

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROMAN CARRILLO IBANEZ,

Defendant and Appellant.

C066889

(Super. Ct. No. CRF093531)

Defendant Roman Carrillo Ibanez represented himself and his jury found him guilty of conspiracy to commit burglary (Pen. Code, § 182, subd. (a)(1);¹ count 1), as well as resisting arrest (§ 148, subd. (a)(1); count 2), and possession of burglary tools (§ 466; count 3). In a bifurcated proceeding, the jury found that defendant had been convicted of a prior serious felony (§ 667, subs. (b)-(i)) and had served a prior prison term (§ 667.5, subd. (b)). The trial court granted a new trial as to the charge of possession of burglary tools and the prosecutor elected not to retry it. Defendant was sentenced to state prison for five years. The trial court also imposed a 60-day county jail sentence for the resisting arrest conviction, with credit for time served.

¹ Undesignated statutory references are to the Penal Code.

On appeal, represented by appellate counsel, defendant contends (1) the trial court committed reversible error when it granted his *Faretta*² motion because he was not mentally competent to defend himself, and (2) his speedy trial rights were violated because he was not brought to trial within 60 days of his arraignment. We affirm the judgment.

DISCUSSION³

I. *Faretta*

Defendant contends the trial court committed reversible error when it granted his *Faretta* motion to represent himself. Specifically, he contends (1) he was not competent to represent himself, and (2) the trial court misadvised him regarding the possible sentence he could receive. Neither point has merit.

A. Background

The information was filed on October 19, 2009. On April 9, 2010, defendant's counsel declared a doubt as to defendant's competency (§ 1368) and criminal proceedings were suspended. Captane Thomson, M.D., was appointed to examine defendant. At a hearing on May 20, 2010, the matter was submitted on Dr. Thomson's report and the trial court found that defendant was competent to stand trial.

Shortly after the court announced its competency finding, defendant indicated to his counsel that he would like to represent himself. Defendant completed a waiver of counsel form. The trial court admonished him at length regarding self-representation, and defendant indicated he understood each admonition. In the process of providing the admonition, the court told defendant that "the charges, Penal Code violation

² *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*).

³ Defendant's appeal raises issues unrelated to the offenses. Thus, we need not set forth the facts underlying the charged offenses. Relevant procedural facts will be set forth in the Discussion.

[section] 182(a)(1), prior strike allegation, the punishments possible are up to 12 months - range from 12 months [in] county jail or six years in state prison plus a substantial fine.” As with the other admonitions, the court asked whether defendant understood, and he said “Yes.” Defendant confirmed his desire to represent himself and the trial court granted defendant’s request.

After the prosecution rested its case-in-chief, the prosecutor told the court she had had a conversation with attorney Lawrence Cobb.⁴ The prosecutor informed the court that Cobb told her he had been contacted by defendant’s family and wanted to pass along some information regarding defendant that he had obtained from the family. Cobb told the prosecutor that defendant suffered from Attention Deficit Hyperactivity Disorder and the condition “may affect [defendant’s] ability to perform as his own counsel.” The trial court responded to this information as follows:

“When I reviewed the file in this case, I came across a report prepared by Dr. Captane Thomson, a respected psychiatrist who often works with the Court to determine whether criminal defendants are legally competent to stand trial. Dr. Thomson had interviewed [defendant] in April of this year, April 12th to be exact. The specific question posed to Dr. Thomson is whether [defendant] understood the charges against him, and, secondarily, whether he was capable of working with an attorney to present his own defense. [¶] Dr. Thomson concluded that the defendant very much understood and appreciated the charges he was facing, and that he could work with an attorney. [¶] In the process of that interview, Dr. Thomson also concluded that in all likelihood, [defendant] suffered from ADHD, Attention Deficit Disorder is what I call it. He wanted to point that out to the Court. [¶] Ultimately, Dr. Thomson said that there was no reason the trial couldn’t proceed because referencing the criteria which the Court must use to

⁴ Following the jury verdicts, defendant retained Cobb for the new trial motion and the remaining proceedings.

determine whether criminal proceedings should be suspended pursuant to Penal Code section 1368, he said that the defendant was certainly competent. [¶] Since I have interacted with [defendant], I would confirm that same observation. Not that I know what ADHD looks like, but in terms of [defendant's] competence, I find that he certainly understands the nature of the charges and elements of those particular charges and *has done a credible job of representing himself during the course of this case*, a job that's not easy for someone who is not trained in the law. [¶] While I have no reason to question Dr. Thomson's ADHD diagnosis, there is no legal basis that would cause me to terminate these proceedings at this time." (Italics added.)

B. Analysis

1. Competence

In *Faretta*, the United States Supreme Court recognized a federal constitutional right to represent oneself but did not identify a standard of mental competency needed to claim the right. (*Faretta, supra*, 422 U.S. at pp. 835-836; *People v. Taylor* (2009) 47 Cal.4th 850, 872 (*Taylor*).) In *Godinez v. Moran* (1993) 509 U.S. 389, 398 [125 L.Ed.2d 321] (*Godinez*), the United States Supreme Court rejected the notion that the standard for determining competence to plead guilty or waive counsel was higher than or different from the standard for competence to stand trial. The high court reasoned that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself" (*Godinez, supra*, at p. 399), and "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation" (*id.* at p. 400).

Following *Godinez*, the California Supreme Court held that the standard for competency for self-representation was the same as the standard for competency to stand trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1373; *People v. Welch* (1999) 20 Cal.4th 701, 740-742; *People v. Halvorsen* (2007) 42 Cal.4th 379, 433; see *Taylor, supra*, 47 Cal.4th at p. 876.)

In *Indiana v. Edwards* (2008) 554 U.S. 164 [171 L.Ed.2d 345] (*Edwards*), the United States Supreme Court held the federal Constitution does not prohibit state courts from denying self-representation to defendants who are mentally competent to stand trial with an attorney, i.e., are trial competent, but who, because of severe mental illness, are not competent to conduct their own defense at trial. (*Id.* at p. 178.)

In *Taylor*, the trial court granted the defendant's request to represent himself. (*Taylor, supra*, 47 Cal.4th at p. 868.) Relying on *Edwards*, the defendant contended on appeal that he was incompetent to represent himself and that the trial court had acted under the mistaken belief his request for self-representation could not be denied once he was found "trial competent." (*Id.* at p. 866.) Our high court observed, "The court in *Edwards* did not hold, contra to *Godinez*, that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard, a result at which *Godinez* had hinted by its reference to possibly 'more elaborate' state standards. [Citation.] 'In light of *Edwards*, it is clear . . . that we are free to adopt for mentally ill or mentally incapacitated defendants who wish to represent themselves at trial a competency standard that differs from the standard for determining whether such a defendant is competent to stand trial. It is equally clear, however, that *Edwards* does not *mandate* the application of such a dual standard of competency for mentally ill defendants. In other words, *Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.' [Citation.] *Edwards* thus does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." (*Taylor, supra*, 47 Cal.4th at pp. 877-878.)

In *People v. Johnson* (2012) 53 Cal.4th 519 (*Johnson*), the defendant's request to represent himself was granted, but the trial court subsequently suspended proceedings and appointed experts to evaluate the defendant's mental competence. (*Id.* at pp. 523-524.) A jury determined the defendant was competent, and defendant was permitted to resume self-representation. (*Id.* at p. 524.) Two days later, the court expressed concern about the defendant's ability to represent himself. (*Id.* at p. 525.) Relying on *Edwards*, the court revoked the defendant's self-representation, over his objection, and appointed counsel. (*Ibid.*) On appeal, the defendant contended the court should have allowed him to continue self-representation. Our high court disagreed and held that California trial courts "may deny self-representation in those cases where *Edwards* permits such denial." (*Johnson, supra*, 53 Cal.4th at p. 528, italics added.) Under *Edwards*, "[T]he standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from *a severe mental illness* to the point where he or she *cannot carry out the basic tasks needed to present the defense* without the help of counsel." (*Id.* at p. 530, italics added.) Our high court cautioned, however, that "Trial courts must apply this standard cautiously. . . . Criminal defendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly." (*Id.* at p. 531.)

Our high court also repeated its holding in *Taylor* that *Edwards* does not *mandate* a higher standard of mental competence for self-representation. (*Johnson, supra*, 53 Cal.4th at p. 527.) The court wrote, "Because the *Edwards* rule is permissive, not mandatory, we held [in *Taylor*] that *Edwards* 'does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted.' [Citation.]" (*Id.* at p. 528.) Our case is indistinguishable from *Taylor* on this point. There is no constitutional error in allowing a defendant who

is competent to stand trial to represent himself. And defendant here makes no claim that he was not competent to stand trial.

Even applying the new standard in *Johnson*, we cannot find that the trial court abused its discretion in allowing defendant to represent himself. A trial court's determination regarding a defendant's competence must be upheld if supported by substantial evidence. (*Johnson, supra*, 53 Cal.4th at p. 531.) Such deference is especially appropriate when, as here, the trial judge has been in a position to make numerous observations of the defendant. (*Ibid.*) As we have noted, after the prosecution had rested its case-in-chief, the trial court, aware of defendant's diagnosed ADHD, expressly stated defendant "*has done a credible job of representing himself during the course of this case, a job that's not easy for someone who is not trained in the law.*" (Italics added.)

Defendant relies on excerpts from Dr. Thomson's report in which it was reported that defendant is limited by "difficulty expressing his thoughts clearly and succinctly," "wandering from one subject to another" and that he has a serious learning disability. Defendant's father told Dr. Thomson that defendant "cannot hold a conversation," "mixes subjects," and "does not conclude an idea." Yet, defendant points to nothing in the record that illustrates these purported deficiencies. Nor does he identify anything he did or did not do that refutes the trial court's assessment of the "credible" job defendant had done.

The trial court did not err in allowing defendant to represent himself.

2. Advisement

Defendant contends he was misadvised about his sentence exposure and that this invalidated his *Faretta* waiver. "In order to make a valid waiver of the right to counsel, a defendant 'should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation.]' [Citation.] No particular form of words is required in

admonishing a defendant who seeks to waive counsel and elect self-representation; the test is 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. [Citations.] [¶] In *People v. Lopez* (1977) 71 Cal.App.3d 568 (*Lopez*), the court enumerated a set of suggested advisements and inquiries designed to ensure a clear record of a defendant's knowing and voluntary waiver of counsel. First, the court recommended the defendant be cautioned (a) that self-representation is 'almost always unwise,' and the defendant may conduct a defense 'ultimately to his own detriment' [citation]; (b) that the defendant will receive no special indulgence by the court and is required to follow all the technical rules of substantive law, criminal procedure and evidence in making motions and objections, presenting evidence and argument, and conducting voir dire; (c) that the prosecution will be represented by a trained professional who will give the defendant no quarter on account of his lack of skill and experience; and (d) that the defendant will receive no more library privileges than those available to any other self-represented defendant, or any additional time to prepare. Second, the *Lopez* court recommended that trial judges inquire into the defendant's education and familiarity with legal procedures, suggesting a psychiatric examination in questionable cases. The *Lopez* court further suggested probing the defendant's understanding of the alternative to self-representation, i.e., the right to counsel, including court-appointed counsel at no cost to the defendant, and exploring the nature of the proceedings, potential defenses and potential punishments. The *Lopez* court advised warning the defendant that, in the event of misbehavior or disruption, his or her self-representation may be terminated. Finally, the court noted, the defendant should be made aware that in spite of his or her best (or worst) efforts, the defendant cannot afterwards claim inadequacy of representation. [Citation.] As indicated above, the purpose of the suggested *Lopez* admonitions is to ensure a clear record of a knowing and voluntary waiver of counsel, not to create a threshold of competency to waive counsel. [Citations.]' (*People v. Koontz*

(2002) 27 Cal.4th 1041, 1070-1071 (*Koontz*.) The admonitions given by the trial court here comport with this suggested guideline.

Defendant claims that, in addition to the foregoing admonishments, an advisement of “the possible penalties” he faced in the trial was required. We shall assume for present purposes that defendant is correct.⁵

Defendant claims the trial court “misadvised [him] by stating that the possible punishments for [conspiracy] ranged from 12 months [in] county jail to six years in state prison.” In his view, this “advisement was incorrect because it ignored the effect of” the strike allegation. Specifically, if defendant were convicted of conspiracy, and the strike allegation were found true, defendant “could **only** have received a state prison sentence.” (See § 667, subd. (c)(2).)

Defendant’s argument overlooks the possibilities of the jury finding the strike allegation not true and the trial court striking the allegation in the interest of justice. (*People v. Superior Court (Romero)* 13 Cal.4th 497, 529-530.) Either of these possibilities would have precluded the operation of section 667, subdivision (c)(2). The trial court correctly advised defendant of the minimum punishment absent the strike allegation and the maximum punishment, which would have resulted from the strike. Assuming the court had a duty to advise defendant of the range of possible punishments,

⁵ Defendant’s sole authority is a decision of the Ninth Circuit Court of Appeals. (*United States v. Hernandez* (9th Cir. 2000) 203 F.3d 614, 623-624, overruled on other grounds in *United States v. Ferguson* (9th Cir. 2000) 203 F.3d 1060, 1068, fn. 4.) This court is not bound by decisions of the lower federal courts, even on federal questions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) The guideline set forth in *Koontz* adequately incorporates the requirements announced in *Faretta*. In any event, *Hernandez* does not help defendant. *Hernandez* holds that as a precondition to granting a request for self-representation, defendants must be made aware of the “possible penalties.” (*Hernandez, supra*, 203 F.3d at p. 624.) As we will discuss, that is exactly what the trial court did here.

the court fulfilled its duty and arguably would have erred had it given the advisement suggested by defendant on appeal.

There was no *Faretta* admonishment error.

II. Speedy Trial

Defendant contends his fundamental right to a speedy trial was violated by the failure to bring him to trial within 60 days of his arraignment. We disagree.

A. Background

Defendant was arraigned on the information on October 23, 2009, making the 60th day December 22, 2009. Defendant did not waive time and the trial was set for December 7, 2009. On December 7, 2009, the case was called for trial and the prosecutor was ready to proceed. Defendant's trial counsel was not present because he was in a trial in Sacramento County.⁶ The trial court found good cause to continue the trial based on defense counsel's unavailability. The case was continued to December 9, 2009, the date a codefendant's counsel indicated that defense counsel would first be available.

On December 9, 2009, defense counsel again was not present. Counsel for a codefendant stated he had spoken with defense counsel the night before and defense counsel was still in trial in Sacramento. The codefendant's counsel stated that defense counsel would not be available for the next two days because of the Sacramento trial and some required appearances in federal court. Defendant did not waive time. The trial was reset for December 14, 2009, still within 60 days of the arraignment.

On December 10, 2009, a codefendant's counsel made a special appearance for defense counsel, who was not present. The codefendant's counsel indicated that defendant's counsel was still in trial in Sacramento and that trial had been delayed because of a defense attorney's illness. The counsel said that defense counsel had spent

⁶ Defendant had two codefendants at trial. Neither is a party to this appeal. During defense counsel's absences, a codefendant's counsel made special appearances for him.

a substantial period of time with defendant on December 9, 2009, and he had received a commitment from defendant that defendant would waive time. Defendant waived time and the court calendared the matter for December 15, 2009 for trial setting.

On December 15, 2009, defendant was present with his defense counsel. Defendant again waived time, and the matter was set for February 16, 2010.

On February 11, 2010, defendant was present with his counsel. The trial court granted defendant's request for a continuance. The February 16, 2010 trial date was vacated and trial was set for April 12, 2010.

On April 9, 2010, defendant was again present with his counsel. Counsel expressed a doubt as to defendant's competency pursuant to section 1368. The court suspended criminal proceedings.

On May 20, 2010, defendant was present with his counsel. The trial court found defendant competent and reinstated criminal proceedings. Defendant chose to represent himself. Defendant did not waive time and trial was set for July 6, 2010, within 60 days of May 20, 2010.

On July 6, 2010, the court set a hearing on a discovery motion for July 9, 2010 and continued the trial to July 19, 2010 to accommodate the discovery motion. On July 9, 2010, the court found that the prosecution had complied with its discovery obligations.

On July 15, 2010, the trial court advised defendant that it had not reviewed a document defendant had filed because it had not been properly served. The court advised defendant that it would be unable to hear defendant's motions prior to the July 19, 2010 trial date, and that defendant's options were to go to trial on July 19, 2010, without any rulings on the motions, or agree to continue the trial. Defendant agreed to vacate the trial date of July 19, 2010. The court further advised defendant that July 19, 2010 was the 60th day for trial, and he would have to agree to waive his right to have his trial heard within 60 calendar days of the arraignment. Defendant waived time and the court set a

trial setting conference for July 26, 2010. On July 26, 2010, the trial was set for August 30, 2010.

On August 23, 2010, the prosecutor announced that she was ready to proceed with trial; defendant told the court he was not quite ready to proceed with trial and asked for more time. On August 25, 2010, defendant had not filed a motion to continue, and the trial court confirmed the August 30, 2010 trial date.

On August 30, 2010, defendant, in propria persona, filed a “Notice of Motion to Consider Dismissal of Charges.” The notice stated that on August 28, 2010, or as soon thereafter as he may be heard, defendant would “suggest that the court consider dismissal of charges against” him “according to the provisions of Pen. Code § 1385.” No written motion or points and authorities accompanied the notice.

Defendant apparently presented the motion to dismiss orally on the morning of August 30, 2010. The clerk’s minutes for the morning session state, “Defendant’s motion to dismiss pursuant to 1384 [sic] PC, for violation of defendant receiving a trial within 60 days is denied.” There is no reporter’s transcript of the morning session of August 30, 2010.

Jury selection commenced the following day.

B. Analysis

Defendant argues that when he “ ‘waived time’ on December 10, 2009,” he intended to do so only “for a very limited period, about a week,” and thus the delay of trial beyond that week violated his speedy trial rights. The point fails because the present record does not indicate whether defendant’s motion to dismiss on speedy trial grounds had been based upon this theory. As appellant, defendant has the burden to show error by an adequate record. (E.g., *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) Because the present record does not reveal the grounds of the dismissal motion or whether the trial court had considered and ruled upon the present theory, defendant has not met his burden of showing error.

In any event, at the trial setting conference five days later, on December 15, 2009, defendant was present with defense counsel. Defendant again waived time, and the matter was set for February 16, 2010.⁷ Thus, even if defendant’s intent on December 10, 2009 had been to waive time for only one week, his evident intent just five days later was to enter a further waiver that allowed the trial to be continued until February 2010. For that reason, defendant’s contention fails.

Moreover, defendant has not shown prejudice. “Although a defendant seeking pretrial relief for a speedy trial violation is not required to make an affirmative showing of prejudice [citation], the situation is different after judgment. [Citations.] ‘Upon appellate review following conviction, . . . a defendant who seeks to predicate reversal of a conviction upon denial of his right to speedy trial must show that the delay caused prejudice: this court, in reviewing the judgment of conviction, must “weigh the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself.” ’ [Citation.]” (*People v. Lomax* (2010) 49 Cal.4th 530, 557.) Here, defendant has not shown prejudice, and no prejudice appears. For that additional reason, he is not entitled to reversal.

DISPOSITION

The judgment is affirmed.

_____ MURRAY _____, J.

We concur:

_____ RAYE _____, P. J.

_____ ROBIE _____, J.

⁷ There is no reporter’s transcript of this hearing either, but the clerk’s minutes reflect defendant’s time waiver.