

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

LAMARR EDWARD BROWN,

Defendant and Appellant.

F063194

(Super. Ct. No. VCF251646A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Eleanor M. Kraft, 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, William K. Kim and Tiffany J. Gates, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Levy, Acting P.J., Gomes, J. and Detjen, J.

Defendant and appellant Lamarr Edward Brown appeals from a judgment entered after a guilty plea. He contends the court erred in denying his *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) and he seeks a stay of punishment on one count of conspiracy pursuant to Penal Code section 654. We deny relief on the *Marsden* motion but order that punishment for conspiracy be stayed.

FACTS AND PROCEDURAL HISTORY

On April 19, 2011, defendant and another man were arrested in a parking lot after they stole baby products from a Rite Aid Pharmacy. The district attorney filed a felony complaint charging defendant with second degree commercial burglary (count 1, Pen. Code, § 459) and conspiracy to commit burglary (count 2, Pen. Code, § 182, subd. (a)(1)). As to each count, the complaint included special allegations that defendant had suffered one prior “strike” conviction (see Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and served one prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

Defendant was arraigned on May 11, 2011, where he pled not guilty to both counts and denied the special allegations in the complaint. On May 20, 2011, defendant changed his pleas to guilty to both counts and admitted that he suffered one prior “strike” conviction and served a prior prison term, pursuant to an indicated sentence of 32 months in prison.

Prior to the sentencing hearing on July 27, 2011, defendant requested a *Marsden* hearing. (*Marsden, supra*, 2 Cal.3d 118.) At this hearing, in response to the court’s request that defendant “tell [the court] what the situation is here,” defendant stated: “Well, the only reason I took the 32 months is because she [defense counsel] said I would do a year and four months. That’s 16 months. And I thought -- she never told me I was getting half time or anything. She just said that’s what I’ll be doing out of 32.” When asked by the court to respond, defense counsel stated: “Your Honor, what I would say is that he admitted a prior strike and a prior prison and that means that he would not get half

time. And, in fact, if he's getting 32 months, that doesn't automatically mean he's not getting half time. I wouldn't have advised somebody that they were getting half time if we were sentencing mitigated doubled. I advise people all the time about their sentencing. And the credits are really not the issue anyway because those aren't determined here." Defendant acknowledged he was advised of his constitutional rights and the maximum sentence he would receive. As to conduct credits, however, defendant said he "felt that nothing was explained to me. Just it was thrown to me. [Sic.]"

The trial court denied the motion, finding that defendant was advised of his maximum exposure and his constitutional rights. The court concluded that defendant affirmatively stated at the change of plea hearing that he did not have any questions regarding the rights he was giving up, consequences of his plea, or the nature of the charges against him. The trial court determined that defendant was fully advised as to the consequences of his plea, but that conduct "[c]redits are not something we discuss here anyhow. That's between you and the prison, so I'm going to deny your [Marsden] motion."

The trial court imposed the indicated sentence of 32 months on each count (that is, the lower term of 16 months doubled pursuant to the "Three Strikes" law (Pen. Code, § 1170.12, subd. (c)(1)); the sentences were ordered to run concurrently. The trial court struck the prior prison term enhancements for the purpose of sentencing.

DISCUSSION

A defendant who seeks substitute counsel because of dissatisfaction with his current attorney can make a "Marsden motion." (*People v. Smith* (1993) 6 Cal.4th 684, 690; see also *Marsden, supra*, 2 Cal.3d at pp. 122-123.) "[T]he trial court must give the defendant the opportunity to explain the reasons for desiring a new attorney." (*People v. Smith, supra*, 6 Cal.4th at p. 690.) "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." (*People v. Webster* (1991) 54

Cal.3d 411, 435.) “[T]he decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed attorney.” (*Marsden, supra*, 2 Cal.3d at p. 123.) “The court does not abuse its discretion in denying a *Marsden* motion “unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.” [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing [constitutionally] inadequate representation or when ‘the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].’” (*People v. Clark* (2011) 52 Cal.4th 856, 912.) In the present case, defendant contends trial counsel, either by failing to fully explain conduct credits or by misadvising him of the extent of such credits, provided constitutionally ineffective assistance of counsel. Accordingly, we turn to the established standards to determine whether the trial court abused its discretion in impliedly finding that defendant’s trial counsel had not provided constitutionally ineffective representation.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*)). “‘A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components.’” (*Id.* at p. 216, quoting *Strickland v. Washington* (1984) 466 U.S. 688, 687 (*Strickland*)). “‘First, the defendant must show that counsel’s performance was deficient.’ [Citations.] Specifically, he must establish that ‘counsel’s representation fell below an objective standard of reasonableness ... under prevailing professional norms.’” (*Ledesma, supra*, 43 Cal.3d at p. 216, quoting *Strickland, supra*, 466 U.S. at pp. 687, 688.) In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny. (*Ledesma, supra*, 43 Cal.3d at p. 216.)

“[A] criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim.” (*Ledesma, supra*, 43 Cal.3d at p. 217.) “In certain contexts, prejudice is conclusively presumed.” (*Ibid.*) “Generally, however, prejudice must be affirmatively proved.” (*Ibid.*) “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.... The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at pp. 217-218, quoting *Strickland, supra*, 466 U.S. at pp. 693, 694.) “[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.” (*Ledesma, supra*, 43 Cal.3d at p. 218.) Reviewing courts undertake an independent review of the record to determine whether a defendant has established deficient performance and prejudice by preponderance of the evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 944-945.)

“[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.) In this case, it is clear that defendant has failed to demonstrate prejudice as a result of counsel’s performance; accordingly, it is unnecessary to determine whether the performance itself was deficient.

At his *Marsden* proceeding before he was sentenced, defendant essentially argued that he pled guilty because counsel informed him he would only be serving 16 months of a 32-month sentence. While defendant failed to establish that counsel initially misadvised him concerning credit on a Three Strikes sentence, even if we assume she did

so initially, the error was corrected prior to sentencing – as was made clear by defendant’s repeated statements at the *Marsden* hearing. Despite having knowledge that he was facing a 32-month sentence, defendant did not move to withdraw his guilty plea before he was sentenced. (See Pen. Code, § 1018 [permitting withdrawal of guilty plea prior to sentencing for good cause shown].) In these circumstances, any misadvisal was not prejudicial. In addition, defendant has neither asserted nor proven that he would have elected to proceed to trial had he initially known the facts concerning the limitation on credits. “The [*Strickland*] court held that in order successfully to challenge a guilty plea on the ground of ineffective assistance of counsel, a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel’s incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial.” (*In re Alvernaz, supra*, 2 Cal.4th at p. 934.) In this case, defendant was apprehended at the scene of the crime and made a full confession to the police. On appeal, defendant does not contend he would have taken the matter to trial but merely asserts instead that he might have been able to obtain a better plea bargain if he had known he would have to serve more than 16 months under the indicated sentence of 32 months. Nothing in the record supports this contention. Defendant has not established prejudice as required by *Strickland* and *Ledesma*.

Defendant also contends that because Penal Code section 654 prohibits punishment of an act under more than one provision of law, his sentence on the conspiracy charge in count 2 should be stayed. The People agree, since the conspiracy had no objective apart from the burglary. (*In re Cruz* (1966) 64 Cal.2d 178, 180-181.) We agree with the parties and will stay defendant’s sentence to count 2.

DISPOSITION

Sentence on count 2, conspiracy, is stayed pursuant to Penal Code section 654. The trial court is ordered to amend the abstract of judgment to reflect a stayed sentence to

count 2. The court is further ordered to forward the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.