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

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY LEE TIBBS, JR.,

Defendant and Appellant.

F070831

(Kern Super. Ct. No. BF157024A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Colette M. Humphrey, Judge.

James Edward Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P.J., Kane, J. and Smith, J.

Jerry Lee Tibbs, Jr., entered into a plea agreement to resolve two charges of possession of cocaine base for the purposes of sale. He was sentenced pursuant to the plea agreement. He argues on appeal the trial court erred when it denied his motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, which would permit new counsel to file a motion to withdraw his plea based on ineffectiveness of counsel. We find no error and affirm the judgment.

#### FACTUAL AND PROCEDURAL SUMMARY

According to the police report, in May 2014, members of the Bakersfield Police Department Special Enforcement Unit utilized a confidential informant to purchase rock cocaine from a group of men who were identified as members of the East Side Crips criminal street gang. The area of the transaction was part of the territory claimed by the East Side Crips and was notorious for drug sales. The transaction between the confidential informant and the gang members was observed by officers and was video recorded. The individuals involved in the transaction were Tibbs, Kelvin Peterson, Tennero Wall, and Alfonso Jackson. Later that month, a different confidential informant conducted another transaction with Tibbs. This transaction was also video recorded.

The information charged Tibbs with (1) transportation/sale of cocaine base (Health & Saf. Code, § 11352, subd. (a)), (2) possession of cocaine base for sale (Health & Saf. Code, § 11351.5), (3) active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)), (4) transportation/sale of cocaine base (Health & Saf. Code, § 11352, subd. (a)), and (5) possession of cocaine base for sale (Health & Saf. Code, § 11351.5). Each count also alleged the following enhancements: (1) the crimes were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1); (2) Tibbs had suffered a prior conviction for violation of Health and Safety Code section 11352 within the meaning of Health and Safety Code section

11370.2, subdivision (a); and (3) Tibbs had served four separate and distinct prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

Prior to trial, one of the codefendants moved for disclosure of the identity of the confidential informant used by the police. Defense counsel joined in the motion. The ruling on the motion does not appear in the record, but based on comments made by during the proceedings, it appears the motion was granted.

Thereafter, apparently to avoid disclosing the identity of the confidential informant, the prosecutor entered into plea agreements with Tibbs and the other codefendants. Tibbs agreed to plead no contest to active participation in a criminal street gang reduced to a misdemeanor with a registration requirement (Pen. Code, § 186.22, subd. (a)), one count of possession of cocaine base for sale (Health & Saf. Code, § 11351), and one count of maintaining a space for the sale of narcotics (Health & Saf. Code, § 11366.5, subd. (a)). The latter two counts were added to the information by stipulation of the parties. All enhancements were dismissed. Tibbs would be sentenced to a term of two years for the sales count, and eight months for the maintaining a space count for a total term of two years eight months.

Tibbs signed and initialed a plea agreement form outlining the terms of the plea agreement, acknowledging his constitutional rights, and waiving those rights. He further affirmed he entered into the plea voluntarily, and he had adequate time to discuss the case with his attorney.

The trial court went over the plea agreement form with Tibbs, confirmed he understood the terms of the plea agreement and the rights he was giving up, and confirmed that Tibbs did not have any questions about the plea agreement. Tibbs thereafter entered a plea of no contest to the above charges.

Prior to the sentencing hearing, defense counsel filed a motion to meet with the judge in camera to conduct a *Marsden/Smith* hearing. The notice states that Tibbs will move the court “to conduct an in camera hearing pursuant to *People v. Smith* (1993) 6

Cal.4th 684 [(*Smith*)].” In the accompanying memorandum of points and authorities, defense counsel stated that, “Communications with Mr. Tibbs lead me to believe Mr. Tibbs would like to withdraw his admission in this matter. Accordingly, the defense now asks the Court to conduct an *in camera* hearing to receive and consider the grounds underlying the defendant’s request.” (Italics in original.)

As the hearing on this motion forms the basis for the issue in this case, we review the proceedings in detail. At the hearing, the trial court first confirmed that Tibbs wished to withdraw his plea. The trial court then informed Tibbs that it must determine if there was legal cause to withdraw the plea, and if defense counsel could continue to represent Tibbs.

Tibbs stated that he wished to withdraw his plea because in July 2014, the public defender’s office refused to represent him in two different cases because it had declared a conflict of interest. Further, he complained that his right to due process was violated because he had not seen any of the evidence against him, including the video of the transactions. Tibbs felt he was forced to accept the plea bargain even though defense counsel had not showed him the evidence against him. When questioned by the trial court, Tibbs said he felt pressure to accept the plea agreement because defense counsel told him the prosecution had a strong case against him, but she never showed Tibbs the evidence.

Defense counsel then explained that she had joined a codefendant’s motion to disclose the identity of the confidential informant, and that motion had been granted. Shortly thereafter, the prosecutor significantly changed the plea offer, apparently to avoid disclosing the identity of the confidential informant.

The trial court confirmed the decision made was to accept a favorable plea offer (less serious counts and less prison time) instead of learning the identity of the confidential informant.

Tibbs proclaimed that defense counsel had not told him that was the reason a better plea offer was received. The trial court then confirmed that regardless of what defense counsel told him, he entered the plea agreement even though he had not seen any evidence against him. Tibbs complained he was feeling a lot of pressure at the time and suffered from anxiety. He explained the pressure was not knowing whether to take the plea offer or not. Tibbs explained that he wanted to learn the identity of the confidential informant, but he decided to accept the plea offer because it was a good offer, if he was guilty and had seen the evidence against him.

The trial court then asked defense counsel if she had identified any grounds for withdrawing the plea, and she stated she had not.

The trial court then ruled that she had not heard any legal grounds for Tibbs to withdraw his plea, because from Tibbs's comments it appeared he had merely changed his mind about accepting the plea. Tibbs then asked about the conflict of interest, and the trial court responded that simply because there was a conflict of interest in another case did not mean there was a conflict in this case.

The trial court then proceeded to the sentencing hearing and imposed the agreed upon term.

## DISCUSSION

Tibbs argues on appeal the trial court erred at the hearing on Tibbs's motion to withdraw his plea by failing to make adequate inquiry into the question of whether Tibbs should have new appointed counsel. Specifically, Tibbs argues the trial court failed to evaluate a conflict of interest he raised at the hearing. He goes on to argue "the trial court failed to make proper inquiry as to Mr. Tibbs grounds for new counsel, and to have substitute counsel explore those grounds to determine whether ineffective assistance of counsel provided grounds to withdraw his plea."

From these statements, it appears to us Tibbs is arguing the trial court erred because it failed to address Tibbs's claim of a conflict of interest, *and* because it failed to

adequately address the question of whether Tibbs received ineffective assistance of counsel requiring appointment of a new attorney to explore these grounds for a motion to withdraw his plea. Tibbs's presentation to the trial court was not so nuanced.

We begin with the claim that the public defender's office had a conflict of interest. Tibbs only asserted a conflict of interest existed in his opinion because the public defender's office had declared a conflict in two earlier cases when it had been appointed to represent Tibbs. Tibbs's assertion was not evidence a conflict existed.

"The Sixth Amendment to the federal Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.' Similarly, article I, section 15 of our state Constitution provides that '[t]he defendant in a criminal case has the right ... to have the assistance of counsel for the defendant's defense ....' It has long been held that under both Constitutions, a defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 168 (*Rundle*), overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"A recent decision of the United States Supreme Court, *Mickens v. Taylor* (2002) 535 U.S. 162 ... (*Mickens*), clarified several aspects of the applicable law concerning the determination whether a conflict of interest acted to deny a defendant the Sixth Amendment right to counsel. In its central holding, the high court decided that in cases in which the trial court should have inquired into the possibility of a conflict of interest on the part of defense counsel but failed to do so, before reversal is warranted the defendant nonetheless must demonstrate that an actual conflict of interest affected counsel's performance. (*Mickens, supra*, 535 U.S. at pp. 173–174.) As relevant to the present case, the high court also confirmed that conflict-of-interest claims are a category of ineffective-assistance-of-counsel claims, which, pursuant to the court's decision in *Strickland v. Washington* (1984) 466 U.S. 668 ... (*Strickland*), generally require the

defendant to demonstrate (1) deficient performance by counsel, and (2) “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (Mickens, supra, 535 U.S. at p. 166, quoting Strickland, supra, 466 U.S. at p. 694.) In the context of a claim of conflict of interest, however, the deficient-performance prong of the Strickland test is satisfied by a showing that defense counsel labored under an actual conflict of interest, that is, ‘a conflict that affected counsel’s performance – as opposed to a mere theoretical division of loyalties.’ (Mickens, supra, 535 U.S. at p. 171.) As to the second prong – that a defendant demonstrate prejudice in the outcome – the court recognized an exception to this requirement, applicable when there exist “circumstances of [the] magnitude” of the denial of counsel entirely or during a critical stage of the proceeding. (Id. at p. 166.) The court acknowledged that several of its cases held that circumstances of that magnitude existed when the defendant’s attorney had ‘actively represented conflicting interests,’ and thus no showing of prejudice was required in such circumstances. (Ibid.; see also United States v. Cronin (1984) 466 U.S. 648, 659, fn. 26 ...) Those earlier cases established what has become known as a ‘presumption of prejudice’ that would relieve the defendant of the otherwise applicable burden of demonstrating a reasonable probability that the conflict affected the outcome of the trial. [Citations.]

“In determining whether a defendant has demonstrated the existence of an actual conflict of interest satisfying the first prong of the analysis, we consider whether ‘the record shows that counsel “pulled his punches,” i.e., failed to represent defendant as vigorously as he might have had there been no conflict.’ [Citation.] And yet we must bear in mind, as we observed in People v. Roldan (2005) 35 Cal.4th 646, 674 ... (Roldan), that when “a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission.” ’ (Rundle, supra, 43 Cal.4th at pp. 169–170.)

Accordingly, to prevail on his claim Tibbs must demonstrate (1) that an actual conflict of interest existed, i.e. whether the record establishes defense counsel failed to represent defendant as vigorously as he or she might have if there had been no conflict, and (2) a reasonable probability that but for the conflict of interest the result would have been different. Rundle also clarified that it is Tibbs’s burden to establish an actual

conflict of interest existed that affected defense counsel's performance. (*Rundle, supra*, 43 Cal.4th at p. 169.)

Two cases demonstrate situations where an actual conflict of interest existed. The issue arose in *Rundle*, a capital murder case, after the jury reached a verdict in the guilt phase of the trial. Before the penalty phase of the trial began, defense counsel approached the trial court in camera to disclose potential juror misconduct. The alleged misconduct occurred when a juror made a statement indicating he had discussed the merits of the case outside of jury deliberations and was relying on improper external influences to reach a verdict. Although defense counsel was reluctant to reveal the source of his information, he eventually explained that his wife was a reporter for a local newspaper. Another reporter, who was covering the trial, allegedly overheard the juror's comment. This reporter then shared the comment with defense counsel's wife, who shared the statement with defense counsel. The conflict of interest arose because, according to defense counsel, his wife was specifically instructed by the newspaper to not discuss any aspect of the case with her husband. If the newspaper learned that his wife had told him of the juror's comment, she would be fired from her job, possibly putting the marriage in jeopardy. (*Rundle, supra*, 43 Cal.4th at pp. 164–166.) Much later in the proceedings, the reporter and the juror were questioned and both denied such statements were made. (*Id.* at pp. 166–168.)

The defendant argued that defense counsel had a conflict of interest which deprived him of his Sixth Amendment right to assistance of counsel, and the trial court erred in failing to inquire into the possible conflict of interest. The Supreme Court agreed that defense counsel provided ineffective assistance of counsel because he failed to ask obvious questions of the reporter, i.e., he “pulled his punches.” (*Rundle, supra*, 43 Cal.4th at pp. 170–171.) “We doubt that unconflicted counsel would have ended the investigation of this potentially serious allegation of juror misconduct without asking more direct and probing questions of the witness who supposedly had heard the alleged

statement.” (*Id.* at p. 171.) “In sum, we conclude defense counsel’s questioning of [the reporter] was inadequate compared to what reasonable and unconflicted counsel would have done, was a result of [defense counsel’s] predicament and both [defense] attorneys’ desire not to exacerbate it, and could not have been based upon a strategic choice regarding how best to protect defendant’s rights. Defendant therefore has demonstrated that an actual conflict of interest affected counsels’ performance.” (*Ibid.*)

However, turning to the second prong of the analysis, the Supreme Court concluded the presumption of prejudice did not apply, and the defendant could not establish any prejudice as a result of defense counsel’s conflict of interest. (*Rundle, supra*, 43 Cal.4th at p. 171.) “Only when the court concludes that the possibility of prejudice and the corresponding difficulty in demonstrating such prejudice are sufficiently great compared to other more customary assessments of the detrimental effects of deficient performance by defense counsel, must the presumption be applied in order to safeguard the defendant’s fundamental right to the effective assistance of counsel under the Sixth Amendment. (*Mickens*[, *supra*, 535 U.S.] at p. 175.) We conclude that the *Strickland* standard is not ‘inadequate’ in this case, and, accordingly, no presumption of prejudice is called for.” (*Id.* at p. 173.)

The Supreme Court next turned to state law applicable to conflict of interest claims.

“Although the federal Constitution – regardless of whether a presumption of prejudice applies – requires proof of an actual conflict of interest, that is, proof that counsel’s conflict adversely affected his or her performance during the proceedings [citation], under the state Constitution we have required only that the record support an ‘informed speculation’ that a ‘potential conflict of interest’ impaired the defendant’s right to effective assistance of counsel. [Citations.] Because a conflict of interest may retard counsel’s development of evidence or arguments in support of the defense – and possibly even evidence of the conflict itself – we have retained this stricter standard in order to ‘closely guard’ the fundamental right to the assistance of counsel. ‘The very failure to produce or emphasize such information ... produces a void and results in a record which shields the fact

of any possible conflict and makes it difficult to demonstrate on appeal that a conflict did in fact exist. [Citation.] Accordingly, a [defendant] ... need not establish that there was an actual conflict of interest, but rather it is sufficient if the record provides an adequate basis for an “informed speculation” that there was a potential conflict of interest which prejudicially affected the defendant’s right to effective counsel. [Citations.] [¶] Permissible speculation giving rise to a conflict of interest may be deemed an informed speculation but only when such is grounded on a factual basis which can be found in the record.’ [Citation.]” (*Rundle, supra*, 43 Cal.4th at pp. 174–175, fn. omitted.)<sup>1</sup>

As under the more relaxed federal standard, the Supreme Court concluded a conflict of interest existed, but the defendant could not establish any prejudice. “We conclude, however, that, as under Sixth Amendment standards, no presumption of prejudice is appropriate under state law under the circumstances of this case. We further conclude, based upon the appellate record, that defendant has not carried his burden of demonstrating he was prejudiced by the perceived conflict, including, if we assume them to be conflicted actions, counsel’s decisions to delay the investigation and not to question [defense counsel’s] wife. Counsel’s conflicts did not affect the presentation of the defense case to the jury. Moreover, defendant has not established that [the juror] made the statement attributed to him by [defense counsel], or that even if he did make some statement pertaining to the Hippocratic Oath, this constituted misconduct that would have warranted moving for, and being granted, a mistrial.” (*Rundle, supra*, 43 Cal.4th at pp. 175–176, fn. omitted.)

Finally, the Supreme Court rejected the claim that the trial court failed to conduct an adequate investigation into the alleged conflict of interest. “When the allegation of juror misconduct was raised, the possibility of a conflict of interest as to [defense

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<sup>1</sup> In *Doolin, supra*, 45 Cal.4th 390, 421 the Supreme Court rejected *Rundle*’s informed speculation formulation in favor of the standard set forth in *Mickens*, i.e. “deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest ‘that affected counsel’s performance—as opposed to a mere theoretical division of loyalties.’ [Citations.]” (*Doolin, supra*, at pp. 417–418.) The change in law does not affect our analysis.

counsel] was openly discussed by the court and counsel, with defendant present at the later discussions. [Defense counsel], in fact, eventually revealed the source of his information and explained the particular difficulties he faced, despite his earlier reluctance to do so. Moreover, there is no evidence, and not even an allegation by defendant, that any conflict had an impact on how the defense case was presented to the jury. The conflict of interest concerned only the collateral issue of whether jury misconduct had occurred, an issue the trial court thought could be adequately explored at the conclusion of the trial, at which time [defense counsel] ‘recused’ himself and [co-defense counsel] took charge of the matter for the defense. It is unclear what would have been accomplished by a further inquiry by the trial court into the possibility of a conflict of interest of counsel, and we therefore conclude that no duty to inquire was breached.” (*Rundle, supra*, 43 Cal.4th at p. 176.)

Another example of a conflict of interest arose in *People v. Almanza* (2015) 233 Cal.App.4th 990, 1002. The appellate court found a conflict of interest existed when the prosecutor threatened, before trial, to prosecute both the defense investigator and defense counsel because the defense investigator was apparently not licensed. “Any trial counsel in a criminal case who is worried that the prosecutor is scrutinizing his or her actions for possible criminal investigation and prosecution has a conflict with the interest of representing the client zealously – he or she does not want to antagonize the prosecutor.” (*Ibid.*)

Turning to Tibbs’s arguments, it is clear that (1) there is no evidence that defense counsel had a conflict of interest, (2) there are no facts on which one can speculate that a conflict of interest existed, (3) this is not a case where a presumption of prejudice should be applied, and (4) Tibbs cannot establish any prejudice as a result of the alleged conflict.

The only conflict asserted by Tibbs was that the public defender’s office had declared a conflict in two prior cases in which he was a defendant. But the record does not explain why the public defender’s office had a conflict in those cases. Typically, a

conflict arises because the public defender's office represented a codefendant, or a witness, in a prior proceeding. In the absence of this type of situation, the public defender's office would not have a conflict of interest. Thus, there is no basis to speculate that a conflict of interest existed in this case simply because a conflict of interest prevented the public defender's office from representing Tibbs in a different case.

Moreover, Tibbs cannot establish any prejudice. Defense counsel made or joined in appropriate motions, one of which was successful. Because of the success of the motion to reveal the identity of the confidential informant, Tibbs received, and accepted, a very generous plea offer from the prosecutor. There is no evidence defense counsel did anything other than zealously advocate on Tibbs's behalf.

We also note that there is no evidence the trial court failed to conduct an adequate investigation into the alleged conflict. The issue was openly discussed, and from the record, it does not appear Tibbs had any additional information he could supply to the court on the asserted conflict of interest. It is true the trial court could have inquired of defense counsel to ascertain if she had any knowledge of why a conflict of interest was declared in the two prior cases, and to make sure a conflict check was performed in this case. But it is unlikely defense counsel would have any knowledge of the prior conflicts, if they existed, and unlikely the office would have continued to represent Tibbs if a conflict existed.

Moreover, considering Tibbs's primary argument was that he wished to withdraw his plea, the trial court may well have concluded the claim lacked merit. Tibbs had no evidence of a conflict of interest; he presented his claim right before the sentencing hearing; and there was no evidence the alleged conflict impacted the defense of the charges. Accordingly, we conclude the trial court's investigation into the claim was adequate.

Turning to Tibbs's primary argument in the trial court, the record establishes that he asserted that defense counsel was ineffective because she failed to apprise him of the

facts of his case. We do not know what defense counsel told Tibbs, however, it is patently untrue that he was unaware of the evidence against him. Tibbs was present for the preliminary hearing. At the preliminary hearing, the testifying police officers explained that two confidential informants made separate purchases of cocaine from Tibbs. The dates, times, and locations of the purchases were disclosed. Tibbs learned that both confidential informants wore video recording devices. He also learned that both transactions were recorded by police officers. These recordings were admitted into evidence at the preliminary hearing. Accordingly, Tibbs was fully aware there was overwhelming evidence of his guilt.

The only evidence not disclosed at the preliminary hearing was the identity of the confidential informant. Tibbs admitted he knew a motion had been made to disclose the identity of the confidential informant. Whether he knew the outcome of this motion is unclear from the record. However, since Tibbs accepted a very favorable plea agreement, the outcome of the motion is irrelevant. Accordingly, Tibbs cannot establish (1) that defense counsel was ineffective, and (2) that he would have obtained a more favorable result under any circumstances.

We also note Tibbs complains the trial court focused on his motion to withdraw his plea. This, however, was what Tibbs asked for in his motion. He cited *Smith, supra*, 6 Cal.4th 684 in his motion for an in camera hearing, which is a factually similar case. *Smith* entered into a plea agreement. Prior to sentencing, he moved for new counsel to assist in presentation of a motion to withdraw his plea based on ineffectiveness of counsel. The trial court denied the motion. The Supreme Court held “that substitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or

that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]. This is true *whenever* the motion for substitute counsel is made. There is no shifting standard for the trial court to apply, depending upon when the motion is made.” (*Id.* at p. 696, original italics.)

The Supreme Court also rejected Smith’s claim that the trial court erred in denying his motion. “The court fully allowed defendant to state his complaints, then carefully inquired into them. Defense counsel responded point by point. He correctly understood his duty in the plea negotiation process to present and evaluate all plea offers. [Citation.] To the extent there was a credibility question between defendant and counsel at the hearing, the court was ‘entitled to accept counsel’s explanation.’ [Citation.]” (*Smith, supra*, 6 Cal.4th at p. 696.)

Tibbs’s motion was directed at the sole goal of withdrawing his plea. He attempted to achieve his goal in two ways. First, he claimed defense counsel had a conflict of interest, but as explained above, Tibbs presented no evidence to support an asserted conflict. Second, Tibbs asserted, in essence, that he was entitled to new counsel pursuant to *Marsden* because defense counsel withheld discovery from him. As we explained, Tibbs was well aware of all of the discovery in the case since he was present at the preliminary hearing. Moreover, as the trial court noted, if Tibbs had not received important discovery, he was aware of that fact when he entered into his plea agreement. Tibbs apparently decided to accept the plea agreement regardless of his purported ignorance of the strength of the case against him. At the hearing at which his plea was accepted, Tibbs confirmed in writing that he had adequate time and opportunity to discuss the matter with defense counsel, including any possible defenses he may have to the charges, before he voluntarily chose to enter into the plea agreement. Tibbs told the trial court he did not have any questions about the plea agreement before he entered his plea.

At the hearing on the *Smith* motion, the trial court provided Tibbs with adequate opportunity to state any reason he had to withdraw his plea, including ineffective assistance of counsel. It inquired numerous times why Tibbs felt he should be able to withdraw his plea, but failed to elicit any grounds that would permit him to do so. Tibbs asserted a conflict of interest, but failed to explain why such a conflict existed, or how it would entitle him to substitute counsel.

Based on the totality of the record, the trial court reasonably came to the conclusion that Tibbs had changed his mind about entering into a plea agreement. This is not a valid ground for rescinding a plea agreement. (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1466.) The assertion that the trial court should have conducted some more searching inquiry is simply nonsense. The assertion the trial court failed to inquire into the alleged conflict is incorrect. Tibbs stated the grounds for his perceived conflict, which the trial court correctly dismissed. Tibbs had adequate opportunity to voice any complaints he may have had. The complaints he voiced did not entitle him to any relief, whether he was seeking to withdraw his plea or seeking substitute appointed counsel.

Moreover, appellate counsel apparently misunderstands the record. He asserts defense counsel was incompetent because she failed to explain to Tibbs that if he entered into the plea agreement, he would be unable to obtain a ruling on the motion to disclose the identity of the confidential informant. Defense counsel stated a favorable ruling was issued on that motion, which she believed was the reason Tibbs received such a favorable plea offer.

Finally, appellate counsel asserts defense counsel should have made a distinction between the *Smith* motion and the *Marsden* motion. As *Smith* explains, the two concepts are inseparable. A defendant is entitled to substitute appointed counsel to investigate whether a motion should be filed to withdraw his or her plea based on ineffectiveness of counsel only if the requirements of *Marsden* are met, i.e., only when “in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the

appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].” (*Smith, supra*, 6 Cal.4th at p. 696.) Tibbs failed to meet these requirements.

#### DISPOSITION

The judgment is affirmed.