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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.

MATTHEW JOHANSEN,

Defendant and Appellant.

B268957

(Los Angeles County  
Super. Ct. No. KA109433)

APPEAL from the judgment of the Superior Court of  
Los Angeles County. George Genesta, Judge. Affirmed.

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Michele A. Douglass, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,  
Chief Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Chung L. Mar and Paul S. Thies, Deputy  
Attorneys General, for Plaintiff and Respondent.

Appellant Matthew Johansen appeals from the judgment entered on his convictions of felony possession of marijuana for sale and felony transportation of marijuana. Appellant asserts that the trial court denied his constitutional rights to effective assistance of counsel and a fair trial when it failed *sua sponte* to relieve his privately retained trial counsel and order a substitution of a new lawyer. We disagree. As we shall explain, appellant waived any claim that he was denied effective assistance of counsel during the trial. Appellant was fully aware of his counsel's conduct; nonetheless, appellant voluntarily kept his trial counsel even though the court repeatedly advised him of defense counsel's lack of competency and the risks of the representation, and gave appellant opportunities to replace his lawyer. In addition, the trial court conducted the proceedings to ensure that appellant received a fair trial. Accordingly, we affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Appellant's Crime and Arrest**

On the afternoon of April 1, 2015, Los Angeles County Sheriff's Deputy Joanne Arcos and her partner, Deputy Jessica Triay, pulled over appellant for driving on the wrong side of Larchwood Avenue in Hacienda Heights. As she approached appellant's car, Deputy Arcos smelled marijuana, and appellant admitted he had marijuana in the vehicle. The deputies recovered bags of marijuana from appellant and one of appellant's passengers. They also found marijuana and items

used for the sale of marijuana (i.e., baggies and a scale) in the vehicle.

Appellant admitted that the marijuana and other items belonged to him. He said he started selling marijuana to support his marijuana habit. Appellant and one of his passengers, Steven Thompson, were arrested. An information charged appellant with one count of possession of marijuana for sale, a felony (Health & Saf. Code, § 11359 (count 1)) and one count of transportation of marijuana, a felony (Health & Saf. Code, § 11360, subd. (a) (count 3)). Appellant's codefendant, Thompson, was charged with possession of marijuana for sale.

## **B. Pretrial Proceedings**

Appellant retained an attorney to represent him in the criminal proceedings.<sup>1</sup> At the preliminary hearing in May 2015, the attorney argued that the deputies lacked probable cause to stop appellant's vehicle and that the traffic stop was pretextual. In August and October 2015, before trial, the attorney filed a motion to suppress evidence seized during the arrest, a *Pitchess* motion based on a claim that the officer's planted evidence on appellant, and a motion to dismiss. His conduct in connection with these pretrial motions and proceedings was unremarkable; his arguments were appropriate and focused, and his discussion of the issues was lucid.

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<sup>1</sup> Appellant's attorney had known appellant, who was 20 years old at the time of the trial, and his family for decades; and defense counsel had apparently agreed to represent appellant pro bono. According to defense counsel, he and appellant's father had volunteered together in "Rotary."

At pretrial hearings on discovery matters on November 13 and 15, 2015, in the presence of Johansen, however, his attorney's behavior had changed; he was aggressive and unprofessional. Counsel's arguments were irrelevant and incoherent. He continually disrupted the proceedings and interrupted the court and opposing counsel, accusing the court, court personnel and the police of misconduct and conspiring in a "Rampart cover up." His behavior caused the court<sup>2</sup> to express concerns about his mental health and to ask whether he was taking medication. The attorney made several remarks indicating that he was either bipolar or suffered from PTSD and that he was not taking his medication. The court also addressed appellant directly: "You've heard the court[ ] express[ ] some opinions [about your lawyer], and you had observations of your counsel;" and "[i]t's up to you whether you return with Mr. Becerra as your counsel of record."

At the next pretrial date on December 3, 2015, the prosecutor indicated that she had offered both appellant and Thompson a plea deal of pleading to one count of possession of concentrated cannabis, an offense which as a "wobbler" would require them to do 180 days of community service at a tree farm followed by a year of probation. She noted that the offense would be reduced to a misdemeanor after successful completion of the

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<sup>2</sup> The judge assigned to try the case commented that he had known defense counsel for 40 years. The court observed, however, that based on counsel's courtroom behavior during appellant's case, the court had serious concerns about defense counsel's mental health.

program and probation. The court characterized the deal as a “gift offer,” encouraging appellant and Thompson to accept it. The court observed that the current charges—possession for sale and transportation—were felonies, remarking, “I have handled hundreds of these cases and this is not the offer that oftentimes comes before a defendant.” When asked whether appellant might accept the plea deal, the attorney admitted that it was a “great deal,” but in a rambling and digressional response, he indicated that appellant would reject it because, in his view, appellant would not be convicted.

The court then addressed appellant directly: “I don’t believe your attorney is competent to represent you in this trial. I don’t believe—based upon his actions before and then today, regards to his theories on the law and presentation of your case, I don’t believe he’s competent. However, if you wish to continue to have him represent you, that is your choice. You can take him and you can make your own assessment, but that’s my assessment. Do you wish to proceed and continue on with Mr. Becerra as your attorney of record? It’s your call. Yes or no? Or do you wish to consult with your father or a family member at this time? [Appellant responded in the affirmative.] “Because once you say yes, we’re going forward to trial, and you’ve heard him. You’ve heard him before the previous proceedings, and you’ve heard him now. . . . Twelve jurors are going to be listening to this nonsense. . . . That’s the court’s opinion at this point in time. . . . Do you wish to consult with your father in this matter? . . . Do you wish to go outside, sir?”

The appellant left the courtroom to consult with his family, and upon his return, he affirmed to the court that he wanted the attorney to continue as his counsel.

The prosecutor then requested the court remove the attorney as appellant's counsel, asserting that both defendants and the People would be denied a fair trial if defense counsel were allowed to continue to represent appellant, observing: "[W]e are essentially making a built-in ineffective assistance of counsel claim on behalf of [appellant] . . . and it's the People's position that the court has the inherent authority . . . to disqualify Mr. Becerra as counsel of record . . . given that he has clearly demonstrated to the court that he is not competent to proceed."

And the court responded: "Defendant has an absolute constitutional right to represent himself or the attorney of his choice. This court has advised Mr. Johansen of the court's own personal opinion, notwithstanding the fact that I've known Mr. Becerra for 40 . . . I have great regard for him as a friend and lawyer. . . . But he is not the lawyer he was. . . . As long as Mr. Johansen is aware of that and has heard the court's opinion on that and has made the observations of his counsel on that. If he still wishes to be represented by Mr. Becerra, then it is this court's opinion that he cannot later claim that his lawyer was incompetent, and he wishes the Court of Appeal[] to invalidate the trial because he was denied due process. He was given this opportunity at this time to say I don't want to go forward with this lawyer. I want to have someone else represent my interests. I've dealt with his issues before in regards to people insisting on representing themselves, without an attorney, and being told of

the dangers of self-representation, and they've insisted to go forward and then later on—I even had a case where the court—the issue on appeal was I should not have granted him pro[.] per[.] status and represented himself, and the Court of Appeal[] said too bad, so sad. You were advised and you decided to go forward with it, the dangers of it, and so you can't raise it again. You don't get two bites at the apple. So, no. I'm confident the Court of Appeal[] is saying you chose him, you kept him, you understand the circumstances, and you can live with the results, Mr. Johansen, whatever those results are going to be. . . . He's been advised of his attorney's competence in the eyes of this court, and he has had the opportunity to observe his attorney's conduct in court, both on and off the record, and he has chosen to go forward with Mr. Becerra. That's correct, Mr. Johansen?"

Appellant agreed.<sup>3</sup>

### **C. Appellant's Trial**

Defense counsel's unfocused and disrespectful behavior persisted during jury selection. During the prosecutor's case, defense counsel made numerous irrelevant, incoherent and unfounded objections, multiple requests for a mistrial and engaged in distracting and disruptive conduct.

At the beginning of the cross-examination of the first witness, Officer Triay, the court again stopped the proceedings and asked the jury to leave the courtroom. The court gave appellant another opportunity to relieve his counsel. The court

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<sup>3</sup> After that, the court granted appellant's codefendant Thompson's motion to sever his case from appellant's based on the ongoing behavior of appellant's counsel.

said it would grant a mistrial and give appellant time to get a new attorney to represent him: “I don’t know what advice you got from your father or anyone else, but you’re the one that’s got to pay the price” if you continue. Even defense counsel encourage appellant to fire him at that point. Appellant indicated that he did not want the proceedings to “go like this” and was not happy about his attorney’s representation, but wanted to keep him. The court then allowed appellant to consult with counsel; and after doing so, appellant requested that he be allowed to serve as co-counsel and give his counsel questions to ask the witnesses. The court denied the request. The court then addressed appellant’s father, observing that counsel had not provided competent or fair representation during the proceedings. The court urged appellant to fire counsel and agree to a mistrial so that he could retain a new lawyer. The court reminded appellant that he was risking going to jail if he was convicted. Appellant’s father told the court that he had known counsel for many years and that he believed he was a competent lawyer in the past. He was concerned by his strange behavior during the trial and asked the court to give counsel a few days to rest. The court refused, stating that “we’re in the middle of a trial now. Your son is not getting a fair trial. Your son is not getting a fair representation. If you think he is, you can keep him, but your son’s going to live with the result. And as far as I’m concerned, if he keeps this lawyer, then he’s sanctioning his conduct, and that’s what he wants, is he wants the lawyer to act this way in front of this jury because he thinks he’s going to profit from it. . . . It’s your call because you’ve had plenty of opportunity



to see the level of representation he has given you.” Appellant, however, chose to remain with his counsel.

Throughout the trial in response to counsel’s conduct, the trial court took an active role in directing the presentation of the evidence. The court regularly intervened to reformulate the questions so that the witnesses could answer. In addition, in response to counsel’s conduct, the court admonished defense counsel numerous times. The court informed the jury to disregard counsel’s comments and to not base its decision “upon the conduct of any of the participants in this trial.” The court also instructed the jury that it must “not let bias, sympathy, prejudice or public opinion influence your decision,” including “bias for or against the . . . attorneys.” The court held counsel in contempt of court several times, continued to control the scope of witnesses’ examinations, and made suggestions as to the order of proof. Before the testimony of the prosecutor’s final witness, Deputy Arcos, appellant’s lawyer advised the court that appellant wanted to assert a *Marsden* motion based on counsel’s conduct and a breakdown in their relationship. During the *Marsden* proceeding, the court stated that it had given appellant at least two prior opportunities to change counsel based on trial counsel’s lack of competence and behavior. The court stated that at this late stage in the proceedings, appellant’s only option was to represent himself or continue with counsel. Appellant decided to continue with his lawyer.

The jury found appellant guilty of both counts. At the sentencing hearing, the court granted appellant's request to relieve his defense counsel as his attorney, and a public defender was appointed to represent appellant. The court suspended imposition of sentence and granted appellant three years of formal probation on both counts on condition he serves 60 days in jail. The sentence on count 1 was stayed under Penal Code section 654, and the court imposed various fines and fees and awarded custody credits. This timely appeal followed.

### DISCUSSION

Appellant claims that the trial court denied his right to a fair trial and effective assistance of counsel when it failed to relieve his trial counsel. For reasons discussed below, we disagree.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution, guarantee every criminal accused the right to counsel. This constitutional right means the right to competent assistance of counsel. (*McMann v. Richardson* (1970) 397 U.S. 759, 771, fn. 14; *Reece v. Georgia* (1955) 350 U.S. 85, 90.) Nonetheless, the right to effective counsel may be waived by a criminal defendant so long as the waiver is knowing, voluntary, and intelligent. (See *People v. Escarcega* (1986) 186 Cal.App.3d 379, 396 [finding defendant waived issue of retained counsel's ineffectiveness at trial], disapproved of on other grounds in *People v. Sutton* (2010) 48 Cal.4th 533, 562.) An analogous situation arises when a defendant chooses to represent himself.

“Defendants untrained in the law may well provide themselves with inept representation. But *Faretta* [*v. California* (1975) 422 U.S. 806, 818-821] gives them the right to make a thoroughly disadvantageous decision to act as their own counsel, so long as they are fully advised and cognizant of the risks and consequences of their choice” and they knowingly and voluntarily waive their right to competent counsel. (*People v. Butler* (2009) 47 Cal.4th 814, 828.)

Substantial evidence supports the trial court’s implied finding that appellant voluntarily, intelligently, and knowingly waived effective counsel when he decided to proceed with his trial counsel. (See *People v. Escarcega*, *supra*, 186 Cal.App.3d at pp. 396-397 [holding an express finding of waiver is not mandated where the record fully sets forth the colloquy between the court and defendant and substantial evidence exists to support an implied finding of waiver].) The trial court repeatedly informed appellant (and his father) that his counsel was not providing appellant with competent representation. The unambiguous record reveals the court’s advisements and admonishments as well appellant’s voluntary and clear responses indicating that appellant understood the shortcomings of counsel’s representation. The court gave appellant several opportunities to consider and reconsider his decision and to have new counsel appointed. Nonetheless, appellant remained determined to be represented by the same counsel.

Implicit in the constitutional right to counsel is the right to representation by retained counsel of one's choice; it was not within the province of the court to substitute new counsel. (*People v. Crovedi* (1966) 65 Cal.2d 199, 206.) This notwithstanding, just as the court may revoke a defendant's pro. per. status if the defendant engages in obstructive misconduct, the trial court here retained the authority to relieve appellant's retained counsel under the same circumstances. The court's discretion is, however, severely limited. "[T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, . . . and that . . . desire 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." (*Id.* at p. 208.) The involuntary removal of any attorney may be justified, if at all, only in the most " 'flagrant circumstances of attorney misconduct or incompetence *when all other judicial controls have failed.*' " (*People v. Jones* (2004) 33 Cal.4th 234, 243, emphasis added, quoting *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697.)

Here the court protected appellant's constitutional rights and the integrity and reliability of the trial. After it became apparent that appellant wanted to proceed with counsel, the court actively participated in the trial. The judge intervened by controlling the scope of the examination, questioning witnesses, making appropriate suggestions as to the order of proof,

commenting on the evidence, admonishing the jury, and when counsel's conduct became too disruptive, finding him in contempt. Thus, the court's conduct of the trial balanced the interests of appellant's choice of counsel with the fair and orderly administration of justice. And "[a] defendant cannot be heard on appeal to complain of his counsel's inadequacy or ineffectiveness at trial if defendant is advised by the court of possible problems concerning that attorney's competence and he knowingly, intelligently, and voluntarily chooses to proceed with that particular attorney. A contrary rule would impermissibly allow a defendant "an automatic right to reversal on appeal should the defense or defenses at trial fail." (*People v. Cook* (1975) 13 Cal.3d 663, 673, fn. 10, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Appellant has waived any complaint concerning the adequacy of his counsel's representation. The court did not violate appellant's constitutional rights when it failed to relieve appellant's counsel and order a substitute counsel.

## **DISPOSITION**

The judgment is affirmed.

Pursuant to California Code of Judicial Ethics, canon 3D(2), we hereby report attorney Danilo Becerra, former trial counsel for appellant, to the State Bar of California to investigate his conduct during the trial of this matter. The clerk of this court is directed to send copies of this opinion to the State Bar of California and to Mr. Becerra at his address listed by the State Bar.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.