Filed 3/27/18 P. v. Pennington CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN PENNINGTON, Defendant and Appellant.	B279190 (Los Angeles County Super. Ct. No. TA138850)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura R. Walton, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Benjamin Pennington (appellant) was charged with human trafficking of a minor for a commercial sex act (count 1; Pen. Code, § 236.1, subd. (c)(1)),[1] three counts of pimping a minor 16 years of age or older (counts 2, 6, 8; § 266h, subd. (b)(1)), one count of unlawful sexual intercourse (count 3; § 261.5, subd. (b)), one count of lewd act on a child (count 4; § 288, subd. (a)), two counts of human trafficking of a minor for a commercial sex act by force, fear, or fraud (counts 5, 7; § 236.1, subd. (c)(2)), one count of unlawful sexual intercourse (count 9; § 261.5, subd. (c)), one count of human trafficking (count 10; § 236.1, subd. (a)), one count of pimping (count 11; § 266h, subd. (a)), and two counts of dissuading a witness (counts 13 & 14; § 136.1, subd. (b)(2)).[2] As to counts 1 through 4, it was alleged, inter alia, that appellant would have to serve any sentence in state prison and was subject to enhancements because he was previously convicted of criminal threats (§ 422), a violent or serious felony (§§ 667, subds. (b)-(j), 667.5, 1170, 1170.12).

Appellant pleaded no contest to counts 1, 10 and 13, and admitted the prior conviction allegations. The trial court sentenced appellant to an aggregate sentence of 16 years 8 months in state prison.

On appeal, appellant claims the trial court erred when it failed to hold a *Marsden*[3] hearing regarding whether substitute counsel should be appointed. He seeks a conditional reversal so a

---

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

[2] The information did not contain a "count 12."

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Marsden hearing can be held. We conclude that any error was harmless and affirm on that basis.

FACTS

The August 12, 2016 Hearing

On August 12, 2016, the prosecutor informed the trial court of a potential plea deal: pleas to counts 1, 10 and 13, admission of the prior strike, and waiver of "back time." The trial court asked defense counsel if he was "willing to do that?" Defense counsel replied, "He would love to keep his back time, your Honor, but he understands that is the settlement offer, and that he's made up his mind to settle the case."

The prosecutor advised appellant as follows: "You are being charged in case No. TA138850. It is alleged in count 1 that you committed the crime of human trafficking, in violation of Penal Code Section 236.1[, subdivision] (C)(1), a felony. [¶] And, also, you are charged in count 10, violation of Penal Code Section 236.1[, subdivision] (A). [¶] Both are known as human [trafficking]. 1 is, in count 1, a minor for commercial sex act. [¶] And in count 10, it's . . . human trafficking. . . . [¶] Also, count 13, you are charged with dissuading a witness from prosecuting a crime, in violation of Penal Code Section 136.1[, subdivision] (B)(2), also a felony. [¶] However, . . . there were . . . 13 counts. Two of them carry a life sentence maximum, meaning that if you were convicted of all of those counts, the allegations found true, you could serve life in state prison. However, in exchange for your plea here today, if you enter into the counts described, you will be sentenced to 16 years, 8 months in the state prison. [¶] And also, as part of the disposition, we're going to ask you to waive your credits, meaning that you will—you will not be given

credit for any time that you've spent in custody up until this point. [¶] Do you understand the disposition?"

Appellant replied, "Yes, I do, sir."

Later, the following colloquy ensued:

"[PROSECUTOR]: After speaking with your attorney, is that what you want to do considering all of the defenses that you might have and that you want to enter into this plea and settle the case?

"[APPELLANT]: I guess I don't have a choice.

"[PROSECUTOR]: Sir, you do have a choice. This is your decision. It is not mine. It is not your attorney's.

"[APPELLANT]: I understand."

The prosecutor proceeded to inform appellant of his constitutional rights, and asked if appellant understood each of those rights. He said he did. In addition, he said that he waived those rights. Next, the prosecutor explained that as a consequence of his plea, appellant would go to state prison. Once he was released, he would be on parole, and there would be certain terms and conditions for parole. If he violated those terms and conditions, he could be sent back to prison for one year for each violation. Also, the counts were "priorable." In particular, count 13 was a "strike," which he was required to admit as part of his plea. If he picked up another case that was charged as a strike, he could be a "third striker," which would mean that his case "could be a 25-years-to-life case automatically based on [the] prior conviction."

Appellant was asked if he understood. He said yes. The prosecutor explained some other consequences, such as fines and fees and the requirement that he submit a DNA sample and fingerprint samples.

The conversation continued thusly:

"[PROSECUTOR]: Do you understand everything that I said to you?

"[APPELLANT]: Yes.

"[PROSECUTOR]: Are you pleading freely and voluntarily because you believe it is in your best interest to do?

"[APPELLANT]: Yes.

"[PROSECUTOR]: Has anyone threatened you or anyone close to you, or promised you anything other than what we talked [about] here in open court in order to get you to plead guilty or no contest?

"[APPELLANT]: No.

The trial court informed the prosecutor that he could "take the plea."

There was a discussion regarding a sex offender registration requirement. Appellant affirmed that he still wanted to enter the plea.

Appellant pleaded no contest to the three counts and admitted the prior conviction allegation.

The October 12, 2016 Hearing

On October 12, 2016, the trial court held a sentencing hearing. The trial court recited the plea agreement and discussed various matters with the prosecutor. Then the following discussion transpired:

"[TRIAL COURT]: And does counsel otherwise waive time for sentencing, no legal cause[?]

"[DEFENSE COUNSEL]: Yes. Of course, my client says that he wants to set aside the disposition of the deal, but I have no evidence additional since the negotiated settlement to do that. And I have advised him of that.

"[TRIAL COURT]: Okay. All right, [appellant], you pled on August 12th, 2016, in front of me. I was present. It was sent here for trial. Both sides were ready for trial. [¶] I advised you, as I was flipping through the information, that you had been misinformed . . . on two of your multiple counts. . . . Just on two of them, when I looked at the information, you were looking at 30 years to life. I think the People told you it was 50 years to life. That is just on two of the counts. I didn't even calculate your exposure for the other counts.

"Based on that and your discussions with your attorney, you agreed to take the People's offer. The People had indicated that they no longer wished to give you that offer because it was a jury trial and they were ready to proceed to trial.

"I implored on the People that they should still give you the offer because you had been told the wrong maximum exposure date. And in all fairness, because you had been advised of the wrong exposure date, the People should still give you the offer. And then the People agreed to give you the offer, however, on the condition that you would waive your back credits.

"And you said you understood that. You agreed to do so, and then we entered the plea. . . .

"[APPELLANT]: Before you go on, I was – I was being misled this whole time. . . . I didn't know what I was being sentenced for. I didn't even know my counts. You told me that day of the trial my counts.

"My attorney hadn't been informing me of the stuff that I was supposed to be given. We didn't get the evidence together, whether it was for trial. I didn't even know what I was going to trial for. Then you—you changed from 15 to life. I didn't know I

was facing 15 to life until you told me. You changed it to 30 years to life the same day that you want me to pick a jury.

"I need—I need counsel that is going to help me fight my case. I didn't get a chance to get no discovery. I didn't have nobody go out and get witnesses on my behalf or anything. All I been doing is coming back and forth to this place, and coming in here, getting extensions.

"And I haven't—I haven't heard anything, read anything. I didn't know what I was being charged with. I feel like I'm being pressured to take all of this time without having a fair trial or a chance to get evidence to beat this trial.

"I am not—I am not guilty for this. The only reason that I was going to take the deal was because y'all made me feel like I had to go to trial that day. If I went to trial that day without my evidence, I would lose. I know I would lose.

"[TRIAL COURT]: You did have to go to trial that day. That was the day that was set for trial. Your attorney announced ready for trial. The People announced ready for trial. And you were sent here for trial, so—

"[APPELLANT]: Right.

"[TRIAL COURT]: So I didn't force you to take anything.

"[APPELLANT]: Right.

"[TRIAL COURT]: I explained right here in this courtroom what you were looking at, the time that you were looking at. I told you—

"[APPELLANT]: Right.

"[TRIAL COURT]: —[O]ver and over again you have a right to go to trial.

"[APPELLANT]: Right. But I wasn't ready for trial.

"[TRIAL COURT]: Well, your attorney said otherwise. You didn't have to be ready for trial as long as your attorney was ready for trial.

"[APPELLANT]: My attorney—

"[TRIAL COURT]: Then that's all that matters. You may not have been ready for trial.

"[APPELLANT]: But—

"[TRIAL COURT]: But your attorney . . . announced ready for trial. So he was ready to proceed to trial.

"[APPELLANT]: With no evidence. No—No coming to ask me anything. No telling me anything about trial. I didn't even know we were going to trial. I got family members that is willing to come in as witness."

At that point, the trial court stated: "All right. . . . I was present. Everything was perfectly explained to you. Both side[s] were ready to go to trial. The People no longer even want to give you the offer, which I encouraged them to give it to you because your maximum exposure had been told differently to you. [¶] So at this time, you are going to be sentence[.]" The trial court sentenced appellant to a term of 16 years 8 months pursuant to the plea agreement.

While the trial court was in the middle of explaining the consequences of appellant's plea, such as the requirement that he register as a sex offender, appellant interrupted and said that he could not "accept this deal." He said, "I was bamboozled [into] taking the deal. All I'm asking [for is] . . . a fair trial. I need a lawyer that will give me the correct information and not false information right when we start the day of trial. He didn't give me any information on this. I didn't know what I being charged

with. I am not a sex offender. I should not have to register for the rest of my life for something that I didn't do."

The trial court explained that appellant had given up his right to trial when he pleaded no contest. Appellant said he pleaded only out of fear. He also said that at the time he entered his plea, he did not know what was going on. The trial court replied: "Then you should have said so." Also, the trial court opined that sometimes taking a plea deal is the best advice when a defendant is facing 30 years to life on two out of 10 counts.

Appellant said he was innocent. Then he said: "I'm being sincere, your Honor. I didn't do this. And the more—I was pressured into doing this, Ma'am. Can you give me a chance to have a fair trial? That's all I'm asking."

The trial court replied, "You didn't appear to be pressured when you took the plea in my courtroom, sir. Everything was explained to you. You were given as much time as needed. You were given the opportunity to go to trial that day. On that day, you entered the plea freely and voluntarily. [¶] Now that you are having buyer's remorse, there is nothing that I can do about that. [¶] Good luck to you."

This appeal followed.

DISCUSSION

I. *Relevant Law*.

Marsden permits a defendant to seek appointment of new counsel because his or her appointed counsel is providing inadequate representation. (*People v. Smith* (2003) 30 Cal.4th 581, 604 (*Smith*); *Marsden*, *supra*, 2 Cal.3d at p. 124.) A trial court is required to conduct a *Marsden* hearing "when there is 'at least some clear indication by [a] defendant,' either personally or through his current counsel, that defendant 'wants a substitute

attorney.' [Citation.]" (*People v. Sanchez* (2011) 53 Cal.4th 80, 89–90 (*Sanchez*).)

Whenever a *Marsden* motion is made, "the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

II. *Any Error Harmless*.

On October 12, 2016, appellant indicated, inter alia, that defense counsel did not inform him of the charges or potential sentence, and also that defense counsel did not gather evidence for trial, give him discovery or consult with him. Appellant stated, "I need counsel that is going to help me fight my case," and "I need a lawyer that will give me the correct information and not false information right when we start the day of trial. He didn't give me any information on this." Also, he repeatedly claimed his innocence and said that family members would testify on his behalf. In broad terms, appellant indicated that defense counsel was not providing effective assistance regarding trial or the plea deal. It is debatable whether appellant was asking for substitute counsel.

Assuming without deciding that appellant clearly asked for substitute counsel, any error was harmless beyond a reasonable doubt. (*Marsden*, *supra*, 2 Cal.3d at p. 124, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's *Marsden* request came after appellant entered a plea. According to appellant, he was prejudiced because if substitute counsel had been appointed, then "a motion for withdrawal of the plea may have been forthcoming." But appellant has not offered a legal or factual basis for withdrawing his plea. As a result, he has not established prejudice.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT