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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO CASTRO PEREZ,

Defendant and Appellant.

2d Crim. No. B182014  
(Super. Ct. No. KA066479)  
(Los Angeles County)

Pedro Castro Perez appeals convictions for evading an officer causing injury (Veh. Code, § 2800.3), leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), and driving without a valid driver's license (Veh. Code, § 12500, subd. (a)). The jury found a true allegation that he had a prior serious or violent felony conviction. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Perez's 15-year sentence included a 5-year upper term for the evading an officer causing injury offense. Perez contends the trial court violated his constitutional right to self-representation, and erred in imposing an upper term sentence based on aggravating facts that were not found true by the jury. We affirm the judgment, but remand for resentencing.

**FACTS AND PROCEDURAL HISTORY**

Perez was driving his Jeep Cherokee recklessly and at an unsafe speed. He was forced to stop behind a truck, but drove onto the sidewalk to evade a pursuing police

car. Perez ran a red light, side-swiped a car, and collided with a pickup truck. A passenger in the car hit by Perez was seriously injured and had to be hospitalized for several weeks. Perez was apprehended as he ran from his vehicle. He did not have a valid driver's license.

The public defender was appointed to represent Perez but was later replaced by private counsel. In August 2004, the trial court declared a doubt regarding Perez's mental competence and suspended criminal proceedings. In October 2004, the court found Perez competent and criminal proceedings resumed.

On November 2, 2004, after one day of jury trial, the trial court questioned the representation provided by defense counsel and stated that it would grant a mistrial if requested. After independent counsel was appointed for him, Perez requested a mistrial and it was granted. The public defender was reappointed to represent Perez.

Later in November, Perez made a *Marsden* motion for new appointed counsel and the motion was denied. (*People v. Marsden* (1970) 2 Cal.3d 118.) Perez made a second *Marsden* motion on February 25, 2005, the first day of trial. The trial court's denial of the motion was followed immediately by a *Faretta* motion for self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) Perez appeals the denial of his *Faretta* motion.

## DISCUSSION

### *No Error in Denial of Faretta Motion*

Perez contends that the trial court's denial of his *Faretta* motion violated his constitutional right to represent himself. We disagree.

A criminal defendant has a constitutional right of self-representation. (*Faretta v. California, supra*, 422 U.S. at pp. 818-836.) To invoke that right, a defendant must unequivocally assert it within a reasonable time prior to the commencement of trial. (*People v. Marshall* (1996) 13 Cal.4th 799, 827; *People v. Burton* (1989) 48 Cal.3d 843, 852.) The trial court must permit self-representation as long as the defendant's motion is timely, and is intelligently and knowingly made. (*People v. Stanley* (2006) 39 Cal.4th 913, 931-932; *Faretta*, at p. 835.)

The trial court, however, has discretion to deny an untimely motion for self-representation. (E.g., *People v. Burton, supra*, 48 Cal.3d at p. 852.) Although there is no particular time at which a motion becomes untimely, a timely motion must be made a reasonable time before trial. (*Burton*, at pp. 853-854; *People v. Windham* (1977) 19 Cal.3d 121, 127-128.) Courts have affirmed the denial of motions as untimely when made within a few days of a scheduled trial date. (See *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626 [three days before trial]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [five days before trial]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790-791 [six days before trial].)

Here, the trial court reasonably concluded that Perez's motion was not timely. The motion was made on the day of trial, yet his two *Marsden* motions show dissatisfaction with appointed counsel for several months. Perez had ample opportunity to seek self-representation earlier, and offered no explanation for his delay. (See *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.)

Perez cites a Ninth Circuit rule that generally *Faretta* motions are timely when made before impanelment of the jury unless they are used as a tactic to secure delay. (*Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 264; see also *Avila v. Roe* (9th Cir. 2002) 298 F.3d 750, 753.) But, the California Supreme Court concluded that, to the extent the federal and state rules differ, "we find the federal rule too rigid in circumscribing the discretion of the trial court and adhere to the California rule." (*People v. Burton, supra*, 48 Cal.3d at p. 854 & fn. 2.) We are obligated to follow this precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, a more recent Ninth Circuit decision upheld the California standard, concluding that California's "reasonable amount of time before trial" standard for timeliness is consistent with *Faretta*. (*Marshall v. Taylor* (9th Cir. 2005) 395 F.3d 1058, 1060-1061, cert. den. (2005) 126 S.Ct. 139.) In any event, the record supports the trial court's implied finding that the self-representation request by Perez was a tactic designed to cause delay which would render his motion untimely under the cited Ninth Circuit cases.

The record also supports a finding that Perez's motion was equivocal, and made in reaction to the denial of his *Marsden* motion. "Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion." (*People v. Marshall, supra*, 15 Cal.4th at p. 23.) A motion is equivocal if it arises from a defendant's annoyance or frustration with counsel or with his motion for substitution of counsel. (*Id.*, at pp. 21-22; *People v. Scott, supra*, 91 Cal.App.4th at p. 1205.)

Here, Perez made a *Marsden* motion to obtain new appointed counsel arguing, in essence, that he and counsel did not understand each other, counsel was not helping him, and counsel failed to provide him with "papers" from the case. Immediately after the trial court denied his motion, Perez stated to the court: "I want to tell you something. . . . If you cannot change my attorney, I will go—I will represent myself." But, Perez was unprepared to defend himself, and the record suggests that he had not considered the possibility of self-representation and was unable to assess his own position in the case.

Perez also contends that, even if his *Faretta* motion was untimely, the trial court abused its discretion in denying it. Perez argues the trial court summarily denied the motion without questioning Perez about, or considering, the relevant criteria. We disagree, and conclude that there was no abuse of discretion.

In exercising its discretion to deny an untimely *Faretta* motion, the trial court must consider the quality of counsel's representation, the defendant's prior proclivity to substitute counsel, the reason for the request, the length and stage of the proceedings, and the disruption or delay that might follow the granting of such a motion. (*People v. Windham, supra*, 19 Cal.3d at p. 128.) Such consideration may be explicit or implicit and it is not necessary for the court to make express inquiries and findings regarding the factors. (*People v. Marshall, supra*, 13 Cal.4th at p. 828.) A reviewing court must give considerable weight to the trial court's exercise of discretion, and the

defendant has the burden of justifying the delay. (*People v. Valdez* (2004) 32 Cal.4th 73, 102; see also *People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

Here the trial court's ruling followed a lengthy hearing during which the trial court considered the *Windham* factors as well as the factors applicable to a *Marsden* motion. The court favorably evaluated the representation being provided by appointed counsel, considered Perez's proclivity to change counsel through *Marsden* motions, the absence of any reason for the request, the absence of any reason for delaying the request until the day of trial, and the delay and disruption of the proceedings if the motion were granted. Clearly, Perez was mentally unstable and unprepared to direct his own defense.

In any event, any error in the trial court's failure to weigh the *Windham* factors on the record is harmless. Any error in the exercise of the trial court's discretion is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058.) The error is harmless if it is not reasonably probable that the defendant would have obtained a more favorable result had he represented himself. Here, the record contains overwhelming evidence of Perez's guilt, evidence that was essentially unchallenged. There is no reasonable probability he would have obtained a better result had he represented himself.

#### *Remand Required for Resentencing*

The trial court imposed an upper term sentence for the evading an officer causing injury offense based on aggravating factors that were not determined by a jury. Perez contends that *Blakely v. Washington* (2004) 542 U.S. 961, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, require that the jury determine beyond a reasonable doubt such factual findings used by the trial court to impose an upper term of imprisonment. Subsequent to the briefing of the case, the United States Supreme Court invalidated the portion of California's Determinate Sentencing Law that permits a judge to impose an upper term sentence based on aggravating sentencing factors that are not determined by a jury. (*Cunningham v. California* (2007) \_\_\_ U.S. \_\_\_ [2007 WL 135687], overruling *People v. Black* (2005) 35 Cal.4th 1238 in part.) Accordingly, we will vacate the sentence and remand for resentencing consistent with the *Cunningham* case.

DISPOSITION

The sentence of five years for evading an officer causing injury is vacated and the matter remanded for resentencing on that offense consistent with *Cunningham v. California, supra*, 2007 WL 135687. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the Department of Corrections. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Bruce F. Marrs, Judge  
Superior Court County of Los Angeles

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