

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,) Case No. S278262
)
Plaintiff and Respondent,) Court of Appeal No.
) C094949
v.)
) Superior Court No.
ISHMAEL M. CARTER,) 97-7081
)
Defendant and Appellant.)
)
)
)

Appeal from the Superior Court of the State of California

In and For the County of Yolo

Honorable Daniel M. Wolk, Judge

APPELLANT’S REPLY BRIEF ON THE MERITS

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APPELLANT’S REPLY BRIEF ON THE MERITS

ARGUMENT

I

Appellant’s Right to Effective Assistance of Counsel under the Federal and State Due Process Clause, and Right to Counsel under Welfare and Institutions Code Section 6603, subdivision (a), Require: (1) Reversal of the Judgment Because the Trial Court Erroneously Denied Appellant’s Request for Appointment of New Counsel, or alternatively; (2) a Conditional Reversal of the Judgment and Appointment of New Counsel to Determine Whether Appellant was Deprived of Effective Assistance of Counsel.

Appellant waited 12 years for his SVP trial. That was an extraordinarily long time for appellant to wait to find out whether he should be confined at all. Appellant argued in the Opening Brief that: (1) his defense counsel had a conflict of interest which required appointment of an attorney not employed by the Public Defender’s Office; (2) the judgment should be reversed because appellant was represented by an attorney with a conflict of interest; and (3) alternatively, the case should be conditionally reversed with appointment of an attorney not

associated with the Public Defender's Office who would litigate a motion to dismiss the petition based on denial of appellant's right to a speedy trial. (AOB at pp. 12-31.)

Respondent argues the case should be conditionally remanded to the trial court with directions to conduct an inquiry into whether attorney Zuvela had a conflict of interest. This argument is wrong for two reasons.

The *Marsden*¹ hearing was held on January 15, 2020. (RT 6-26.) This hearing disclosed facts establishing as a matter of law a conflict of interest between appellant and the Public Defender's Office because : (1) appellant wanted a motion to dismiss to be filed which was clearly not frivolous; and (2) litigation of this motion to dismiss required determining whether attorneys from the Public Defender's Office had provided effective assistance of counsel. The appropriate remedy is reversal of the entire judgment because the entire Public Defender's Office should have been removed from representing appellant at the *Marsden* hearing.

Absent a complete reversal, a limited remand should be ordered for appointment of conflict free counsel, and litigation of appellant's speedy trial motion to dismiss. Contrary to Respondent's assertion, the limited remand should not be for the narrow purpose of determining whether Zuvela had a conflict of interest.

A. This Court's Recent Opinion in *Camacho v. Superior Court* (2023) 2023 Cal. LEXIS 4944

This Court recently affirmed the due process right of an SVP defendant to a speedy trial. (*People v. Camacho* (2023) 2023 Cal. LEXIS 4944, 2.) The Court concluded that the four-part test for a speedy trial violation in *Barker v. Wingo*

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

(1972) 407 U.S. 514, 531, provided the correct framework to analyze the speedy trial rights of a SVP defendant. (*People v. Camacho, supra*, 2023 Cal. LEXIS at pp. 2, 26-31.) The Court rejected applying the balancing framework in *Mathew v. Eldridge* (1976) 424 U.S. 319, to a SVP's speedy trial claim. (*Id.* at pp. 25-27.) The Court thus rejected the analytical framework for a speedy trial violation adopted in *People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36. (*Ibid.*) *People v. Camacho* thus affirmed that appellant had the right a speedy trial right that was entitled to an appropriate remedy including possibly dismissal. (*People v. Camacho, supra*, 2023 Cal. LEXIS at p.-31, fn. 5.)

The first *Barker* factor is the length of the pretrial delay. "This fact operates as a threshold hurdle. If the accused makes this showing, the court must then consider the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." (*People v. Camacho, supra*, 2023 Cal. LEXIS at p. 32, quoting *Doggett v. United States* (1992) 505 U.S. 647, 652.) Appellant met the threshold hurdle of an unreasonable delay because approximately 12 years elapsed from the filing of the SVP petition to the trial.

B. Any Conditional Remand Ordered by this Court should be for Litigation of Appellant's Speedy Trial Motion to Dismiss the Petition.

Appellant and respondent agree that the **minimum** remedy is a limited remand to the trial court. However, they disagree regarding its purpose. Respondent's argues the remand should be to determine whether Zuvela had a conflict of interest. The facts already establish that she had a conflict of interest. Zuvela could not file a speedy trial motion to dismiss without implicating her fellow deputy public defenders in providing ineffective assistance of counsel. (1RT 20-21.) The remand must be for the purpose of appointing conflict free counsel who can pursue, if appropriate, the filing of a speedy trial motion to dismiss.

Respondent's proposed limited remand to determine whether Zuvela had a conflict of interest is contrary to law and fundamentally unfair to appellant. Respondent is hoping for the same outcome on remand that occurred when the trial court heard appellant's *Marsden* motion heard on January 15, 2020—the trial court denies appellant relief based on the representations of counsel and appellant never obtains his day in court to have his speedy trial motion litigated. This outcome will only result in another appeal on the same grounds and further delay of justice. Appellant is entitled to appointment of a conflict free counsel who will pursue his best interests including the filing of a speedy trial motion to dismiss the petition.

1. Respondent's Assertion that Zuvela had no Conflict of Interest as to Herself Is Wrong.

Respondent asserts that "Carter's counsel had no conflict as to herself." (RB at p. 34.) Respondent then concludes from this assertion that the trial court properly denied appellant's request to appoint counsel in substitution of Zuvela because she tried to obtain a speedy trial for appellant when he made that request. (RB at pp. 34-36.) Respondent's argument is not consistent with the law, facts, or common sense. Under the facts of this case, Zuvela had a conflict of interest if any attorney in the Public Defender's Office had a conflict of interest because they were part of the same office and their conflicts were imputed to each other. (59 Ops. Cal.Att.Gen 27(1976).) Appellant's speedy trial motion would have required pursuing an ineffective assistance of counsel claim against another deputy public defender. Furthermore, Zuvela should have been removed as appellant's counsel, regardless of any conflict of interest, because she was not willing to pursue the filing of a speedy trial motion to dismiss the petition.

Court appointed counsel should be discharged upon a showing that: (1)

counsel is not providing adequate representation: or (2) counsel and the defendant have become embroiled in an irreconcilable conflict. (*People v. Panah* (2005) 35 Cal.4th 395, 431.) Zuvela's duty to provide competent representation extended to all aspects of appellant's case. (See *People v. Pope* (1979) 23 Cal.3d 425 [criminal defense attorneys have a duty to investigate carefully all defenses of fact, and of law, that may be available to the defendant].) Perhaps Zuvela had provided effective assistance of counsel in terms of her personal efforts to obtain a speedy trial for appellant. This conclusion, however, did not resolve whether Zuvela should have been replaced. The trial court's *Marsden* inquiry was not limited to whether Zuvela had attempted to obtain a speedy trial for appellant. It also required assessment of whether Zuvela was not pursuing a speedy trial motion for an improper reason such as accusing her fellow deputy public defenders of not providing effective representation.

Even if Zuvela did not need to be relieved based on any ineffectiveness on her part she nevertheless had a disqualifying conflict of interest because: (1) there was an issue whether Bandley provided ineffective assistance of counsel because of the delay of appellant's trial; and (2) Zuvela and Bandley were part of the same office. (Gov. Code, §§ 7, 1194, 24100; 59 Ops. Cal. Att. Gen. 27 (1976).)

An attorney has a duty to research the law, investigate the facts and make a pretrial motion under circumstances where a diligent and conscientious advocate would do so. (*In re Neeley* (1993) 6 Cal.4th 908, 919.) Zuvela had a duty to file a speedy trial motion to dismiss if there was any non-frivolous basis to do so. (*People v. Ibarra* (1963) 60 Cal.2d 460, 464; cf *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, 1508-1511 [the defendant controls certain core decisions including whether to admit guilt].) Zuvela's response to whether she could file a speedy trial motion to dismiss was "I don't think I can ethically pursue that." (1RT 21.)

The undisputed evidence was that Zuvela refused to pursue a potentially meritorious motion to dismiss the petition because she did not feel that she could ethically do so. This Court should not parse the reasons for her belief that her ethical duties prevented her from pursuing this motion. The reasons were not based on the merits of the motion. Appellant made a threshold showing of a significant delay under *People v. Superior Court (Vasquez)* and now *People v. Camacho*. Zuvela's refusal to file this motion required her removal either because she had a conflict of interest or she was providing ineffective representation. This Court does not need to go further to conclude attorney Zuvela should have been relieved.

Respondent also argues Zuvela never stated that she was refusing to file a speedy trial motion to dismiss because she did not want to accuse other attorneys in her office of being ineffective. Zuvela never uttered in those precise words that she was not filing a speedy trial motion to dismiss for that reason. However, the authorities cited in Appellant's Opening Brief (AOB at p. 20), and Respondent's Brief² (RB at pp. 45-46), establish there was no legal distinction between attorney Zuvela and the rest of the attorneys in the Public Defender's Office for purpose of whether there was a disqualifying conflict of interest in this case. Zuvela should have been removed when the undisputed evidence showed she was not investigating a potentially meritorious motion that could have resulted in dismissal of the petition. It makes no difference whether her motivation was to avoid implicating herself or her colleagues in the Public Defender's Office.

Zuvela represented appellant the first two years his case was pending in the Superior Court. (ACT 14-31.) Deputy Public Defender Brent Bandley was

² E.g. Govt. Code, §§ 7, 1194, 24100; 59 Ops.Cal.Att.Gen. 27 (1976).

appellant's counsel from November 4, 2009, to April 29, 2015. (SCT³ 32-50.) Zuvela was appellant's counsel at the next hearing on October 27, 2015. (SCT 51.) Respondent argues there were no grounds to remove Zuvela as appellant's attorney because she had tried to obtain a speedy trial for appellant when he made that demand. This argument ignores the fact that Zuvela had an obligation to pursue a speedy trial motion to dismiss the petition regardless of whether she personally believed she had worked diligently to obtain a speedy trial for appellant.

Footnote eight of Respondent's Brief asserts that the majority and concurring and dissenting opinions of the Court of Appeal concluded appellant's *Marsden* motion was properly denied as to Zuvela's performance. (RB at p. 35, fn. 8, citing *People v. Carter* (2022) 86 Cal.App.5th 739, 750; *People v. Carter, supra*, 86 Cal.App.5th at p. 760 [conc & dis. opn., of Robie. J.].) Both opinions reached the wrong conclusions. The trial court, and the opinions below, correctly concluded Zuvela did not need to be relieved because she had failed to pursue appellant's right to a speedy trial. However, she did need to be relieved because she failed to pursue the filing of a speedy trial motion to dismiss the petition.

Recusal of the entire public defender's office is not required in every case involving an allegation of a deputy public defender provided ineffective assistance of counsel. For example, a deputy public defender could be relieved as counsel because the trial court concluded the attorney was providing ineffective assistance of counsel by failing to subpoena a defense witness for trial. Removal of this deputy public defender would not require recusal of the entire Public Defender's Office because the next deputy public defender could resolve the situation by serving a subpoena on the witness. The instant case is different because litigating

³ This citation is to the 73-page supplemental clerk's transcript.

appellant's speedy trial claim required resolution of whether any attorney from the Public Defender's Office had provided ineffective assistance of counsel.

2. Zuvela had an Actual Conflict of Interest as to her Colleague.

Respondent asserts that: (1) it appears Zuvela had a possible conflict of interest as to Bandley's prior representation; (2) the trial court should have inquired whether a conflict had prevented Zuvela from pursuing a motion to dismiss based on Bandley's performance. (RB at pp. 36-37.) However, as explained above, Zuvela had an actual conflict of interest which required the Public Defender's Office to be removed as counsel for appellant and appointment of an attorney not associated with that office.

Respondent asserts that "[t]o be clear, nothing in the record establishes that Zuvela should have declared a conflict vis-a-vis Bandley. More specifically, the record does not show that Zuvela was aware of any facts—other than Carter's +complaints in his pro-se motions—suggesting that Bandley's conduct had resulted in unjustified delay." (RB at p. 43, fn. 13.) This assertion is wrong because the extraordinary length of the delay of appellant's trial, when combined with his complaint, put Zuvela on notice that appellant was blaming the Public Defender's Office for the delay. Appellant is not arguing that the trial court must find a conflict of interest and remove an attorney every time a defendant makes a complaint which raises the specter of a conflict of interest. The extraordinary 12 year length of the delay of appellant's trial removed it from the facially frivolous category. (*Camacho v. Superior Court, supra*, 2023 Cal. LEXIS at p. 26-31; *People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36, 61-80.) Further, appellant may have been able to demonstrate the delay was because of a break down of the public defender system. (*People v. Camacho, supra*, 2023 Cal.App. LEXIS at p. 37.) All these issues required inquiry into the practices of the Public

Defender's Office and Bandley's representation.

Respondent lists a series of questions it asserts could have been asked at the *Marsden* hearing such as whether appellant had ever told Bandley that he was ready to go to trial or whether appellant had agreed to the continuances. (RT at p. 44.) However, appellant made a threshold showing of prejudice and unreasonable delay and the record establishes a conflict of interest. These questions posited by the Attorney General would make no difference with regard to the need to relieve Zuvela and the Public Defender's Office.

C. The Judgment must be Reversed in its Entirety.

In *People v. Mai* (2013) 57 Cal.4th 986, 1010-1011, and *People v. Parker* (2022) 13 Cal.5th 1, 84-86, this Court approved of the trial court's appointment of independent counsel to resolve claims of ineffective assistance of counsel. Respondent cites these cases to argue a limited remand to the trial court is appropriate to resolve appellant's conflict of interest claim. This procedure may have been appropriate had the trial court adopted it when appellant initially raised his complaints during the January 15, 2020, hearing. However, the trial court did not follow that procedure. It instead forced appellant to proceed with the Public Defenders Office representing him when it had a conflict of interest. Appellant was not represented at trial by Zuvela. He was represented by Deputy Public Defender Monica Brushia. (1RT 74; CT 136.) The change of attorneys is irrelevant to whether the judgment should be reversed in its entirety based on counsel having a conflict of interest because the disqualification extended to the entire office. (*People v. ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1139.)

Respondent asserts that appellant has failed to show that any conflict of interest adversely impacted counsel's performance. (RB at p. 52.) This Court

cannot make that determination at this juncture. Respondent's limited conditional remand is not an adequate remedy at this juncture of the proceedings. The judgment must be reversed in its entirety.

CONCLUSION

The trial court erred by denying appellant's *Marsden* motion. The Court of Appeal reached a result that cannot legally be defended. The judgment must be reversed in its entirety. Alternatively, the judgment should be conditionally reversed and the case remanded to the trial court with directions to appoint counsel not associated with the Public Defender's Office who will investigate, and file if appropriate, a speedy trial motion to dismiss the petition. .

Dated: September 18, 2023

/S/ John L. Staley

DECLARATION REGARDING WORD COUNT

I declare under penalty of perjury this Reply Brief contains 2,993 words.
Executed on September 18, 2023, in San Diego, California.

/S/ John L. Staley

PROOF OF SERVICE
(People v. Carter, Appeal No. S278262)

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action; My business address is John L. Staley, Attorney, 12463 Rancho Bernardo Road, No. 372, San Diego, CA 92128-2143. On September 18, 2023, I served the foregoing document described as: **APPELLANT’S REPLY BRIEF ON THE MERITS** on all parties to this action as follows:

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Supreme Court of California

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