

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH SMITH,

Defendant and Appellant.

Case No. B230679

Los Angeles County Superior Court, Case No. VA116772
The Honorable Roger Ito, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Following a jury trial in which appellant represented himself, appellant was found guilty of assault by means likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(1)¹ involving the personal infliction of great bodily injury, in violation of section 12022.7, subdivision (a) (count 1), and battery with serious bodily injury, in violation of section 243, subdivision (d) (count 2). In a bifurcated proceeding, the jury found true eight prior convictions alleged pursuant to the Three Strikes Law as well as section 667, subdivision (a)(1). (CT 94-95, 101-105, 123-133, 135, 139.)

The trial court sentenced appellant to an aggregate term of 38 years to life in state prison. (CT 153-157.)

Appellant filed a timely notice of appeal. (CT 158.)

STATEMENT OF FACTS

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

Appellant punched Quinto in his right eye, causing Quinto to bleed and fall to the floor in pain. (2RT 315, 322.) Francisco Florido, a

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

mechanic at the shop, and Jesus Duran, who worked next to the shop, heard yelling and came to Quinto's aid; appellant hit Duran's arm while he was trying to hit Quinto. (2RT 317, 385-396, 391.) Appellant continued hitting Quinto while Quinto was on the floor. (2RT 316, 387, 389.) Appellant challenged Florido to fight; Florido called the police. (2RT 622.) Appellant told Florido that he had already called the police, and took pictures of Quinto. (2RT 393, 622-623.)

Quinto was transported to St. Francis Medical Center, where it was determined that he sustained a medial orbital fracture and a posterior floor orbital fracture. (2RT 323, 366-368, 370, 391.) Lorpu Beyan, a physician's assistant working in the emergency room when Quinto arrived at the hospital, testified that Quinto's injury occurred from a blunt force trauma. (2RT 366-368, 373.) At the time of trial, Quinto was scheduled to undergo eye surgery, was suffering double vision, and could not work due to the injury from the assault. (2RT 318-319, 324-325.)

ARGUMENT

I. APPELLANT VALIDLY WAIVED HIS RIGHT TO COUNSEL WHEN HE CHOSE TO REPRESENT HIMSELF; THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANT'S MIDTRIAL REQUESTS TO TERMINATE SELF-REPRESENTATION

Appellant contends that he was denied his right to counsel because the trial court did not adequately warn him of the dangers of self-representation, and because the trial court abused its discretion by refusing to allow him to revoke his right to self-representation after he made an unequivocal request for counsel. (AOB 5-13.) Respondent disagrees.

A. Factual Background

Prior to trial, on December 10, 2010, after the trial court noted that the case involved "multiple strikes alleged" and his appointed counsel

acknowledged that appellant “is technically a third striker,” appellant moved to have his appointed counsel relieved, and a confidential hearing was held. (2RT C-2-C-3.) Appellant then filled out an “Advisement and Waiver of Right to Counsel” form. (CT 38-41.) The trial court then explained to appellant that he must abide by the rules of the courtroom with no outbursts or inappropriate or unprofessional conduct or language. (2RT C-6-C-7.) The trial court also explained that in the event that appellant was convicted, he could not come back later and claim that he was not competent to represent himself. (2RT C-7.) The trial court also explained that appellant would not “get any breaks” or assistance from the court, and that “if you make mistakes during the proceedings, you fail to do things, it’s all on you.” (2RT C-8.) Appellant indicated he understood and that he was ready to proceed with the trial without a continuance. (2RT C-8-C-9.)

Later, during trial, on January 11, 2011, appellant asked to “speak with my co-counsel.” (2RT 301.) The trial court advised appellant that he did not have a co-counsel, and that since he had decided to represent himself, “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.) When appellant asked if he had anybody to confer with, the trial court replied:

[Appellant], you opted to represent yourself. You had a highly competent, effective attorney representing you previously. That was Ms. McDaniel from the Alternate Public Defender’s Office. She was relieved at your request because you wanted to represent yourself. [Appellant], this was explained to you at length. You are on your own.

(2RT 302.)

A day later, on January 12, 2011, the trial court indicated that appellant was unwilling to come to the courtroom and had refused to get

out of the transport vehicle. Therefore, he was taken to a hospital where he was examined by an emergency room physician, who performed various tests on appellant, including an x-ray or C.T. scan to make sure he was not suffering from any kind of disability. (2RT 602-603, 608.) Later that same day, the trial court advised appellant that “I’m going to make a finding based upon the fact that you’ve been seen by a doctor and you don’t have any physical ailments that would prevent you from being in court, I’ll make a finding you’re voluntarily absenting yourself from these proceedings.” (2RT 604.) The trial court further indicated that “this case is not going to stop or be derailed because of what you’re doing right now. I believe this is a deliberate intent to inject some sort of error into the proceedings.” (2RT 605.) In doing so, the trial court noted:

[A]t this juncture, based upon what I know about the case, what I’ve seen of your prior behavior, the fact that you are alert, oriented, and conducting a full defense yesterday and then apparently this morning decided that you did not want to participate further, I’m going to make a finding that you’re voluntarily absenting yourself.

(2RT 605.)

When asked if he wanted to participate in the proceedings, appellant said that he was “hearing voices” and that he “intend[s] to kill myself on pills.” (2RT 606.) The trial court again indicated that it was making a finding that appellant was voluntarily absenting himself from the proceedings, “And this issue about hearing voices, when I have no indication whatsoever that you’ve had any kind of mental illness, *this is a deliberate intent to either delay the proceedings or inject error.* We’re not going to play that.” (2RT 606, italics added.) In response to appellant’s repeated claim that he was hearing voices, the trial court stated, “I have reviewed the medical clearance from Dr. Nemazee, who’s cleared you absolutely. There’s no indication whatsoever that you’re not able to go

forward at this point.” (2RT 607.) The trial court also indicated that “there’s been no indication, no evidence whatsoever, that he has received any kind of medication or any kind of pills or anything along those lines.” (2RT 607.) Therefore, the trial court found that appellant had voluntarily absented himself from the proceedings, and the trial proceeded in absentia. (2RT 608-609.)

The next day, January 13, 2011, the trial court, outside the presence of the jury, indicated that while in lockup, appellant was apparently having suicidal ideations and had been evaluated by personnel at the county jail, and that, out of an abundance of caution, a 72-hour hold had been placed on him. (2RT 901.) The trial court further indicated as follows:

Yesterday when [appellant] was transported to the Coast Hospital for clearance before going forward with trial – this is yesterday morning – [appellant], in fact, was subjected today [sic] a C.T., a chest x ray – a CT scan and chest X ray; was given a blood test; and also was going to be administered a urinalysis by way of catheter because he was nonresponsive. And when he was instructed or when they told him he was going to get a catheter, he miraculously, apparently, regained his faculties and then did voluntarily submit to urinalysis.

...

And based on all of that information that was imparted to the Court, the Court did find him voluntarily absenting himself from yesterday’s proceedings going forward.

At the conclusion of yesterday’s business day, once again I think [appellant] was alluding to the fact he was suicidal and this morning, consistent with that, he – although contrary to what he indicated to the Court yesterday he had overdosed on pills, there was no outstanding medical issue this morning.

But he did, in fact, indicate that he was having those same thoughts and was, according to the deputies, banging his head in the presence of the medical or psych personnel there. And, out of an abundance of caution, they did, in fact, place a 72-hour hold on him.

The Court's intended course of action at this point is to indicate to the jury that there has been a delay in the proceedings, that the delay would be at least 72 hours, and they would be ordered to return on the next business day, which is January 18th, to recommence trial.

(2RT 902-903.)

On January 18, 2011, when court reconvened, appellant was present in lockup but refused to come up to the courtroom. Appellant 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.

(2RT 1202.) The trial court responded by noting:

When you announced ready for trial last week and we brought you down here – I should say, two weeks ago you announced ready for trial. You didn't ask for a continuance. You didn't ask for a lawyer. You said you wanted to – you wanted your speedy trial rights. A panel was ordered – hang on a second. We ordered a panel. We picked a jury. You made no mention of having an attorney, requesting an attorney at that point.”

(2RT 1203.)

The trial court indicated, “This is the first the Court's hearing of you requesting an actual attorney to represent you,” but also indicated, “[Appellant], here's the problem: The problem is that you did not give up your pro per status. We've already picked a jury. It's too late to do that, so *that's not timely.*” (2RT 1204, italics added.) Appellant indicated that he could not represent himself, and that he had “hemorrhaging in [his] head” and was “bleeding.” (2RT 1204.) The trial court responded by noting that appellant had been “psychologically and physically, medically cleared to come to court.” (2RT 1204.)

Appellant was then allowed until 1:30 p.m. that afternoon to get his affairs in order and prepare to resume trial, since he had indicated that the officers had taken his “stuff,” so he was not “ready to go.” (2RT 1204; see 2RT 1205-1350.) At 1:30 p.m., it was determined that appellant did not have his glasses; therefore, the case was continued until the following day, which is what appellant had originally requested. (2RT 1358; see 2RT 1212 [“[if] I could, I’d like to start tomorrow morning, that way I have everything prepared and ready to start tomorrow”].) Outside the presence of the jury, the trial court indicated that appellant had had a package of documents reproduced for him, but because of where he was currently housed, those items would be confiscated from him, and that he would have them available for him the following morning. (2RT 1426.) In response, appellant again indicated that he was not competent to represent himself. (2RT 1427-1428.) The trial court indicated that although appellant claimed he needed his glasses, “[T]he record is pretty clear you were reading those notes this afternoon without your glasses and making notes after you were told what jury instructions were or not going to be used.” (2RT 1427.) The trial court also noted, “From everything I have seen, and all of the antics that I have seen in this courtroom, I’m convinced that you are more than adequately able to represent yourself.” Appellant then claimed he had two bone fractures in the front of his head trying to attempt to commit suicide, but the trial court noted for the record that “[appellant] has no knots or anything to the front of his head whatsoever.” (2RT 1428.) At the close of the proceedings, the trial court indicated that appellant had “received his entire packet back,” and that in the event it was confiscated, it would also “be available in the courtroom.” (2RT 1430.)

B. Appellant Was Properly Advised of the Risks of Self-Representation

The gist of appellant's contention is that since the trial court did not repeat word-for-word each warning set forth in the written pro per waiver form which he initialed and signed, he is entitled to reversal. (AOB 8.)

The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1225; see *People v. Jenkins* (2000) 22 Cal.4th 900, 1042.) Here, appellant completed a written form that contained a full advisement of his right to appointed counsel, and the dangers and disadvantages of waiving that right. Appellant was aware of the charges against him and that this was a Three Strikes case, with the potential of suffering a sentence of at least 25 years to life. Knowing this, and having completed the form, appellant elected to represent himself. (See CT 38-41; 2RT C-2-C-9.) Accordingly, the record clearly shows that appellant understood exactly the choice he was making, including its risks and that he chose to represent himself notwithstanding those risks. There is no basis to find that appellant was not made aware of, or failed to understand the dangers and disadvantages of representing himself.

Appellant's reliance on *People v. Noriego* (1997) 59 Cal.App.4th 311, 315, 319-321 (AOB 8), is misplaced. *Noriego* was a case in which there was a wholesale failure to advise the defendant of the consequences of representing himself, the court appeared to encourage the defendant to waive counsel, which is not the case here, and defendant did not receive a full advisement via a written waiver form, whereas here, appellant filled out, signed and initialed the waiver form. Therefore, no error occurred in this regard.

C. The Trial Court Properly Denied Appellant's Midtrial Requests to Terminate Self-Representation

Notwithstanding the fact that appellant initialed on the written waiver form that he understood “that depending on the stage of my case, if I ask to give up my pro per status and request counsel to handle my case, the Court may deny this request and I may have to proceed with trial without an attorney” (CT 39), appellant now contends that the trial court abused its discretion in denying his midtrial requests to revoke his right to represent himself and appoint counsel on his behalf (AOB 10-13). His contention is not well taken.

A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 223-227; *Gideon v. Wainwright* (1953) 372 U.S. 335, 339-345; *Powell v. Alabama* (1932) 2897 U.S. 45, 71.) At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. (*Faretta v. California* [(1975) 422 U.S. 806, 819] (*Faretta*).)

(*People v. Marshall* (1997) 15 Cal.4th 1, 20, parallel citations omitted.)

Once a defendant has commenced trial representing himself, it is within the sound discretion of the trial court to determine whether he may change his mind and assert the right to appointment of counsel. (*People v. Gallego* (1990) 52 Cal.3d 115, 164-164; *People v. Elliott* (1977) 70 Cal.App.3d 984, 993.) In exercising that discretion, the trial court may consider:

(1) defendant's prior history in the substitution of counsel and the desire to change 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.

(*People v. Elliott, supra*, 70 Cal.App.3d at pp. 993-994; accord, *People v. Lawrence* (2009) 46 Cal.4th 186, 192.) A court may also consider the defendant's motive in asking to withdraw a *Faretta* waiver. (*People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1126.) However, it is "the totality of the facts and circumstances" which the trial court must consider in determining whether to permit a defendant to again change his mind regarding representation. (*People v. Lawrence, supra*, 46 Cal.4th at pp. 192-193; *People v. Gallego, supra*, 52 Cal.3d at p. 164.)

Here, it is clear the trial court denied appellant's requests, first made on the fourth day of trial, and later a few days later, to terminate self-representation and have an attorney appointed in his place because it was untimely and a tactic designed to delay the proceedings or "inject error." (2RT 606.) It appeared to the trial court that appellant was simply feigning medical distress in order to delay the proceedings (and stave off his inevitable conviction) – he first claimed medical problems, yet was examined and determined not to be suffering from any physical ailments, and therefore the trial concluded that his refusal to participate in the proceedings constituted a voluntary absence from the trial. (2RT 605-607.) Appellant was later examined again at county jail and determined to have no psychological or medical impediments, yet requested to terminate self-representation based on assorted claimed medical problems. (2RT 1201-1204.) The trial court denied the request as untimely. (2RT 1204.) Appellant then claimed he was unable to proceed because he could not read without his reading glasses (2RT 1352) and was given a continuance on this basis, but the trial court observed him reading and writing without them in court (2RT 1427).

Appellant again requested to terminate self-representation, but only after the trial court initially advised appellant that he may not have access to his records overnight when housed in custody. (2RT 1426-1429.) Appellant appeared to relent when he was allowed to take his papers with him back to custody. (2RT 1428-1430.) Appellant also claimed he had “two bone fractures” in the front of his head, but the trial court noted for the record that it observed none. (2RT 1428.)

Thus, apart from the fact that the trial court concluded that his request to terminate self-representation was untimely, it is clear that appellant was simply attempting to “play games” and manipulate the system. A request to terminate self-representation may properly be denied when the court determines it is merely an attempt to manipulate the court system. (*People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1087.) This is exactly what occurred here – the trial court’s comments clearly indicate that it believed appellant was attempting to play games, delay the proceedings and inject error into the proceedings.² (See, e.g., 2RT 606, 608, 902, 1201-1206, 1427-1428.)

Appellant’s reliance on *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, is misplaced. Apart from the fact that Ninth Circuit decisions are not binding on this Court (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3); *Menefield* did not involve a midtrial request to terminate self-representation, but instead, a request made in connection with a post-trial

² A trial court need not review on the record each factor mentioned in *Elliott* – the standard is whether the court’s decision as an abuse of its discretion *under the totality of the circumstances*, not whether the court correctly listed factors or whether any one factor should have been weighed more heavily in the balance. (*People v. Lawrence, supra*, 46 Cal.4th at p. 196, italics added.)

proceeding. (*Menefield v. Borg, supra*, 881 F.2d at pp. 697-698, fn. 2.)

Indeed, the Ninth Circuit specifically noted:

There is . . . a substantial practical distinction between delay on the eve of trial and delay at the time of a post-trial hearing. [Citation.] Delay immediately prior to trial engenders a significant potential for disruption of court and witness scheduling. . . . Conversely, it is unlikely that a continuance *after* the verdict will substantially interfere with the court's or the parties' schedules.

(*Id.* at pp. 700-701, italics in original.) Here, both of the “unequivocal midtrial requests” appellant claims he made were exactly that – *midtrial* requests, not requests made in connection with a post-trial proceeding. (See AOB 11, citing 2RT 1202-1205, 1428-1429.) Accordingly, *Menefield* does not assist appellant here, and the trial court properly exercised its discretion in denying appellant's right to terminate self-representation. This claim fails.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 1, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 3,630 words.

Dated: September 1, 2011

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Joseph Earl Smith**

No.: **B230679**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On September 1, 2011, I electronically filed the attached **RESPONDENT'S BRIEF** with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 1, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 1, 2011, at Los Angeles, California.

M.I. Rangel

Declarant

Signature