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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS BROWN, Defendant and Appellant.	B278420 (Los Angeles County Super. Ct. No. BA442989)

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie A. Swain, Judge. Reversed and remanded.

Alex Coolman, 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, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Lindsay Boyd and Esther Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Douglas Brown contends the trial court abused its discretion in rejecting his motion to withdraw his plea, and failed to hold a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We conclude the trial court did not err in denying Brown's motion to withdraw his plea. However, we find the trial court erred in failing to hold a *Marsden* hearing and conditionally reverse and remand for the trial court to do so.

FACTUAL AND PROCEDURAL BACKGROUND

Because the facts of the underlying crime are not relevant to the resolution of the issues on appeal, we note only that Brown was charged with one count of criminal threats (Pen. Code, § 422), to which he later pled no contest as we describe below.

Shortly after Brown's arrest in January 2016, the court granted a defense request for a medical order directing that Brown be examined for mental health treatment. The order indicated Brown claimed to suffer from a schizoaffective disorder and was not receiving medication. In February, the court granted another defense request for a medical examination. The court order stated Brown suffered from schizophrenia and he had not received any medication while in custody.

Brown filed a total of 14 complaints with the Los Angeles County Sheriff's department in February and March, claiming he was not receiving medical treatment. The complaints included grievances such as "I need help with my medication for mental health." He made repeated requests to see a doctor or to "see the floor sergeant about [his] mental health doctor." He complained that without medication he "could not sleep at night" and was "having mood swings."

In March, Brown pled no contest to the criminal threats charge and was sentenced pursuant to the plea agreement to three years of formal probation and 138 days of county jail, with credit for time served.

In June, Brown moved to withdraw his no contest plea. Brown asserted the plea was invalid because his "judgment was clouded by his concerns about his mental health." The motion represented Brown suffers from a schizoaffective disorder.[1] Documentation attached to the motion included the two court orders for a mental health examination and Brown's repeated requests for mental health treatment during the period of his incarceration between his arrest and the plea. The motion also included evidence of Brown's current medications and mental health treatment.

At the hearing on the motion, defense counsel argued Brown believed that the deciding "factor in accepting the plea was not that it was in his best legal interests to do so, but that [it] was in his best medical interest to do so because he was not getting the treatment that he felt he needed while in custody . . . ." Thus, "the motivating force was some kind of duress due to the fact that he was not getting that treatment." Defense counsel further explained Brown believed "the lack of medication was clouding his judgment and that he was not fully able to appreciate the plea that he entered and that he didn't fully understand the consequences of a strike at that time." The prosecutor opposed the motion, arguing Brown understood the consequences of his plea and that he showed no signs of duress. He also noted there was no declaration from Brown,

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[1] There is no evidence of an official medical or psychiatric diagnosis in the record.

and that the motion did not establish Brown's diagnosis or condition. The prosecutor stated, "we know in the courtroom he seemed to be perfectly fine. He even asked questions for the court when [*sic*] he reports to probation."

The trial court denied the motion. The court explained it had reviewed the transcript and record and it demonstrated no indication that Brown "was under any sort of compulsion to take the plea." The court noted that during the plea colloquy, Brown said he understood the consequences of his plea and was pleading no contest freely and voluntarily.

Brown timely appealed.

DISCUSSION

I. The Trial Court Did Not Err in Denying Brown's Motion to Withdraw His Plea

Brown contends the trial court erred when it denied his motion to withdraw his no contest plea because he lacked access to medication while in pretrial custody and his plea "may not have been voluntary or intelligent." We disagree.

A. Applicable Legal Principles

We review a trial court's decision to deny a motion to withdraw a plea for abuse of discretion and adopt the trial court's factual findings if substantial evidence supports them. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 (*Fairbank*).)

Under Penal Code section 1018, a defendant may withdraw a guilty plea for "good cause" within six months of the grant of probation. It is the defendant's burden to establish, by clear and convincing evidence, good cause for withdrawing a guilty plea. (*Fairbank, supra,* 16 Cal.4th at p. 1254.) Good cause includes, "[m]istake, ignorance, or any other any other factor overcoming the exercise of free judgment. . . ." (*People v. Cruz* (1974) 12

Cal.3d 562, 566.) "Other factors overcoming defendant's free judgment include inadvertence, fraud, or duress." (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) A plea may not be withdrawn merely because a defendant changed his mind. (*Ibid.*) Pleas resulting from a bargain should not be lightly set aside, " 'and finality of proceedings should be encouraged.' " (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.)

Absent evidence of incompetence or impairment due to the denial of medication, a trial court does not abuse its discretion in concluding a defendant did not satisfy his burden of proving by clear and convincing evidence that there was good cause to withdraw the plea. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 918 [denial of motion proper where sole evidence defendant's judgment was affected by medication was his own assertions in support of the motion to withdraw and the assertions were at odds with what the trial judge observed].)

B. Analysis

Brown argues there was good cause to grant the motion to withdraw his plea because he was denied medication while in custody. He asserts the lack of medication affected his mental state, such that his plea was not voluntary or intelligent, or that he involuntarily accepted a plea simply to be able to receive medication. We disagree.

Documentation accompanying the motion to withdraw indicated Brown claimed to have a schizoaffective disorder and that he and his counsel repeatedly requested that he receive medication or a mental health evaluation. However, the lack of medication alone does not establish Brown was unable to enter a voluntary or intelligent plea.

For example, Brown provided the court with a letter from Veteran's Affairs indicating that since 1997, he has regularly engaged in mental health services at the VA and is currently "medication compliant." However, the letter does not offer a diagnosis or indicate if Brown was prescribed medication at the time of arrest. The letter also does not include an opinion on the effects of him failing to receive medication while in custody. Instead, the letter reflects only *Brown's* report that he was unable to sleep while in custody and that he felt he was under duress to accept the plea.

Brown also supported the motion with a list of his medications four months after the plea. It indicated Brown was taking medication for mood, anxiety, sleep, and other medical issues such as high cholesterol and acid reflux. But Brown did not provide evidence establishing which of these medicines, if any, he was prescribed at the time of the arrest, or that the lack of any of these medications affected his ability to knowingly and voluntarily enter a plea.

Moreover, nothing in the record demonstrates Brown was impaired or incapable of understanding the nature of the proceedings or the consequences of his plea. In fact, the record reflects just the opposite. During the plea colloquy, the prosecutor explained Brown's constitutional rights in detail. Brown stated he understood the rights and the consequences of waiving them. The prosecutor explained the consequences of the plea. Brown answered "yes," or "yes, sir," each time the prosecutor asked if he understood. When the prosecutor explained that Brown was pleading to a serious felony which could be used to enhance the penalties for a future felony conviction, Brown stated, "I understand."

After Brown entered his plea, the court explained Brown's sentence and the terms of probation. Throughout this explanation, Brown continued to affirm that he understood the court's statements. He asked a question to clarify the search condition of his probationary sentence. When the court asked Brown if he knew what he needed to do next to comply with the terms of probation, he reiterated what he had been informed by the court, including the specifics about where he was to report the next day.[2]

Substantial evidence, including the trial court's own observations of Brown, supported the court's factual determination that Brown was not impaired for lack of medication and that his plea was knowing, intelligent, and voluntary. (*Fairbank, supra,* 16 Cal.4th at p. 1254; *People v. Broady* (1953) 120 Cal.App.2d 901, 902–903.)

Brown's reliance on *Miles v. Stainer* (9th Cir. 1997) 108 F.3d 1109 (*Miles*), for a contrary result is misplaced. In *Miles*, the defendant initially pled not guilty by reason of insanity. He was then examined by three psychiatrists who eventually agreed he was competent to stand trial. Thereafter, the defendant withdrew his not guilty plea and entered a plea of guilty. (*Id.* at p. 1111.) On appeal to the Ninth Circuit, he argued his due process rights were violated because the trial

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[2] We also note that as the court made findings that Brown's plea was free and voluntary, and that he had expressly, knowingly, and intelligently waived his constitutional rights, Brown's counsel interrupted to state: "And I will note this is a *People v. West* plea, that Mr. Brown is accepting this not because he's agreeing necessarily with the allegations, but because he believes it's in his best interest to do so, given the People's offer."

court should have held a competency hearing before accepting his guilty plea. (*Ibid.*)

In support of the motion, the defendant offered evidence from the three psychiatrists who had examined him. Each stated that the defendant was taking large doses of antipsychotic drugs. (*Miles, supra,* 108 F.3d at p. 1112.) The doctors indicated the defendant's competence depended on this medication, which he often refused to take. The record demonstrated the defendant lost and regained competency several times and it included jail records showing the defendant did not take his medication for two weeks before his guilty plea. (*Ibid.*) The Court of Appeal concluded the medical evidence created reasonable doubt about the defendant's competence to plead guilty. It found that in light of the warnings that the defendant's competence depended on him taking his medication, it was incumbent upon the trial court to ask if the defendant had been taking his medication before accepting his plea. (*Ibid.*)

Unlike the defendant in *Miles,* Brown presented no evidence of his medication regime or the effect of his failure to comply with it on his competency. In *Miles,* the defendant highlighted medical evidence in the record establishing that his mental competence depended on his taking prescribed medication and that he had not taken the medication for several weeks before pleading guilty. In this case there is no such evidence. As a result, *Miles* does not assist Brown.

We find no abuse of discretion in the trial court's order denying Brown's request to withdraw his plea.

II. The Trial Court Erred in Failing to Hold a *Marsden* Hearing

Brown next asserts the trial court erred in failing to hold a *Marsden* hearing. We agree and conditionally reverse and remand the case for the trial court to hold such a hearing.

A. Background

At one of the hearings on defendant's motion to withdraw his plea, defense counsel indicated Brown was seeking a continuance. Brown interrupted, and the following colloquy ensued:

> "The Defendant: I am going to fire him. I wish to fire this man.
> The Court: Well, you're on probation. You can go-- you can be on your own if you want. I'm not going to – I'm not -- I don't think I need to appoint counsel for you at this point. Pardon me?
> The Defendant: Nothing.
> The Court: Well, there is -- your case is completed, Mr. Brown. You're off probation.
> The Defendant: I'm in the process when I took the plea that [defense counsel] should not have let me take this plea. I wasn't in my right mind. I was off my meds. I have paperwork saying that from the Los Angeles County Jail they gave me no medication. You requested that they evaluate me. They never evaluated me. I wasn't in my right mind that day.
> The Court: Okay. Well, then you should file a motion. Have [defense counsel] file that motion.
> The Defendant: He didn't -- he didn't look out for me and he shouldn't have let me took the plea.

> The Court: You know what, I know [defense counsel] very well and if he thought that you weren't competent to take the plea, he wouldn't have allowed you to take the plea."

Brown then asked for a 60-day continuance. Defense counsel informed the court he had only filed a one-page motion because Brown wished to present an argument "on facts that I might not necessarily agree with for the purposes of a points and authority . . . ." Brown again interrupted, and the following proceedings were reported:

> "The Defendant: What are you saying? I don't want to talk to this dude, man. I don't want to talk to him. All he's doing is telling me -- he led me on the whole time.
> The Court: Okay, Mr. Brown.
> The Defendant: I don't want to talk to this dude no more. I don't want nothing to do with him. Sorry, no disrespect to the court at this. Throw myself on the mercy of the court.
> The Court: Well, you're going to have to bring a motion. You're already on probation. You have an attorney. He will file the motion. He already filed a motion.
> The Defendant: It's not -- I don't know -- I don't know this guy. I don't know who he is. When I was in custody he gave me no hope. I had no hope, nothing to look forward to.
> [¶] . . . [¶]
> The Court: I need you to stop talking. I need you to

speak through your attorney.
The Defendant: I don't know this guy. Why do you want me to talk to someone I don't know?
The Court: Because he's your attorney.
The Defendant: Who is he though? Is he in my best interest, your honor?
The Court: Yes.
The Defendant: I don't believe so."

At a later hearing, the prosecutor expressed a concern that there may be conflict between Brown and defense counsel. He explained: "If he's basically saying that my attorney allowed me to make this plea and I was in this condition, then maybe -- I don't know if he's the right person even to be representing him. There may be some issue with the state bar if that's their position." Defense counsel indicated he had similar questions at one point and acknowledged he could understand why there would be a potential conflict. However, counsel indicated he had discussed the matter with a supervisor and his office was willing to proceed with the representation. He then stated that in talking more with Brown, "I'm of a position that does not actually create a conflict."

B. Discussion

" 'The law governing a *Marsden* motion "is well-settled. 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.]' " ' " (*People v. Jackson* (2009) 45 Cal.4th 662, 682.) The defendant need not

make a formal motion, or use the term "*Marsden*." (*People v. Dickey* (2005) 35 Cal.4th 884, 920; *People v. Richardson* (2009) 171 Cal.App.4th 479, 484.) However, " ' "there must be 'at least some clear indication by defendant that he wants a substitute attorney.' " [Citations.]' [Citation.]" (*Dickey*, *supra*, at p. 920.) "Mere grumbling" about counsel's failures is not enough. (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.) "[W]e will not find error on the part of the trial court for failure to conduct a *Marsden* hearing in the absence of evidence that defendant made his desire for appointment of new counsel known to the court." (*People v. Richardson*, *supra*, at p. 484.)

Here, we find Brown told the trial court in clear terms that he wished to discharge his attorney. He stated unequivocally, "I wish to fire this man." The People argue Brown's request was insufficient to trigger a *Marsden* hearing because he did not also ask for replacement counsel. (See *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8 [there must be a clear indication by defendant that he wants a substitute attorney].) We agree Brown did not do so. However, as soon as Brown indicated he wished to relieve his counsel, the trial court indicated it would not appoint substitute counsel. It would have been futile for Brown to make such a request, and we cannot find it necessary under these unique facts.

The People further assert no formal *Marsden* hearing was required here because Brown was able to explain his dissatisfaction with counsel. We disagree. The trial court informed Brown it would not appoint new counsel as soon as Brown expressed his dissatisfaction with counsel. In response to Brown's later statements about his attorney, the court redirected the discussion to having defense counsel file a motion to

withdraw the no contest plea. Our review of the proceedings indicates that Brown was not provided " 'ample opportunity to explain and if possible to document the basis of his contention [beyond the] bare complaint[s]' that counsel is not providing adequate assistance." (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179 (*Armijo*), citing *Marsden, supra,* 2 Cal.3d at p. 125.)

Denial of the opportunity to explain the grounds for a *Marsden* motion compels reversal unless the record shows beyond a reasonable doubt that the error was harmless. (*Armijo, supra,* 10 Cal.App.5th at p. 1179.) We cannot find the error harmless. Although Brown was able to offer some explanation of his reason for wishing to fire his counsel, the record does not allow us to determine whether Brown would have "catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel," or an irreconcilable conflict, had the court in fact conducted a hearing. (*Marsden, supra,* 2 Cal.3d at p. 126.) Defense counsel suggested he and Brown disagreed about the arguments to be raised in the motion to withdraw the plea. The prosecutor later raised concerns that defense counsel may have a conflict in continuing to represent Brown, creating further question of the harmlessness of the error in this case.

It is possible Brown would not have been able to show defense counsel's representation was inadequate or that there was an irreconcilable conflict. But because the record was limited only to Brown's brief statements at the hearing, we do not know what other evidence he could have offered had the court conducted a *Marsden* hearing. "It is conceivable that he could have provided at the hearing 'knowledge of conduct and events relevant to the diligence and competence of his attorney[s] which are not apparent' from the 'bare complaint[s]' and that would

have tipped the balance in favor of appointment of substitute counsel. (*Marsden*, *supra*, 2 Cal.3d at pp. 123, 125.) Under these circumstances, we 'cannot speculate upon the basis of a silent record that the trial court, after listening to defendant's reasons, would decide the appointment of new counsel was unnecessary.' [Citation.]" (*Armijo, supra,* 10 Cal.App.5th at p. 1183; *People v. Reed* (2010) 183 Cal.App.4th 1137, 1148-1149.)

"When the trial court's failure to afford the defendant an opportunity to state the reasons for his dissatisfaction with his attorney results in a record which is insufficient for meaningful review but the trial was otherwise free of error, it is appropriate to reverse the judgment and remand the cause for the limited purpose of conducting a postjudgment *Marsden* hearing." (*People v. Hill* (2013) 219 Cal.App.4th 646, 653.) We therefore conditionally reverse the judgment and remand this case to the trial court with instructions to hold a *Marsden* hearing. If, after the hearing, the trial court finds Brown demonstrates ineffective assistance or an irreconcilable conflict, the court is to appoint new counsel to assist Brown in filing any motions newly appointed counsel may deem appropriate. Following a hearing, if the trial court denies Brown's *Marsden* motion, or if newly appointed counsel makes no motions, or if any such motions are denied, the court shall reinstate the judgment. (*People v. Sanchez* (2011) 53 Cal.4th 80, 92-93.)

DISPOSITION

The judgment is conditionally reversed and the case is remanded with directions to the trial court to conduct a *Marsden* hearing. If Brown's request for substitute appointed counsel is granted, the trial court is directed to appoint new counsel to assist Brown and to entertain such motions as newly appointed counsel may file. The court shall reinstate the order if, after a hearing: (1) Brown's request is denied; (2) the request is granted but substitute counsel declines to file any further motions, or (3) the trial court denies any such motion filed.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.