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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD BARRY ARMSTRONG,

Defendant and Appellant.

A104525

**(San Mateo County
Super. Ct. No. SC049269A)**

Defendant appeals from a judgment following remand of his case by this court to correct *Marsden*¹ error and for resentencing. Defendant contends that, following remand, the trial court erred in refusing to permit his counsel to file a new trial motion based on newly discovered evidence. We agree.

BACKGROUND

In June 2001, a jury found defendant guilty of rape by force (Pen. Code, § 261, subd. (a)(2)),² criminal threats (§ 422), and two counts of attempted witness dissuasion (§ 136.1, subds. (b)(1) & (2)). He was also convicted of misdemeanor battery against a girlfriend (§ 243, subd. (e)) and violation of a restraining order (§ 273.6, subd. (a)).

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

² All undesignated section references are to the Penal Code.

On August 8, 2001, prior to sentencing, appellant brought an unsuccessful *Marsden* motion to have his court-appointed counsel removed from the case and new counsel appointed on his behalf. On August 28, 2001, the court denied the motion and sentenced defendant to prison for a total of 12 years 4 months.

Defendant appealed, and in January 2003, this court reversed the *Marsden* ruling and remanded the case “for the appointment of new counsel and further sentencing.” (*People v. Armstrong* (Jan. 10, 2003, A096210) [nonpub. opn.]) We concluded that the court had inadequately explored the “ ‘irreconcilable differences’ ” between counsel and appellant that allegedly existed. “[T]he court had a duty to inquire into counsel’s state of mind, not just the defendant’s.”

Thereafter, new counsel was appointed who sought permission from the court to file a motion for new trial on defendant’s behalf. The court denied the request, later sentencing defendant to prison for a total term of 12 years 4 months. This appeal followed.

DISCUSSION

Defendant contends that the trial court erred in not considering his motion for new trial. He argues that the previous remand of his case had not been for resentencing only and, hence, did not deprive the trial court of jurisdiction to hear his motion for new trial under *People v. Smyers* (1969) 2 Cal.App.3d 666 (*Smyers*). He further argues that application of the holding in *Smyers* to the circumstances in this case would deprive him of his Sixth Amendment right to counsel and his federal and state rights of due process.

Under section 1182, the application for a new trial “must be made and determined before judgment.” Appellate decisions applying this section have determined that a motion for new trial cannot be heard after judgment is entered. (*Smyers, supra*, 2 Cal.App.3d at pp. 668-669.) However, when the judgment is subsequently vacated or set aside on appeal, and the matter remanded to the trial court, a new trial motion is appropriate. (*People v. Hales* (1966) 244 Cal.App.2d 507, 511.) Where the appellate court affirms the conviction of guilt and merely orders a limited reversal and remand for resentencing or other specified post-trial procedures, the trial court lacks jurisdiction to

entertain a motion for new trial. (*Smyers*, at pp. 668-669; *People v. Pineda* (1967) 253 Cal.App.2d 443, 450-451 (*Pineda*); see *People v. Deere* (1991) 53 Cal.3d 705, 712-713 (*Deere*)). “On remand with directions, after a judgment on appeal, the trial court has jurisdiction only to follow the directions of the appellate court; it cannot modify, or add to, those directions.” (*People v. Oppenheimer* (1965) 236 Cal.App.2d 863, 865-866.)

The trial court erred in finding that this limited exception applied to this case. In the initial appeals in *Pineda*, *Smyers*, and *Deere* the appellate court *expressly upheld* the guilt determination in the trial court and remanded for a limited purpose related to sentencing. (*Pineda, supra*, 253 Cal.App.2d at p. 447; *Smyers, supra*, 2 Cal.App.3d at p. 668; *Deere, supra*, 53 Cal.3d at p. 713.) In that context, permitting a motion for new trial attacking the conviction would effectively grant the trial court the unwarranted power to rehear a decision of the appellate court on the determination of guilt. (*Pineda*, at p. 451.)

Unlike *Pineda, supra*, 253 Cal.App.2d 443, *Smyers, supra*, 2 Cal.App.3d 666, and *Deere, supra*, 53 Cal.3d 705, we neither considered nor resolved any challenge to the guilt determination in the initial appeal in this case. Our decision simply placed appellant in the position he would have been in had the trial court upheld the *Marsden* motion and appointed new counsel prior to entry of judgment. Thus, appellant should have been permitted to move for a new trial. It would be anomalous to deny appellant the right to move for a new trial on the basis that the motion is untimely when we have already determined that, during the applicable time frame, appellant was not adequately assisted by counsel.

DISPOSITION

The judgment is vacated and the matter remanded for proceedings consistent with this opinion.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.