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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN LAMONT HILL,

Defendant and Appellant.

A134470

(Contra Costa County  
Super. Ct. No. 5-110691-3)

Nathan Lamont Hill (appellant) was convicted, following a jury trial, of possession of cocaine base for sale; possession of a controlled substance (cocaine) for sale; possession of a firearm by a felon; and possession of ammunition by a convicted person. On appeal, he contends the trial court's denial of his *Faretta*<sup>1</sup> motion violated his federal constitutional right to self-representation. In a petition for writ of habeas corpus (habeas petition), appellant further argues that the trial court misunderstood the circumstances surrounding his motion for self-representation due to either prosecutorial misconduct or ineffective assistance of counsel, or both.

We conclude the court erred in denying appellant's timely *Faretta* motion, and shall therefore reverse the judgment. In light of this result, we need not address the related issues raised in appellant's habeas petition, which we shall deny in a separate order.

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<sup>1</sup> *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

### ***PROCEDURAL BACKGROUND***

On May 10, 2011, appellant was charged by information with possession of cocaine base for sale (Pen. Code, § 11351.5)<sup>2</sup>; possession of a controlled substance (cocaine) for sale (§ 11351); possession of a firearm by a felon (§ 12021, subd. (a)(1)); and possession of ammunition by a convicted person (§ 12316, subd. (b)(1)). The information further alleged, as to counts one and two, that appellant was personally armed with a handgun at the time of the offenses (§ 12022, subd. (c)), and, as to count two, that he possessed for sale 28.5 grams or more of cocaine (§ 1203.073, subd. (b)(1)). The information also contained probation ineligibility and prior convictions allegations.

On October 12, 2011, following a jury trial, appellant was found guilty as charged, except that the jury was unable to reach a verdict as to the arming allegations under section 12022, subdivision (c).

On December 16, 2011, the trial court sentenced appellant to six years in state prison.

On January 18, 2012, appellant filed a notice of appeal.

### ***FACTUAL BACKGROUND***

On March 1, 2011, officers with the Richmond Police Department executed a search warrant at appellant's apartment in Richmond. Appellant was in the apartment and was detained. During the search, police found two handguns; ammunition; a large amount of cocaine and cocaine base; two digital scales; a measuring cup, large knife, and plate with white residue on them; sandwich bags; and \$2,107 in cash. Police did not find any paraphernalia for ingesting cocaine in the apartment.

After he was arrested, appellant told the arresting officer that he had been laid off from his job in 2005, that the drugs were his, and that he sold them to support himself. The arresting officer opined, based on his training and expertise, that appellant possessed

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

the drugs for sale. A criminalist testified that the seized drugs included 84.74 grams of cocaine salt and over 100 grams of cocaine base.

A cell phone was also seized from appellant's apartment. An inspector with the Contra Costa County District Attorney's Office testified that he had retrieved text messages from the phone, most of which were incoming messages. Numerous incoming messages were from people seeking to buy cocaine. The few outgoing text messages on the phone were responses to incoming messages; they affirmed meeting times and places.

In 1994, appellant was convicted of possession and transportation of 5.41 grams of cocaine. In 2003, he was arrested in possession of 1.34 grams of cocaine base.

### ***DISCUSSION***

Appellant contends the trial court's denial of his *Faretta* motion violated his federal constitutional right to self-representation.

#### ***I. Trial Court Background***

Appellant was represented at trial by Deputy Public Defender Shara Davis, who first appeared personally in the case on May 5, 2011, at appellant's preliminary hearing. Davis also represented appellant when he appeared at his May 23, 2011, arraignment, at which time trial was set for August 8, 2011. On July 28, 2011, appellant appeared with Davis at a hearing on the prosecutor's motion to continue the trial due to a conflict with his vacation schedule, at which time the court vacated the August 8 trial date and set a new trial date of September 26, 2011. Appellant also appeared with Davis at the September 7 trial readiness conference, at which he made his unsuccessful *Faretta* motion. The trial ultimately began on October 4, 2011.

On September 7, 2011, when appellant appeared in court with Davis for the trial readiness conference, appellant asked to address the court, stating, "I'd like to go Pro Per under the *Faretta* law at this time." After Davis asked the court to continue the matter until the following week so that appellant would have time to complete the necessary documents as part of his request to represent himself, the following discussion took place.

“THE COURT: Well, I will note we have an upcoming trial date in this matter and [it] is the second trial setting. [¶] Have the People issued subpoenas in this matter?

“MR. OCONNELL [the substitute prosecutor]: Yes, your Honor. Subpoenas have been issued.

“THE COURT: And do the People—[¶] Are the People prepared to go to trial on the trial date of September 26?

“MR. OCONNELL: People are ready.

“THE COURT: All right. [¶] Mr. Hill, if I grant your *Faretta* motion, are you going to be prepared to go to trial on September 26?

“THE DEFENDANT: I need 60 days to, as a time waiver, to get my motions and everything granted, you know.

“THE COURT: All right, Ms. Davis, [are] you prepared to proceed with trial if the Court denies the *Faretta* motion?

“MS. DAVIS: Yes.

“THE COURT: All right. [¶] All right, before we go down the path of any *Faretta*-related paperwork, I . . . would need for you, Mr. Hill, to describe to me why you are wishing to go Pro Per at such a late date and why I should find good cause to continue your trial[,] which is the second trial setting[,] that’s currently set for September 26.

“THE DEFENDANT: Well, because I just received my police report like three weeks ago and I’ve been in custody almost seven months and I was repeatedly denied my police report and I was repeatedly denied and I just received it three weeks ago. I was also told I couldn’t waive time to try and discuss the matter with my family so I was misinformed, and I was repeatedly denied my police report. And it is my right to have my police report.

“THE COURT: I’m not so sure it is, sir. You’re not Pro Per yet. You’re represented by an attorney. [¶] Ms. Davis, did your . . . client request a copy of the investigation reports in this matter from you?

“MS. DAVIS: He did.

“THE COURT: And is it your opinion as counsel that [it] is often very unwise to release into a jail environment a copy of a police report due to the dangers of other individuals seeing such reports and the possibility of, for lack of a better phrase, jailhouse snitches?

“MS. DAVIS: Yes.

“THE COURT: Is that one of the reasons you have delayed providing a report to Mr. Hill[,] that it’s for security reasons?

“MS. DAVIS: That is correct.

“THE COURT: And, Mr. Hill, any other reasons why I should grant your *Faretta* motion at this late date?

“THE DEFENDANT: Counsel is acting on my behalf on anything [*sic*], you know, motions, and when I asked for the report then it was always like an aggressive, you know, attitude or what have you.

“THE COURT: All right, are you asking the Court to hear a *Marsden*<sup>3</sup> motion in any way? [¶] You know what I mean by that?

“THE DEFENDANT: Yes.

“THE COURT: Are you asking me to replace your attorney?

“THE DEFENDANT: No. [¶] I would like to go Pro Per, also.

“THE COURT: And currently the trial’s set for September 26 and there is a 10-day trial following that and do you believe that you could be prepared to go to trial on September 26 or within 10 calendar days thereafter?

“THE DEFENDANT: I think I would need a little more time so I can look over the paperwork. And study.

“THE COURT: All right, and are the People objecting to any continuances?

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<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

“MR. OCONNELL: Yes, your Honor. [¶] I think this is strategic by Mr. Hill. He hopes to delay his trial yet again.”

The court then denied appellant’s *Faretta* motion, stating: “Matter’s confirmed for jury trial. I find it to be untimely. I do not find you to be credible regarding the reasons for wanting to go Pro Per. [¶] Most importantly, I find that it would result in unreasonable delay of the trial which is set for September 26. I do not find good cause to continue the matter.”

Ultimately, the trial date was continued from September 26 to October 4. On October 4, the first day of trial, appellant made a *Marsden* motion for substitution of counsel, which the trial court denied.

## **II. Legal Analysis**

Appellant now contends the trial court erred when it denied his request to represent himself at trial.

In *Faretta, supra*, 422 U.S. 806, 836, the United States Supreme Court held that a defendant in a state criminal trial has a federal constitutional right to represent him or herself without counsel if he voluntarily and intelligently elects to do so. The California Supreme Court recently discussed the right to self-representation under *Faretta*: “A trial court must grant a defendant’s request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently. [Citations.] As the high court has stated, however, ‘*Faretta* itself and later cases have made clear that the right of self-representation is not absolute.’ [Citations.]” (*People v. Lynch* (2010) 50 Cal.4th 693, 721 (*Lynch*), overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 636-638.) A *Faretta* motion thus may be denied if the defendant is not competent to represent him or herself, is disruptive or engages in misconduct that seriously threatens the integrity of the trial, or if the motion is made for the purpose of

delay. (*Lynch*, at pp. 721-722.) Likewise, our Supreme Court has long held that a self-representation motion may be denied if it is untimely. (*Id.* at p. 722.)

“Under [*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*),] a motion is timely if made ‘a reasonable time prior to the commencement of trial.’ [Citation.]” (*Lynch, supra*, 50 Cal.4th at p. 722.) Neither the United States Supreme Court nor our Supreme Court has articulated a bright line rule with respect to the timeliness of a *Faretta* motion. In general, courts have held that *Faretta* motions made on the eve of trial are untimely. (*Lynch*, at p. 723 [citing cases].) Conversely, such motions made months before trial have been considered timely. (*Ibid.*) “[O]utside of these two extreme time periods, pertinent considerations may extend beyond a mere counting of the days between the motion and the scheduled trial date.” (*Ibid.*)

Specifically, “a trial court may consider the totality of the circumstances in determining whether a defendant’s pretrial motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.” (*Lynch, supra*, 50 Cal.4th at p. 726.) “An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is ‘to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.’ [Citation.]” (*Id.* at p. 724.)

*Faretta* error is automatically reversible since “[a]nything short of a per se rule is unworkable and would undermine the *Faretta* doctrine itself.” (*People v. Joseph* (1983) 34 Cal.3d 936, 948; *People v. White* (1992) 9 Cal.App.4th 1062, 1075-1076.)

In *Lynch, supra*, 50 Cal.4th 693, 712, 714, the defendant in a death penalty case had been arraigned nearly four years before he filed his first *Faretta* motion, and had also

been represented by defense counsel for about four years. He had withdrawn his prior waiver of the right to a speedy trial, which required that he be brought to trial within 60 days. (*Id.* at p. 713.) Then, two weeks before pretrial motions were scheduled to begin, he filed a *Faretta* motion. (*Id.* at pp. 714, 719.) At the hearing on that motion, the defendant said he would need a continuance of an uncertain number of months to review the massive amounts of discovery in the case. (*Id.* at pp. 716-717.) The case was a complex one, with the prosecution and defense counsel estimating that the guilt phase trial would take five to seven weeks, with a possible penalty phase thereafter. (*Ibid.*) Moreover, the prosecutor anticipated calling at least 65 witnesses during the guilt phase, many of whom lived outside the San Francisco Bay Area or were elderly and might not be available after further delay. (*Id.* at p. 718.)

In light of all of these circumstances, our Supreme Court affirmed the trial court's denial of the defendant's *Faretta* motion as untimely in "[a] case that had endured significant delay [and] was finally nearing resolution." (*Lynch, supra*, 50 Cal.4th at p. 727; see also *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [*Faretta* motion made six days before trial, with both defense counsel and prosecutor ready to proceed and "with a serious witness problem at hand" was not timely].)

The present case is quite distinct from the situation addressed in *Lynch* and in other cases in which trial courts' denial of *Faretta* motions as untimely have been upheld on appeal.

Here, appellant did not bring his *Faretta* motion on the eve of or during trial. Instead, he requested to represent himself on September 7, 2011, 19 days before the scheduled trial start date of September 26. (See *Lynch, supra*, 50 Cal.4th at p. 723.) In addition, although both attorneys stated that they were ready for trial and the prosecutor told the court that subpoenas had been issued, the only witnesses who testified at trial, or were even disclosed by the prosecution as potential witnesses, were employees of local law enforcement agencies. (Compare *Lynch, supra*, 50 Cal.4th at p. 718 [prosecutor

expected to call some 65 witnesses during guilt phase, many of whom were elderly or lived out of area]; *People v. Ruiz, supra*, 142 Cal.App.3d at p. 785 [prosecutor told court he had “encountered great difficulty” securing presence of one subpoenaed witness and other witnesses had said they were afraid to testify because defendant had threatened to kill them if they did so].) Appellant did request a 60-day continuance to prepare for trial. But such a continuance would have delayed the trial by less than six weeks and the trial still would have commenced less than six months after appellant’s arraignment. In *Lynch*, a death penalty case that had been pending for some four years, the attorneys estimated a five- to seven-week guilt phase trial and the defendant claimed he needed months to go through the evidence before he would even know how long a continuance he would need. The present case, on the other hand, was factually simple and appellant could reasonably expect to be prepared for trial within the 60 days requested. (*Lynch*, at pp. 716-717, 726.)<sup>4</sup>

In addition, the only previous delay in this case resulted from the July 27, 2011 request of the prosecutor for a continuance. That continuance request, which came only 12 days before trial was originally scheduled to begin, was based on the fact that the original trial date conflicted with the recently assigned prosecutor’s “pre-approved vacation out of state.” The court granted the request and moved the start date for the trial from August 8 to September 26. At the subsequent hearing on appellant’s *Faretta* motion, before a different judge than the one who had heard the prosecutor’s continuance motion, the prosecutor—who was appearing for the prosecutor actually assigned to the case—seemed to imply that appellant was responsible for that first continuance when he accused appellant of attempting to delay his trial “yet again.” In fact, appellant had not been responsible for any prior delay in the proceedings and had not brought any previous

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<sup>4</sup> In fact, appellant’s trial lasted five days.

*Faretta* motions; nor had he ever requested substitution of counsel under *Marsden*.<sup>5</sup> Indeed, when the court asked him on September 7 if he wanted to make a motion for substitution of counsel, appellant made clear that he only wanted to “go Pro Per.” Hence, the court had no basis for concluding that appellant made the *Faretta* motion for purposes of delay, rather than from a desire to represent himself. (See *Lynch, supra*, 50 Cal.4th at pp. 721-722.)

Nor did appellant have numerous earlier opportunities to assert his right to self-representation. (See *Lynch, supra*, 50 Cal.4th at pp. 716-717 [one factor for court to consider is whether defendant had earlier opportunities to request self-representation].) Following the May 5, 2011 preliminary hearing, appellant had appeared in court with defense counsel only twice—at his May 23 arraignment and the July 28 hearing on the prosecutor’s continuance motion—before he made his *Faretta* motion on September 7. At that time, appellant complained about counsel’s misinforming him about his situation and failing to file motions or do other things on his behalf, her refusal to give him the police reports until three weeks before the hearing, and her “aggressive” attitude. Appellant cannot be faulted for attempting to work with counsel for a few months before deciding that his conflict with her was not remediable. (Compare *Lynch, supra*, 50 Cal.4th at p. 713 [defendant had been represented by defense counsel for nearly four years when he made his *Faretta* motion].)

In conclusion, after considering all of the circumstances in this case, we find that appellant’s request to exercise his constitutional right to self-representation was timely and not made for the purpose of delay. The trial court therefore had no discretion to deny it on that basis. (*Lynch, supra*, 50 Cal.4th at p. 721; *People v. Joseph, supra*, 34 Cal.3d at

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<sup>5</sup> Thereafter, on the first day of trial, appellant did make a *Marsden* motion. That motion, however, made after the court’s ruling on the *Faretta* motion, is not relevant to our timeliness analysis. (See *People v. Marshall* (1997) 15 Cal.4th 1, 24, fn. 2 [“the trial court’s determination of untimeliness necessarily must be evaluated as of the date and circumstances under which the court made its ruling”].)

p. 948.)<sup>6</sup> Consequently, the judgment must be reversed. (See *People v. Joseph*, at p. 948; *People v. White*, *supra*, 9 Cal.App.4th at pp. 1075-1076.) On remand, the court shall consider appellant's motion solely to determine whether appellant's unequivocal request to represent himself was made voluntarily, knowingly, and intelligently. (*Lynch*, at p. 721; *People v. White*, at pp. 1071076.)<sup>7</sup>

***DISPOSITION***

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with the views expressed herein.<sup>8</sup>

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Kline, P.J.

We concur:

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Haerle, J.

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Richman, J.

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<sup>6</sup> At oral argument, respondent emphasized that the standard of review is abuse of discretion. That is true with respect to an untimely motion for self-representation, but where, as here, the motion is timely, the court's discretion does not come into play. (See *Lynch*, *supra*, 50 Cal.4th at pp. 721-722 & fn. 10.)

<sup>7</sup> Since the trial court did not find, and the record does not reflect, that appellant was not competent to represent himself, that he was disruptive in the courtroom, or that he engaged in misconduct that seriously threatened the integrity of the trial, those additional possible grounds for denying a timely *Faretta* motion are not applicable here. (See *Lynch*, *supra*, 50 Cal.4th at pp. 721-722.)

<sup>8</sup> In a separate order, we deny appellant's related petition for writ of habeas corpus.