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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LARRY GLENN HUNTER, Defendant and Appellant.	F043635 (Super. Ct. No. 1020342) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy Ashley, Judge.

Linda J. Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Larry Hunter pleaded guilty to possession of a firearm by a person previously convicted of a felony (Pen. Code, § 12021, subd. (a)(1); [1] count 1) and grossly

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* Before Harris, Acting P.J., Buckley, J., and Wiseman, J.

1 All statutory references are to the Penal Code.

negligent discharge of a firearm (§ 246.3; count 2), and admitted a "strike"[2] allegation. The court dismissed count 2 and imposed a sentence of four years, consisting of the two-year midterm on count 1, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)).

Appellant contends he made what is commonly called a *Marsden* motion, i.e., a motion to have appointed counsel discharged and substitute counsel appointed,[3] and the court denied the motion without first giving appellant an adequate opportunity to explain his reasons for the motion. Therefore, appellant contends, reversal is required. We will affirm.

PROCEDURAL BACKGROUND[4]

In September 2001, appellant, represented by attorney Richard Orenstein, entered his pleas and admission of the strike allegation, and the matter was set for sentencing. Subsequently, following two continuances, appellant failed to appear for sentencing on February 5, 2002, at which time a bench warrant for his arrest was issued.

More than seven months later, on September 10, 2002, appellant was taken into custody. He appeared for sentencing two days later. The matter was continued.

Following several more continuances, on October 21, 2002, Mr. Orenstein informed the court appellant wished to withdraw his plea and that he (Mr. Orenstein) anticipated that appellant "is going to suggest [Orenstein] misrepresented something to him . . . ." The court appointed "Conflict II for the sole purpose of determining whether there does lie a valid motion for [appellant] to withdraw [his] plea."

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[2] We use the term "strike" to describe a prior felony conviction that subjects a defendant to the increased punishment specified in the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12).

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

[4] Because the facts of the instant offenses are not relevant to the issues raised on appeal, we will forgo recitation of those facts.

Following several more continuances, on January 30, 2003,[5] the court appointed attorney Stephen Davis with regard to appellant's motion to withdraw his plea, and continued the matter to February 28. On that date, the matter was continued to March 7. On that date Mr. Davis filed a notice of motion to withdraw appellant's plea, with accompanying points and authorities.

On March 28, Mr. Davis informed the court he had discovered he had based the motion on a "factual misunderstanding" and "submit[ed]" the motion "on the paperwork." The court denied the motion. Shortly thereafter, appellant told the court, "I advised Mr. Davis I would like to request a Marsden hearing." The court noted that "Mr. Orenstein is the attorney of record on that case" and that "he would need to be present if it proceeds to a hearing of that nature," and continued the matter to April 4.

On April 4 and April 11, the matter was continued for the purpose of having Mr. Orenstein present. On April 18, Mr. Orenstein appeared; the instant case was continued to May 9 for sentencing; and a preliminary hearing was set in another case. There was no mention of appellant's *Marsden* motion. On May 9, Mr. Orenstein appeared with appellant. Appellant waived the preliminary hearing and, in the instant case, sentencing was continued May 16. Again, there was no mention of appellant's *Marsden* motion. Mr. Orenstein and appellant appeared on May 16. The proceeding was not transcribed but the minute order indicates the matter was continued to June 6.

On June 6, appellant and Mr. Orenstein appeared in court, at which time the following exchange occurred.

"THE COURT: Any legal cause why sentence should not now be pronounced?

"MR. ORENSTEIN: I don't think so, but maybe if the Court can take a second and address that to the defendant.

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[5] All further references to dates of events are to dates in 2003.

"THE COURT: Okay. But you indicated, Mr. Orenstein, that you're still representing Mr. Hunter in this case, and you are prepared to continue representation of Mr. Hunter?

"MR. ORENSTEIN: Correct. We even made the last appearance. We've made all appearances after Mr. Davis did the motion to withdraw the plea which was denied. We made subsequent court appearances thereafter.

"THE C OURT: Correct.

"MR. ORENSTEIN: And that's the situation as is sits now.

"THE COURT: And, Mr. Hunter, what was your basis for not wanting to have Mr. Orenstein continue to represent you in this case?

"THE DEFENDANT: There were discussions between Orenstein and myself that pertain to information on another case that was subsequently passed on to the District Attorney's Office, and I'm not really sure exactly what is -- what was done with that.

"MR. ORNESTEIN: I told you, didn't I? [¶] I could explain that fully, but I don't think I can do it in the open courtroom.

"THE COURT: Was that the basis to withdraw the plea originally?

"MR. ORENSTEIN: No, not at all.

"THE COURT: And, Mr. Orenstein, you're satisfied that you can continue to represent Mr. Hunter?

"MR. ORENSTEIN: I know of no reason why not. There was a situation that occurred recently that Mr. Hunter is referencing, speaking about. And Ms. Hertle was present as well as myself, and we did follow through completely as to what we were supposed to do on our behalf. The other side that was involved did not want to -- the other side did not want to engage themselves.

"MR. BAKER: Okay.

"THE DEFENDANT: Personally, I don't think that they -- the other side has indicated anything as of yet.

"MR. ORENSTEIN: Yes, they have to me. They have on a telephone call. They left a message. I told you. I tried to keep on calling them back, but they refuse to call me back, but they left a message that they didn't want to do that.

"THE COURT: Mr. Baker, does your office have a recommendation as to the appropriate sentence for Mr. Hunter in 1020342?"

The probation officer then responded to the court's question, and the court shortly thereafter imposed sentence. Toward the close of the hearing, the following exchange occurred:

"THE DEFENDANT: Could I let the Court know that I did request a Marsden hearing that I never did receive.

"THE COURT: That request, Mr. Hunter, at this point in time I'm going to go ahead and deny that. I don't believe there's been any change of circumstance, and I believe it was just a delay tactic on your part."

DISCUSSION

Appellant argues as follows: he made a *Marsden* motion; the court did not allow appellant to state the basis for the motion; and therefore the court did not accord appellant a proper hearing. We disagree.

"In [*Marsden*], the Supreme Court held that when a defendant seeks to discharge appointed counsel and substitute another attorney, the trial court must give the defendant an opportunity to state his reasons before ruling on the motion. In reaching this conclusion, the court started with the propositions that (1) criminal defendants are entitled to the assistance of court-appointed counsel if they are unable to employ private counsel; (2) the right of a defendant to the assistance of appointed counsel may include the right to have appointed counsel discharged or other counsel substituted, if it is shown that failure to do so would substantially impair or deny the right; (3) the right to such discharge or substitution is not absolute, but obtains only if it is sufficiently shown that the right to the assistance of counsel would be substantially impaired in case the request

is not granted; and (4) within these limits there is a field of discretion for the court." (*People v. Young* (1981) 118 Cal.App.3d 959, 964-965.)

Thus, " '[a] defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' " (*People v. Fierro* (1991) 1 Cal.4th 173, 204.) A "[d]enial [of a *Marsden* motion] 'is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' " (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

As a preliminary matter, we note that a nonindigent defendant seeking to discharge retained counsel is not required to make such a showing. (*People v. Ortiz* (1990) 51 Cal.3d 975, 984.) This point has some significance here because the record indicates at various points that Mr. Orenstein was retained, and not appointed counsel. For example on June 29, 2001, Mr. Orenstein stated he was making a "pro bono appearance at this time," and various minute orders refer to defense counsel as retained. However, at the hearing on June 6, Mr. Orenstein identified himself as appointed counsel. Based in part on this portion of the record, appellant argues, as indicated above, that he sought on that date to have *appointed* counsel discharged. The People agree, as do we. Therefore, the principles applicable to *Marsden* motions summarized above are applicable here.[6]

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[6] Because we conclude the record demonstrates appellant made a *Marsden* motion, we need not address appellant's alternative contentions that (1) the court abused its discretion in denying appellant his right to discharge retained counsel, and (2) the record is unclear as to whether Mr. Orenstein was appointed or retained, and therefore the record is insufficient to permit meaningful appellate review.

We turn now to the crux of appellant's argument, i.e., his contention that "[he] was not allowed to state reasons for [his] *Marsden* request." The record belies this claim. The court specifically asked appellant, "what was your basis for not wanting to have Mr. Orenstein continue to represent you in this case?" Appellant responded with a vague statement that suggested he was displeased with Mr. Orenstein's representation in another case, but stopped short of claiming that counsel had provided, or was likely to provide in the future in the instant case, inadequate representation, or appellant and the attorney were embroiled in an irreconcilable conflict. The court listened to appellant, and did not interrupt or otherwise prevent appellant from responding. No more is required. (*People v. Young*, *supra*, 118 Cal.App.3d at p. 965.) Nor did such a vague response by appellant necessitate further inquiry by the court. (*Ibid*.; *People v. McElrath* (1985) 175 Cal.App.3d 178, 184-185.) The record demonstrates that appellant was afforded the opportunity to state his reasons for his *Marsden* motion and he failed to establish that the court's " 'failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' " (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1085.) Therefore, the denial of the motion did not constitute an abuse of discretion.

DISPOSITION

The judgment is affirmed.