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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FATAI AGBABIAKA,

Defendant and Appellant.

B285194

(Los Angeles County  
Super. Ct. No. BA456824)

APPEAL from a judgment of the Superior Court of Los Angeles County. C. H. Rehm, Jr., Judge. Conditionally reversed and remanded.

Carlos Ramirez, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, and Noah P. Hill, Deputy Attorney General, for Plaintiff and Respondent.

\* \* \* \* \*

Fatai Agbabiaka (defendant) was charged with felony possession of controlled substances, and convicted by a jury of the lesser included crime of simple possession. On appeal, he argues that the trial court abused its discretion in not conducting an in camera hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) after he told the court that he was looking to “[g]et rid of” his appointed counsel and was “asking for somebody else.” Defendant is right, and we conditionally reverse his convictions and order that the trial court conduct an in camera hearing at which defendant may state his reasons for desiring the appointment of new counsel; if those reasons satisfy *Marsden*’s requirements for the appointment of new counsel, the court must order a new trial. (Accord, *People v. Minor* (1980) 104 Cal.App.3d 194, 200 (*Minor*).)

## **FACTS AND PROCEDURAL BACKGROUND**

### **I. Facts**

In April 2017, defendant was lawfully arrested on the corner of Fifth and Main Streets in downtown Los Angeles, California, an area known for trafficking in prescription pills. Police searched defendant, and found 40 codeine pills in a prescription bottle bearing someone else’s name, \$829 in various bills, and a set of car keys. Police located the car associated with the car keys in a nearby parking garage; inside the car, they found a smorgasbord of different prescription medications, including Alprazolam.

### **II. Procedural Background**

#### **A. Charges**

The People charged defendant with two counts of possessing controlled substances for sale (Health & Saf. Code, § 11351), with one count tied to his possession of codeine and the

other to his possession of Alprazolam. The People alleged that defendant had three prior strike offenses under our “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(j) & 1170.12, subds. (a)-(d)), seven prior prison terms (*id.*, § 667.5, subd. (b)), and four prior controlled substances convictions (Health & Saf. Code, § 11370.2, subd. (a)).

**B. *Pretrial request for new counsel***

More than two months prior to trial, defendant informed the trial court that he “would like to have another lawyer.” The trial court held a hearing outside the prosecutor’s presence, and asked defendant to elaborate. Defendant explained that he had a “conflict of interest” with the public defender appointed to represent him because she wanted to file a motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, while he wanted to file a second motion to suppress under Penal Code section 1538.5 (his first motion had been denied). The trial court stated that it had no reason “to believe” that the public defender “has done anything wrong or is not capable of representing [defendant] fully in this matter,” and denied the motion.

**C. *Trial***

**1. *Mid-voir dire expression of dissatisfaction***

In the midst of several days of voir dire, defendant informed the court that he wanted to file a *Pitchess* motion and asked how he could subpoena witnesses. The trial court responded that it was defense counsel’s job to subpoena witnesses. Defendant responded that he and his attorney “don’t even converse,” but went on to explain that he had told her which witnesses to call. When the trial court asked defendant if he had “other concerns [he] wanted to express,” defendant declined.

## 2. *Midtrial request for self-representation and for new counsel*

After several days of testimony, defendant—through his attorney—informed the trial court that he wanted to represent himself. After securing defendant’s assurance that he would be able to step into counsel’s shoes by the next day of trial (which was four calendar days later), the trial court gave defendant a written waiver form to review and told defendant they would then have a “brief conversation” to “see if it is appropriate” to allow defendant to proceed pro se. Defendant initialed the written waiver form, but in response to the court’s questioning, stated that he “just put [his] initials on” the form without reading it. When the court asked him “what [he] hope[d] to achieve by just putting [his] initials” on the form, defendant responded that he was hoping to “[g]et rid of” defense counsel and clarified that he was “asking for somebody else.” The trial court stated that “it appears . . . that you really do not want to represent yourself. You simply don’t want to be represented by” appointed counsel. Defendant replied, “God bless you.” The court then ruled that disappointment with appointed counsel was “not an appropriate ground upon which to grant you your pro per status.” When defendant asked, “You can’t give me another attorney?” the court responded, “No. We have already been through this.” A few minutes later, defendant explained why he wanted to absent himself from the courtroom except during his own testimony: “[I]f your lawyer can’t ask the right question for you, at least they can hear what I have got to say.” Defendant ultimately decided to remain in the courtroom.

## 3. *Verdicts*

The trial court instructed the jury on the charged crimes as well as the lesser included misdemeanor offense of simple

possession. The jury acquitted defendant of the felony possession for sale charges, and convicted him of the misdemeanors.

#### 4. *Sentencing*

The trial court sentenced defendant to 728 days in the county jail, comprised of 364 days for each of the misdemeanor counts, to be served consecutively.

#### **D. *Appeal***

Defendant filed this timely appeal.

### **DISCUSSION**

Defendant argues that his convictions must be overturned because the trial court did not conduct an in camera hearing in response to his midtrial request for new counsel. His argument is well taken.

The Sixth Amendment guarantees the right to the appointment of counsel in felony cases. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345.) This guarantee does not confer upon a criminal defendant the right to the appointed counsel of his choice (*People v. Suff* (2014) 58 Cal.4th 1013, 1040), but it does secure the right to the appointment of new counsel if the defendant's currently appointed counsel is (1) not providing adequate representation, or (2) so embroiled in an irreconcilable conflict with him that ineffective representation is likely to result. (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488; *People v. Clark* (2011) 52 Cal.4th 856, 912 (*Clark*); see generally *Marsden, supra*, 2 Cal.3d at p. 123.) To effectuate this right, a trial court confronted with a "clear indication by [a] defendant that he wants a substitute attorney" must permit the defendant, in an in camera hearing outside the prosecutor's presence, "to state the reasons why he believes that a court-appointed attorney should be discharged." (*People v. Lucky* (1988) 45 Cal.3d 259,

281-282 & fn. 8; *People v. Valdez* (2004) 32 Cal.4th 73, 95; *People v. Sanchez* (2011) 53 Cal.4th 80, 89-90.) Although such a so-called *Marsden* motion is reviewed for an abuse of discretion (*People v. Taylor* (2010) 48 Cal.4th 574, 599), a trial court generally abuses that discretion if it does not hold a hearing when a defendant makes a sufficiently clear request for a new appointed attorney (*Marsden*, at p. 124).

The trial court abused its discretion in this case. During the midtrial exchange, defendant clearly indicated his desire for a new attorney: He said, point blank, that he wanted to “[g]et rid of” his current attorney and was “asking for somebody else.” What is more, the trial court heard defendant loud and clear when it summarized that defendant “simply [did not] want to be represented” by his current counsel. Yet the trial court did not convene a hearing to allow defendant to explain the reasons for his request. This was error.

The People make three arguments in response. First, the People cite the trial court’s statement that “[w]e have already been through this” and contend that it is “reasonable to infer” that defendant’s reasons for requesting new counsel a second time were the same reasons he requested new counsel two months prior to trial, thereby making a further *Marsden* hearing unnecessary. To be sure, a trial court need not convene a further *Marsden* hearing if it has already held one, and if the defendant’s renewed complaints rest on the same grounds. (*People v. Clark* (1992) 3 Cal.4th 41, 104 [no further hearing required where defendant’s renewed request was based on “a similar accusation”]; see generally *People v. Vera* (2004) 122 Cal.App.4th 970, 980 [“a defendant is not entitled to keep repeating and renewing complaints that the court has already heard”].) In this

case, however, the record is silent on defendant's midtrial reasons for objecting to his counsel's representation. It is also not reasonable to infer that the reasons were the same: Defendant's first request was more than two months earlier and was based on a disagreement over pretrial motion strategy; his second request occurred midtrial and, based on defendant's more contemporaneous comments, seemed to be based upon disagreements over which witnesses to call and which questions to ask defendant during his testimony.

Second, the People assert that defendant's disagreements seem to deal mostly with trial strategy, which is an insufficient basis for replacing appointed counsel. This is true (*Clark, supra*, 52 Cal.4th at p. 912), but this argument rests on the assumption that the basis for defendant's second *Marsden* motion was disagreement over trial strategy. This assumption is wholly speculative precisely because the trial court never inquired into the basis for his second motion.

Lastly, the People liken this case to *People v. Gonzalez* (2012) 210 Cal.App.4th 724. *Gonzalez* is inapt because there, unlike here, "[t]here was no clear indication that [the defendant] was requesting a substitute appointed attorney." (*Id.* at p. 741.)

Defendant's conduct in requesting new counsel, then self-representation, then new counsel, and also threatening to absent himself from trial, has more than a whiff of gamesmanship. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 762, fn. 9 ["This court is not oblivious to the 'game' quality of many *Marsden/Faretta* proceedings"].) But the motivation for making a *Marsden* motion does not relieve a trial court of its well-established duty to inquire into the basis for that motion. Contrary to what defendant contends, the trial court's breach of this duty in this

case does not entitle defendant to vacation of his convictions. Instead, we conditionally reverse the convictions, and order that the trial court conduct an in camera hearing at which defendant may state his reasons for desiring the appointment of new counsel and, if those reasons satisfy *Marsden*'s requirements for the appointment of new counsel, order a new trial. (*Minor, supra*, 104 Cal.App.3d at p. 200; *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400-1401.)

### **DISPOSITION**

The judgment is conditionally reversed. The trial court is ordered to schedule a hearing, give notice of that hearing to defendant and his counsel, and if defendant appears at that hearing, conduct an in camera hearing at which defendant may state his reasons for desiring the appointment of new counsel. If those reasons satisfy *Marsden*'s requirements for the appointment of new counsel, the court must order a new trial; if they do not, the convictions shall be affirmed.

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\_\_\_\_\_, J.  
HOFFSTADT

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ