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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN DAVID DONGES,

Defendant and Appellant.

F063056

(Super. Ct. No. CRF34460)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Michael L. Pinkerton, 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, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J. and Franson, J.

INTRODUCTION

Appellant Sean David Donges was found guilty of transportation of marijuana and possession of marijuana for sale. He appeals his convictions, contending he entered a “slow plea,” which was not knowing and voluntary. Donges also contends the trial court erred by failing to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Finally, he asserts the trial court violated Penal Code section 654¹ when it imposed a fine on both counts, because the offenses were an indivisible course of conduct with a single objective.

The first two contentions lack merit. Donges is correct that imposition of the fines violated section 654; therefore, we will remand for reimposition of the fines.

FACTUAL AND PROCEDURAL SUMMARY

On January 14, 2011, Donges was charged with transportation of marijuana and possession of marijuana for sale. On April 11, Donges pled not guilty to the charges.

On June 29, at the commencement of trial, there was a discussion about participating in a court trial with no jury. The trial court addressed Donges, indicating that defense counsel had suggested the court make the decision on the charges, without a jury, based on the preliminary hearing transcript. Defense counsel stated that Donges’s primary concern was the appeal, stating that Donges would retain his appellate rights even though he waived a jury trial. The trial court asked Donges if he wished to waive a jury trial, to which Donges responded affirmatively. The prosecutor joined in the waiver of a jury trial.

The parties agreed on the evidence that would be considered, including certain exhibits, the preliminary hearing transcript, a stipulation that 160 mature female plants

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

were found in Donges's vehicle when he was stopped, and the amount of marijuana found in the vehicle was in excess of three ounces. The trial court made a finding that Donges freely and voluntarily waived his right to a jury trial. After both sides submitted the matter, the trial court found Donges guilty of both counts.

The trial court sentenced Donges to probation, on condition that he serve 120 days in jail. Certain fines and fees also were imposed.

DISCUSSION

Donges contends his submission on the preliminary hearing transcript constituted a slow plea, not a plea of guilty, and was not knowing and voluntary; the trial court was required to hold a *Marsden* hearing; and the fines imposed at sentencing were in violation of section 654.

I. Slow Plea

Donges contends the judgment must be reversed because his submission on the preliminary hearing transcript was a slow plea that was not knowing and voluntary.

A slow plea (see *People v. Wright* (1987) 43 Cal.3d 487, 495-497 (*Wright*)), is apparently so named because when the defendant's guilt is apparent on the basis of the evidence the parties have agreed to have the court consider, "conviction [is] a foregone conclusion if no defense [is] offered." (*Id.* at p. 496.) Although the California Supreme Court has determined that certain procedural safeguards (not in issue on this appeal) should be utilized when a slow plea procedure is used (see *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 (*Bunnell*)), a slow plea is not actually a guilty plea. "[E]ven a bargained-for submission is not a plea of guilty." (*Id.* at p. 602, fn. 4.) "[T]he defendant who submits his cause on the transcript does not give up his right to any trial, only to a jury trial" (*Id.* at p. 604.)

In *People v. Sanchez* (1995) 12 Cal.4th 1, 27-29 (*Sanchez*), the California Supreme Court elaborated: "[A slow plea is] a submission of the guilt phase to the court on the basis of the preliminary hearing transcripts that is tantamount to a plea of guilty

because guilt is apparent on the face of the transcripts and conviction is a foregone conclusion if no defense is offered.” (*Sanchez, supra*, 12 Cal. 4th at p. 28.) “An appellate court, in determining whether a submission is a slow plea, must assess the circumstances of the entire proceeding.” (*Wright, supra*, 43 Cal.3d at p. 496.) If, after such an examination it appears “that the defendant advanced a substantial defense, the submission cannot be considered to be tantamount to a plea of guilty. Sometimes, a defendant’s best defense is weak. He may make a tactical decision to concede guilt as to one or more of several counts as part of an overall defense strategy. A submission under these circumstances is not a slow plea” (*Sanchez, supra*, 12 Cal.4th at p. 29.)

Sanchez and other cases acknowledge that deciding whether a submission is a slow plea “is often difficult, and courts generally review such pleas based on defendant’s willingness to contest guilt during the court trial.” (*Sanchez, supra*, 12 Cal.4th at p. 28; see also *Wright, supra*, 43 Cal.3d at p. 49.) *Sanchez* set forth two non-exclusive circumstances in which a submission is not considered a slow plea: “(1) the preliminary hearing involves substantial cross- examination of the prosecution witnesses and the presentation of defense evidence or (2) the facts revealed at the preliminary examination are essentially undisputed but counsel makes an argument to the court as to the legal significance to be accorded them.” [Citation.]” (*Sanchez, supra*, 12 Cal.4th at p. 28.)

In the present case, Donges argued that he could legally sell to a marijuana cooperative as long as it was not “for profit.” Donges essentially argued that even if the allegations were true, it did not lead to a legal conclusion of guilt.

Moreover, defense counsel cross-examined the prosecution witness at the preliminary hearing. Substantial evidence, in addition to the preliminary hearing transcript, was submitted and agreed upon: Donges’s testimony at the Evidence Code section 402 hearing; the stipulation on Donges’s medical marijuana recommendation; the additional exhibits to be considered and admitted into evidence; and the stipulation on the amount of marijuana and marijuana plants found in the vehicle.

After considering all the evidence and Donges's legal arguments, the trial court found that Donges's possession and transportation was not excused by the Medical Marijuana Act and found Donges guilty as charged in both counts.

As recognized in *Sanchez*, “[s]ometimes, a defendant’s best defense is weak.” (*Sanchez, supra*, 12 Cal.4th at p. 29.) Here, it was virtually impossible to controvert that Donges was in possession of marijuana and marijuana plants and transporting them in his vehicle. Defense counsel was forced to develop a strategy that accounted for this reality. Although the strategy proved unsuccessful, it was not tantamount to a slow plea. (*Sanchez, supra*, 12 Cal.4th at pp. 28-30 [submission on preliminary hearing transcripts was not slow plea]; *Wright, supra*, 43 Cal.3d at pp. 495-499 [partial submission on preliminary hearing transcript was not a slow plea].)

II. Marsden

Donges contends the judgment must be reversed because the trial court failed to hold a *Marsden* hearing when he requested one. He is incorrect.

Factual Summary

At a pre-trial conference on June 8, 2011, the trial court stated it was not granting Donges's motion for a continuance. Defense counsel then stated there needed to be a *Marsden* hearing, because counsel was short staffed, had not been able to talk to Donges about the case, and counsel was not ready for trial. There was discussion again of continuing the case, which ultimately was continued to June 29, 2011.

At the June 27 readiness hearing, defense counsel confirmed he was ready for trial. Donges personally addressed the court, stating he was trying to hire private counsel. The trial court stated if private counsel made an appearance by the next day, the trial would be continued, otherwise a continuance would not be granted. When Donges attempted to address the court on a demurrer; the trial court responded that Donges was “not representing yourself.” When Donges replied, “It seems that I am,” the trial court

responded, “No, you’re not.” There was no further mention of a *Marsden* hearing, either at trial or sentencing.

Analysis

“When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel’s inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would ‘substantially impair’ the defendant’s right to assistance of counsel. [Citations.]” (*People v. Webster* (1991) 54 Cal.3d 411, 435; *Marsden, supra*, 2 Cal.3d at pp. 123-124 .) These principles apply equally preconviction and postconviction. (*People v. Smith* (1993) 6 Cal.4th 684, 694.)

In the present case, Donges never requested a *Marsden* hearing; defense counsel indicated one was needed if the case was moving forward to trial because counsel was unprepared. Donges’s case was continued and at the continued readiness hearing, defense counsel indicated he was prepared for trial. When Donges addressed the trial court, he did not indicate he wanted a *Marsden* hearing, either at the readiness hearing or any subsequent time.

Donges never expressed any grounds for dissatisfaction with his appointed counsel. (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695.) Defense counsel expressed concern about being prepared for trial if a continuance was not granted; ultimately, the trial court granted the continuance.

Assuming for the sake of argument that Donges made a valid request for a *Marsden* hearing on June 8, 2011, abandonment of a *Marsden* request has been found where the defendant fails to raise the issue at subsequent hearings. (*People v. Vera* (2004) 122 Cal.App.4th 970, 976-977, 981-982; *People v. Harrison* (2001) 92 Cal.App.4th 780, 790; *People v. Lloyd* (1992) 4 Cal.App.4th 724, 731-732.) Donges did not request a *Marsden* hearing when he was in court for the June 27 readiness conference

or later, at any point during the trial or sentencing. Presumably, the need for a *Marsden* hearing was resolved when the trial date was continued in order to allow defense counsel to adequately prepare.

III. Section 654

Donges contends, and the People concede, that section 654 prohibited imposition of a fine on both counts. Both parties concede that the fine imposed pursuant to Health and Safety Code section 11372 is intended as punishment and therefore, section 654 prohibits imposition of the fine on both counts because the sale and transportation of the marijuana was an indivisible course of conduct with a single objective. (*People v. Sharrett* (2011) 191 Cal.App.4th 859, 865-866; *People v. Solo* (1970) 8 Cal.App.3d 201, 208.)

DISPOSITION

The judgment is affirmed in all respects except for the imposition of fines pursuant to Health and Safety Code section 11372, which are vacated. The matter is remanded for the sole purpose of re-imposition of the fine in accordance with section 654.