

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH SANTILLAN,

Defendant and Appellant.

F061857

(Super. Ct. No. BF132653A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Meredith Fahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

---

\*Before Cornell, Acting P.J., Gomes, J. and Franson, J.

Michael Joseph Santillan (appellant) entered a negotiated plea agreement whereby he pled no contest to one count of transporting cocaine (Health & Saf. Code, § 11352, subd. (a)) and one count of driving under the influence (Veh. Code, § 23152, subd. (a)). He admitted a prior narcotics conviction allegation (Health & Saf. Code, § 11370.2, subd. (a)). The plea agreement included a maximum indicated sentence of seven years. In exchange, the remaining counts of unlawful use of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), vehicular hit-and-run resulting in property damage (Veh. Code, § 20002, subd. (a)), possession of not more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b)), and additional allegations were dismissed.

After denying appellant probation, the trial court sentenced appellant to seven years in state prison.

On appeal, appellant contends the trial court erred when it failed to appoint substitute counsel to file a motion to withdraw his plea, depriving him of his federal Sixth Amendment right to counsel as a result. He asks that we reverse and remand for the limited purpose of allowing him to pursue his motion to withdraw his plea. We reject his contention and affirm.

### **FACTS<sup>1</sup>**

On the evening of June 18, 2010, police officer Casey Grogan was on patrol when he heard a loud noise consistent with the sound of a tire blowing out. He turned the corner and observed a group of individuals standing on a sidewalk. One of the individuals pointed toward the south and yelled, “brown Explorer.” Grogan proceeded south and observed a continuous rubber mark in the roadway that led to a brown Ford Explorer stopped in the roadway, blocking traffic. The vehicle had a flat tire. Grogan contacted the driver, appellant, and detained him. While at the scene, a passing motorist indicated that appellant’s car had struck his.

---

<sup>1</sup>The facts are not at issue and are taken from the preliminary hearing.

Police officer Jeffrey Saso arrived on the scene and contacted appellant. Based on his training and experience, Saso formed the opinion that appellant was under the influence of an illicit narcotic.<sup>2</sup> Saso searched appellant's front pocket and discovered a clear plastic baggie containing a green leafy substance Saso believed to be marijuana. A search of appellant's back pocket revealed a clear plastic baggie containing 22.43 grams of an off-white, rock-like substance.<sup>3</sup> Saso testified that the white substance he seized from appellant was contained in a single packet and that he did not know if appellant possessed it specifically for sale.

### PROCEDURAL SUMMARY

On November 3, 2010, appellant proceeded to jury trial. Judge Friedman noted (1) that a "pre-prelim offer" of six years had been made, (2) that one readiness hearing before Judge Bush and two readiness hearings before Judge Lewis had indicated a sentence of seven years, (3) that the People wanted eight years, and (4) that morning, appellant proposed four years. Judge Friedman stated that he was not in a frame of mind to "wheel and deal," and that, if appellant wanted to go back to the presiding judge and take the readiness offer, he could, but Judge Friedman saw no reason to "undercut any offers that have been made."

Following a reading of the information, appellant requested a *Marsden*<sup>4</sup> hearing, which was heard and denied.<sup>5</sup> When open court resumed, defense counsel stated that appellant was requesting a day to "mull over the seven-year deal." The trial court stated that appellant would have such an opportunity because court would not be in session the

---

<sup>2</sup>For purposes of the preliminary hearing, the parties stipulated that blood drawn from appellant tested positive for both PCP and marijuana.

<sup>3</sup>For purposes of the preliminary hearing, the parties stipulated that the white substance contained cocaine.

<sup>4</sup>*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

<sup>5</sup>Appellant's brief does not put at issue the superior court rulings on either of his *Marsden* motions, or the facts contained in the transcripts of those motions. As such, we have denied respondent's request for a copy of the sealed transcripts from those motions.

following day. After going through several motions in limine not pertinent here, the court informed defense counsel that Judge Lewis had agreed to defense counsel's request to reopen the readiness negotiations.

Appellant then appeared in Judge Lewis's courtroom and entered a plea on the condition that he serve no more than seven years in state prison.<sup>6</sup> The trial court asked appellant, in reference to the waiver of rights he had signed, whether defense counsel had gone over his rights with him, whether he understood these rights, whether he gave up these rights, and whether he did so freely and voluntarily. Appellant answered "yes" to each question. When asked if he had had enough time to speak with defense counsel about his case or whether he had any questions, appellant indicated he had some questions. After two off-the-record conversations between defense counsel and appellant, appellant stated that he understood he was agreeing to a seven-year sentence.

The trial court then again stated that it was holding a "waiver of rights" form and asked appellant if he had gone over these rights with defense counsel, whether he understood these rights, whether he gave up these rights, and whether he was entering the plea freely and voluntarily. Again, appellant answered "yes" to each question. When asked if he had any questions "about anything related to [his] case that [he] would like to ask [his] attorney or the Court," appellant said, "No."

Following a finding that there was a factual basis for the plea, appellant entered a no contest plea to one count of Health and Safety Code section 11352, subdivision (a), transportation of a controlled substance, a felony, and admitted a prior Health and Safety Code section 11370.2, subdivision (a) allegation, and pled no contest to one count of Vehicle Code section 23152, subdivision (a), driving under the influence. The remaining counts and allegations were dismissed.

---

<sup>6</sup>The reporter's transcript for this hearing states that it took place on November 1, 2010, but the date was obviously November 3, 2010, as evidenced by the transcripts in Judge Friedman's courtroom both immediately before and after the plea hearing, which are both dated November 3, 2010, and the minute order for the plea hearing dated November 3, 2010.

At sentencing on December 6, 2010, before Judge Lewis, defense counsel explained that appellant wished to withdraw his plea, and counsel requested that independent counsel be appointed to represent appellant “for that purpose only.” The trial court, citing *People v. Smith* (1993) 6 Cal.4th 684 (*Smith*),<sup>7</sup> stated that it would be “inappropriate” to appoint counsel at this point based on what had been presented. Defense counsel then requested a *Marsden* hearing, and appellant agreed that he wished to have defense counsel relieved. A second *Marsden* hearing was then heard and denied, this time before Judge Brownlee. Appellant and defense counsel then returned to Judge Lewis’s courtroom where appellant was sentenced.

### DISCUSSION

Appellant contends the trial court’s failure to appoint counsel to assist him with a motion to withdraw his plea resulted in a denial of his Sixth Amendment right to counsel, requiring remand to the trial court to permit him to present his motion with the assistance of counsel. Appellant bases this argument in large part on *People v. Brown* (1986) 179 Cal.App.3d 207 (*Brown*).

In *Brown*, trial counsel informed the court at sentencing that the defendant wanted to withdraw his plea but that, in her opinion, there was no “legal basis” for such a motion, and she was not making the motion for him. (*Brown, supra*, 179 Cal.App.3d at p. 211.) The defendant told the court that at the time he entered his plea, he ““wasn’t in the right frame of mind”” (*ibid.*) because ““a death ... had [him] shook up”” (*id.* at p. 213). He asked the trial court if he could withdraw his plea and obtain another attorney, but the

---

<sup>7</sup>In *Smith*, the defendant was convicted of felony charges pursuant to a plea bargain and, prior to sentencing, sought to withdraw the plea. When that was denied, he moved to substitute counsel. The trial court denied the substitution motion. We remanded for the limited purpose of rehearing the defendant’s motion for new counsel because we found that the trial court had applied an incorrect test in denying the postconviction motion for substitution. The California Supreme Court disagreed and held that the same standard for substitution of counsel applied equally preconviction and postconviction, and substitute counsel should be appointed only when the trial court finds that the defendant has shown that a failure to replace appointed counsel would substantially impair the right to assistance of counsel. (*Smith, supra*, 6 Cal.4th at pp. 694-696.)

trial court refused to grant either request. (*Id.* at pp. 211-213.) The appellate court, noting that a criminal defendant has a “right to be represented by counsel at all stages of the proceedings” (*id.* at p. 214), concluded that the defendant was “deprived of his right to make an effective motion to withdraw his plea” (*id.* at p. 213) and remanded the case to allow the defendant, represented by counsel, to move to withdraw his plea, with instructions for a *Marsden* hearing should counsel continue to refuse to bring the motion (*id.* at p. 216). In so holding, the court stated that it was not suggesting that counsel is required to make a frivolous motion or “compromise accepted ethical standards.” (*Ibid.*)

We find the very recent case of *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*) instructive. In *Sanchez*, our Supreme Court addressed the question “under what circumstances a trial court is obligated to conduct a hearing on whether to discharge counsel and appoint new counsel when a criminal defendant indicates a desire to withdraw a guilty or no contest plea on the ground that current counsel has provided ineffective assistance.” (*Id.* at p. 84.) In *Sanchez*, the trial court appointed substitute counsel to represent the defendant on a motion to withdraw his plea in lieu of conducting a *Marsden* hearing; in effect, granting the defendant’s *Marsden* motion without conducting the required hearing. (*Sanchez, supra*, at p. 92.) The Supreme Court held that a trial court

“must conduct such a *Marsden* hearing only when there is at least some clear indication by the defendant, either personally or through counsel, that the defendant wants a substitute attorney. We additionally hold that, if a defendant requests substitute counsel and makes a showing during a *Marsden* hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. In so holding, we specifically disapprove of the procedure of appointing substitute or ‘conflict’ counsel solely to evaluate a defendant’s complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea.” (*Id.* at p. 84.)

Here, the trial court followed the exact procedure set out in *Sanchez*. Appellant, through counsel, indicated that he wished to withdraw his plea and counsel asked that the trial court appoint substitute counsel “for that purpose only.” When the trial court denied

the request, counsel asked for a *Marsden* hearing, and appellant agreed that he wished to have counsel relieved. A full *Marsden* hearing was then heard and denied. Appellant fails to allege any error with regard to the litigation of the *Marsden* proceedings. Appellant made no further request to withdraw his plea. We conclude that, under the circumstances of this case, the trial court was not required to appoint substitute counsel to investigate and bring a motion to withdraw the plea, and we reject appellant's claim to the contrary.

#### **DISPOSITION**

The judgment is affirmed.