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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE YOCHEM, Defendant and Appellant.	B280641 (Los Angeles County Super. Ct. No. MA068311)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

Law Offices of James Koester and James Koester, 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, Scott A. Taryle and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Michael Lee Yochem pleaded guilty to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1),[1] with admission of two prior serious felony convictions (§ 667, subd. (a)(1)). Immediately before entry of his plea, the trial court denied his second *Marsden*[2] motion to discharge his appointed trial counsel. Appellant obtained a certificate of probable cause, and argues on appeal the trial court erroneously denied his *Marsden* motion and that he should be permitted to vacate his plea. Appellant asserts any errors in the denial of his *Marsden* motion were not forfeited by the entry of his guilty plea because his contentions go to the "constitutional, jurisdictional or other ground going to the legality of the proceedings" under Penal Code section 1237.5. We disagree, and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On March 26, 2016, at approximately 1:00 p.m., Michael Kassens, a loss prevention officer of Home Depot in Palmdale, observed appellant behaving erratically. Appellant was doing "pull-ups" on the aisle racks. Appellant was holding a paint key,[3] and he walked toward the outside garden, along the way hitting merchandise.

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[1] All statutory references herein are to the Penal Code unless otherwise noted.

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

[3] A paint key opens a paint can, and is about four inches long with a circular base. Home Depot gives them away free.

A customer entered the building from the outside area, and appellant swung the paint key at the customer, who jumped back to avoid being hit with the paint key. Kassens and another Home Depot employee approached appellant. The customer said, "that guy just got crazy with us." Kassens and the other Home Depot associate followed appellant into the garden area and told him to leave. Appellant told them he had lost his sunglasses and his wife was in the store. Kassens told appellant to wait outside. Appellant went outside and asked to speak to the manager. Kassens told him to leave, and called the Sheriff. Appellant walked off through the parking lot, punching the air and waving his hands. Kassens saw appellant go to the 99 Cent Store across from the Home Depot.

Kassens asserted the incident was not captured on video, but the other Home Depot associate believed it likely was recorded because there were video cameras in the area.

Los Angeles County Deputy Sheriff Jason Kiger responded to Kassens's call. When he arrived at the scene, Deputy Kiger met with Kassens, who gave him a description of appellant. Deputy Kiger parked his patrol vehicle across from the 99 Cent Store and observed appellant leave the store. Appellant looked toward the deputy and walked back inside the store. Appellant walked out of the store about three minutes later, and Deputy Kiger approached appellant and asked to speak to him. Deputy Kiger observed that appellant "was rambling, stating that

he needed to call the FBI and that he was afraid he was going to be arrested."

After telling appellant to sit down, Deputy Kiger requested backup. Deputies Warner and Paulson arrived and spoke to appellant and got appellant's driver's license. Deputy Warner ran a warrant check, which revealed that appellant was a registered sex offender. Deputy Kiger asked appellant to stand up so the deputy could check for weapons on appellant's person. Appellant refused. With Deputy Paulson's assistance, Deputy Kiger attempted to handcuff appellant, but appellant pulled his hands away. Appellant's arms were very rigid and the deputies could not bend his elbows. The deputies were finally able to place handcuffs on appellant, and attempted to walk him over to the patrol car. Appellant refused by dragging his feet and kicking his feet in front of him.

The deputies picked appellant up and carried him to the patrol car, where they hobbled him. Appellant was screaming, claiming he was having a seizure and being attacked. Deputy Warner believed appellant was under the influence of a controlled substance. Appellant yelled at the deputies and was "doing everything he could to be difficult for us to get him back to the patrol car." A search of appellant's person yielded a paint key and a bag of white crystalline substance that was methamphetamine.

Because appellant claimed he was suffering from seizures, they placed him on his right side on the ground and called the Fire Department. After the Fire Department arrived, appellant was taken to Palmdale Regional Medical Center.

The amended information filed April 25, 2016 charged appellant with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1);[4] count 1), possession of a controlled substance after a specified prior conviction (Health & Saf. Code, § 11377; count 2), misdemeanor resisting a peace officer (§ 148, subd. (a)(1); counts 3, 4, 5) and resisting an executive officer (§ 69). The information also alleged as to counts 1, 2, and 6 that appellant had suffered three serious or violent felony convictions (§§ 667, subd. (a)(1), (b), 1170.12, subd. (b)) and that appellant suffered two prior convictions for which he had served a prison term (§ 667.5, subd. (b)).

Through appointed counsel, appellant entered a plea of not guilty on all counts and denied the special allegations. Appellant made a *Pitchess* motion, which the trial court granted as to Deputy Paulson. Appellant also made a motion to dismiss pursuant to section 995, to suppress evidence, and obtained the appointment of an expert on use of force.

On November 7, 2016, appellant made a *Marsden* motion to have his appointed counsel replaced. Appellant asserted counsel would not file a motion for discovery to obtain a transcript of the 911 call to the Sheriff and any video camera coverage of the incident inside the Home Depot. Defense counsel advised the court that no video of the incident existed, yet appellant continued to insist that video footage existed and would exonerate him. Counsel advised the court that she had watched some store videos and evaluated the evidence and believed appellant did not have a good chance of winning his case.

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[4] All statutory references herein are to the Penal Code unless otherwise noted.

The trial court denied the motion, finding that there had been no breakdown in the attorney client relationship to the degree that would make it unlikely that counsel could properly represent appellant. After denial of the motion, on his own, appellant made a motion for discovery to obtain any video that Home Depot had of the incident.

On January 9, 2017, appellant made another *Marsden* motion, again asserting there was a Home Depot video which would establish there was no victim and thus he did not commit the assault with the paint key on the customer. Appellant stated that the entire time he was in Home Depot, he was with his wife and a special agent from the FBI. Further, he wanted a constitutional law expert on police brutality because the police beat him at the time of his arrest. Defense counsel responded that investigators had gone to Home Depot, and no video existed, and she had made a tactical decision that the witnesses to the incident were "not good witnesses" for appellant because they arrived after the bulk of his arrest occurred. Finally, a use of force expert had determined that there was no viable issue with respect to excessive force. Appellant continued to insist the video would show he was innocent.

The trial court denied the *Marsden* motion, making the following findings: "To the extent there are conflicts between the defendant and his counsel I believe [defense counsel], based on the fact that she is able to clearly articulate specific things she has done to support her work or her office's work in this case—in particular they filed a *Pitchess,* a substantial *Pitchess,* they did investigation. They hired a use of force expert whose opinion is contrary to the defendant's position. [Defense

counsel] has seen the videos, has reviewed them and they have investigated and spoken to the potential witnesses. For reasons explained she has decided tactically they would not benefit the defendant and in some cases may even hurt him. [¶] She has also, in my opinion, based on my knowledge of the case and observations, investigated this case extensively. I find she has properly represented the defendant and will continue to do so. I find—if there is any deterioration of the relationship between the defendant and the counsel I don't find that there has been a breakdown sufficient that would make it unlikely that counsel could . . . properly represent the defendant. I find that any deterioration in the relationship has been caused only by the defendant's attitude and there is no reason to believe that the defendant cannot be represented effectively. . . . [¶] Moreover, there is no reason to believe based on my observations and the statement of the defendant the defendant will get along any better with any other attorney I might appoint."

On January 9, 2017, after denial of his *Marsden* motion, appellant entered a guilty plea on count 1 pursuant to which he received 14 years, suspended, consisting of the high term of four years, plus two five-year terms for each prior under section 667, subdivision (a)(1), with five years probation.[5] Defendant was facing a maximum of 35 years to life.

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[5] Previous plea offers included 32 months on count 6, with a single strike admission, or three years on count 6, with no prior strike admission. Appellant also rejected an offer of three years on count 2, with all priors stricken.

After advisement from the trial court, appellant pleaded guilty and admitted the prior allegations. Appellant stated that he was freely and voluntarily entering the plea because he believed it was in his best interest. He informed the court his attorney had not threatened or coerced him into taking the plea. Appellant admitted he signed the plea form with explanations and waiver of rights, and stated he understood the rights set forth on the form.

After making his plea, appellant requested a certificate of probable cause, asserting that he was bullied into taking the plea. Appellant asserted he was factually innocent of the offense, the paint key was not a deadly weapon, and he was afraid to be in jail due to his prior conviction for a sex crime. The trial court granted a certificate of probable cause.

DISCUSSION

Appellant seeks to vacate his plea, arguing that the trial court erred when it denied his second *Marsden* motion because his relationship with his attorney had irretrievably broken down due to her failure to obtain needed discovery. As a threshold matter, however, he acknowledges that generally any challenge to his pre-plea *Marsden* motion does not survive the guilty plea. (See, e.g., *People v. Lobaugh* (1987) 188 Cal.App.3d 780 (*Lobaugh*); *People v. Lovings* (2004) 118 Cal.App.4th 1305 (*Lovings*).) Nonetheless, appellant urges us to disregard *Lobaugh* and *Lovings* because in those cases, the appellants did not allege their pleas were not intelligently or voluntarily made, and thus no constitutional or jurisdictional defect existed. Here, however,

such a defect exists because (1) he alerted the trial court to an ineffective assistance of counsel claim based upon counsel's failure to secure the Home Depot videos, and (2) he was coerced into taking the plea due to the oppressive and torturous nature of the jail confinement and the fact he had a prior sex offense.

A. *Under the Facts of This Case, Appellant's Marsden Claim is Not Cognizable On Appeal*

A guilty plea serves to admit all issues essential to a conviction. "[I]ssues which merely go to the guilt or innocence of a defendant are 'removed from consideration' by entry of the plea." (*People v. Shults* (1984) 151 Cal.App.3d 714, 719; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178.) As a result, issues cognizable on appeal following a guilty plea are limited to those issues based on "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" resulting in the plea. (§ 1237.5, subd. (a);[6] *People v. DeVaughn* (1977) 18 Cal.3d 889, 895.)

Among the issues that can be raised after a guilty plea are whether a defendant knowingly, voluntarily, and intelligently waived

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[6] Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

his or her rights in entering the plea. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.) Thus, improper plea inducement is cognizable on appeal. In *DeVaughn*, *supra,* 18 Cal.3d 889, the defendants entered guilty pleas based upon the trial court's execution of a certificate of probable cause that purported to preserve for review on appeal their challenge to the voluntariness of their confessions. (*Id.* at p. 893.) *DeVaughn* held that the issue was cognizable on appeal in spite of the limitations of section 1237.5 because "it was beyond the power of the trial court to bargain with defendants to preserve for appellate purposes the issues of involuntariness," and the pleas were induced by misrepresentations of a fundamental nature. (*Id.* at p. 896; see also *People v. Hollins* (1993) 15 Cal.App.4th 567, 574.)

On the other hand, generally *Marsden* errors are subsumed within any subsequent plea. In *People v. Lobaugh, supra*, 188 Cal.App.3d 780, the defendant pleaded guilty and challenged on appeal the denial of his pre-plea *Marsden* motion. (*Id.* at p. 786.) Finding that defendant made no contention that his plea had not been intelligent or voluntary, or that counsel had deficiently advised him regarding the plea, *Lobaugh* concluded the *Marsden* issue was not cognizable on appeal because it did not go to the legality of the proceedings. (*Ibid.*)

Similarly, in *People v. Lovings, supra,* 118 Cal.App.4th 1305, the defendant did not contend his plea was not intelligent and voluntary. (*Id.* at p. 1311.) He did, however, argue that *Lobaugh* was distinguishable because he entered his plea over counsel's advice and because he felt coerced to enter the plea because of the denial of his

Marsden motion. (*Id.* at pp. 1311–1312.) The *Lovings* court rejected that argument, concluding that to the extent that the plea represented a "break in the chain of events," the defendant's plea was "a very pronounced 'break in the chain of events' involving the attorney-client relationship in this case. The animosity and poor communications previously suggested or alleged were not in evidence at the plea hearing," where counsel attempted to dissuade the defendant from taking the plea and the defendant acknowledged counsel's advice. (*Id.* at p. 1312.) The defendant further attempted to argue that he did not have legal representation at the time of his plea due to the breakdown in the relationship, but the court rejected this argument because admittedly his relationship with his counsel had no bearing on the defendant's decision to enter the plea. (*Id.* at p. 1312.) "Accordingly, the prior *Marsden* rulings cannot be deemed to have had any abiding impact that tainted the plea, and the plea waived any error in connection with those rulings." (*Ibid.*)

Accordingly, in *People v. Marlin* (2004) 124 Cal.App.4th 559 (*Marlin*), the defendant embellished his claim of *Marsden* error with an ineffective assistance of counsel claim—a claim which can survive a plea.[7] The defendant sought to withdraw his plea and engage an attorney to investigate a defense of contributory negligence of the victim. (*Id.* at p. 567.) The defendant expressed dissatisfaction with his counsel's failure to undertake an accident scene investigation although

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[7] Under some circumstances, a claim of ineffective assistance of counsel can be a constitutional question going to the legality of the proceedings. (*In re Brown* (1973) 9 Cal.3d 679, 682.)

counsel had advised defendant that such an investigation would not aid defendant's case. Counsel also advised against withdrawing the plea because he believed defendant would be convicted as charged. (*Id.* at p. 564.) The trial court found no grounds for relieving defendant's attorney or withdrawing the plea. (*Id.* at p. 565.)

On appeal, *Marlin* rejected the defendant's claim of ineffective assistance of counsel. Recognizing that a claim of ineffective assistance could, in some cases, affect the legality of the proceedings, *Marlin* found that "[e]ven so, we doubt defendant's claim of ineffective assistance of counsel goes to the legality of the proceedings under the circumstances presently before us. Defendant's claim is premised on the thought his attorney failed to investigate and present a particular defense to the charge to which he eventually pleaded no contest. The record reflects, however, that defendant had discussed and urged upon his attorney a defense along these lines prior to the time of the plea. He accepted the plea bargain and entered his plea knowing his attorney would not assert the defense on his behalf. By thereafter admitting the offense and waiving defenses to the charge, defendant necessarily waived a claim that his attorney was ineffective for failing to present the defense that defendant thought he might have had. He knowingly gave up that defense in order to take advantage of a plea bargain. He cannot revive it now by claiming his attorney was ineffective for not presenting it." (*Marlin, supra*, 124 Cal.App.4th at p. 567.)

In contrast, in *People v. Armijo* (2017) 10 Cal.App.5th 1171, the defendant's post-plea claim of *Marsden* error was cognizable on appeal

because the defendant never received a requested *Marsden* hearing. *Armijo* distinguished *Lobaugh* and *Lovings* on the grounds the defendants in those cases received *Marsden* hearings, and observed that the defendant's plea could not forfeit his right to a *Marsden* hearing. (*Id.* at pp. 1180–1181; see also *People v. Sanchez* (2011) 53 Cal.4th 80, 84, 92.)

Here, here appellant cloaks his asserted *Marsden* error with arguments that as a result of the breakdown of the relationship with his attorney, his plea was not voluntarily made, and he received ineffective assistance of counsel. Nonetheless, appellant's claim of *Marsden* error fails to survive his guilty plea because, like the defendant in *Lovings,* he cannot show that the asserted breakdown of his relationship with counsel tainted his plea. Nor can appellant show, like the defendant in *Marlin,* his counsel was ineffective—appellant entered his plea knowing his attorney would not present the defense appellant wanted. On the contrary, there is no evidence that appellant's plea was anything other than knowing, voluntary and intelligent. Defendant stated he was voluntarily giving up his rights and his attorney had not coerced him in any way. Defendant signed and initialed the plea form. There is no evidence at the plea hearing that in making the plea agreement defendant stated he was doing so because he feared jail confinement due to his status as a sex offender.[8] Second, there is no evidence that at the plea hearing, appellant entered the plea due to the breakdown of his

[8] Appellant first raised this contention in his request for a certificate of probable case.

relationship with counsel. (*Lovings, supra,* 118 Cal.App.4th at p. 1312.) At most, there was a disagreement over trial tactics. There is no evidence in the record that counsel was ineffective for failing to obtain a non-existent surveillance video or call witnesses whose testimony would not aid appellant. (*People v. Welch* (1999) 20 Cal.4th 701, 728–729 [conflict over the tactical decisions or trial strategy does not constitute type of "irreconcilable conflict" indicating counsel's representation has become inadequate; evidence of professionally unreasonable conduct is required].) Finally, there was a factual basis for the plea, given the testimony of the Home Depot employees to appellant's behavior in the Home Depot. (*People v. Holmes* (2004) 32 Cal.4th 432, 442 [factual basis for plea only requires prima facie showing].) For that reason, under *DeVaughn, Lobaugh, Lovings,* and *Marlin,* defendant's attack on his *Marsden* motion is not cognizable on appeal.

B. *Even Assuming Defendant's Marsden Claim is Cognizable on Appeal, It Lacks Merit*

Under *Marsden,* a criminal defendant has the right to discharge and replace appointed counsel where the failure to do so would substantially impair the right to assistance of counsel. (*Marsden, supra,* 2 Cal.3d at p. 123.) The right arises where the "'record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*People v. Fierro* (1991) 1 Cal.4th

173, 204.) A formal motion is not required; the defendant need only indicate to the court that he or she is requesting the discharge and replacement of appointed counsel. (*People v. Reed* (2010) 183 Cal.App.4th 1137, 1146.)

Once a defendant has made a request under *Marsden,* the court is required to hold a hearing to allow the defendant to explain the basis for the request. (*People v. Sanchez, supra,* 53 Cal.4th at pp. 89–90.) The determination whether to discharge defense counsel is within the discretion of the trial court. (*Marsden, supra,* 2 Cal.3d at p. 123.) We evaluate whether the error prejudiced defendant under the *Chapman* standard, and consider whether any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Here, appellant claims that there were substantial indicators that appellant was not confident in his appointed counsel and they were not getting along. Appellant complained repeatedly about the missing video tape and the witnesses counsel intended to call. He claims the error was prejudicial because he consistently maintained his innocence throughout the proceedings, and if he had been given replacement counsel, he would not have accepted a plea and proceeded to trial. Indeed, appellant had rejected more favorable plea offers earlier in the proceedings.

We disagree. Appellant's arguments, for the most part, rely on the Home Depot videotape that did not exist. The trial court was entitled to rely upon defense counsel's assertions that she had sought to find it, determined it did not exist, evaluated the potential testimony of witnesses, and concluded that appellant's prior convictions mandated

that acceptance of a plea was a more favorable outcome for appellant than proceeding to trial. (See *People v. Smith* (1993) 6 Cal.4th 684, 696–697 [court entitled to accept counsel's explanation at *Marsden* hearing].) At most here, appellant's assertions were a device to manufacture conflict with his counsel over the conduct of his case where none existed. (*Id.* at p. 697.)

On the other hand, appellant received five years' probation and a suspended sentence, a result much more favorable than the 35 years to life he was facing. On that basis, appellant cannot demonstrate that had his *Marsden* motion been granted, he would have gone to trial and received a more favorable result. Accordingly, we find no error and no prejudice in the trial court's denial of his *Marsden* motion.

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J. COLLINS, J.