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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

LOUREECE CLARK,

Defendant and Appellant.

C068785

(Super. Ct. No. 09F06018)

An information accused defendant Loureece Clark of three counts of second degree robbery, driving with willful wanton disregard for safety while eluding a pursuing peace officer, assault with a firearm, attempted second degree robbery, misdemeanor resisting arrest, and attempted murder as well as several allegations he was armed with a firearm.

A jury found defendant guilty of resisting arrest and deadlocked on the remaining counts and allegations. The trial court declared a mistrial, and the prosecution announced its intention to retry defendant.

Defendant pled no contest to two counts of second degree robbery and evading a peace officer. The remaining counts and allegations were dismissed. Defendant was sentenced to prison for six years.

On appeal, defendant contends the trial court erred when it refused to hear his request, filed prior to the jury trial, to proceed in propria persona. Thus, he claims his resisting arrest conviction must be reversed.<sup>1</sup> The People claim any error is harmless because defendant abandoned his request. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

The facts of defendant's offenses are not at issue in this appeal and need not be recounted.

On February 3, 2010, appointed counsel represented defendant at the preliminary examination. On February 11, 2010, while presumably still represented by appointed counsel, defendant pled not guilty and denied all allegations.

On June 7, 2010, defendant filed a pro se "Petition to Proceed in Propria Persona" under *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562]. A hearing on this petition was twice continued. On June 24, 2010, defendant withdrew the petition. The trial court set the trial readiness conference for July 29, 2010, and the trial for August 5, 2010.

On June 30, 2010, defendant filed another pro se "Petition to Proceed in Propria Persona." This petition had a hearing date of July 9, 2010, in department 63.

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<sup>1</sup> Defendant concedes his claim of error does not require reversal of the matters that were resolved subsequently by his no contest plea.

The clerk's minutes for July 9, 2010, indicate defendant appeared in custody ("REL[EASE STATUS] I/C") in department 63. Judge Sawtelle presided and a certified shorthand reporter was present.

The reporter filed a declaration stating no on-the-record proceedings were conducted that date.

The clerk's minutes for July 9, 2010, state "mot[ion] for Pro Per - Drop[ped]. [Defendant] has [counsel and] is not allowed to file motions." In addition, the words "[Defendant] has counsel & is not allowed to file motions" appear handwritten and undated on the face of the pro se petition.

Subsequently, but prior to trial, defendant appeared in court with counsel on July 29, 2010; September 27, 2010; October 7, 2010; October 15, 2010; and October 21, 2010. Neither defendant nor his counsel mentioned the *Faretta* request at any of those appearances.

Trial commenced on November 2, 2010. On December 9, 2010, the jury found defendant guilty of misdemeanor resisting arrest and the court declared a mistrial on the remaining counts.

The prosecution chose to retry defendant and trial was set for February 7, 2011. On February 1, 2011; February 10, 2011; March 25, 2011; and May 2, 2011, defendant appeared in court with counsel. Again, there was no mention of a *Faretta* request at any of these appearances.

Then, on May 2, 2011, defendant filed a pro se motion to proceed without counsel pursuant to *Faretta* and a motion for a continuance. But on May 6, 2011, defendant withdrew his motion to represent himself. On June 14, 2011, defendant pled no contest to multiple counts.

#### DISCUSSION

"[A] defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." (*Faretta v.*

*California, supra*, 422 U.S. at p. 807 [45 L.Ed.2d at p. 566].) “ ‘ “[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an *unequivocal* assertion of that right within a reasonable time prior to the commencement of trial.” [Citations.]’ [Citation.] Failure to grant a proper *Faretta* request is reversible error. [Citation.]” (*People v. Skaggs* (1996) 44 Cal.App.4th 1, 5.)

“When ‘a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. . . .’ ” (*People v. Dent* (2003) 30 Cal.4th 213, 217.)

It is undisputed defendant’s two-page handwritten motion, filed June 30, 2010, was both unequivocal and timely in that it was set to be heard on July 9, 2010; trial was set for August 5, 2010; and the motion did not request a continuance. (E.g., *People v. Tyner* (1977) 76 Cal.App.3d 352, 353, 355.)

Ordinarily, a defendant who chooses professional representation, rather than self-representation, is not entitled to present his or her case personally or to act as cocounsel at trial. (*In re Barnett* (2003) 31 Cal.4th 466, 472, fn. 2.) “There is one exception to this rule: Defendants may make *pro se* motions regarding representation, including requests for self-representation [citation] and for substitution of counsel [citation].” (*Ibid.*)

Thus, the parties agree the trial court erred on July 9, 2010, when it dropped defendant’s timely and unequivocal *Faretta* motion on the ground it was improperly filed by defendant rather than by trial counsel.

The People claim any error is not reversible because defendant abandoned or waived his request. We agree.

“ ‘[I]t is established that a defendant’s conduct may amount to abandonment of a request to represent himself . . . . [citations.]’ ” (*People v. Jones* (2012) 210

Cal.App.4th 355, 361, quoting *People v. Vera* (2004) 122 Cal.App.4th 970, 981-982.) “Numerous courts have held that after a defendant invokes the right to self-representation, a waiver may be found if it reasonably appears that the defendant abandoned the request.” (*People v. Tena* (2007) 156 Cal.App.4th 598, 609-610.)

In *Tena*, the court denied a *Faretta* request at the preliminary examination as untimely for that hearing but invited the defendant to renew the request at the next appearance. (*People v. Tena, supra*, 156 Cal.App.4th at pp. 605-606.) However, the defendant never renewed the request. On appeal, the court concluded the failure to renew the request constituted abandonment. (*Id.* at pp. 609-610.)

In *People v. Kenner* (1990) 223 Cal.App.3d 56 the defendant made a timely and unequivocal *Faretta* request and the court set a hearing. (*Kenner*, at p. 58.) Because the defendant was in custody on an unrelated matter, he repeatedly missed the hearing, which was continued three times. (*Ibid.*) The defendant later appeared with counsel who requested the motion be reserved until the next hearing. (*Id.* at pp. 58-59.) Thereafter, the defendant never mentioned his *Faretta* motion until he challenged his conviction on appeal. (*Kenner*, at pp. 58-59.) The court concluded “a defendant’s conduct may indicate an abandonment or withdrawal of a request for a *Faretta* hearing.” (*Kenner*, at p. 62.)

Defendant argues *Tena* and *Kenner* are distinguishable on their facts, but their reasoning applies by analogy to this case.

As noted, the minutes do not indicate defendant’s counsel was absent from the July 9, 2010, proceeding or was otherwise unaware of the trial court’s unreported, and erroneous, disposition of the *Faretta* request. The court did not, and legally could not, state or imply defense counsel had discretion to refrain from

refiling the *Faretta* request on defendant's behalf if defendant desired to pursue the matter. Rather, defense counsel was obligated to file the request if defendant so desired. On appeal, defendant does not claim defense counsel rendered ineffective assistance by failing to refile the *Faretta* request. Under these circumstances, the only plausible explanation for counsel's failure to refile the *Faretta* request is that defendant subsequently elected not to pursue the matter. (Cf. *People v. Tena*, *supra*, 156 Cal.App.4th at pp. 609-610 [failure to renew *Faretta* request constituted abandonment]; *People v. Kenner*, *supra*, 223 Cal.App.3d at p. 62.)

This explanation is consistent with defendant's conduct before and after the disputed *Faretta* request. The record reveals that, just days before the disputed request, defendant had made and then withdrawn an earlier pro se *Faretta* request. Further, following the jury verdict and deadlock, defendant made and then withdrew a *third* pro se *Faretta* request. Because the disputed *second* request was made, dropped by the court, and *not resubmitted* through counsel, the record reflects that defendant followed his pattern by abandoning the second request as he previously, and subsequently, did with the first and third requests.

Defendant appeared in court with counsel on July 29, 2010; September 27, 2010; October 7, 2010; October 15, 2010; and October 21, 2010. If he still desired to pursue self-representation, he could have had his counsel submit the request on his behalf at any of those hearings. Instead, defendant silently accepted his counsel's assistance all the way through to the jury trial. Thus, defendant abandoned any *Faretta* request as to the jury trial and his challenge to his resisting

arrest conviction is waived. (*People v. Tena, supra*, 156 Cal.App.4th at pp. 609-610; *People v. Kenner, supra*, 223 Cal.App.3d at p. 62.)

DISPOSITION

The judgment is affirmed.

          ROBIE          , J.

We concur:

          BLEASE          , Acting P. J.

          DUARTE          , J.