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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN W. KING,

Defendant and Appellant.

B233414

(Los Angeles County  
Super. Ct. No. BA381678)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Bork, John Fisher and Norm Shapiro, Judges. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Appellant Kevin W. King was convicted of Health & Safety Code section 11350, subdivision (a), possession of a controlled substance (cocaine base), upon a plea of no contest. He was given a suspended sentence of one year of probation under the terms of sections 1210 and 1210.1 of the Penal Code. He appeals from his conviction, arguing that his motion to set aside the information against him under Penal Code section 995 should have been granted. We affirm.

### **PROCEDURAL HISTORY**

Kevin W. King was arrested on March 2, 2011, after a police officer recovered a bundle containing what appeared to be cocaine base (rock cocaine), and \$179 in cash, from King's jacket pocket following police observation of what appeared to them to be drug transactions.

In a four-page document filed March 4, 2011, entitled "Advisement And Waiver Of Right To Counsel (Faretta Waiver)," King requested that he be permitted to proceed in propria persona.<sup>1</sup> King represented in that document that he was a high school graduate with one year of college, having earned certification as a paralegal. He confirmed his understanding that he had (among other rights) the right to be represented by an attorney, and that an attorney would be appointed for him if he lacked funds to hire one; the right to testify at his trial, but that he could not be compelled to testify against his desire; and the right to represent himself and to waive his right to counsel. He certified his understanding of 13 listed "dangers and disadvantages" of representing himself, separately initialing each listed item. He affirmed his understanding of the crime with which he was charged, including that it is a general intent crime, and his knowledge of its elements and legal defenses. And he affirmed his understanding of the court's written advice and recommendation that he not represent himself, and that he accept appointed counsel (again initialing each of three paragraphs in which that advice was given).

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<sup>1</sup> The record does not reflect the nature of the March 4, 2011 hearing. In his trial court motion to set aside the information under section 995, King identified the March 4 hearing as an arraignment "on existing charges."

At his March 16, 2011 preliminary hearing, after the court received testimony from police officers about their observations before his arrest, King took the stand to testify about the police officers' observations, to explain how the substance identified as cocaine had wound up in his pocket, and to describe his arrest and following search. He testified that the substance identified as cocaine had apparently been put in his pocket by a homeless woman to whom he had loaned his jacket while he exercised, because she appeared to be cold; or perhaps it had been planted there by the police when he was arrested. The money, he testified, was what remained from his social security disability payment after he paid his Sprint phone bill. He attempted, unsuccessfully, to elicit evidence (from the police and from himself) that, for example, none of those with whom the police had observed him before his arrest were found with cocaine, thus tending to contradict the officers' conclusion that they had observed drug sale transactions, and their inferences involving possible sale transactions.

Judge Terry Bork denied King's oral motion to dismiss the charge against him, holding him to answer for a violation of Health & Safety Code Section 11350, subdivision (a), possession of a controlled substance. His arraignment on that charge was set for March 30, 2011. An information filed March 30, 2011, charged King with one count of possession of a controlled substance (cocaine base) (Health & Saf. Code, § 11350, subd. (a)), and with having had 10 prior convictions for which he had served separate terms of imprisonment and failed to remain free from custody for five years after his release.

At King's March 30, 2011 arraignment on that charge, after King had confirmed that he had represented himself at the preliminary hearing and had stated that he had not been advised of "the dangers and disadvantages" of representing himself, the court, Judge Norm Shapiro, orally advised King of those dangers and disadvantages. The court then questioned King about his ability to handle his own defense and to understand the consequences of that decision, determining that King had graduated paralegal training, that he had successfully represented himself in previous criminal proceedings, and that he was currently engaged to do legal research for a local law office. On that basis the court

concluded that King met the minimum qualifications for self-representation, and granted his request for pro. per. status. King then pleaded not guilty and denied the prior prison term enhancement allegations.

On April 27, 2011 the court (again Judge Fisher) heard written motions King had filed on March 30, 2011, to set aside the information (Pen. Code, § 995), and to suppress the evidence of cocaine and return the \$179 that had been seized when he was arrested (Pen. Code, § 1538.5).<sup>2</sup> The section 995 motion sought to set aside the information on two grounds: (1) the magistrate's March 16, 2011 violation of section 866.5, by permitting King to testify at the preliminary hearing without either being represented by counsel or having waived his right to counsel after being advised of that right "at such examination," as section 866.5 requires; and (2) the absence of evidence at the March 16, 2011 preliminary hearing to establish probable cause that he had violated the crime charged in the information. King's section 1538.5 motion sought suppression of the search and return of the items seized from him at the time of his arrest, arguing that the evidence presented at the preliminary hearing failed to establish that the police had probable cause to search him. A "Supplemental Amendment" to the section 1538.5 motion, filed by King on April 27, 2011, argued that since no cocaine was found on any of those with him when he was arrested, the police had no probable cause to believe that his \$179 came from sales of cocaine.

On April 27, 2011, the court denied King's section 995 motion after hearing argument from King and the People (without prejudice to King's right to further brief the law the People had cited at the hearing). In opposition to King's section 1538.5 motion, the People presented the testimony of police officers about their observations at the time of King's arrest, focusing primarily on the bases for their suspicions that drug transactions had occurred and that the substance found in King's pocket was cocaine. However, when King refused to heed the court's admonitions to stop arguing about its

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

evidentiary rulings once the rulings were made, the court called a halt to the hearing, revoked King's pro. per. status, and appointed counsel for King.

When the hearing resumed, King was represented by appointed counsel, who did not request resumption of the section 1538.5 hearing. Instead, counsel indicated King's desire "to enter a plea for Prop. 36" (known as the Substance Abuse and Crime Prevention Act of 2000). King signed and filed a five-page "Advisement Of Rights, Waiver, And Plea Form For Felonies And/Or Misdemeanors – Proposition 36 (Penal Code §1210 et seq.)." Much like the "Advisement And Waiver Of Right To Counsel" that King had signed and filed on March 4, 2011, in this form, too, King affirmed his understanding of his right to be represented by an attorney, without charge if he were unable to afford the cost, and his understanding of the dangers and disadvantage of giving up that right, as well as his rights to a jury trial, to confront witnesses, against self-incrimination, and to produce evidence on his own behalf.

The April 27, 2011 Proposition 36 waiver form also required King to affirm his understanding that he had "a statutory right to a preliminary hearing" within a specified period of time, and that "I would also have all of the above constitutional rights at the hearing . . . ." King then affirmed that he waived all the listed constitutional rights, "for all the charges in this case, including any prior convictions or probation violations, which may be presented against me at my trial (and preliminary hearing)." King's appointed counsel affirmed in writing that he had consulted with King with respect to each of the rights identified in the waiver form, and that he concurred with King's decision to waive his constitutional rights.

The court accepted King's withdrawal of his not guilty plea and his plea of no contest. It found King guilty of the Health & Safety Code section 11350, subdivision (a), violation. On April 27, 2011 King was given a suspended sentence of one year of probation under the terms of sections 1210 and 1210.1, which had been enacted in 2000 by the Proposition 36 initiative.

King filed a handwritten notice of appeal from the final judgment of conviction on May 17, 2011, "on the ground that the court illegally denied the defendant's due process

right to dismissal pursuant to Penal Code §995, as required by *McCarthy vs. Superior Court* (1958) 57 Cal.App.2d 755, 758-759 by virtue of a Penal Code §866.5 violation.” An amended notice of appeal, filed on King’s behalf on June 24, 2011, indicated that the appeal is based on matters occurring after the no contest plea that do not affect the plea’s validity, and upon the denial of the section 1538.5 motion to suppress evidence.<sup>3</sup>

On October 19, 2011, King’s appointed appellate counsel filed a brief that set forth a summary of the facts and proceedings with citations to the transcript, but raised no specific issues which, if resolved in King’s favor, would result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442; *Anders v. State of California* (1967) 386 U.S. 738, 744, 87 S.Ct. 1396.)<sup>4</sup> After review, this court requested counsel to provide letter briefs addressing whether the Superior Court erred by failing to grant relief in response to King’s motion under section 995, based on the trial court’s failure to advise King of his right to counsel before King testified on his own behalf at his March 16, 2011 preliminary hearing, as required by section 866.5. (See Gov. Code, § 68081.)

The responsive letter-brief filed on King’s behalf argues that because King was unrepresented by counsel at his preliminary hearing, without having been advised of his right to counsel as required by section 866.5, the commitment order and information were invalidly obtained and should have been set aside in response to his March 30, 2011 motion under section 995. Because the charge against him should have been set aside before his plea was taken, King argues, his conviction must be reversed. We do not agree.

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<sup>3</sup> On July 11, 2011 this court received a 15-page legibly hand-lettered “Appellate Brief” from King. On August 2, 2011 we denied permission to file the brief in propria persona, ordering the appointment of appellate counsel and that a copy of King’s unfiled brief be forwarded to his counsel.

<sup>4</sup> The submission from King’s counsel included a declaration stating that he had informed King of his right to submit by brief or letter any grounds of appeal, contentions, or argument he wished this court to consider, within 30 days. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442.) This court has received no further response from King.

## DISCUSSION

King correctly argues that section 866.5 provides he “may not be examined” at his preliminary hearing without representation by counsel, unless he was advised “at such examination” of his right to counsel and he waived that right. He is correct that the record contains no indication that he was advised of his right to counsel at his April 16 preliminary examination hearing—although it shows that on March 4, 2011 he unambiguously acknowledged receiving detailed written notice of his right to counsel and of the court’s advice that he should not waive that right, and that he then signed a written waiver of that right.

He is also correct that the advice-of-counsel provision of section 866.5 has long been held to be mandatory. A failure to advise a defendant at his preliminary hearing of his right to appointed counsel—before he testifies, as section 866.5 explicitly requires—renders his commitment unlawful within the meaning of Penal Code section 995. And that is true even if he had earlier been advised of, and had knowingly waived, that right. (*McCarthy vs. Superior Court* (1958) 162 Cal.App.2d 755, 758-759.)<sup>5</sup>

King is not correct, however, that the section 866.5 violation at his preliminary hearing, and the court’s failure to set aside the charge against him as a result of that violation, entitle him to automatic reversal of his conviction on appeal, without any showing that he was prejudiced by those errors. Nor is he correct that prejudice is shown because his conviction followed (and thus resulted from) the court’s improper failure to set aside the charge against him.

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<sup>5</sup> King’s right to the assistance of counsel under the Sixth Amendment to the United States Constitution is not coterminous with his statutory right to the assistance of counsel under California law. (*People v. Crayton* (2002) 28 Cal.4th 346, 361.) King does not argue that his waiver of counsel at the March 4, 2011 hearing was insufficient under the Sixth Amendment to the United States Constitution to waive his right to counsel at subsequent proceedings.

The law that he cites to support these contentions—*People v. Elliot* (1960) 54 Cal.2d 498, 504-505—has been expressly repudiated and overruled.<sup>6</sup> It is now the rule that a failure to set aside an information under section 995 “can be successfully urged as a ground of reversal on appeal only if it in some way prejudiced defendant at his subsequent trial.” (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523, citing Cal. Const., art. VI, § 13.) “Henceforth irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.” (*Id.* at p. 529 [citing harmless error standard of prejudice].)

The record contains no basis for a determination that the error urged by King prejudiced him in any way. In *People v. Pompa-Ortiz, supra*, 27 Cal.3d 519, the defendant’s preliminary hearing on a charge of rape was closed to the public over his objection, denying him his statutory right to a public preliminary hearing, “a substantial right the denial of which entitled him to have the information set aside pursuant to section 995.” (*Id.* at pp. 525-526.) But in *Pompa-Ortiz* the trial court’s erroneous failure to set aside the charges under section 995 nevertheless did not require reversal of his conviction, because the record revealed no way in which the defendant had been prejudiced by the error in failing to grant his section 995 motion. The error therefore was of no consequence: “There being no showing of prejudice, the judgment is affirmed.” (*People v. Pompa-Ortiz, supra*, 27 Cal.3d at p. 530.)

So, too, in this case the record shows that King suffered no prejudice resulting from the trial court’s erroneous failure to advise him of his right to counsel at the preliminary hearing, and its failure to set aside the charges against him in response to his section 995 motion. When King withdrew his plea of not guilty when he pled under

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<sup>6</sup> Before it was overruled, *People v. Elliot, supra*, held that “no showing of actual prejudice is required” for a failure to adhere to section 995’s requirement to set aside charges; “[p]rejudice must be presumed.” (54 Cal.2d at p. 505.)

Proposition 36, he was represented by counsel. At that time he affirmed, in writing—with his counsel’s express concurrence—that he had been advised about his constitutional rights, and that he waived those rights. His written waiver specifically included a waiver of his right to an attorney “for all the charges in this case . . . which may be presented against me at my trial (and preliminary hearing) . . . .”

Moreover, although King had earlier testified at his preliminary hearing without the benefit of counsel, his preliminary hearing testimony apparently revealed nothing that could have prejudiced his defenses to the charge against him (even if he had not later withdrawn his not guilty plea after obtaining counsel). Nothing suggests that anything in his preliminary examination testimony could have increased his vulnerability to the charge against him, or could have enhanced the prosecution’s ability to carry its burden if the case had gone to trial. His failure to have the information set aside due to his preliminary hearing testimony without having been readvised of his right to counsel, “gave away nothing of value.” (*People v. White* (1963) 213 Cal.App.2d 171, 176.)

In this case, as in *People v. White, supra*, 213 Cal.App.2d at page 176, and *People v. Pompa-Ortiz, supra*, 27 Cal.3d at page 530, the error in failing to grant the section 995 motion to set aside the charge therefore was of no consequence. King had represented to the trial court his training and experience in the law, and had demonstrated his clear understanding of the intricacies of pretrial procedures. He had shown himself to be literate, to be very familiar with the facts of his case, and to be competent to logically and intelligently understand the charge against him and his defenses to that charge. And he had repeatedly expressed his unequivocal intention to represent himself throughout the pretrial and trial proceedings. Moreover, even if King’s section 995 motion had been successful in having the information set aside in the trial court, “there would have been a second preliminary examination followed by the filing of a new information, with the eventual result that defendant would have found himself slightly older but in exactly the same predicament.” (*People v. White, supra*, 213 Cal.App.2d at p. 176; see *People v. Crayton, supra*, 28 Cal.4th at pp. 365-366 [Error in failing to comply with statutory duty to readvise defendant of right to appointed counsel was not prejudicial under harmless

error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, where record shows earlier unequivocal waiver of counsel and absence of reasonable probability that repeated advice of right to counsel would have affected defendant's decision to represent himself throughout the proceedings].)

We therefore affirm the judgment.

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.