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

THE PEOPLE,

Plaintiff and Respondent,

v.

RYAN JEFFREY GALINDO,

Defendant and Appellant.

F071632

(Super. Ct. No. F14911342)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Alvin M. Harrell III, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Sally Espinoza, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Poochigian, Acting P.J., Detjen, J. and McCabe, J.†

†Judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

As part of a plea agreement, Ryan Jeffrey Galindo pled guilty to possession of ammunition by a person who had previously been convicted of a felony. He also admitted two prior strike convictions and a prior prison enhancement. He was sentenced within the terms of the plea agreement.

He argues the trial court erred by (1) not permitting him to fully argue his motion to withdraw his plea and (2) by failing to hold a second competency hearing. He also argues defense counsel was ineffective when he made his motion to withdraw his plea. We find no error and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The complaint charged Galindo with a single count of possession of ammunition by a person previously convicted of a felony. (Pen. Code, § 30305, subd. (a)(1).)¹ The complaint also alleged Galindo had suffered two prior convictions constituting strikes within the meaning of section 667, subdivisions (b)-(i), and had served a prior prison term within the meaning of section 667.5, subdivision (b). !(CT 4-5)!

A first amended complaint was filed but later withdrawn by the prosecutor. This complaint added one count of second degree robbery. (§ 211.) !(CT 10-11, 20)! This charge is only relevant to perhaps explain some of the confusion exhibited by Galindo in later hearings.

The probation report provides the only indication of the events leading to Galindo's arrest. It states the Fresno Police Department received a report of a robbery. While patrolling the area of the robbery, two officers encountered Galindo, who resembled the description of the perpetrator. The victim did not identify Galindo as the perpetrator. However, while waiting for the victim to be transported to the scene, the officers learned Galindo was subject to a probation search condition. When they searched Galindo, they discovered several bullets in his pocket. !(CCT 19)!

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

Galindo was arrested on or about December 23, 2014. At the January 12, 2015, hearing, defense counsel expressed doubt as to the competency of Galindo. The trial court suspended criminal proceedings and appointed a psychologist, Doriann Hughes, Psy.D., to examine Galindo. !(CT 9-13; RT 4-9)! Hughes interviewed Galindo on January 23, 2015. After also reviewing various documents, Hughes filed a report on February 23, 2015, concluding Galindo was incompetent to stand trial. !(CCT 4- 10)! Hughes diagnosed Galindo with “Other Specified Schizophrenia Spectrum and Other Psychotic Disorder” due to his “presentation of disorganized thought and speech.” !(CCT 8)! At the February 23, 2015, hearing to review the report, the parties submitted the issue of Galindo’s competency based on Hughes’s report, and the trial court found him incompetent. However, Galindo refused psychotropic medication. Therefore, in order to issue a court order to have psychotropic medications administered against Galindo’s wishes, the trial court appointed Luis Velosa, M.D., to examine Galindo. !(RT 11-13; CT 15-16)!

Velosa examined Galindo on March 3, 2015, and filed his report on March 30, 2015. Velosa opined Galindo did not suffer from any psychiatric disorder, psychotic symptoms, or developmental disability. Therefore, Velosa concluded Galindo was competent to stand trial. !(CCT 11-16)!

At the hearing held on March 30, 2015, defense counsel expressed concerns about Galindo’s competency. The trial court discussed the charges with Galindo. Despite Galindo’s long and often unfocused responses, the trial court found Galindo competent to stand trial and reinstated criminal proceedings. !(RT 15-22; CT 18)!

On April 6, 2015, a hearing was held at which Galindo changed his plea to no contest. The change of plea was pursuant to a plea agreement wherein Galindo agreed to plead guilty and admit the various enhancements in exchange for an agreement that the maximum possible sentence to which he would be exposed was 44 months. !(CT 20; RT 24)! Galindo completed a “Felony Advisement, Waiver of Rights, and Plea Form” in

which he gave up his constitutional rights and was informed of the consequences of his plea. On the form, Galindo's attorney confirmed he had explained to Galindo his constitutional rights and the terms of the plea agreement. !(CT 22-23)!

The trial court confirmed that Galindo reviewed the plea form with defense counsel, had adequate time to do so, initialed each of the boxes on the form, and understood the rights he was giving up by entering into a plea agreement. !(RT 24-5)! Galindo stated he did not have any questions about the plea. !(RT 27)! Defense counsel confirmed that in his opinion Galindo understood the rights he was giving up. !(RT 27)! Galindo then pled no contest to the charge and admitted the enhancements. !(RT 27-29)!

The sentencing hearing occurred on May 4, 2015. At the hearing, Galindo moved to withdraw his plea. The trial court asked Galindo for the "legal basis" for wanting to withdraw his plea. The following then occurred.

"THE DEFENDANT: Probably about four—four appearances into court and then after doing about two more trying to get it done myself, I think it's probably just best to fight it.

"THE COURT: Probably just best to fight it?

"THE DEFENDANT: Yeah.

"THE COURT: All right. I'm going to ask you again, what is the legal basis for your motion to withdraw the plea?

"THE DEFENDANT: This is something that I think I should do.

"THE COURT: Okay. Now, here's what I'm going to do, we're going to go over this, and what happens, Mr. Galindo is, when you enter into a change of plea like you did in this case, and you did that on April the 6th, when you do that, you don't just get to automatically say, 'You know what, never mind.' There has to be a legal basis for the Court to set aside the change of plea. And typically, it has something to do with the way the plea was taken. And I am very methodical. I am very specific when it comes to taking change of pleas because I have to make a finding that you have knowingly, intelligently and voluntarily waived all your constitutional rights and that you have been fully apprised of the possible consequences of your plea before I will even accept it. I won't even put my name on anything, I won't sign anything until I'm convinced of that. Okay. And

I'm going to go over with you what we did on April the 6th. Let me see what day that was. It wasn't April the 6th—it was, yeah, April the 6th.

“[PROSECUTOR]: Your Honor, I have the change of plea in front of me if the Court has any questions.

“THE COURT: You have it. Okay. I know what I said, because I say it every time, not because I'm a genius, but because I do that because I want to make sure that if we ever have these situations, I'm very confident that when we go back, and I'm glad that you have the change of plea transcript, that I've covered every single base that's required. Now, I'm sure that I was informed that you wanted to change your plea—

“THE DEFENDANT: Yes, sir.

“THE COURT: —on April the 6th, otherwise we wouldn't be here today. And I was handed this felony advisement, waiver of rights and plea form, this tan colored form. Do you remember this, sir?

“THE DEFENDANT: Vague—yeah, yeah.

“THE COURT: Okay. And I looked at it, and I said, ‘Mr. Galindo, I have a felony advisement, waiver of rights and plea form, sir. It has your name on it, case number, what appear to be your initials and signature on the form.’ Then I asked you, ‘Sir, did you go over this change of plea form with your attorney?’ And your response was?

“THE DEFENDANT: Yes, had taken care of it as in he had taken care of it.

“THE COURT: Okay. But when I asked you, ‘Did you go over the change of plea form with your lawyer,’ what did you say, yes or no?

“THE DEFENDANT: Trying to remember. I think I said, ‘Yes.’

“THE COURT: I know you said, ‘Yes,’ because otherwise we wouldn't have went through. Then the next thing I asked you was, ‘Sir, did you have enough time to do so?’ And if you would have said, ‘No,’ I would have said, ‘Okay. I'm going to give you more time.’ But that's rare—very rarely happens. So, I'm pretty sure that you said, ‘Yes.’ The next thing I would have said, ‘And sir, did you place your initials in the boxes and sign the back of the form?’ And had you said, ‘No,’ I would have stopped right there. So, I made sure that I confirmed that you had placed your initials in the boxes and signed the back of the form. And you know, that's not enough. I need to make sure that you understand why you did it. So, the next question I asked you was, ‘Sir, did you do so to indicate

that you understand all of the constitutional rights you're giving up as well as the possible consequences of your no contest plea?' And again, I wouldn't have proceeded to take your change of plea unless you said, 'Yes.'

"THE DEFENDANT: Okay. But—

"THE COURT: And then I asked, 'Sir, do you have any questions at this time?' And you would have had the opportunity to ask any questions, and I would have answered them. Then once I'm satisfied with that, I went to your lawyer. And the lawyer that day was, let's see here—

"[PROSECUTOR]: Mr. Kunder.

"THE COURT: Okay. Mr. Kunder, and I asked him, 'Did you go over this change of plea form with your lawyer'—no I didn't ask him that. I asked him, 'Did you go over this change of plea form with your client, Mr. Galindo?' He would have said, 'Yes.' I said, 'Are you satisfied he understands the constitutional rights he's giving up as well as the possible consequences of his no contest plea?' So, I hit it on two bases. First I asked you, did you go over it with a lawyer and did you have enough time? Did you place your initials and sign the form? Did you do so to indicate that you understand the constitutional rights you're giving up, consequences of the plea? Then I ask if you have any questions. Then I also asked you, 'Did anyone promise you anything that is not set forth in writing on this change of plea form?' And if they would have promised you something that's not on the form, we would have went over that to make sure that everybody's on the same playing field in terms of what's the expectations in your change of plea. And then only after I would have went over all of those things would I have went through the exercise of having you enter the no contest plea to Count One, a violation of Penal Code Section 30305(a)(1) and then take the admission as to the two strikes as well as the prison prior. And I did all of those things. And then after that, I would have made the finding. I would have asked each of the lawyers, 'Do you all stipulate to a factual basis?' In other words, we just can't let somebody come in here and just plead to something without there being a factual basis. And they're both lawyers, they both graduated from law school, passed the bar, worked as a prosecutor and criminal lawyer. So, they have to be satisfied that there's a factual basis to support your plea. And they both said, 'Yes,' stipulated to a factual basis. And only then after going through all of those steps, do I say, 'All right. Court will adopt the orders and findings as set forth on the change of plea form.' Because I have findings here that basically say this, 'The Court having reviewed this form and having questioned the defendant concerning the defendant's constitutional rights, accepts the defendant's plea and the factual basis for

the plea and finds that the defendant has expressly, knowingly, understandingly and intelligently waived his constitutional rights. The Court finds the defendant's plea is freely and voluntarily made with an understanding of the nature and consequences of the plea. The defendant is convicted on the basis of his plea.'

"THE DEFENDANT: So, that's what had come my way as soon as I gave you the plea, as soon as the plea was given, that's what I had to.

"THE COURT: That's it.

"THE DEFENDANT: That's what I was given, okay, because I had said to him in the first couple times I came in—

"THE COURT: Yes.

"THE DEFENDANT: —'If possible, let me fight. Let me fight it so I can get out.' And he said, 'Well, we can do something and give—give it one or two more times, and we'll see how it goes.' Now, come around to probably this time of where it could be at least—at least taken care of and out of—out of everybody's hands or anything. Is there any way that I could make it happen where it is going to be a—a fight where—

"THE COURT: Well, sir, you—actually, looking back at the minute orders, it looks like you were arraigned back on December the 29th, and we set the matter for a pre-preliminary hearing on January the 5th, preliminary hearing January the 12th, and then we came back here on January the 5th, and at that time, we confirmed the preliminary hearing for January the 12th. You were ordered to be present on that date. Then on January the 12th, the prosecution filed a first amended complaint, and there was a 1368 demand. A doubt was risen, and I appointed Dr. Dorian Hughes to examine you and review your medical records. The report—you were examined. I suspended criminal proceedings, and let's see here, then you came back here on February the 23rd after I read the report. I found that you were not competent to stand trial, so I suspended criminal proceedings, then we set the matter over to—

"[PROSECUTOR]: Your Honor, on the 23rd, the psychologist came back with not competent, but you had to have a psychiatrist, so you had to appoint Dr. Velosa.

"THE COURT: Right. I appointed Dr. Velosa. Dr. Velosa was ordered to prepare a report.

"[PROSECUTOR]: And he came back as competent.

“THE COURT: Came back as competent, the Court reinstated criminal proceedings and set the matter within statutory time for preliminary hearing, and that was set for April the 6th. Then on April the 6th is the date that you entered into a change of plea.

“THE DEFENDANT: Okay. Now, for the change of plea, it was originally for me to fight, and I was going to get my no contest. It was going to stay like that. It was going to be no contest. That’s all you were going to hear. She came and had said, ‘Within the time for you to even have it resolved, it will probably be a second until we give something to you. Whether or not you signed it or do anything with it, make sure you know what you want to tell the guy when he’s going to come at you.’

“[DEFENSE COUNSEL]: I’m going to interrupt you for a moment. Your Honor, I would ask the Court to reconsider the report on the 1368. I don’t believe that Mr. Galindo is competent, and at least one of these doctors agreed. So, I—I’m not sure Mr. Galindo understands what’s happening right now.

“[PROSECUTOR]: Your Honor, there might be something that I can clarify if that might make a difference.

“THE COURT: Go ahead.

“[PROSECUTOR]: In this case, your Honor, the People filed an amended complaint. That amended complaint never actually had him arraigned on it because he pled before he was arraigned on the amended complaint. The amended complaint was going to allege a robbery. Mr. Galindo was well aware of the robbery charge. At the time he took the plea, that was the main primary concern was that that robbery charge—he was going to fight that robbery charge the whole way because he did not do the robbery based on what he said at—at the time of—of between discussions between the People and defense, Mr. Kunder. I agreed to not go forward to amend the complaint and just allow him to proceed on the previous complaint only as to the ammunition, not as to the robbery, which he was going to fight. He pled to the ammunition charge, and I agreed to not have him amend—arraigned on the robbery charge. So, it was—the only thing we’re here today on is the ammunition charge, not the robbery charge that he was planning to fight and go to the box with, according to what I recall from talking to Mr. Kunder that day as well as when the defendant sat in the box, and he was discussing with me and Mr. Kunder while you were in the back.

“THE COURT: Okay. Now, as to the motion to the Court to reconsider the report of Dr. Velosa, the Court has reread that report, and the

Court finds no basis for the Court to reconsider, and that's reconsider whether or not Mr. Galindo was competent to enter a change of plea on the date in question. Mr.—or actually, Dr. Velosa's psychiatric opinions are very adamant with respect to Mr. Galindo being competent. It's not even close. Specifically, Dr. Velosa indicated that on the basis of his psychiatric examination, he found Mr. Galindo free from any psychiatric disorder which may impair his concept of reality. There is no evidence of psychotic symptoms. There is no evidence of any bizarre, disorganized or schizophrenic behavior. In addition, the doctor found that Mr. Galindo did not exhibit any signs or symptoms of a developmental disability. He therefore found that Mr. Galindo at that time—at the time he wrote the report, which was March the 4th, 2015 that he was not suffering from any psychiatric disorder, and again, he was—the doctor was not able to detect any evidence of any psychiatric symptoms, no evidence of any psychosis, no evidence of any disorganized, bizarre behaviors, no evidence of any sever[e] thinking impairment such as delusional symptoms, auditory or visual hallucinations. Therefore, Dr. Velosa found that Mr. Galindo was able to understand the nature and purpose of the proceedings against him and capable to cooperate in a rational manner with counsel with presenting a defense, and therefore competent to stand trial. So, the request to reconsider the report and his competency is denied. All right. Likewise, the motion to withdraw the plea is denied.” !(RT 30-40)!

The trial court first denied Galindo's motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, then sentenced Galindo to the mitigated term of 16 months, doubled because of the strike priors, and enhanced by one year because of the prison prior, for a total term of 44 months. !(RT 40-42; CT 24-25)!

DISCUSSION

We quoted at length from the sentencing hearing because the events that took place form the basis for Galindo's arguments. He asserts three errors occurred during this hearing. First, he asserts the trial court erroneously limited Galindo when he moved to withdraw his plea. Second, he asserts defense counsel was ineffective during the hearing. Third, he argues the trial court should have suspended the hearing to have him examined to determine if he was competent. We reject each of these arguments and affirm the judgment.

1. The Motion to Withdraw the Plea

Galindo begins his argument by asserting the trial court failed to conduct a proper hearing. He then summarizes the facts from the hearing, quoted above, and cites case law related to withdrawal of pleas. Nowhere, however, does he explain what a “proper hearing” consists of, or how the trial court violated the requirements of a “proper hearing.” Instead, he asserts, in essence, the trial court failed to elicit the factual basis of Galindo’s motion. According to Galindo, the trial court precluded him from presenting any facts to support his motion by providing a comprehensive review of the plea proceedings.

We begin with section 1018, which provides in relevant part that, on “application of the defendant at any time before judgment ... the court may ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” “‘Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea.’ [Citation.]” (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) A defendant who wishes to withdraw his plea has the “burden of proving by clear and convincing evidence that he entered his plea unknowingly. [Citations.]” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) A defendant who asserts he wishes to withdraw his plea because he had changed his mind has not established good cause. (*People v. Archer* (2014) 230 Cal.App.4th 693, 702; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1143-1144.)

“A decision to deny a motion to withdraw a guilty plea “rests in the sound discretion of the trial court” and is final unless the defendant can show a clear abuse of that discretion. [Citation.] Moreover, a reviewing court must adopt the trial court’s factual findings if substantial evidence supports them. [Citation.]” (*People v. Fairbank, supra*, 16 Cal.4th at p. 1254.)

Therefore, Galindo bore the burden of proving by clear and convincing evidence he entered his plea unknowingly, i.e., the plea was the result of mistake, ignorance, or some other factor which overcame the exercise of his free judgment. The trial court

twice asked Galindo the basis for his motion. Both times, Galindo asserted, in essence, that he changed his mind and wanted to fight the charges. Clearly, Galindo did not meet his burden of proving he entered his plea unknowingly.

In his brief, Galindo focuses on the trial court's lengthy recitation of the change of plea hearing, as well as Galindo's at time incoherent comments. We view the trial court's comments as an attempt to explain to Galindo that he would not be able to withdraw his plea because he entered into the plea knowingly. We cannot conceive how these comments could be construed as preventing Galindo from explaining the basis for his motion. Galindo's ramblings, on the other hand, will be addressed in response to his third argument.

Galindo relies on *In re Adoption of Baby Girl B.* (1999) 74 Cal.App.4th 43 to support his argument. The petitioner filed a petition to adopt the baby. The Department of Social Services (the department) was appointed to investigate her suitability to be an adoptive parent. The petitioner failed to provide much of the extensive documentation requested by the department. The department prepared a report recommending the petition be denied. A hearing was set on the petition. The department filed a memorandum of points and authorities supporting its recommendation. The petitioner did not file a response to the department's filings, but appeared at the scheduled hearing and indicated she wished to oppose the department's recommendation. The trial court decided a further hearing was unnecessary and denied the petition.

The appellate court held the trial court erred because it refused to hold an evidentiary hearing on the petition. (*In re Adoption of Baby Girl B.*, *supra*, 74 Cal.App.4th at p. 50.) The appellate court observed the petitioner was *entitled by statute* to a hearing. (*Id.* at pp. 51-52.)

“We hold the trial court violated the Family Code by refusing to hold an evidentiary hearing. Even under the state law standard of prejudice (Cal. Const., art. VI. § 13), the erroneous denial of a hearing is reversible per se. [Citations.] But even if we were to consider whether it was reasonably probable the outcome would have been more favorable to [the petitioner] in

the absence of the erroneous denial of a hearing [citation], we would still find the error prejudicial.” (*Id.* at p. 55.)

We find this case inapposite. To the extent this case holds a trial court errs when it refuses to hold a hearing that is statutorily mandated, the holding is indisputable. In this case, however, Galindo received a hearing at which he failed to meet his burden of proving he had unknowingly entered into the plea. To the extent he is arguing he did not receive a hearing, we disagree. Galindo was provided an opportunity to address the trial court and explain why he wanted to withdraw his plea. Galindo’s inability to provide any grounds to support his motion compelled the trial court to deny it.

2. Ineffective Assistance of Counsel

Galindo’s next argument is that defense counsel was ineffective during the hearing when he moved to withdraw his plea. He argues, in essence, that because defense counsel did not actively assist him in the presentation of his motion, she was ineffective.

“Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.] A ‘reasonable probability’ is one that is enough to undermine confidence in the outcome. [Citations.] [¶] Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel’s conduct from counsel’s perspective at the time. [Citation.] A court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance. [Citation.] ... Nevertheless, deference is not abdication; it cannot shield counsel’s performance from meaningful scrutiny or automatically validate challenged acts and omissions. [Citation.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

We reject Galindo’s argument because (1) counsel’s conduct did not fall below an objective standard of reasonableness, and (2) Galindo cannot demonstrate any prejudice. The record makes it virtually impossible for Galindo to meet the required showing on either prong of an ineffective assistance of counsel claim. To find defense counsel’s action fell below an objective standard of reasonableness, the record would have to

demonstrate there were meritorious grounds for Galindo to withdraw his plea. The record is devoid of such evidence. The only argument made by Galindo was that he changed his mind. As explained in the preceding section, that is not a valid ground for withdrawal of one's plea. Defense counsel's conduct did not fall below an objective standard of reasonableness when she refused to assist Galindo in making a meritless motion.

Galindo cites as support for his motion the case of *People v. Brown* (1986) 179 Cal.App.3d 207 (*Brown*). *Brown* is factually similar to this case. Brown pled no contest to various charges, but at the sentencing hearing he made a motion to withdraw his plea. Defense counsel told the trial court she refused to make the motion because she believed it was meritless. Brown himself explained why he wished to withdraw his plea, and the trial court denied the motion. The appellate court remanded the matter to the trial court to permit him to make a motion to withdraw his plea. The appellate court reasoned that when defense counsel refused to make the motion, Brown was deprived of the assistance of counsel. (*Brown, supra*, at pp. 214-215.) The appellate court concluded that Brown had the right to insist defense counsel make the motion even if defense counsel disagreed with Brown's decision. (*Id.* at p. 215.) The appellate court went on to state that defense counsel is not compelled to make a motion that is frivolous or would compromise ethical standards, but found Brown's motion would not fall into either category. (*Id.* at p. 216.)

Brown was decided before *People v. Smith* (1993) 6 Cal.4th 684 (*Smith*). Although *Smith* did not directly address *Brown*, its reasoning certainly undercuts *Brown*. *Smith* addressed the proper standard to be utilized when a defendant informs the trial court he or she wishes to withdraw a plea, or make a motion for new trial, on the ground that he or she received ineffective assistance of counsel. The Supreme Court clarified that in such a situation, the defendant is making a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118), and would be entitled to new counsel if, and only if, the standards of *Marsden* are met, i.e., "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].” (*Smith, supra*, at p. 696.) Significant to this case, the Supreme Court noted that if substitute counsel is appointed, then that attorney will determine whether “any particular motion should actually be made.” (*Ibid.*) This statement directly conflicts with the *Brown* court’s conclusion that the defendant may order defense counsel to file a motion to withdraw the plea.

Brown and *Smith* can easily be reconciled. If a defendant wishes to withdraw his or her plea, but defense counsel refuses to file a motion because counsel believes it is meritless, the defendant may make a *Marsden* motion, but will be entitled to new counsel only if he or she can demonstrate that the failure to replace defense counsel would substantially impair the right to assistance of counsel.

Even were we to find *Brown* had some continued validity, it is easily distinguishable. The appellate court in *Brown* apparently concluded the record suggested that the motion to withdraw the plea might have merit because Brown stated he was not in the right frame of mind at the time of the plea, and a death had caused him to be upset. (*People v. Brown, supra*, 179 Cal.App.3d at pp. 212-213, 216.) Galindo did not present at the hearing any facts providing a legal basis for withdrawal of his plea. Accordingly, *Brown* does not provide support for Galindo’s argument.

Finally, the record also precludes Galindo from establishing any possible prejudice as a result of defense counsel’s alleged incompetence. Since the record does not contain any grounds constituting good cause pursuant to section 1018, Galindo’s motion would have been denied regardless of whether defense counsel presented it to the trial court. To suggest a better outcome would have been received had defense counsel argued for

withdrawal of the plea is pure speculation because there is no evidence that valid grounds existed for Galindo to withdraw his plea. Without evidence in the record that the motion may have had merit, Galindo cannot establish he was prejudiced by defense counsel's refusal to participate in the motion.

3. Competency

Galindo's final argument presents a much closer question. He argues the trial court erred when it failed to suspend the proceedings and order another mental health examination to determine whether he was competent.

“A defendant who, as a result of mental disorder or developmental disability, is “unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner,” is incompetent to stand trial. [Citation.] When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] Evidence is “substantial” if it raises a reasonable doubt about the defendant's competence to stand trial. [Citation.] The court's duty to conduct a competency hearing arises when such evidence is presented at any time “prior to judgment.” [Citations.]” (*People v. Kelly* (1992) 1 Cal.4th 495, 542.)

“Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations.” (*People v. Rogers* (2006) 39 Cal.4th 826, 847.)

“A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial. [Citations.] The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence, however, requires reversal of the judgment of conviction. [Citations.]” (*People v. Rodgers, supra*, 39 Cal.4th at p. 847.)

The record indicates Galindo was examined on two occasions by mental health professionals prior to entering his plea. Hughes concluded Galindo was incompetent, and approximately two months later Velosa concluded Galindo was competent. After

receiving Velosa's report, a hearing was held and the trial court found Galindo was competent to stand trial.

“Once a defendant has been found competent to stand trial, a second competency hearing is required only if the evidence discloses a substantial change of circumstances or new evidence is presented casting serious doubt on the validity of the prior finding of the defendant's competence. (See *People v. Kelly*[, *supra*,] 1 Cal.4th[at pp.] 542-543 [no change in circumstance to justify second hearing]; *People v. Jones* (1991) 53 Cal.3d 1115, 1153-1154 [general assertion of defendant's worsening condition and inability to cooperate with counsel inadequate to justify second hearing].)” (*People v. Medina* (1995) 11 Cal.4th 694, 734.) The defendant has the burden of demonstrating his incompetence. (*Id.* at pp. 734-735.)

“However, once a defendant has been found to be competent, even bizarre statements and actions are not enough to require a further inquiry. [Citation.] Reviewing courts give great deference to a trial court's decision whether to hold a competency hearing. ““An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.”” [Citation.]” (*People v. Marks* (2003) 31 Cal.4th 197, 220.)

A trial court's decision whether to grant a competency hearing is reviewed for an abuse of discretion. (*People v. Ramos* (2004) 34 Cal.4th 494, 507.) Although Galindo's competency poses a closer question than his other arguments, we conclude the trial court did not abuse its discretion.

The question is whether there was a substantial change in circumstances casting serious doubt on the prior finding of competency. We note defense counsel did not question Galindo's competency until he began making his motion to change his plea. Therefore, the only evidence presented to the trial court was Galindo's comments while making his motion.

We have reviewed those comments and do not find a substantial change in circumstances casting serious doubt on the finding of competency. Without a doubt,

defendant was difficult to understand, and some of his comments do not appear to make sense. Nonetheless, defendant knew he wanted to make a motion to withdraw his plea and fight the charges. He expressed this desire to the trial court. He did not exhibit any bizarre behavior, nor did he commit any action that would raise doubt about his competency. All that can be said was that he had difficulty verbalizing his thoughts, which may have been the result of nervousness or lack of education. It also appeared Galindo may have been confused about the robbery charge, which had been withdrawn.

Nonetheless, the trial court was in the best position to observe Galindo's behavior. It observed Galindo throughout the proceedings and was in the best position to determine whether he was no longer competent to proceed with sentencing. It could compare his behavior earlier in the proceedings to his behavior at the sentencing hearing. It was present when Galindo entered his plea, with all of his responses being appropriate. The record does not demonstrate a substantial change in circumstances. The trial court did not abuse its discretion in denying defense counsel's motion for another competency evaluation.

DISPOSITION

The judgment is affirmed.