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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

AHMAD MUSTAFA YOUSEF,

Defendant and Appellant.

B233613

(Los Angeles County
Super. Ct. No. VA109147)

APPEAL from a judgment of the Superior Court of Los Angeles County,
John A. Torribio, Judge. Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne and
Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Ahmad Mustafa Yousef appeals from the judgment entered following his conviction by a jury for making a criminal threat (Pen. Code, § 422)¹ with special findings by the court in a bifurcated proceeding that he had suffered a prior serious felony conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1). Yousef contends his enhanced sentence as a second strike offender was unauthorized because his prior conviction was not for a serious felony under section 1192.7, subdivision (c), and denial of his request to represent himself at sentencing was reversible error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Yousef was charged in an information filed September 4, 2009 with one count of making a criminal threat after he became involved in a confrontation at a bar and threatened to kill the bar owner in December 2008. The information specially alleged Yousef had suffered a prior serious felony conviction (attempted arson, § 455) within the meaning of section 667, subdivision (a)(1), and the Three Strikes law and he had served one separate prison term for a felony (§ 667.5, subd. (b)). Yousef, represented by retained counsel, Charles E. Mullis, pleaded not guilty and denied the special allegations.

On October 2, 2009 Yousef appeared with Mullis, who declared a conflict of interest making him unable to represent Yousef. The trial court relieved Mullis as counsel of record and appointed the public defender’s office to represent Yousef.

On October 26, 2009 Yousef failed to appear in court, and a bench warrant was issued. On March 25, 2010 Yousef appeared in court, represented by a deputy public defender, and the bench warrant was recalled. The trial court remanded Yousef into custody and set a pretrial hearing.

At the April 29, 2010 pretrial conference Yousef appeared with a deputy public defender and moved to discharge his appointed counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)). After a closed hearing the motion was denied. The court trailed the trial date from May 14 to May 17, 2010.

¹ Statutory references are to the Penal Code.

On May 14, 2010 Yousef appeared in court, represented by retained counsel John McDonald. The public defender's office was relieved as counsel of record. Following a continuance at the request of Yousef's counsel, trial commenced on June 21, 2010. Yousef was represented at trial by McDonald. After jury selection and a full day trial, Yousef was convicted of making a criminal threat. In a bifurcated proceeding Yousef admitted the prior conviction allegations, specifically admitting he had been convicted of violating section 455, which the court described as "attempted arson" and "a serious felony."²

² The prosecutor took Yousef's waivers although the court participated in the questioning.

"[Prosecutor]: Do you admit that you suffered the following conviction, Penal Code section 455, case no. KA064533, date of conviction, May 23, 3004, do you admit that prior?

"[Defense counsel]: It's attempted.

"The Court: We are admitting it as a serious felony, not a strike. Court determines the use as long as it's pled. Attempted arson, do you admit that, sir?

"[Yousef]: Yes, I was

". . . .

"The Court: Sir, this has the effect of doubling your penalty and also adding five years.

"[Defense counsel]: I had filed a motion [to strike the prior conviction for purposes of sentencing].

"The Court: I saw that. I have to tell him that now. . . . All I have to tell you now is that it is a potential consequence.

"[Yousef]: Yeah, okay.

"The Court: Understanding that, do you want to stand by your admission?

"[Yousef]: Yes, sir."

On July 27, 2010 Yousef appeared in court with McDonald for sentencing. The trial court granted the defense motion for a continuance.

At the continued hearing on August 18, 2010 McDonald declared a conflict. The court relieved McDonald as counsel of record, appointed the public defender's office and continued the sentencing hearing.

On October 7, 2010 Yousef appeared represented by retained counsel Ryan V. Kinderman. The trial court relieved the public defender's office as counsel of record and continued the hearing to November 9, 2010. Thereafter, the court granted two defense requests to continue sentencing for a hearing on a new trial motion.

At the sentencing hearing scheduled for January 12, 2011 Kinderman declared a conflict. The trial court granted Kinderman's motion to be relieved as counsel of record and then asked Yousef whether he had the means to retain private counsel. Yousef replied he did not, and the court appointed the public defender's office to represent him. The sentencing hearing was continued yet again.

On February 23, 2011 Yousef's counsel, deputy public defender Daniel Im, obtained a further continuance of the hearing.

On March 30, 2011 Im advised the court Yousef "indicates to me he wishes to either hire a private attorney or represent himself." The following exchange occurred:

"The Court: Well, do you have the means and the funds to hire a private attorney?"

"[Yousef]: No, Sir. I do not. I already hired three and two of them ripped me off. I do not have the money. He's filing motions.

"The Court: You have to speak a little louder.

"[Yousef]: This attorney is filing motions I have not seen and have not read. And he didn't give me copies. I have no idea what he's doing. He declines to file a motion I wanted to file, ineffective assistance of counsel on Mr. McDonald, and he refused to do it. I cannot proceed. If you want to sentence me, that's your—the law gives you that. Go ahead and do it. But I don't feel it's fair.

“The Court: What is the motion you asked him to file?”

“[Yousef]: The motion that I asked him to file is ineffective assistance of counsel. Mr. McDonald, when he brought me in here, into your courtroom that day, I didn’t even know I was going to trial. I was told that the D.A. is going to come in and dismiss the case and refile it. I was brought in, rushed into trial. No preparation. No nothing. I didn’t even know what was going on. He brought in supposedly the victim. He was on the stand for five minutes. The question I asked him to ask the guy, ask him just one question, ‘How come you waited a week to call the police? If you are so scared Mr. Yousef is going to kill you, you don’t wait a week. You are a business man. Why didn’t you call the same hour? Why didn’t you call the next day?’ I told him to ask that one question in front of the jury. He refused to do it because of his plan for me to lose. His plan for me to go to prison. That’s all it was. My whole trial didn’t even take three hours. From picking jury, opening statement, and closing argument everything was one day. What does that tell you?”

“The Court: Sir, I’ve done trials in an hour. That doesn’t mean it wasn’t a fair trial. The length of the trial doesn’t determine fairness.

“[Yousef]: That’s right. I agree.

“[Defense Counsel]: It was a couple of days.”

After Yousef and Im conferred, the trial court reviewed with Yousef his history of seeking continuances and alternate representation by the public defender’s office and private counsel. The court concluded, “So you’ve had the public defender, three private attorneys, and back to the public defender, and your request to continue to hire a new attorney is denied, sir. The history of this case is that you have changed attorneys almost willy-nilly. I find this is merely a sham to try to delay the inevitable based on the history of the record in this matter, this matter has been continued numerous times since the conviction which occurred in June of last year. So, I’m going to treat your request as a motion to relieve the public defender’s office. I’m going to – and represent yourself. I’m going to deny that. Your request to continue the matter in an attempt to hire an attorney

when you don't have funds, as you stated you don't have funds, I'm going to deny that. I find this is done strictly to be dilatory and delay the case and not made in good faith.

The trial court then heard Yousef's motions for a new trial and to dismiss the prior strike conviction for attempted arson (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531 (*Romero*). The court denied the new trial motion, but agreed to trail the *Romero* motion to allow the parties to submit further briefing.

At the sentencing hearing on April 8, 2011 Yousef appeared with retained counsel Charles E. Mullis, who had represented Yousef at the preliminary hearing in 2009. The trial court relieved the public defender's office as counsel of record and granted the defense motion to continue the pending matters with no further continuances.

At sentencing on May 3, 2011 Yousef appeared with Mullis. The court heard and denied the *Romero* motion, declining to dismiss the prior strike conviction for attempted arson. The court sentenced Yousef to an aggregate state prison term of 11 years, consisting of six years for making a criminal threat (the three-year upper term doubled under the Three Strikes law), enhanced by five years for the prior serious felony conviction.

DISCUSSION

1. Trial Court Did Not Err in Denying Yousef's Request To Represent Himself

A criminal defendant has the right under the Sixth and Fourteenth Amendments to waive the right to counsel and to represent himself or herself. (*Faretta v. California* (1975) 422 U.S. 806, 819 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*) [“[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense”].) ““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. [Citations.] At the same time, . . . 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.”” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069.)

A defendant's right to self-representation, however, is absolute only if he or she knowingly, voluntarily and intelligently invokes that constitutional right a reasonable time prior to the start of trial (*People v. Lynch* (2010) 50 Cal.4th 693, 721, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637) or sentencing proceedings (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024 (*Miller*)). Otherwise, a defendant's request for self-representation is addressed to the sound discretion of the trial court. (*People v. Windham* (1977) 19 Cal.3d 121, 127-129 (*Windham*).)

When a request for self-representation is untimely, the trial court must inquire sua sponte into the reasons for the request and exercise its discretion in light of certain factors identified in *Windham*. These factors include "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham, supra*, 19 Cal.3d at p. 128; accord, *People v. Lynch, supra*, 50 Cal.4th at p. 722, fn. 10.) Also pertinent are the defendant's mental competence (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365) and any apparent equivocation or ambiguity of the request (*People v. Barnett* (1998) 17 Cal.4th 1044, 1109-1110).

The Supreme Court in *Windham*, however, "decline[d] to mandate a rule that a trial court must, in all cases, state the reasons underlying a decision to deny a motion for self-representation which is based on nonconstitutional grounds." (*Windham, supra*, 19 Cal.3d at p. 129, fn. 6.) The court's exercise of discretion in denying the untimely motion is properly affirmed if substantial evidence in the record otherwise supports the inference the court had those factors in mind when it ruled. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) This is true even if the trial court failed not only to state the reasons for its decision to deny the motion but also to make the sua sponte inquiry generally required. Thus, in *People v. Dent* (2003) 30 Cal.4th 213, a motion for self-representation was denied without a *Windham* inquiry solely because it was a death penalty case, an improper reason. The Supreme Court stated, "Even though the trial court denied the request for an improper reason, if the record as a whole establishes

defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling." (*Dent*, at p. 218.) Ultimately the Supreme Court concluded the record in *Dent* did not otherwise support denial of the motion. Nevertheless, *Dent* sanctions appellate review of the entire record to determine whether the trial court abused its discretion in denying a motion for self-representation, even when the trial court based its denial of self-representation on an improper ground and without a *Windham* inquiry.

Citing *People v. Miller*, *supra*, 153 Cal.App.4th 1015 Yousef contends the denial of his request for self-representation at sentencing on March 30, 2011 was reversible error. *Miller* held a sentencing hearing is a proceeding separate from trial and an unequivocal request for self-representation made in advance of a sentencing hearing was timely and should therefore be granted as a matter of right if the defendant has knowingly and intelligently waived his or her right to counsel. (*Id.* at p. 1024.) In an apparent acknowledgement his request for self-representation was untimely, Yousef contends his request "became timely" when the trial court thereafter agreed to trail sentencing so his counsel could submit additional briefing on the *Romero* motion. Alternatively, Yousef argues, if his request were untimely, then the trial court abused its discretion by denying it for invalid reasons.

Yousef's request to represent himself at sentencing—made only after repeated continuances of the sentencing hearing at his request or on his behalf—was neither timely nor improperly denied. In *People v. Doolin* (2009) 45 Cal.4th 390 (*Doolin*), a capital case, on the day of sentencing the defendant made a *Marsden* motion to replace appointed counsel, which the trial court denied. The defendant then made a request for self-representation, which the court also denied. In its opinion the Supreme Court noted "[t]he timeliness requirement 'serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice.'" (*Id.* at p. 454.) The Court recognized, while it had not previously addressed the timeliness of a request for self-representation made after the penalty phase verdict but before sentencing in a capital case, it need not do so in the instant case because the defendant's request was "manifestly untimely" and intended to serve only as a delaying tactic. (*Ibid.*) The *Doolin*

Court explained the defendant had never requested self-representation during the guilt or penalty phases of the trial; only when his efforts to secure new appointed counsel and a continuance failed, did he seek self-representation and only then with the appointment of “an assistant” to help him prepare various motions. The defendant was not prepared to proceed and could give no estimate of when he would be ready to proceed with sentencing. (*Id.* at pp. 454-455.) Based on these circumstances, the *Doolin* court concluded “the trial court’s ruling was well within the scope of its discretion.”³ (*Id.* at p. 455.)

In this case, although the trial court made no formal *Windham* inquiry, the record as a whole establishes Yousef’s request for self-representation was similar to that of the defendant in *Doolin*—manifestly untimely and intended solely as a delaying tactic. Deputy public defender Im advised the court Yousef wanted either to represent himself or to be granted a continuance to retain counsel. In response to the court’s inquiry, Yousef said he could not afford to hire private counsel. Yousef then explained his request for self-representation was based on his dissatisfaction with Im’s refusal to file a motion

³ The *Doolin* court distinguished *Miller*, observing: “The circumstances of [the] defendant’s posttrial request for self-representation are in stark contrast to a recent Court of Appeal decision that held such a motion in a noncapital case is timely if made ‘a reasonable time prior to commencement of the sentencing hearing.’ [Citation.] In *Miller*, the defendant moved for self-representation after the jury rendered its verdict and a new trial motion was made and denied, but more than two months before the scheduled sentencing hearing. At the time he made his motion, the defendant indicated to the court he planned to conduct his own investigation and he would be prepared on the date the court had set. [Citation.] In holding the trial court erred by denying the defendant’s motion as untimely, the court observed that concerns about trial delay or disruption do not apply to separate sentencing hearings. [Citation.] Because the defendant’s request was timely, he ‘had an absolute right to represent himself at sentencing and the trial court was required to grant his request for self-representation, which was unequivocal, as long as he was mentally competent and the request was made “knowingly and intelligently, having been apprised of the dangers of self-representation.”’ [Citation.] In this case, for the reasons stated, [the] defendant’s right to self-representation at sentencing was not absolute but subject to the court’s discretion.” (*Doolin, supra*, 45 Cal.4th at p. 455, fn. 39.)

based on McDonald's purported ineffective assistance at trial. However, McDonald had ceased to represent Yousef more than six months earlier, and neither Yousef nor any of his counsel during that period suggested *any* such motion was contemplated. (McDonald himself had filed a motion for new trial in August 2010 based on the insufficiency of the evidence to support the verdict.) Moreover, Yousef had never before requested self-representation in this case, instead demonstrating a proclivity to substitute counsel by switching between appointed and retained counsel both before and after McDonald was relieved as counsel of record. As a result, Yousef benefitted from multiple continuances of his sentencing. Finally, although Yousef purportedly wanted to represent himself, he volunteered he was not ready to proceed if his request for self-representation were granted.

From these circumstances, it was reasonable for the trial court to find Yousef's request was merely an improper attempt to further delay sentencing. The trial court's ruling was well within its discretion. (See *People v. Burton* (1989) 48 Cal.3d 843, 852 [trial court's discretion to deny an untimely motion exists to "prevent the defendant from misusing the motion to unjustifiably delay trials or obstruct the orderly administration of justice"].)

2. *Yousef Was Not Improperly Sentenced*

Yousef contends the trial court imposed an unauthorized sentence by erroneously doubling his base term under the Three Strikes law and enhancing his sentence by five years under section 667, subdivision (a)(1), because his prior conviction for violating section 455, which he admitted, does not equate to attempted arson, which is defined instead by sections 664 and 451,⁴ and therefore is not a serious felony within the meaning of section 1192.7, subdivision (c).

⁴ Yousef suggests an attempt to burn one's own personal property, although a violation of section 455, may not qualify as attempted arson because arson as defined by section 451 does not include a person's burning his or her own *personal* property unless there is an intent to defraud or injury to another person or another person's property. (See § 451, subd. (d).) He then argues there was no evidence before the court his conviction for violating section 455 involved an attempt to burn someone else's property.

In *People v. Flores* (1995) 39 Cal.App.4th 1811, our colleagues in Division Six of this court held an attempted arson must be charged under section 455, the specific statute that prohibits an “attempt[] to set fire to or attempt[] to burn or to aid, counsel or procure the burning of any structure, forest land or property, or [commission of] any act preliminary thereto, or in furtherance thereof,” rather than under the general arson and attempt statutes, sections 664 and 451: “In *People v. Alberts* (1995) 32 Cal.App.4th 1424, we held that section 455 was a special statute concerning attempted arson which prevailed over section 664, the general attempt statute. [Citation.] We reasoned that section 654 expressly applied only “where no provision is made by law for the punishment of such attempts . . .” [Citation.] Section 455 punishes ‘attempts to set fire to or attempts to burn.’ Also section 455 prohibits specific conduct while section 664 prohibits general conduct. [Citation.] ‘Thus, the general statutes (§§ 664, 451, subd. (b)) are included in the specific statute (§ 455). Since these sections cannot be reconciled, section 455 must prevail.” (*Flores*, at p. 1814.) The *Flores* court then held a violation of section 455 is a “serious felony” under section 1192.7, subdivision (c), because subdivision (c)(14) lists arson as a serious felony and former subdivision (c)(27), now subdivision (c)(39), defined as a serious felony “any attempt to commit a crime listed in this subdivision.” (See *Flores*, at p. 1814.) We agree and decline Yousef’s invitation to depart from the holding of *Flores*.

However, not only did Yousef expressly admit his prior conviction was for attempted arson and a serious felony, but also his *Romero* motion conceded that fact. Moreover, as an exhibit to that motion, Yousef’s counsel attached the information, which alleged he had attempted to burn a *structure*. Yousef pleaded guilty to that charge.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.