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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E039087
v.	(Super.Ct.No. FSB47288)
CHRISTOPHER J. GEBHARDT,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Marsha Slough, Judge. Affirmed in part, reversed in part with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Quisteen S. Shum, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of driving under the influence, causing injury (Veh. Code, § 23153, subd. (a)), driving with a blood alcohol level of 0.08 percent or greater (Veh. Code, § 23153, subd. (b)) and leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), during all of which he inflicted great bodily injury on the victim. (Pen. Code, § 12022.7, subd. (a).) In bifurcated proceedings, he admitted suffering two felony convictions for which he served prison terms (Pen. Code, § 667.5, subd. (b)) and the trial court found that he suffered a third.[1] He was sentenced to prison for 17 years 4 months,

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[1] It should be noted that the information, which bears a file stamp, alleged that defendant had suffered two priors for which he served prison terms, specifically, a conviction of violating Penal Code section 215 in 1996, and a conviction of violating Penal Code section 12020, subdivision (a)(4) in 2002. In the record before us, there is an undated amended Information which bears no file stamp. It alleges that there are three priors for which defendant served prison terms, i.e., a 1990 felony driving under the influence (DUI), the 1996 conviction of violating Penal Code section 215, and the 2002 conviction of violating Penal Code section 12020, subdivision (a)(4). There is no notation in any of the minutes that this document was filed by the prosecutor or that defendant was arraigned on it. At the bifurcated proceedings on the truth of the prior allegations, defendant admitted to suffering the 1990 felony DUI and what the prosecutor said was "a violation of Penal Code section 212" in 2002, which bears the same number as the violation of Penal Code section 12020, subdivision (a)(4) alleged in the information and the amended information. We assumed the prosecutor misspoke (or her words were misreported) when she identified the section of the Penal Code defendant violated in 2002. The trial court found defendant had been convicted of the 1996 violation of Penal Code section 215. Just before imposing sentence, the trial court noted that, pursuant to Penal Code section 667.5, subdivision (b), defendant had admitted or been found by it to have been convicted of the 1990 DUI, the 1996 carjacking and "carrying a concealed weapon in 2002." However, when it imposed sentence, it imposed a 5-year term for the 1996 carjacking under Penal Code section 667, subdivision (a), and "1 year for each of the other 2 convictions which were admitted by [defendant] at the time of this trial . . . [making] . . . a total state prison term . . . of 17 years 4 months." Despite this, the abstract of judgment and minutes of the sentencing hearing show that the trial court imposed three one year terms for each of the Penal Code section 667.5, subdivision (b) true findings, for a total sentence of 18 years 4 months, which is not

[footnote continued on next page]

and appeals, claiming the trial court erred in allowing him to represent himself, in excluding evidence and in sentencing him.

After the case was fully briefed, the United States Supreme Court decided *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) ___U.S.___ [2007 D.A.R. 1003]. Therein, the court held that the California determinate sentencing law violates a defendant's Sixth and Fourteenth Amendment rights to trial by jury by allowing the trial court to impose the upper term based on facts found by it, applying a preponderance of the evidence standard.

Under the compulsion of *Cunningham,* we reverse the sentence for count 1 and remand the matter to the trial court to permit the People to have an opportunity to present what they believe are factors justifying the imposition of an upper term to a jury. In the event they opt not to do so, or if a jury does not find such factors, the trial court shall resentence defendant, imposing either the mid or low term for driving while under the influence, causing injury (count 1).

We reject defendant's remaining contentions and affirm his convictions and sentences on counts 2 and 3 and the prior convictions/prison enhancments.

The facts surrounding the crimes of which defendant was convicted are irrelevant t this opinion.

[footnote continued from previous page]
supported by the oral pronouncement of the trial court. The trial court should take care not to repeat these errors on remand.

ISSUES AND DISCUSSION

1. *Self-Representation*

Defendant made a *Marsden*[2] motion on May 27, 2005. During the hearing on the motion, defendant told the trial court that he had been through a trial before and his court appointed attorney was "corrupted" and, due to this, defendant "c[ould not] believe or trust attorneys in this courtroom." He said he wanted to represent himself in the current case because he was present during these offenses and knew what really happened, while his attorney did not. He said he had no problem taking the deal then being offered by the People, but the latter wanted to double his sentence due to his prior strike conviction, which defendant believed had been obtained illegally, i.e., through "tricking" the jury that convicted him. Defendant announced that he intended to call, during the hearing to determine whether he had been convicted of the strike prior, the juror in the trial of the prior who would support his claim that that jury had been tricked. Defense counsel acknowledged that defendant wanted to represent himself. The trial court agreed to hear defendant's motion pursuant to *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525] (*Faretta*) almost three weeks hence and pointed out that defendant could spend the interim thinking about his desire to represent himself. The trial court told defendant, "People, in my view, are also better represented by a lawyer who can look into facts and subpoena people . . . ."

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

On June 17, 2005, during the first proceeding following arraignment, defense counsel told the trial court that defendant wanted to make a motion to represent himself. The following colloquy occurred between defendant, his attorney, the prosecutor and the trial court:

"THE COURT: [To defendant] [Y]ou have just been given a document, I think, that I need to go over with you. [¶] Do you understand, Mr. Gebhardt, that it is generally not a wise choice to represent yourself in a criminal matter? [¶] . . . [¶]

"THE DEFENDANT: Yes, I do.

"THE COURT: [¶] . . . [¶] I am going to go over the form with you, and I want you to look at it. And would you read to me the second statement. . . .

"THE DEFENDANT: 'The penalties for the offenses if found guilty and additional consequences that could result.'

"THE COURT: In other words, do you understand the penalties for the offenses that you're charged with if the jury found you guilty?

"THE DEFENDANT: Yes

"THE COURT: What's your understanding of them? [¶] . . . [¶] What do you understand your exposure to be?

"THE DEFENDANT: The money that is going to be involved bringing all the people in the jury, the Court is going to retaliate and give me more time.

"THE COURT: What do you understand your maximum time in state prison to be based on the charges?

"THE DEFENDANT: From what I hear right now, it's 6, with 85.

“THE COURT: You have 6 years with 85 percent?

“[PROSECUTOR]: That’s the offer.

“[DEFENSE ATTORNEY]: That’s the offer.

“THE COURT: Okay. That’s the offer. [¶] Do you understand that I will not give you any special consideration if you are representing yourself throughout the course of this trial?

“THE DEFENDANT: I understand.

“THE COURT: Do you understand that you have to comply with all of the rules of evidence and all the other rules of criminal proceedings just as though you were trained in law school?

“THE DEFENDANT: I understand that, . . . [¶] . . . [¶]

“THE COURT: Do you understand that incompetency of counsel cannot be raised on appeal if you go to trial and you represent yourself and lose? In other words, you can’t say [, “]I was incompetent as a lawyer.[”]

“THE DEFENDANT: I understand.

“THE COURT: Okay. Do you understand that disruptive behavior on your part during any of your court proceedings, including the trial, could result in the Court terminating your pro per status? Do you understand that?

“THE DEFENDANT: Yes.

“THE COURT: Do you understand that if you cannot afford an attorney that you have the right to have one, a public defender, to continue representing you? Do you understand that?

“THE DEFENDANT: Yes.

“THE COURT: Do you need an interpreter?

“THE DEFENDANT: No.

“THE COURT: All right. What is your date of birth?

“THE DEFENDANT: 7-4-64.

“THE COURT: Can you explain to me what your years of schooling have been?

“THE DEFENDANT: I think I went up to about 10th or 11th grade, but I also took a course in business college and, you know, other things I always read and went into the law books and stuff like that.

“THE COURT: . . . Have you been involved in any prior criminal proceedings in the past such that makes you feel like you’re competent to represent yourself?

“THE DEFENDANT: Um, yeah. That’s one of the reasons that I feel it would be better.

“THE COURT: Have you represented yourself in the past, or did you have a lawyer in the past?

“THE DEFENDANT: I wanted to [represent myself], but I put my faith in the lawyer, and he really did it this time. That’s why I don’t want to have nobody do it again.

“THE COURT: Can you read English?

“THE DEFENDANT: Yes.

“THE COURT: Do you have difficulty understanding, reading English?

“THE DEFENDANT: No. [¶] . . . [¶]

“[DEFENSE ATTORNEY]: [¶] . . . [¶] I did speak with [defendant] about this yesterday. I know [the attorney who appeared specially for defense counsel on May 25, 2005] has spoken with him. And he is very adamant that he wants to exercise his right to represent himself. He just feels based upon what has happened to him in his past cases that he is better off representing himself. [¶] I have talked to him about the law and the fact that he has to follow courtroom rules and procedures as well as being able to clearly communicate with the Court. I have advised him of *Faretta versus California*. [¶] Under the Sixteenth and Fourteenth Amendment, it’s his right. And he’s adamant that he wants to represent himself. [¶] . . . [¶]

“THE COURT: [To defendant] . . . I have asked and inquired into your educational background, training and knowledge. Based upon my inquiries, I find that you are knowingly, intelligently and voluntarily giving up your right to counsel. I will allow you to represent yourself in this case. . . . [¶] However, if at any point in time, . . . you want me to reappoint the public defender to represent you, tell me, and I will do that.

“THE DEFENDANT: I don’t think that’s going to happen.

“THE COURT: [T]hat does not mean that we can get ourselves involved in the middle of trail and all of a sudden you say ‘Hey, I want a lawyer.’ That might be a little

bit too late. I don't want you to think that. But if you want a lawyer, tell me you want a lawyer, and the Court will be happy to consider the request.

"THE DEFENDANT: I look at it like this, your Honor, if I want to stick my foot in the mud, I will do it myself. [¶] . . . [¶]

"THE COURT: Do you understand that your case is being called back July 1 for assignment calendar, . . . with trial starting July 5? [¶] Will you be ready to proceed by that time?

"THE DEFENDANT: Yes. . . ."

The form to which the trial court referred is included in the record before this court.[3] The trial court went over each point in the form orally with defendant, except for one, which dealt with the fact that defendant would be opposed by a trained, experienced prosecutor should he choose to represent himself.

Defendant here essentially contends that "'the record as a whole [fails to] demonstrate . . . that [he] understood the disadvantages of self-representation, including the risks and complexities of the particular case.'" (*People v. Blair* (2005) 36 Cal.4th 686, 708.) We review the matter de novo. (*People v. Danks* (2004) 32 Cal.4th 269, 295.) Defendant carries the burden of showing that his waiver of counsel was not knowing and intelligent. (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1824.) This burden is not satisfied by simply pointing out that certain advisements were not given. (*Ibid*.) However, this is primarily what defendant does here.

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[3] Defendant did not sign it.

Defendant made clear to the trial court during the hearing on his *Marsden* motion that he was aware of the facts involved in his case. In fact, he felt that he was more competent to represent himself than to have a lawyer represent him because of that familiarity. During the hearing on the *Faretta* motion, his attorney advised the court that he had explained the law to defendant. Defendant twice represented to the trial court that he was aware of the deal that was being offered by the prosecutor. It is highly unlikely that he would have this awareness without also knowing what maximum he faced if he rejected the deal. In fact, he told the trial court during the *Faretta* hearing that he was so aware. He demonstrated knowledge of how criminal proceedings occurred in that he knew there would be a separate trial involving the truth of the prior allegations, and he had a plan as to how to conduct that trial. He had been through the system numerous times. Given this, it would also be highly unlikely that he was unaware that the prosecutor he faced was an experienced litigator. He had twice been told by the trial court, once during the *Marsden* hearing and once during the *Faretta* hearing, that self-representation was not wise or preferable. He acknowledged knowing he would be expected to comply with all the rules of evidence and procedure, as though he were an attorney, and he would be given no special consideration. He knew he could not claim incompetency of counsel on appeal if he represented himself. He had gotten as far as the 10th or 11th grade, had taken courses in business college and had read law books. He had no difficulty reading or understanding English. According to his attorney, he was "very adamant" about wanting to represent himself. As defendant himself stated, "[If] I want to stick my foot in the mud, I will do it myself." He had over two weeks to think

about his decision before he officially made it, and, of course, he had the rest of the trial to rescind it.[4]

As in *Blair*, "[t]hese facts support the conclusion that defendant understood the *Faretta* warnings." (*People v. Blair*, *supra*, 36 Cal.4th at p. 709.) Defendant has not carried his burden of showing that his waiver was not knowing and intelligent.

2. *Exclusion of Evidence*

After defendant testified, he announced that he had no other witnesses to call. The trial court informed the jury that it would be reviewing all the documents, adjourn for the day, give instructions, have argument by the prosecutor and defendant and submit the case to the jury on the following court day. After the trial court, the prosecutor and defendant went over exhibits and instructions, proceedings were adjourned with the trial court saying, "[W]e'll resume on [the next court day] with closing [arguments] and instructing the jury." At the beginning of proceedings the next court day, the trial court noted that it had just been handed a notice of motion to introduce evidence of the defendant's character and defendant stated orally that he had filed such a motion. Defendant here concedes that there is no such written motion in the superior court file and the Clerk's Transcript supports this.[5] The trial court pointed out to defendant that he

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[4] As the People correctly point out, in the weeks following the granting of his motion for self-representation, the record makes clear that defendant was aware of the charges against him and their attendant sentences and he reiterated his desire to continue to represent himself.

[5] The People appear to be a bit confused on this point. Before defendant mentioned the motion to introduce character evidence, he made a motion "for the Court

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had rested the prior court day and the time to present such evidence was during the trial. Defendant replied that he had not rested the previous court day. The matter was not further addressed.

Defendant here contends that the trial court erred in failing to allow him to present character evidence or, in the alternative, to consider his motion to be a motion to reopen and grant it. Of course, we have no idea what was in the motion, so we are completely unable to assess the prejudicial impact of the trial court's ruling, even if we were to fault the trial court on either score. As such, reversal of defendant's convictions on the basis that this evidence should not have been excluded would require pure speculation on our part that it might have made a difference in the outcome of defendant's trial. This we cannot do.

DISPOSITION

Defendant's convictions are affirmed, as are his sentences for counts 2 and 3 and the prior/prison enhancements. His sentence for count 1 is reversed and the matter is

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to order the return of Gebhardt, the test results, November 12, 2005, and the page stating I was wearing a helmet[.]" After mentioning the character evidence motion, defendant said, "These documents consist of four pages: blood specimens, one page of receipts stating I was wearing a helmet, pictures of the roadway where the motorcycle fell and so forth." Although the People interpret the foregoing as meaning that this latter information was part of the character evidence motion, logic suggests that it referenced the first motion defendant made. Indeed, after the trial court reiterated that one of defendant's motion "asks to submit narrative supplemental reports[,] . . . blood specimen reports, photos of the accident[,] . . . an overall of the photographs on Thursday afternoon, medical declaration of condition . . . and . . . arrest application . . ." the trial court denied that motion. If this denial referenced the character evidence motion, as the
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remanded to the trial court to permit the People to have the opportunity to have a jury determine beyond a reasonable doubt the existence of one or more aggravating factors. If the People choose not to do this or if the jury fails to find one or more aggravating factors, the trial court is directed to resentence defendant to the lower or mid term.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

RICHLI
J.

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People assert, then the trial court failed to rule on defendant's first motion, which we find difficult to believe.