court that he felt threatened and pressured to take the plea offer because counsel did not believe his entrapment defense, counsel told him he would be “railroaded” and not get a fair trial if he did not take the deal, and that counsel had led him to believe he would serve only half of the eight years instead of 80 percent, defense counsel demonstrated that he gave an accurate legal assessment to defendant about his prospects for obtaining a lesser sentence. First, defense counsel did not believe defendant could establish the elements of entrapment, given that defendant voluntarily sold drugs to an informant on two separate occasions, nor establish egregious conduct by the police. Second, defense counsel explained that he accurately told defendant that the arresting police officers had opposed a better plea deal and there was a significant chance he would lose if he went to trial. Defense counsel denied using the term “railroaded,” and said that he would have filed a motion if he really believed defendant could not get a fair trial. Third, counsel accurately asserted the reality that a prosecutor is not likely to offer a better deal after a defendant rejects the offered plea, especially given the position of the arresting officers and the state of the evidence in this case. Finally, defense counsel had written right on the plea

bargain sheet that defendant would be serving 80 percent of his sentence, just to avoid any confusion.

To conclude, the trial court did not abuse its discretion when it concluded during the *Marsden* hearing that defense counsel provided adequate representation to defendant.

(b) *Conflict of Interest*

Defendant's claim that he had a right to new appointed counsel for the hearing on his motion to withdraw his plea is without merit. The California Supreme Court clearly stated in *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*) that a defendant is not entitled to conflict counsel to investigate grounds for a motion to withdraw a guilty plea unless the trial court determines, in its discretion, that the defendant's right to counsel in entering into the plea has been substantially impaired. In fact, the Court "specifically disapprove[d]" of the practice of appointing "a substitute or 'conflict' attorney solely to evaluate whether a criminal defendant has a legal ground on which to move to withdraw the plea on the basis of the current counsel's incompetence." (*Id.* at p. 90.) The trial court here found that the defendant was receiving a competent defense from his counsel, and so there was no ground for appointing substitute counsel for the purpose of investigating and possibly filing a motion to withdraw defendant's guilty plea based on ineffective assistance of counsel.

(c) *The Marsden Hearing was Adequate*

Defendant claims the trial court failed to provide him with a full and adequate *Marsden* hearing because it declined his request to obtain any recordings of his telephone

conversations with counsel to back up his claim that counsel told him he would be “railroaded” at trial if he declined the offered plea bargain. The court was required to afford defendant the opportunity to explain why he wanted a new attorney and to give specific examples of his attorney’s failings. (*People v. Smith* (1993) 6 Cal.4th 684, 690.) The court did this. In fact, the trial court accepted for the sake of argument defendant’s claim that his attorney used the term “railroaded” during a telephone conversation. The court reasoned that even if defense counsel had “used the word railroaded in the context of saying the consequences of you withdrawing your plea, I don’t think that’s ineffectiveness of counsel. I think that, based on how he’s described it in court, is essentially accurate about what would be the consequences of withdrawing your plea.” For these reasons, we cannot conclude that the trial court afforded defendant less than a full and complete *Marsden* hearing.

## 2. Motion to Withdraw Guilty Plea

The trial court’s consideration of defendant’s request to withdraw his guilty plea was inextricably intertwined with its consideration of his expressed desire for new counsel.<sup>1</sup> The court and the parties addressed both issues during the *Marsden* hearing. Defendant stated he wanted to withdraw his guilty plea because he felt pressured by defense counsel to accept it. Before the court called for the *Marsden* hearing, it had the

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<sup>1</sup> We also note that the California Supreme Court in *Sanchez* expressed in a footnote its approval of the procedure that “the trial court’s duty to conduct a *Marsden* hearing was triggered by defense counsel’s request for appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on Sanchez’s behalf.” (*Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.)

following conversation with defendant in open court at the beginning of the sentencing hearing.

“Q THE COURT: Mr. Samuel, you had some issues you wanted to talk about regarding your attorney; is that correct?”

“A THE DEFENDANT: Attorney and actually the plea agreement.

“Q THE COURT: I’m sorry?”

“A THE DEFENDANT: The attorney, the actual plea agreement, yes.

“Q THE COURT: Okay. Give me a short version of what you want to talk about?”

“A THE DEFENDANT: I would like to take my plea back?”

“Q THE COURT: Why is that?”

“A THE DEFENDANT: The pressure I was under. I was—what he told me.

“Q THE COURT: What who told you?”

“A THE DEFENDANT: [Defense counsel]

“Q THE COURT: I don’t want to get into the details—tell you what. I’m going to construe that as a request for a *Marsden* hearing. With that, I’m going to seal the courtroom. Have everyone else leave and talk to Mr. Samuel a little more, and I will let you know when we are ready to talk.”

The court then held the *Marsden* hearing out of the presence of the prosecutor. After the hearing was concluded, the court informed the People that it had conducted the *Marsden* hearing and cited to *Sanchez*.

During the *Marsden* hearing, the trial court adequately addressed the factual basis for both defendant's request for new counsel under *Marsden* and for his request to withdraw his plea—that defense counsel had pressured him to accept a plea he did not want. Defendant argues in this appeal that the trial court should have focused its inquiry less on defendant's assertions of counsel's previous inadequate representation and more on defendant's assertions that counsel would in the future provide inadequate representation in presenting a formal motion with withdraw his guilty plea. However, the California Supreme Court in *Sanchez* made it clear that, for a defendant to compel the trial court to appoint substitute counsel to investigate and bring a motion to withdraw the defendant's guilty plea, the defendant must first show that his right to counsel has been ““substantially impaired.”” ( *Sanchez, supra*, 53 Cal.4th at p. 87) We have already upheld the trial court's ruling that defendant's right to counsel was not substantially impaired when he entered into the plea agreement, and so for this reason we conclude that the trial court did not err, in substance or in process, when it denied the defendant's request that he be able to withdraw his guilty plea and obtain substitute counsel for that purpose.

During oral argument, defendant's appellate counsel acknowledged the rule in *Sanchez, supra*, 53 Cal.4th 80, regarding the requirement for appointment of substitute counsel, but nevertheless argued that the hearing on defendant's oral motion to withdraw his plea was inadequate. Counsel pointed out that, among many other factors, the motion was heard *ex parte* and no evidence was taken. Further, counsel suggested the trial court

should have advised defense counsel to file a written motion on defendant's behalf, because defendant was entitled to decide whether such a motion should be filed. Finally, counsel emphasized that the crux of defendant's complaints was not ineffective assistance of counsel, as is best dealt with in a *Marsden* hearing, but rather that defendant should be allowed to withdraw his plea because he entered into it as a result of defense counsel's pressure and threats. Counsel argued that this claim by defendant warranted a full-fledged, adversarial hearing including, among other things, written motions, investigation, the taking of evidence and argument by counsel. We appreciate counsel's vigorous rendering of his client's position and acknowledge that such a rule would be far more preferable from a defendant's point of view. However, the trial court in this case followed the exact procedure approved of by our Supreme Court in *Sanchez*. The court gave defendant every opportunity to explain how he felt pressured and threatened and, based on that information, found that defendant's right to counsel had not been substantially impaired. Thus, the court fully provided defendant with the process to which he was entitled and so we cannot find any error here.

**DISPOSITION**

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

MILLER  
J.

CODRINGTON  
J.