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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WEIBLE,

Defendant and Appellant.

A104991

(San Francisco County
Super. Ct. No. 186560)

Defendant was convicted of burglary and receiving stolen property. At a hearing prior to trial, defendant's attorney had informed the court that defendant wished to represent himself. Counsel expressed misgivings about defendant's request because the trial was likely to include testimony about DNA testing and preparation for the trial would require working with an expert retained on that subject. After questioning defendant briefly about his knowledge of the distinction between general and specific intent, the trial court denied defendant's request, primarily on the basis of the difficulties inherent in responding to DNA-related testimony.

On the record presented, we conclude that the trial court erred in denying defendant's request to represent himself. Because the wrongful denial of this motion constitutes a per se violation of defendant's constitutional rights, we reverse the conviction and remand for a new trial.

I. BACKGROUND

Defendant was charged in an amended information with burglary (Pen. Code, § 459), two counts of receiving stolen property (Pen. Code, § 496, subd. (a)), and vehicle

theft. (Veh. Code, § 10851, subd. (a).) In addition, the amended information alleged that defendant had suffered a prior conviction in violation of Penal Code sections 667, subdivisions (d) and (e) and 1170.12, subdivisions (b) and (c), that the prior conviction was a serious felony under Penal Code sections 667, subdivision (a)(1) and 1192.7, and that defendant had served a prison term in connection with two prior convictions within five years of the current offenses. (Pen. Code, § 667.5, subd. (b).)

At trial, the victim of a residential burglary testified that the door of her home had been kicked in and a window broken. Jewelry had been stolen, and one of her adult daughter's credit cards was missing. When police later stopped defendant while he was driving a stolen vehicle, he was in possession of the daughter's credit card. It was subsequently discovered that defendant's DNA was a statistical match with the DNA in bloodstains found near the broken window at the home. In testifying, defendant admitted breaking into the home, but he claimed to have been coerced into committing the break-in by his cocaine dealer, who threatened harm to defendant or his girlfriend if defendant refused to assist in the burglary.

The jury convicted defendant on the burglary count and one of the counts of receiving stolen property.¹ Defendant admitted the prior conviction allegations. He was sentenced to a prison term of 13 years, consisting of the midterm sentence of 4 years on count I, plus 9 years as a result of the enhancement allegations. Sentence on the other count was stayed under Penal Code section 654.

Prior to trial, on July 2, 2003, the court had conducted a hearing pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Defense counsel opened the hearing by informing the judge, "Yesterday Mr. Weible expressed an interest in representing himself in this matter. . . ."² Counsel proceeded to express his concern that, because the

¹ The remaining two counts were dismissed upon motion by the prosecution.

² It appears that defendant's "expression of interest" in representing himself might have occurred during a hearing held the prior day before a different judge, during which defendant withdrew his waiver of speedy trial rights. Although we have been provided

case involved DNA testing and presentation of testimony from a scientist retained to assist the defense, defendant would not be up to the task of representing himself: “Mr. Weible is a very smart man, I think in many respects will be competent within the framework of *Faretta*. [¶] I do want to express some concerns in my duty of loyalty as his attorney. The DNA material and the nuances surrounding it can be overwhelming and cannot be done alone. . . . [a]nd I am concerned about whether Mr. Weible would be able to properly defend himself because of the nature of the scientific evidence.”

The trial judge took over from there. Because the exact nature of the subsequent proceedings is critical to resolving this appeal, we quote from the transcript:

“The Court: Mr. Weible, the Court gave you a form yesterday, explaining all these things, and you didn’t sign it.

“The Defendant: I never received no form, Your Honor.

“The Court: It was given to you. Point one. So that’s a negative thing against you.

“Number two, you have a right to represent yourself, as we know, if you desire, if you are capable. If by your very outburst as you came into court just now^[3] and if your apparent lack of control -- my immediate reaction is maybe you should be certified for competency. Now that your attorney said that you are intelligent, as opposed to personality [*sic*], I won’t certify you for competency.

“But these are very serious charges and you as your own attorney, you need someone on the outside to make the contact with the DNA expert, especially if they are out of state. It would be very, I would say,

with the minutes of the prior day’s hearing, which do not mention a *Faretta* request, we do not have the transcript.

³ Very early in the hearing, defendant is recorded as saying, “Excuse me.” The trial judge admonished him, “Mr. Weible, calm down. You are going to get your chance.” His lawyer followed up, “I am speaking now. Then you speak.” Defendant then said, “Judge, can I file this with the Court?,” to which the judge replied, “Not yet. You talk after he is through.” This is the only indication of a verbal “outburst” in the record provided to us.

impossible for you to make that contact while you are in custody. . . .

“I see no way you can represent yourself in view of the facts of this case. I assume you are aware of all the elements of the charge or you wouldn’t be asking to do this.

“Do you know which charge here has a specific intent and which has a general intent?”

“The Defendant: I can speak now?”

“The Court: Yes. Do you know the answer to my question?”

“The Defendant: I understand the charges against me, Your Honor. I also understand that, before I waived time, the Court was 17 days past my last day to speedy trial.

“The Court: I asked you a question about general intent and specific intent. Do you know anything about that?”

“The Defendant: This actually goes to the intent of the charges.

“The Court: Tell me about it.

“The Defendant: Intent of the charge is what I am going to be charged with on the evidence against me, and what time I can face if convicted by those charges of the intent.

“The Court: Do you know the answer to my question, which of these have specific intent, which have general intent?”

“The Defendant: Well, 459 burglary in the first degree would have the intent, because the other two are misdemeanors, possession of stolen property.

“The Court: Unfortunately, it’s charged as a felony.

“The Defendant: No, they were dropped to a misdemeanor, sir.

“The Court: Were they?”

“The Defendant: Yes, they were. We had a motion, and the district attorney stipulated to that effect.

“The Court: At any rate, did you say anything else on that line?”

“The Defendant: Well, Your Honor --

“The Court: I don’t feel that you are competent to represent yourself in this matter, namely because of the DNA analysis.

“The Defendant: Well, Your Honor, there are a few things I have to say.

“The Court: Yes.

“The Defendant: A, we have the court order for the district attorney’s office and the S.F.P.D. to turn over the DNA, I believe, four months ago, at which time they sent those laboratory tests out to Ohio. And when S.F.P.D. did, they sent them incomplete. So 18 weeks later it was impossible --

“The Court: You are having a hard time focusing on the issue.

“The Defendant: No, sir, I am speaking very clearly for the record.

“The Court: I am sorry. I can’t waste all my day here. I’ve got a jury trial coming in.

“The Defendant: Can I ask you one question?

“The Court: Let me tell the reporter. Since we’re both talking, just put down what I am saying, because he will not speak over me.

“If you cannot focus on the issue as to whether or not you are competent to represent yourself, then I’m going to find that you are not competent. You refused to sign the waiver form. You have not answered my question as to specific and general intent.

“I find from the nature of the DNA analysis, which was explained by the attorney, that you would never be able to do that by yourself while you are in custody. Your motion to represent yourself is denied.

“You may take him back in.”

Thereafter, defendant was permitted to hand up a document apparently drafted by defendant himself. The trial judge reiterated that trial was set for August 15 and caused defendant to be removed from the courtroom. After examining the document, the judge identified it as a “document entitled motion for habeas corpus. Virtually makes no sense. It is not signed. No authorities. There is nothing here. Just demanding to be released. [¶] The record will reflect that his motion for habeas corpus is denied.” After a further brief scheduling discussion among court and counsel, the hearing ended.

Defendant contends that the trial court erred in denying his motion to represent himself.

II. DISCUSSION

In *Faretta*, the Supreme Court held that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.” (*Faretta, supra*, 422 U.S. at p. 817.) Accordingly, “[o]nce a defendant proffers a timely motion to represent himself, the trial court must proceed to determine whether ‘he voluntarily and intelligently elects to do so If these conditions are satisfied, the trial court *must* permit an accused to represent himself without regard to the apparent lack of wisdom of such a choice and even though the accused may conduct his own defense ultimately to his own detriment.’ ” (*People v. Joseph* (1983) 34 Cal.3d 936, 943, quoting *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 891, italics added, limited on other grounds by *People v. Carson* (2005) 35 Cal.4th 1, 7–8; *People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*).

Criminal defendants, who generally lack legal training, are unlikely to provide themselves the same quality of defense that would be supplied by experienced counsel. Yet since *Faretta*, it has been accepted that a defendant’s lack of skill in representing himself or herself does not provide a basis for denying a motion for self-representation, even in the most demanding of prosecutions. (*Faretta, supra*, 422 U.S. at p. 836 [a defendant’s “technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself”]; *People v. Dent* (2003) 30 Cal.4th 213, 218 (*Dent*) [defendant has the right to represent himself even in a capital trial].) Accordingly, the only measure of “competence” applied to a defendant who has made a motion under *Faretta* is whether he or she is mentally competent to make an informed decision to waive the right to counsel—effectively the same standard used in evaluating competence to stand trial. (*Godinez v. Moran* (1993) 509 U.S. 389, 398–400; *Welch, supra*, 20 Cal.4th at p. 733.)

Although a defendant’s lack of legal ability is not a basis for denying a motion for self-representation, our Supreme Court has recognized several limits on a defendant’s

exercise of that right. Given the importance of the countervailing Sixth Amendment right to an attorney, courts are to indulge every inference against a waiver of counsel's assistance. (*People v. Marshall* (1997) 15 Cal.4th 1, 20 (*Marshall*.) A tentative request therefore need not be recognized; the assertion of the right of self-representation must be unequivocal and unmistakable. (*Marshall*, at pp. 20, 23; *People v. Danks* (2004) 32 Cal.4th 269, 296–297.) A request made as a result of a temporary whim, annoyance or frustration, particularly at the time of the denial of a motion for substitute counsel, need not be granted. (*Marshall*, at pp. 21–22, 23; *People v. Valdez* (2004) 32 Cal.4th 73, 99.) Vacillation between requests for self-representation and appointment of counsel can lead to a loss of the right of self-representation, and requests for self-representation made for the apparent purpose of delay or manipulation may be denied. (*Marshall*, at pp. 22, 23.) A defendant who has a history of disruptive conduct may also be denied the right of self-representation, since a defendant must be “ ‘able and willing to abide by rules of procedure and courtroom protocol.’ ” (*Welch, supra*, 20 Cal.4th at p. 734, quoting *McKaskle v. Wiggins* (1984) 465 U.S. 168, 173, italics omitted.)

An appellate court must review the entire record de novo to determine whether the invocation of the right of self-representation satisfies these requirements, even where the trial court has failed to conduct a full and complete inquiry. (*Marshall, supra*, 15 Cal.4th at p. 24.) If the trial court's stated reason for denying a *Faretta* motion is found to be improper, the ruling still will be upheld if the record as a whole establishes that the motion could have been denied on an alternative ground. (*Dent, supra*, 30 Cal.4th at p. 218.)

We find this case to be controlled by *Dent*, in which the trial judge was held to have improperly denied a *Faretta* motion out of concern for the defendant's ability to defend himself in a capital case. When, on the day set for trial, neither of defendant's two attorneys appeared, the trial judge in *Dent* announced that they would be replaced. (*Dent, supra*, 30 Cal.4th at p. 216.) After one of the attorneys arrived and discussed the situation with the defendant, he informed the court, “ ‘Mr. Dent has expressed concerns to me about replacing both counsel. He feels that it will take an inordinate length of time

to prepare the case with two completely new lawyers in the case.’ ” (*Id.* at p. 217.) After additional discussion, counsel told the court, “ ‘The other alternative that he proposes to the court is that he proceed in pro. per. He thinks he would be more inclined to get a fair trial that way than he would with—,’ ” at which point the trial judge interrupted, saying, “ ‘I am not going to let him proceed pro. per. . . . Not in a death penalty murder trial.’ ” (*Ibid.*) Addressed by his attorney, the defendant acknowledged that he had never expressed the desire to represent himself before, “ ‘[b]ut if I receive two new counsel, I would like to go pro. per.’ ” (*Ibid.*) The trial court disregarded defendant’s comment and proceeded to replace both attorneys. The *Faretta* issue was never raised again, and defendant was convicted and sentenced to death. (*Ibid.*)

Addressing the defendant’s claim that his *Faretta* request had been improperly denied, the Supreme Court first noted that the trial court had decided the motion on an improper ground. Citing *People v. Joseph*, the court held that defendant’s facing the death penalty was not alone a legitimate basis for refusing the exercise of his right of self-representation. (*Dent, supra*, 30 Cal.4th at p. 218.) Responding to the prosecution’s argument that the request was properly denied as “ ‘impulsive, ambivalent, and prospective, and therefore equivocal,’ ” the court noted that, given the clarity of defendant’s request, it was “arguably” not equivocal. (*Id.* at p. 218, 219.) Nonetheless, the court held that it did not need to decide the issue because “the trial court’s response effectively prevented defendant from making his invocation unequivocal.” (*Id.* at p. 19.) The categorical nature of the court’s denial of the motion, summarily rendered, “may well have convinced defendant the self-representation option was simply unavailable” (*Ibid.*) Finding no proper basis for denial of the request for self-representation, the court reversed the defendant’s conviction “under compulsion of” *Faretta*. (*Dent*, at pp. 215, 221.)

In this case, the trial judge articulated four grounds for concluding that defendant was not “competent” to represent himself: that defendant (1) did not “answer[] my question as to specific and general intent,” (2) could not “focus on the issue as to whether or not you are competent to represent yourself,” (3) “refused to sign the waiver form,”

and (4) “would never be able to [prepare a response to the DNA testimony] by yourself while you are in custody.” Among these, the judge’s primary concern was defendant’s inability to deal with the DNA evidence. As discussed above, this was not a proper basis for denial of a *Faretta* motion. So long as a defendant is mentally competent to make a knowing and intelligent choice whether to proceed in pro. per., it does not matter whether he or she will be effective in that role. (*Godinez v. Moran*, *supra*, 509 U.S. at pp. 398–400; *Welch*, *supra*, 20 Cal.4th at p. 729.) Accordingly, just as in *Dent*, the trial judge’s primary basis for denying defendant’s motion was improper, and his relatively swift and categorical rejection of the motion “effectively prevented defendant from making his invocation unequivocal.” (*Dent*, *supra*, 30 Cal.4th at p. 219.)

The other factors cited by the trial court—that defendant could not “focus on the issue as to whether or not you are competent to represent yourself” and that he refused to execute a waiver form—might have constituted grounds for denial of the motion had they evidenced defendant’s mental incompetence (*Godinez v. Moran*, *supra*, 509 U.S. at pp. 398–400) or his inability to conduct himself in accordance with accepted courtroom procedures. (*Welch*, *supra*, 20 Cal.4th at pp. 730–732.) The trial judge, however, expressly rejected a finding that defendant was not mentally competent, relying on defense counsel’s characterization of defendant as “intelligent” and generally able. Further, the trial court made no express finding that defendant was disruptive or unable to conform his conduct to the requirements of the courtroom, and such a conclusion would not have been supported by the record before him. The record does not reveal any evidence of prior disruptive courtroom behavior by defendant. Despite the court’s comment on defendant’s difficulty in controlling himself in the courtroom, defendant did not speak until addressed, and his recorded remarks appear to have been reasonably appropriate and respectful. Although the court accused defendant of “refusing” to sign the waiver form, defendant merely denied receiving it. There is simply no basis on this record for concluding that defendant was impermissibly disruptive or not “ ‘able and

willing to abide by rules of procedure and courtroom protocol.’ ” (*Welch*, at p. 734, quoting *McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 173, italics omitted.)⁴

The prosecution’s primary argument in support of the trial court’s denial is that defendant’s request to represent himself was not unequivocal because it was not clear that he wanted to represent himself for all purposes. Rather, the prosecution argues, defendant “wanted to represent himself solely for purposes of a pretrial motion that defense counsel would not present.” This conclusion is premised entirely on the following circumstances surrounding the *Faretta* motion. On the prior day, before a different judge, defendant withdrew his general time waiver. This was allegedly part of a pattern of erratic conduct regarding the time waiver; defendant twice before had refused to waive time and then withdrawn his refusal. Early in the hearing, defendant had created a minor disturbance, asking the trial judge whether he could hand up a document. This turned out to be a one-page, handwritten “Notice of Motion for Habeas Corpus” premised on an alleged violation of defendant’s speedy trial rights, which the judge summarily denied. From these circumstances, the prosecution asks us to infer that defendant’s motion to represent himself was addressed to this petition only.

Even if we were to find these circumstances suggestive, the prosecution’s interpretation of defendant’s request is directly contradicted by the substance of the *Faretta* hearing. Defense counsel, who spoke directly with defendant and was in the best position to know defendant’s intent, announced, “Yesterday Mr. Weible expressed an interest in representing himself in this matter. . . .” Had there been no further proceedings, it would be possible to interpret “this matter” as referring only to the habeas corpus petition. Defense counsel continued, however, by expressing his reservations regarding defendant’s ability to cope with the DNA evidence and interact with the

⁴ Although the prosecution argues in a footnote that defendant used alternating consents and withdrawals of the waiver of speedy trial rights for improper purposes, this argument was never made to the trial judge, and the record contains insufficient information on the circumstances of those withdrawals to permit us to draw that conclusion.

scientist hired to respond to that evidence. He concluded by noting, “I am concerned about whether Mr. Weible would be able to properly defend himself because of the nature of the scientific evidence.” If defendant had intended his motion to be limited to presentation of his petition, as the prosecution argues, there would have been no need for counsel to express these concerns. Just as telling, defendant’s comments were wholly consistent with an intent to represent himself generally; indeed, during the brief hearing he attempted to argue not only the issue of compliance with speedy trial requirements but also the prosecution’s failure to disclose DNA evidence. Finally, as in *Dent*, “the trial court, which was in a position to view defendant’s demeanor, appears to have treated the request to proceed in propria persona not as equivocal but serious” (*Dent, supra*, 30 Cal.4th at p. 219.) The trial judge’s ruling, premised primarily on the defendant’s lack of ability to deal with DNA evidence, would have made no sense if defendant’s motion was addressed only to his habeas corpus petition. Contrary to the prosecution’s claim, the defendant’s desire to represent himself for all purposes was unequivocally expressed, and it was understood by the court in that manner as well.

Cases in which a defendant was found not to have made an unequivocal motion for self-representation generally involve a defendant whose request is conditional (e.g., *People v. Valdez, supra*, 32 Cal.4th at p. 98 [defendant simply asked what would happen “if” he asked to represent himself]) or not clearly and affirmatively stated. (E.g., *People v. Marlow* (2004) 34 Cal.4th 131, 147 [defendant’s question, “Is it possible” for him to represent himself, construed as a request for information]; *People v. Danks, supra*, 32 Cal.4th at pp. 295–297 [defendant made “fleeting statements” about representing himself in the midst of “diatribes” about his treatment].)⁵ Defendant’s request was not impulsive. Having apparently made the request the day before, defendant had the opportunity to think about it overnight, yet there was no indication he was wavering or

⁵ Indeed, because the defendant in *Dent* had expressed his interest in representing himself in an off-the-cuff reaction to the replacement of his two attorneys, it is entirely possible that his request also would have proved to be ephemeral, had the trial judge properly explored it.

had reconsidered. As noted above, all of the participants treated the request as a seriously intended *Faretta* motion for all purposes. There is no basis in the record for finding the request to have been equivocal.

On the record before us, we find no proper basis for a denial of defendant’s motion to represent himself. Because the improper denial of a *Faretta* motion is a per se violation of a defendant’s Sixth Amendment rights, it requires that the judgment be reversed. (*People v. Joseph, supra*, 34 Cal.3d at p. 939.) This is true even if, as in *Dent*, “the evidence against defendant was overwhelming, and our review of the record indicates defendant was vigorously and adequately represented and received a fair trial.” (*Dent, supra*, 30 Cal.4th at p. 222.) Because of our holding on the *Faretta* issue, we need not rule on defendant’s claim that the prosecution was tardy in disclosing discovery materials.

III. DISPOSITION

The judgment is reversed, and the matter is remanded to the superior court for further proceedings consistent with this decision.

Margulies, J.

We concur:

Stein, Acting P.J.

Swager, J.