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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR LARIOS,

Defendant and Appellant.

B242301

(Los Angeles County
Super. Ct. No. VA117061)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Conditionally reversed and remanded with directions.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

As relevant, an amended information, filed on November 16, 2011, charged Hector Larios with six counts: (1) first degree robbery (Pen. Code, § 211¹) (counts 3 and 4); (2) first degree burglary (§ 459) (count 5); (3) possession of a firearm by a felon (former § 12021, subd. (a)(1)) (count 7); and (4) false imprisonment (§ 236) (counts 8 and 9). The amended information asserted as to the robbery counts firearm use allegations under section 12022.53, subdivisions (b) and (e)(1), and a criminal street gang allegation under section 186.22, subdivision (b)(4). It also included as to all counts except count 9 a firearm use allegation under section 12022.5, subdivision (a), and as to all counts a criminal street gang allegation under section 186.22, subdivision (b)(1)(A). It contained as well as to the robbery and burglary counts criminal street gang allegations under section 186.22, subdivision (b)(1)(B) and (C). As to the robbery, burglary and possession counts, the amended information alleged that Larios had served a prior prison term within the meaning of section 667.5, subdivision (b). Larios pleaded not guilty to all counts and denied the special allegations.

In May 2012, the matter proceeded to a jury trial against Larios and two codefendants (another codefendant had resolved the matter before trial by a plea agreement). During trial, on May 10, Larios's counsel told the trial court that Larios is "very ill. He wants to get on the bus so he can see a doctor. . . . He indicates a bad flu and he's coughing and hacking back here behind me. The problem is, if he goes the full day, by the time he gets back to the jail, he can't get medical attention, which means he won't get any medical attention till Saturday. So I indicated to him that I would relay that to the court and the court can make up its own mind." The court declined to stop the trial, stating that it instead would "sign any medical order that will provide him with medical attention that he can get seen by a doctor" that night. Larios remained at trial throughout the day. That afternoon, the People reported that they had just discovered and then turned over to defendants a set of audiotapes that the police recorded while investigating the incident that led to the charges against Larios and his codefendants.

¹ Statutory references are to the Penal Code.

The following day, May 11, the People offered Larios a 20-year sentence if he would plead no contest to the robbery in count 3 and admit the attendant criminal street gang allegation under section 186.22, subdivision (b)(1)(C), and the firearm use allegation under section 12022.5, subdivision (a). Larios accepted the deal, withdrew his guilty plea, entered a no contest plea to the robbery in count 3 and admitted the attendant special allegations.

After accepting the no contest plea, the trial court found Larios guilty as pleaded and the admitted special allegations to be true. The court stated, “I will say that I have heard the evidence in this case and the evidence was strong against [Larios and his codefendant who also had entered a no contest plea]. There was apparently a mix-up in the audio tapes and you got a bit of a benefit because of that. But the evidence was very strong and it was probably a wise move that you did. You saved yourself some time and at some point you’ll be getting out of prison. So it’s a lot of time to take, but all things considered, it’s probably a prudent decision.”

At the sentencing hearing on June 13, Larios requested a three-week continuance so that he could “take care of” “some legal matters.” When the trial court inquired as to their nature, Larios’s counsel stated that Larios “intends or is intending to hire private counsel to bring a motion to withdraw his plea. The basis of that motion, from what I’ve been able to gather, is that he felt pressured into the plea. The threat is that he was threatened with life. I explained to him that’s not sufficient grounds to withdraw a plea because it’s the truth, he was looking at a possible life sentence. The possible outcome is not sufficient grounds to argue coercion. Number two, he claims that I didn’t do enough for him, I didn’t bring enough motions. He hasn’t been able to articulate what motions I was supposed to bring, did or didn’t bring, and that he didn’t have enough time to speak to his family. I said, actually, under the law he’s not entitled to speak to his family. From what I remember, your honor, he spoke to his family for quite some time right here in the courtroom. His mother recommended it. We all recommended that he take the plea. I wasn’t here for his testimony [in the trial that continued as to the one remaining codefendant], but [the prosecutor] explained to me that [Larios] testified that he was

there, he participated in this. I have no idea of what he can possibly raise that would allow him to withdraw his plea. However, I don't want to make a bad record. I don't want the court to make a mistake. I'll let the court do what the court wants to do but that's the state of the case right now. As far as what's been explained to me, he has absolutely no basis to withdraw his plea. Maybe a private lawyer smarter than me can figure something out. I don't know. But I'll leave it with the court. That's his request and the court can act accordingly."

The trial court responded, "Seems like all those issues are cognizable on appeal. I think if he does have a remedy, I think he can receive that remedy in his appeal. So the motion to continue is denied." Larios's counsel then replied, "The only issue I have with that, your honor, is if he raises these issues on appeal, he's limited only to the record. He can't bring in outside information. For example, if he wants to argue that I didn't do this and that, the appellate court can't receive evidence on that. He has to bring a motion prior to being sentenced [or] he loses that motion. . . . But if you'll accept my representation based on what I've heard, there's not even a possibility that he would be successful on a motion to withdraw his plea. But I've been wrong before." The court stated, "Well, I still think his remedy is on appeal. This is a gentlemen who took the stand, testified, swore that he was an active participant in this matter. It appears pretty clear to me he has buyer's remorse, that he would like a better result. But he was facing a life sentence and he at that time took the deal which was, as I understand it, less than what was offered previously and certainly less than [one of] his co-defendant[s] received. So the motion to continue is denied."

The trial court then sentenced Larios, in accordance with the terms of his plea, to 20 years in state prison, consisting of the midterm of six years for the robbery in count 3, plus 10 years for the criminal street gang allegation pursuant to section 186.22, subdivision (b)(1)(C), and the four-year midterm for the firearm use allegation under section 12022.5, subdivision (a). The court also ordered Larios to pay \$300 in restitution to one of the victims. The court granted the People's motion to dismiss the remaining counts and special allegations.

Larios filed a notice of appeal and a request for a certificate of probable cause in which he represented that he wanted to challenge the validity of his plea for a variety of reasons, including ineffective assistance of counsel, the lack of a factual basis to support the criminal street gang allegation that he admitted, pressure into accepting the plea and “not [being] in the right state of mind when the plea was made” as he “was having flu[-]like symptoms, and on methamphetamine [and] had not slept for up to 3 days.” Larios also maintained that the trial of his remaining codefendant revealed new evidence that victims and police officers had “lied under oath,” which resulted in the acquittal of that codefendant. The court granted the request for a certificate of probable cause.

Larios contends that the trial court erred at the sentencing hearing by denying his request for a three-week continuance so that he could retain private counsel and file a motion to withdraw his plea. We agree.

“The right to the effective assistance of counsel ‘encompasses the right to retain counsel of one’s own choosing. [Citations.]’ [Citation.] Underlying this right is the premise that ‘chosen representation is the preferred representation. Defendant’s confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible.’ [Citation.]” (*People v. Courts* (1985) 37 Cal.3d 784, 789.) “Any limitations on the right to counsel of one’s choosing are carefully circumscribed. Thus, the right ‘can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.’ [Citations.] The right to such counsel ‘must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.’ [Citation.] [¶] Limitations on the right to continuances in this context are similarly circumscribed. Generally, the granting of a continuance is within the discretion of the trial court. [Citations.] A continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.] [¶] However, ‘a myopic

insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.’ [Citation.] For this reason, trial courts should accommodate such requests—when they are linked to an assertion of the right to retained counsel—‘to the fullest extent consistent with effective judicial administration.’ [Citation.]” (*Id.* at pp. 790-791.)

Larios requested a three-week continuance of his sentencing hearing so he could retain private counsel to file a motion to withdraw his plea. The trial court denied the request on the ground that Larios’s remedy was on appeal. Larios, however, was entitled to have the court rule on a motion in the first instance. Indeed, the court might have granted the motion or, if not, the trial proceedings would have provided a record that we could review for error. According to Larios’s request for a certificate of probable cause, he wanted to challenge his plea based on, among other things, ineffective assistance of counsel, the lack of a factual basis to support his admission of the criminal street gang allegation, pressure and not being in the right state of mind when accepting the plea and new evidence. With regard to his “state of mind” claim, Larios had complained of flu-like symptoms the day before he accepted the plea. But evidence outside the record presented along with a motion to withdraw the plea would be necessary to determine whether he did have the flu-like symptoms and, if so, whether they affected his decision-making in accepting the plea and to develop his other asserted bases for withdrawal. (See *People v. Cruz* (1974) 12 Cal.3d 562, 566 [withdrawal of plea requires showing of good cause by clear and convincing evidence of mistake, ignorance of any other factor overcoming exercise of free judgment]; *People v. Johnson* (1995) 36 Cal.App.4th 1351, 1356 [establishing ineffective assistance of counsel in connection with guilty plea is ground for defendant to withdraw plea].) Given the continuance related only to sentencing, no other continuances had been requested, the request made was for a reasonable three-week period and Larios was in custody, no prejudice or disruption to the court process would have resulted from granting the continuance. Under these circumstances, denial of the continuance constituted an abuse of discretion, infringing on Larios’s right to counsel of his choosing.

The People contend that Larios was not entitled to a continuance because he did not follow the procedures in section 1050, subdivision (b), to file and serve written notice “on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary” The People did not object to the continuance on this ground, nor did the trial court use it as a basis for denying Larios’s request. In any case, section 1050, subdivision (c), provides that, “[n]otwithstanding subdivision (b), a party may make a motion for a continuance without complying with the requirements of that subdivision.” Section 1050, subdivision (d), sets forth that, “[w]hen a party makes a motion for a continuance without complying with the requirements of subdivision (b), the court shall hold a hearing on whether there is good cause for the failure to comply with those requirements.” If good cause exists for the failure to comply with the section 1050, subdivision (b), requirements, the court may grant a continuance upon a showing of good cause. (§ 1050, subd. (e).) Larios’s failure to make a written motion two court days before the sentencing hearing, therefore, did not preclude the court from granting a continuance, and, based on the circumstances of this case, his request for a continuance to retain private counsel for the purpose of filing a motion to withdraw his plea constituted good cause under the statute.

As such, the trial court should have granted Larios a continuance to afford him a reasonable time to retain private counsel. If Larios did not retain private counsel within the time granted, he was entitled to make a motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) for substitution of his appointed counsel on the ground that a conflict existed between counsel and him with respect to a motion to withdraw the plea. (See *People v. Brown* (1986) 179 Cal.App.3d 207, 216 [“Should counsel’s refusal [to represent defendant in a motion to withdraw his plea] persist upon remand, the trial court should hold a [*Marsden*] hearing, attempt to determine the basis of the conflict and decide, in its discretion, whether substitute counsel should be appointed to represent the defendant”].) Larios thus should be afforded that opportunity if he does not retain private counsel.

DISPOSITION

The judgment is conditionally reversed. The matter is remanded with directions for the trial court to allow Larios a reasonable continuance to retain private counsel for the purpose of filing a motion to withdraw his plea. If Larios does not retain private counsel, the court shall entertain a *Marsden* motion should Larios then request substitute appointed counsel. If the court denies a motion to withdraw Larios's plea, or any *Marsden* motion, then it shall reinstate the judgment.²

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.

² If the judgment is reinstated, Larios contends the restitution award of \$300 to victim Saul Berland is improper because no evidence supported such an award. We disagree. Larios pleaded no contest to the robbery in count 3, which involved Berland. Before Larios entered his no contest plea, Berland had testified at trial that, during the incident, a wallet with cash inside it, a cellular telephone, a safe, his watches and perhaps an iPad were taken from his home. Such evidence is sufficient to show that Berland suffered economic loss as a result of the commission of the crime and that the restitution award was in line with the loss sustained by Berland. (§ 1202.4, subds. (a)(1) and (f).)