

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,) No. H029887
)
v.) (Monterey County
) Superior Court No.
CAIN ALBERT BELTRAN,) SS043225)
)
Defendant and Appellant.)
_____)

APPELLANT’S REPLY BRIEF

**THE COURT ERRED IN REQUIRING APPELLANT TO SHOW
CAUSE TO DISCHARGE RETAINED COUNSEL.**

At the sentencing hearing of December 15, 2005, appellant tried to discharge retained counsel, Clarence Darrow. Instead of permitting counsel to withdraw, it held a hearing for appellant to show cause for removing counsel under *People v. Marsden* (1970) 2 Cal.3d 118. When the court asked for appellant’s reasons, he explained Darrow was not willing to make a motion to withdraw his plea. The court found insufficient grounds for removing counsel. The court erred because it required appellant to show cause to discharge retained counsel; he had a right to discharge counsel without cause.

Respondent asserts the record does not clearly show that trial counsel was retained instead of appointed. (RB 11.) If there were any ambiguity in the

record,¹ this was dispelled when this court took additional evidence that Darrow was retained.

Respondent does not dispute appellant's motion was timely. Nor does it dispute that if appellant made a clear motion to discharge retained counsel, the court was required to have permitted counsel to withdraw.

Respondent instead claims appellant never made a clear enough indication that he wanted to remove Darrow, as he complained at the *Marsden* hearing that he wanted to withdraw his plea. (RB 11-14.) Respondent attempts to distinguish *People v. Lara* (2001) 86 Cal.App.4th 139 and *Bland v. California Dept. of Corrections* (9th Cir. 1994) 20 F.3d 1469² on the premise that in those cases trial counsel made it clear the defendants sought to discharge counsel. (RB 14-15.)

Respondent tries to confuse the remedy appellant sought with the reason why he sought the remedy. An examination of the context of the December 15 hearing leads to the unescapable conclusion that appellant sought to discharge Darrow, and everyone in the courtroom understood this. The reason why he wanted to discharge Darrow was because he wanted to

¹When appellant was arraigned on December 14, 2004, Clarence Darrow made a general appearance as appellant's attorney. (12/14/04 ART 3.) The court never appointed him, so his appearance must have been because he was retained.

²Overruled on other grounds in *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1024-1025 (en banc).

withdraw his plea, but the purpose of the hearing itself was to show cause why Darrow should be discharged.

When the December 15 hearing began, Darrow said “Mr. Beltran wishes to make a motion, a triple [sic] *Marsden* motion.” (3RT 503.) He went on to request that the hearing occur without the prosecution present. (*Ibid.*) Generally, a court is not allowed to hear a matter with only one party present. (Cal. Code of Jud. Ethics, canon 3B(7); see *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1317.) This would include motions to withdraw plea. *Marsden* motions are one of the few hearings which occur without the other party present. (See *Marsden, supra*, 2 Cal.3d at pp. 124-125.) The only remedy available at an in camera *Marsden* hearing is the removal of counsel. (*Id.* at p. 126.) Darrow was an experienced criminal defense lawyer, qualified to handle capital cases, such as this one. When he said appellant wanted an in camera *Marsden* hearing, he could only have meant appellant wished to discharge him.

The court reconvened in chambers with the prosecution present. (3RT 504.) Darrow explained, “Mr. Beltran wishes to make a motion to withdraw plea, and, therefore, I told him he would have to address the Court in discharging me. I told him that – I explained to him what a *Marsden* motion is” (*Ibid.*) Thus, contrary to respondent’s claim that trial counsel never made it clear that appellant wanted to discharge him (RB 13), Darrow expressly stated the hearing was for the purpose of “*discharging* me.” He also

stated that he explained the purpose of *Marsden* motion. This was why appellant never made an expressed statement that he wished to discharge Darrow. It was not necessary. Finally, Darrow stated the grounds for the *Marsden* motion was his refusal to make a motion to withdraw plea. While the failure to withdraw plea was the cause for granting the *Marsden* motion, it was not the remedy sought at this hearing.

At this point, it was appellant's turn to address the court. He, of course, was not as articulate as an attorney. He went right to the point, giving the cause for discharging counsel: "I would like to take back my plea because . . . I have evidence, but it's not on the table yet." (3RT 504.) The court asked what evidence, and the discussion turned to evidence appellant believed existed and how appellant believed it was exonerating. (3RT 505-507.) The discussion then moved to appellant had lied to Darrow. (RT 507-508.) At this point, the prosecution was dismissed from the room. (3RT 508.)

Darrow explained that he did not make a motion to withdraw the plea because he believed he could not ethically bring one. (12/15/05 ART 7.) While this statement might initially appear to be obtuse, it was actually an unambiguous statement. A criminal defendant has a right to withdraw his plea, and counsel must bring the motion even if he or she disagrees with it. (*People v. Brown* (1986) 179 Cal.App.3d 207, 213-216; *People v. Garcia* (1991) 227 Cal.App.3d 1369, 1374-1375, overruled on other grounds in *People v. Smith* (1993) 6 Cal.4th 684, 696.) There are two exceptions.

Counsel need not (and cannot) bring a motion that is frivolous. (*Id.* at p. 216.) And counsel cannot argue his own ineffectiveness. (*Brown, supra*, at p. 1377.) Thus, when Darrow said he felt he could not ethically bring appellant's motion to withdraw plea, he could only have meant the motion was either frivolous in his opinion or concerned allegations of his own ineffectiveness.

Based on the available information, the court found there was insufficient evidence the additional evidence appellant was alluding to warranted bringing a motion to withdraw plea. (12/15/05 ART 7-8.) Thus, it concluded there was insufficient evidence trial counsel was incompetent, and the motion to discharge him was denied: "Lack of substance and lack of an indication that Mr. Darrow's representation has been in any way inadequate, the motion to withdraw plea, as I stated is denied" (12/15/05 ART 7-8) and "[t]he *Marsden* motion is denied" (12/15/05 ART 8).

Anyone can try to create ambiguity from the clearest statements. But the action of the parties in the courtroom clearly indicate that appellant wanted to discharge Darrow and everyone understood this. Other courts have recognized that when the defendant or the attorney requests a *Marsden* hearing, this could only mean the defendant seeks to discharge counsel. (*Lara, supra*, 86 Cal.App.4th at pp. 156-158; *Bland, supra*, 20 F.3d at p. 1475.) Respondent's effort to point to appellant's showing cause for discharging counsel as a source of ambiguity or contingency in his request ignores common sense and the reality of the situation.

It is also unfair to complain about appellant's actions when it was the court that directed the course of the discussion and required him to show cause. Appellant's request to discharge retained counsel did not become ambiguous or contingent because the court erred in holding a *Marsden* motion and because the court asked for reasons for wanting to discharge counsel.

The court's finding that there was insufficient grounds for making a motion to withdraw plea and thus no showing of cause for removing counsel under *Marsden* was the wrong standard. Undisputedly, appellant had the right to discharge retained counsel without cause under the Sixth and Fourteenth Amendments to the United States Constitution. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. __ [126 S.Ct. 2557, 2561]; *People v. Ortiz* (1990) 51 Cal.3d 975, 987; *Lara, supra*, 86 Cal.App.4th at p. 155; *Bland, supra*, 20 F.3d at pp. 1475-1477.) This applies at sentencing as well. (*People v. Munoz* (2006) 138 Cal.App.4th 860, 866-870.) Therefore, the sentence must be reversed and the matter remanded for the trial court to remove retained counsel and to appoint new counsel if appellant is indigent. (*Id.* at p. 870.)

CONCLUSION

For the foregoing reasons appellant, Cain Albert Beltran, respectfully requests that this Court reverse the judgment and remand the matter for a new sentencing hearing.

DATED: March 13, 2007.

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: _____
Jonathan Grossman
Attorney for Appellant
Cain Albert Beltran

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached APPELLANT'S
REPLY BRIEF contains 1420 words.

Executed under penalty of perjury at Santa Clara, California, on March
13, 2007.

Jonathan Grossman