

**WAS THERE REALLY A CRIME? - HEY, I DIDN'T DO THAT!
(EVALUATING THE FACTUAL BASIS FOR THE CRIME)
& Eastman
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I. Introduction to Factual Basis Issues

In California, there are two types of guilty or no contest pleas: (1) a conditional plea, where the plea is conditioned upon receipt of a particular disposition; and (2) an unconditional or open plea. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.)

When taking a conditional plea of guilty or nolo contendere to an accusatory pleading charging a felony, a trial court is required to “cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.” (Pen. Code, sec. 1192.5.) While there is no federal constitutional requirement for this factual basis inquiry, the statutory mandate of section 1192.5 helps ensure that the “constitutional standards of voluntariness and intelligence are met.” (*Ibid.*) Further, the factual basis requirement minimizes the chances of the defendant later successfully challenging his conviction, and provides the court ““with a better assessment of defendant’s competency, his willingness to plead guilty, and his understanding of the charges against him.”” (*People v. Watts* (1977) 67 Cal. App. 3d 173, 178.) Additionally, conducting a factual basis inquiry before accepting a guilty plea “protect[s] against the entry of a plea by an innocent defendant.” (*People v. Hoffard, supra*, 10 Cal.4th at p. 1183.)

In addition to the traditional plea bargain with the guarantee made by the prosecutor, there are also those pleas that do not fit precisely within section 1192.5 but have been implicitly negotiated, namely, when the court provides the defense with an “indicated” sentence. These pleas conceivably present the same danger of false pleading as do the explicit plea bargains reached under section 1192.5 and, arguably, should also be included within 1192.5.

A. Source For Factual Basis

The California Penal Code does not require the trial court to interrogate a defendant personally. Despite the specific language of the statute, “cause an inquiry to be made of the defendant,” the court can look to sources other than the defendant to establish a factual basis for the crime to which defendant is entering his plea. But a bare statement by the judge that a factual basis exists, alone, is inadequate to meet the purpose of the statute. (*People v. Tigner* (1982) 133 Cal.App.3d 430, 434-435.)

1. Factual basis provided by defendant

If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge (*People v. Watts* (1977) 67 Cal.App.3d 173, 179), or question the defendant regarding the factual basis described in the complaint or written plea agreement. (See, e.g., *United States v. Sias* (5th Cir. 2000) 227 F.3d 244, 245, fn. 1; *United States v. Montoya-Camacho* (5th Cir. 1981) 644 F.2d 480, 487.)

2. Factual basis provided by defense counsel

The trial court can also inquire of defense counsel regarding the factual basis. If it does so, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. (*People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1576–1579.) When counsel stipulates to a factual basis for the plea under section 1192.5, absent reference to a particular document that provides an adequate factual basis, “such a stipulation reveals no more of a factual basis supporting the plea than the plea itself.” The better approach under section 1192.5 is for a stipulation by counsel to a factual basis be accompanied by reference to a police report. (*People v. McGuire* (1991) 1 Cal.App.4th 281, 286 (dis. opn. of Poché, J.); *Wilkerson, supra*, at p. 1577; *People v. Gonzalez* (1993) 13 Cal.App.4th 707, 714–

715 [reference to the probation report or preliminary hearing transcript]; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1563–1565 [reference to grand jury testimony].

3. Factual basis from other sources

The charging document, i.e., the complaint, information, or indictment, can provide the requisite basis if it adequately contains a factual basis for the plea and is not merely a recitation of the statute. (*People v. Holmes* (2004) 32 Cal. 4th 432, 436, 441.) “The indictment may be used for this purpose if it is factually precise and sufficiently specific to show ‘the accused’s conduct on the occasion involved was within the ambit of that defined as criminal.’”].)

B. Content of Factual Basis

1. The factual basis required by section 1192.5 does not require more than establishing a prima facie factual basis for the charges. (*People v. Calderon* (1991) 232 Cal.App.3d 930, 935.)

2. It is not necessary for the trial court to interrogate the defendant about possible defenses to the charged crime (*Ibid.*).

3. The trial court need not be convinced of defendant’s guilt. (*People v. West, supra*, 3 Cal.3d at pp. 612-613; *In re Alvernaz* (1992) 2 Cal.4th 924, 940, fn. 9 [so long as the trial court ascertains a factual basis for the plea, it may enter a plea of guilty or no contest despite the defendant’s claim of innocence].)

C. Standard of Review

Whether the court complies with section 1192.5 is determined under an abuse of discretion review. But a trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea. The trial court’s acceptance of the guilty plea, after pursuing an inquiry to satisfy itself that there is a factual basis for the plea, will be reversed only for abuse of discretion. (*People v. Watts, supra*, 67 Cal.App.3d at p. 180.) A finding of error under this standard will qualify as harmless where the contents of the record support a finding of a factual basis for the conditional plea. (*People v.*

Mickens, supra, 38 Cal.App.4th at p. 1564; *Watts, supra*, at p. 182.) Thus, if the court fails to establish the factual basis at the time it takes the plea, if the probation report, or other source in the record, provides an adequate basis, the failure to comply with section 1192.5 will be considered harmless error. But consider *People v. Willard* (2007) 154 Cal.App.4th 1329. In *Willard*, although trial counsel stipulated there was a factual basis for the plea, this stipulation was a general one, including no reference to any document containing factual allegations to support the charge. There were no probation reports, preliminary hearing transcripts, police reports, presentence reports, or any documents which contained facts. The stipulation revealed no more of a factual basis supporting the plea than the plea itself. Accordingly, Third District Court of Appeal held that the trial court abused its discretion in accepting the plea without an adequate factual basis, and that the error was not harmless. The only potentially supporting document was the complaint itself. The complaint alleged the date of the conduct and the names of defendant and the victim. The remainder of the complaint was in the language of the statute. The statutory language set forth the elements of the offense, not facts. This was not enough to satisfy the purpose of the factual basis inquiry, to corroborate what defendant had already admitted by his plea. The Court of Appeal reversed the judgment, concluding that defendant's negotiated plea did not comply with the requirement in Penal Code section 1192.5, that the plea have a sufficient factual basis.

D. Remedy

1. First things first – a certificate of probable cause is required. Because the failure to comply with section 1192.5 in effect alleges an inadequate plea, in order to raise the issue, it is necessary to obtain a certificate of probable cause.

2. If the appellate court agrees that the trial court abused its discretion in accepting the guilty or no contest plea without the requisite factual basis, the judgment will be reversed and the case remanded to the trial court with directions to give the prosecution an opportunity to establish a factual basis for defendant's plea. Of course, if

no factual basis can be established, defendant can withdraw his plea. (*People v. Willard, supra*, 154 Cal.App.4th 1329.)

II. Introduction to the *Eastman* Issue

One of the more complex issues that the guilty plea case presents is dealing with defendant's motion to withdraw his plea on the basis of claimed ineffective assistance of counsel. Although the Fifth District Appellate Court provided a guide to the trial courts with its decision in *People v. Eastman* (2007) 146 Cal.App.4th 688, it appears that the issue continues to remain viable.

In *Eastman*, appellant indicated to the court at the sentencing hearing that he wished to withdraw his guilty plea as he felt that he had not been competently represented. In response, the court, without relieving counsel #1, appointed second counsel, to evaluate appellant's complaint and determine if grounds existed for the filing of a motion to withdraw plea. Second counsel subsequently advised the court that after investigating the matter, it was his opinion that appellant was suffering from "buyer's remorse," and that there were no grounds for a motion to withdraw the plea.

On review, the appellate court found that the trial court had improperly delegated its responsibility to address appellant's claim regarding the representation of counsel by appointing second counsel to evaluate it rather than conducting a *Marsden* hearing. (*People v. Marsden* (1970) 2 Cal.3d 118.) Because the hearing was not held, there was no record to evaluate appellant's claim. Accordingly, the court reversed with direction to the court to conduct the required *Marsden* hearing.

A. Certificate of Probable Cause Required?

Although *Eastman* error concerns the trial court's failure to conduct a *Marsden* hearing, arguably, the claim of error is tantamount to an attack on the validity of the plea because appellant is essentially claiming that his plea was invalid due to ineffective assistance of counsel. However, in *People v. Vera* (2004) 122 Cal.App.4th 970, 978, the

appellate court held that defendant was not required to obtain a certificate of probable cause to challenge the trial court's denial of his post-plea *Marsden* motion, stating, "We regard the issue of whether defendant currently needed a new attorney as a postplea issue not essentially implicating the validity of the no contest plea." Nevertheless, in order to insure that appellant's claim will not be procedurally defaulted, it is recommended that if a certificate has not issued in the trial court, steps be taken to subsequently obtain one.

B. Was Appellant's Complaint a *Marsden* Motion?

A review of the cases following *Eastman* indicates that a critical inquiry into potential *Eastman* error is the substance of appellant's complaint to the trial court. Therefore, in evaluating *Eastman* error, it must first be determined if appellant made a prima facie claim of ineffective assistance by appointed counsel. In *Eastman*, although Eastman did not expressly ask the court to replace his attorney, he submitted a letter to the court which asserted that counsel had failed to adequately represent his interests and claimed that counsel was conspiring with the prosecutor against his interests. The Fifth District found that with the letter, the trial court was obliged to make a record that Eastman's complaint had been adequately aired and considered. (*People v. Eastman*, *supra*, 146 Cal.App.4th 688, 695.)

On the other hand, the record may merely reflect appellant's displeasure or unhappiness with his situation or the guilty plea he has entered. An indication by counsel or appellant that appellant's wishes to withdraw his plea, without more, will not trigger a duty by the court to conduct a *Marsden* hearing. (*People v. Crandell* (1988) 46 Cal.3d 833, 859 ["A trial court should grant a defendant's *Marsden* motion only when the defendant has made 'a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.']; *People v. Smith* (1993) 6 Cal.4th 684, 696; *People v. Hines* (1997) 15 Cal.4th 997, 1025-1026; *People v. Mendoza* (2000) 24 Cal.4th 130, 157 ["Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.'"].)

C. Delegation of Duty

If the record, in fact, does reflect that appellant is dissatisfied with the representation by defense counsel, did the trial court properly conduct an inquiry into the basis for appellant's request to withdraw his plea?

In the pre-*Eastman* era, in the situation where a defendant indicated that he wished to withdraw his guilty plea, the trial courts would often appoint separate counsel for the limited purpose of determining whether grounds existed for withdrawing appellant's plea. As *Eastman* made abundantly clear, where a defendant seeks to withdraw his plea of guilty or no contest on the ground that his attorney of record has not provided adequate representation, the trial court should first elicit and consider the defendant's reasons for believing he has been ineffectively represented, making such inquiries of the defendant and trial counsel as appear necessary" (*People v. Smith* (1993) 6 Cal. 4th 684 , 692, referring to *People v. Stewart* (1985) 171 Cal.App.3d 388, 395 and *People v. Marsden* (1970) 2 Cal.3d 118, 123.) Along with hearing the defendant's complaint, the court is required to make a record that the complaint had been adequately heard and considered. (*People v. Kelly* (1997) 52 Cal.App.4th 568, 579-580.) The court is **not** permitted to delegate the fact-finding powers provided under *Marsden, supra*, and a delegation of its judicial authority is unconstitutional. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 721; *Hosford v. Henry* (1951) 107 Cal.App.2d 765, 772.)

Thus, where appellant has indicated he wishes to withdraw his plea because of ineffective assistance, the court must conduct a *Marsden* hearing and cannot merely appoint second counsel to evaluate appellant's claim. If at the conclusion of the hearing, the court has determined that there is no basis for appellant's claim, present

counsel is not relieved. Of course, if the court finds a basis for the claim, counsel is discharged and new counsel is appointed to represent appellant for all future purposes, including a motion to withdraw plea. (*People v. Smith* (1993) 6 Cal.4th 684, 695.) Although second counsel is not required to pursue such a motion if it is considered frivolous, with the court's ruling on the *Marsden* motion, it is difficult to imagine a situation where a motion to withdraw would then be considered frivolous. (See *People v. Brown* (1986) 179 Cal.App.3d 207 and *People v. Osorio* (1987) 194 Cal.App.3d 183.)

D. Remedy

The erroneous failure to hold a *Marsden* hearing is generally considered prejudicial per se. (*People v. Lewis* (1978) 20 Cal.3d 496, 499; *People v. Winbush* (1988) 205 Cal.App.3d 987, 991.) Therefore, the appropriate appellate remedy is to reverse and remand with directions to hold a new *Marsden* hearing. If the *Marsden* motion is denied, the trial court must reinstate the judgment. (*People v. Eastman, supra*, 146 Cal.App.4th at p. 699; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1667-1668 [Fourth Dist., Div. Two]; *Winbush, supra*, at p. 992.)