

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA)	Court Of Appeal
)	No. B230679
)	
Plaintiff and Respondent,)	Superior Court
)	No. VA116772
vs.)	
)	
JOSEPH SMITH,)	
)	
Defendant and Appellant))	
-----)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROGER ITO, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a jury trial and is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

Appellant, Joseph Smith, was charged with the following crimes: 1) count one – assault by means likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(1), a felony; and 2) count two – battery with serious bodily injury, in violation of Penal Code section 243, subdivision (d), a felony. (1CT 101-105)

It was further alleged as to count one that appellant personally inflicted great bodily injury upon Atanacio Quinto pursuant to Penal Code section 12022.7, subdivision (a). (1CT 102)

It was further alleged that appellant suffered eight prior convictions of a serious or violent felony pursuant to Penal Code sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i). (CT 103)

It was further alleged that appellant suffered eight prior convictions of a serious felony pursuant to Penal Code section

667, subdivision (a)(1) on charges brought and tried together in Case Nos. NA008296 and A704421. (CT 103, 153)

It was further alleged that appellant served nine prior prison terms pursuant to Penal Code section 667.5, subdivision (b). (1CT 52, 104)

The jury found appellant guilty of counts one and two. (1CT 94-95, 98, 3RT 1555-1556) The jury found the allegation that appellant personally inflicted great bodily injury upon Atanacio Quinto pursuant to Penal Code section 12022.7, subdivision (a) to be true. (1CT 94, 3RT 1556) In a bifurcated jury trial, the jury found the eight prior strike convictions and serious felony convictions to be true. (1CT 123-133, 135, 139, 3RT 1811, 1817-1820)

The trial court sentenced appellant to 38 years to life state prison on count one pursuant to Penal Code sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i) (25 years to life), 667, subdivision (a)(1) (10 years), and 12022.7, subdivision (a) (3 years). (1CT 153-154, 156-157, 3RT 2112) The trial court stayed the sentence as to count two pursuant to Penal Code section 654. (1CT 155, 3RT 2112) A timely notice of appeal was filed (Pen. Code § 1237). (1CT 158)

STATEMENT OF THE FACTS

On September 7, 2010, at approximately 4:00 p.m., Atanacio Quinto was working in the office at his car repair shop, Quinto's Auto Electric, located at 6500 South Central Avenue in Los Angeles when appellant came to talk to him. (2RT 310-311, 618) Appellant was angry and wanted Quinto to test drive appellant's car which he had brought to the shop for repair. (2RT 313, 619) Quinto refused to test drive appellant's car because the car had a water pump problem, did not have any visible current plates or tags, and appellant did not provide proof of insurance; appellant became upset and insulted Quinto. (2RT 313-314) The car had a license plate and a permit. (2RT 336, 339) Quinto told appellant to test drive his car himself; appellant became upset. (2RT 314) Quinto told appellant to leave or he would call the police. (2RT 314) Appellant challenged Quinto to hit him. (2RT 621)

Appellant punched Quinto in his right eye, causing Quinto to bleed and fall to the floor in pain. (2RT 315, 322, 622, 624) Francisco Florido, a mechanic at the auto shop, and Jesus Duran who worked next to the auto shop, heard yelling and came over to help Quinto; appellant hit Duran on her arm while he was

trying to hit Quinto. (2RT 317, 385-386, 391, 610-611, 623)
Appellant continued hitting Quinto while Quinto was on the floor.
(2RT 316, 387, 389) Appellant challenged Florido to fight.
(2RT 622) Florido called the police. (2RT 622) Appellant told
Florido that appellant already called the police; appellant took
pictures of Quinto. (1RT 393, 622-623) Florido grabbed a
large screwdriver. (2RT 623) Appellant was not injured. (2RT
624)

Quinto was transported to the St. Francis Medical Center.
(2RT 323, 366-368, 391) Quinto sustained a medial orbital
fracture and a posterior floor orbital fracture. (2RT 370) Lorpu
Beyan, a physician's assistant, who was working in the
emergency room when Quinto came to the hospital, testified
that Quinto's injury would occur from a blunt force trauma.
(2RT 366-368, 373) Quinto was scheduled to undergo eye
surgery, and has double vision, preventing him from working.
(2RT 318-319, 324-325)

ARGUMENT

I.

APPELLANT WAS DENIED HIS RIGHT TO COUNSEL BECAUSE THE TRIAL COURT DID NOT ADEQUATELY WARN APPELLANT OF THE DANGERS OF SELF-REPRESENTATION AND THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW APPELLANT TO REVOKE HIS RIGHT TO SELF-REPRESENTATION AFTER APPELLANT MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL

Appellant represented himself throughout the trial. (2RT C-6-C-10) On December 10, 2010, appellant signed a *Faretta* waiver, waiving his right to have an attorney represent him. (2RT C-6) The trial court explained to appellant that he must comport himself with the decorum that is necessary in a courtroom, he cannot claim ineffective assistance of counsel, the court would not give appellant any breaks or assistance, and he was on his own. (2RT C-6-C-8) However, appellant was not adequately advised of the risks and dangers of self-representation or that he had no right to standby counsel. (2RT C-6-C-10) Appellant specifically requested co-counsel or standby counsel after waiving his right to counsel,

demonstrating his lack of understanding of the dangers of self-representation. (2RT 301-302) On January 11, 2011, after jury voir dire, appellant stated, “I’d like to speak with my co-counsel.” (2RT 301) The trial court responded, “You don’t have co-counsel, sir.” (2RT 301) Appellant stated, “I’m talking about the person that would step in if I decide to relieve my pro per status.” (2RT 301) The trial court replied, “You don’t have the option of relieving your pro per status, sir. You announced ready, we picked a jury, we’re going forward. So you do not have co-counsel. You do not have stand-by counsel. We’re doing the trial now.” (2RT 302) Surprised, appellant asked, “I don’t have no stand-by counsel? ... So I have nobody to confer with in regards to decision making on my case?” (2RT 302)

Further, during trial, appellant unequivocally requested to revoke his in propria persona status and have an attorney appointed. (2RT 1202-1205, 1428-1429) On January 12, 2011, appellant did not come to court for trial and told the court he was hearing voices, he was suicidal, and he “Can’t do it.” (2RT 603-607) On January 18, 2011, appellant expressly stated, “I don’t want to represent myself no more. I fractured my skull, okay. I’m on psych meds. I’m committing suicide, whatnot. I’m not able to represent myself is what I’m saying. I

don't have no problem with coming to the courtroom. I just can't represent myself. ... I'm not refusing to come to court. I can't represent myself, your honor. That's what I'm trying to explain to you. ... I cannot represent myself. I have hemorrhaging in my head. I'm bleeding. ... I'm on psych meds right now. I take pills three times a day. ... I'm not able to represent myself, your honor. I'm trying to explain that to you.” (2RT 1202-1205) Again, on the afternoon of January 18, 2011, appellant explained, “I'm not competent to represent myself. ... I'm not capable of representing myself right now, and I'm not able to do it.” (2RT 1427-1429) The trial court denied appellant's requests, finding appellant was more than adequately able to represent himself and was engaged in games and antics. (2RT 606-607, 1201-1205, 1428)

Prior to waiving his right to counsel, a defendant should be told he will receive no help or special treatment from the court and that he does not have a right to standby counsel. (*People v. Phillips* (2006) 135 Cal.App.4th 422, 428.) In *Faretta v. California* (1975) 422 U.S. 806, 836 [95 S. Ct. 2525, 45 L.Ed.2d 562], the United States Supreme Court held that a defendant has a constitutional right to proceed in propria persona when the defendant intelligently and knowingly elects

to do so. The defendant should be made aware of the dangers and disadvantages of self-representation so that the record will establish that the defendant knows what he is doing and his choice is made with his eyes open. (*Id.* at p. 835.)

In *People v. Noriego* (1997) 59 Cal.App.4th 311, 315, the Court of Appeal reversed the appellant's conviction because the trial court failed to properly advise the appellant of the risks and dangers of self-representation as required by *Faretta*. The Court of Appeal noted that the trial court gave no specific warnings or advisements regarding the risks and dangers of self-representation, did not inquire whether appellant understood the charges and consequences, did not warn him he would be treated like any other attorney, did not point out his lack of legal skills and the fact his opponent would be experienced and prepared, and did not advise him that he had no right to standby counsel. (*Id.* at pp. 319-320.) The Court of Appeal reasoned that the trial court did not give any necessary warnings to assure itself that appellant was making an informed and intelligent decision despite the disadvantages and risks. (*Id.* at p. 320.) The Court of Appeal concluded that the error was not harmless beyond a reasonable doubt under *Chapman v. California* (1966) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d

705] because it was difficult to determine whether the appellant would have chosen professional representation had he been fully informed of the dangers of self-representation. (*Id.* at pp. 321-322.)

Here, the trial court failed to adequately advise appellant that he had no right to standby counsel, that he lacked legal skills, that his opponent would be experienced and did not inquire whether appellant understood the charges and consequences. (2RT C-6-C-10, 301-302) Because appellant's Sixth Amendment right to counsel was violated, reversal is required. The error was not harmless beyond a reasonable doubt because appellant may have chosen professional representation had he been fully informed of the disadvantages and risks of self-representation. (*People v. Noriego, supra*, 59 Cal.App.4th at pp. 321-322.)

Under the Sixth and Fourteenth Amendments to the federal Constitution, a defendant in a criminal case has a right to representation by counsel as well as the right of self-representation. (*Faretta v. California, supra*, 422 U.S. 806, 819.) But once a defendant knowingly and voluntarily waives the constitutionally guaranteed right to counsel, that right is no longer absolute; however, there is a strong presumption that a

post-trial request for counsel should not be refused. (*Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, 700-701 [a defendant should be allowed to withdraw a *Faretta* waiver at the time of sentencing unless the government can show that the request is made for a bad faith purpose]; *People v. Nague* (1991) 229 Cal.App.3d 1115, 1122-1125 [same]; *Robinson v. Ignacio* (9th Cir. 2004) 360 F.2d 1044, 1048 [explicit request for counsel at sentencing].)

An unequivocal midtrial request to revoke in propria persona status and have an attorney appointed is committed to the sound discretion of the trial court. (*People v. Lawrence* (2009) 46 Cal.4th 186, 192-193.) The court must consider the totality of the facts and circumstances in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial. (*Id.* at p. 192.) A trial court should consider the following factors and any other relevant circumstances: (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5)

the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*Id.* at p. 192; *People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994; *People v. Gallego* (1990) 52 Cal.3d 115, 163-164].)

California Courts have repeatedly found abuses of discretion in denying a defendant's request to withdraw his *Faretta* waiver where no showing of disruption was made from a continuance to appoint counsel. (*People v. Hill* (1983) 148 Cal.App.3d 744, 760-761 [abuse of discretion where request made before jury selection, no showing of disruption from short continuance]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 319 [abuse of discretion where request made before assignment to trial department, no showing of disruption from continuance]; *People v. Elliott, supra*, 70 Cal.App.3d at pp. 994-998 [abuse of discretion where request made before presentation of evidence, prompted by prosecutor's offer of proof regarding an uncharged offense and no showing of disruption from continuance] *People v. Nague, supra*, 229 Cal.App.3d at pp. 1122-1125 [matter remanded to trial court to hold hearing on request for counsel made after trial for assistance at sentencing].)

Here, appellant unequivocally requested the withdrawal of his *Faretta* waiver during trial. (2RT 1202-1205, 1428-1429)

Appellant repeatedly explained that he was unable to effectively represent himself and requested that counsel be appointed to represent him in this three strikes case. Appellant had no prior history of alternating between self-representation and representation by counsel, and the reason he gave for wanting counsel was a valid one—he realized that he lacked the necessary skills to represent himself in trial. No showing of an unreasonable disruption from appointing previous counsel was made. Despite the serious nature of the case, the trial court refused to allow appellant to withdraw his *Faretta* waiver and appoint counsel to represent appellant during trial and at sentencing.

Reversal is required because a denial of a criminal defendant's right to counsel under the Sixth and Fourteenth Amendments affects "the framework within which the trial proceeds" and thus it is not "simply an error in the trial process itself." (*People v. Lawrence, supra*, 46 Cal.4th at p. 203, Kennard, J. dissenting, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) Further, the trial court's error in denying the request to retract the *Faretta* waiver was not harmless beyond a reasonable doubt. (*People v. Hill, supra*, 148 Cal.App.3d at p. 762 [reversal

required where error was not harmless beyond a reasonable doubt]; *People v. Sampson* (1987) 191 Cal.App.3d 1409, 1418; *People v. Nague, supra*, 229 Cal.App.3d at pp. 1126-1127.) At a minimum, counsel should have been appointed for sentencing and would have been able to assist at sentencing by arguing for a lesser sentence or bringing a *Romero* motion.

CONCLUSION

Because the record does not establish that appellant knowingly and intelligently waived his right to counsel and the trial court abused its discretion in denying appellant's unequivocal request to withdraw his *Faretta* waiver, reversal is required.

Dated: July __, 2011

Respectfully submitted,

Marta I. Stanton
Attorney for Appellant
Joseph Smith

CERTIFICATE OF WORD COUNT [CRC 8.360]

I certify that the text of Appellant's Opening Brief consists of 3,100 words.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct, and that this Declaration was executed on July __, 2011, at Agoura, California.

July __, 2011

Respectfully submitted by:

Marta I. Stanton

PROOF OF SERVICE BY MAIL

I, Marta I. Stanton, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is 638 Lindero Canyon Rd., #192, Agoura, CA 91377. On July __, 2011, I served the within

APPELLANT'S OPENING BRIEF

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the United States mail at Agoura, California, addressed as follows:

State Attorney General
300 South Spring Street
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Norwalk, CA 90650
For Delivery to the Honorable Roger Ito

District Attorney
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Joseph Smith, 2469333
Los Angeles County Jail
P.O. Box 86164 Terminal Annex
Los Angeles, CA 90086-0164

I declare under penalty of perjury that the foregoing is true
and correct and that I signed this declaration on July __, 2011,
at Agoura, CA.

Marta I. Stanton