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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.

KAL SAECHAO,

Defendant and Appellant.

C073474

(Super. Ct. No. 11F07077)

At the heart of defendant Kal Saechao's appeal of his conviction for drunk driving with bodily injury and related charges is his dissatisfaction with his lawyer and the court's refusal to postpone the trial to allow him to retain private counsel or represent himself. He also complains of sentencing error. Finding no abuse of discretion, we affirm the judgment.

**FACTS**

At approximately 7:40 a.m. on October 12, 2011, defendant, driving under the influence of alcohol and marijuana at about 40 to 50 miles per hour, rear-ended a car at

the end of a long line of cars stopped in traffic, causing a chain collision. Defendant crashed his truck into a Ford Escort driven by Rodolfo Reyes, who suffered broken ribs and facial cuts. Reyes then crashed into a Chevrolet Blazer driven by Brian Haraburda, who was transported to the emergency room and given morphine for pain in his chest, neck, and back. Haraburda's 14-year-old passenger suffered a whiplash injury. Haraburda in turn crashed into a Chrysler Pacifica driven by Jessica Olschowka, who injured her neck and back. She continued to suffer pain a year and a half after the accident.

Defendant, appearing angry and bleeding from his leg, made no effort to contact any of the victims and walked away with his two dogs. When approached by a police officer, defendant denied he had been drinking and reported that he had cut his leg while playing with his dogs. According to the investigating police officers, defendant smelled of alcohol, his speech was slurred, his eyes were bloodshot, he was unable to follow instructions, and he swayed. His blood alcohol level was 0.14 percent when tested, so it could have been as high as 0.17 percent at the time of the collision. He also tested positive for the active ingredient in marijuana.

A jury found defendant guilty of driving under the influence of alcohol, causing bodily injury (Veh. Code, § 23153, subd. (a)); driving with a blood alcohol level of at least .08 percent, resulting in bodily injury (Veh. Code, § 23153, subd. (b)); leaving the scene of an injury accident (Veh. Code, § 20001, subd. (a)); and driving with a suspended license (Veh. Code, § 14601.1, subd. (a)). The jury found true the allegations that defendant caused bodily injury to three victims, but found not true the allegation that one of the victims suffered great bodily injury. The trial court sentenced defendant to an aggregate term of five years eight months in state prison. Defendant appeals.

## I

### *Representation*

#### **Factual Background**

On October 18, 2011, Assistant Public Defender Scott Franklin represented defendant at his arraignment and continued to represent him at his preliminary hearing in December 2011 and in all subsequent hearings for the following year. On November 29, 2012, private criminal defense attorney Russell Miller was in court and told the prosecutor and Franklin that defendant's family was attempting to retain him. The case was continued for two weeks, but on December 13 Miller indicated that "there was no financial arrangement."

At the trial setting conference on December 14, 2012, Franklin reported that he was trying to ascertain whether defendant was going to retain Miller, proceed with Franklin, or request a *Marsden* hearing to relieve Franklin.<sup>1</sup> Defendant stated, "I haven't contacted Miller since [the] last time I talked to him. I'm going to go ahead and file a Marsden." After conducting a hearing, the court denied the *Marsden* motion.

Defendant informed the court that he was "looking for private counsel." The prosecutor had noted in the file that he might agree to a continuance if Miller was in court. Since he was not, the prosecutor filling in for the trial prosecutor confirmed that the trial was set for the following week, December 20. The trial court informed defendant that he could still hire Miller, but the trial was set for the following week.

The trial date, however, was continued another four times. On January 14, 2013, defendant appeared in court once again with Franklin, but he would not talk to him because he had decided to represent himself. Defendant told the court he was not ready to proceed to trial and he had not talked to his lawyer until the day before trial. The court

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<sup>1</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

denied defendant's request to represent himself because he was not prepared to go to trial and the prosecutor would not agree to another continuance because the case was over a year old. The court commented, "As far as your representing yourself, you have a right to represent yourself, but the Court balances that against the timing of your request. And now you're asking for more time on the day of trial."

Nevertheless, the court conducted yet another *Marsden* hearing to give defendant the opportunity to voice his complaints about his lawyer. The court denied the motion. Defendant reiterated his request to represent himself. He explained, "I'll represent myself. I'll come back, and then I'll push for some time and then I'll get on the phone, and I'll true [*sic*] to call for the help on the outside." But the court insisted that he would have to be ready to go to trial the following morning.

Defendant's chief concern was his ability to obtain the X-rays taken of one of the victims, and a discussion ensued about obtaining the X-rays digitally. The court expressed some frustration, stating: "I'm not here to barter. If you're prepared to go to trial tomorrow without a continuance then you can represent yourself. That's my inclination. You have a right to do it. But if you're not prepared to do it -- if you're doing it just because you want to ask for another continuance then we are sort of defeating the purpose of you representing yourself and moving forward." Yet defendant continued to barter. "How about this, your Honor. How about I ask for a week so I can make some phone calls?" The court reiterated once again that he needed to be prepared to go to trial the following day, explaining: "A month ago when your *Marsden* was denied, you could have asked the judge to represent yourself at that time. You didn't do it I'm assuming. At least I didn't notice anything in the file. Then you would have had a whole month to get prepared. Now you're asking me on the day of trial, and I'm going to deny it if you are saying that you cannot [be] prepared."

Another debate ensued about the availability of the X-rays, with defendant expressing his willingness to go forward with Franklin representing him if he could

obtain the X-rays. Once again the court recognized the circular nature of the argument and denied defendant's request to represent himself.

### **The Continuance to Retain Counsel**

A criminal defendant's " 'sacred and sensitive' " constitutional right to the effective assistance of counsel encompasses both the right to retain counsel of his own choosing as well as the right to represent himself. (*People v. Ramirez* (2006) 39 Cal.4th 398, 423; see *People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*); *People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*)). Defendant not only tried twice to have his appointed lawyer relieved but sought a continuance to retain counsel, and when that failed, he attempted to represent himself. The court's decisions thwarting both strategies are reviewed for an abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 453 (*Doolin*); *Courts, supra*, 37 Cal.3d at p. 787.)

Defendant accuses the trial court of having a " 'myopic insistence upon expeditiousness in the face of a justifiable request for delay.' " (See *People v. Ortiz* (1990) 51 Cal.3d 975, 984.) He contends the trial court abused its discretion by refusing his request for a continuance to retain counsel because it was not based on a finding that the delay would truly disrupt the orderly process of justice. The record does not support defendant's allegation that the trial court abused its discretion.

It is certainly true we must jealously protect defendant's fundamental right to counsel in all its permutations. But he distorts the record when he asserts the trial court denied him the right to choose his own lawyer by precipitously denying him a continuance. He overlooks the context in which the request was made.

Apparently defendant had hired Miller on a previous occasion. Nevertheless, he did not raise the issue in court until Franklin had represented him in this matter for over a year. Even when the issue arose, his inclination to hire private counsel was equivocal. Yet the prosecutor agreed to continue the trial for two weeks to give defendant the opportunity to retain Miller. At the end of the two-week continuance, Franklin remained

uncertain whether defendant intended to retain Miller or to proceed with him. But on December 14 at the trial setting conference, Miller informed Franklin and the prosecutor that defendant's family was unable to make a satisfactory financial arrangement with him. After his *Marsden* motion was denied, he requested yet another continuance to retain counsel. And although his motion to continue was denied, the trial was in fact continued another four times and did not commence for another month.

Thus, we reject defendant's allegation that he was not afforded the opportunity to retain private counsel. To the contrary, he had multiple opportunities. Setting aside the year he had before raising the issue, he was given two weeks at the end of November and beginning of December 2012 to make arrangements with Miller or retain another lawyer, and he had another full month before the trial actually began. He mischaracterizes the court's denial of his motion to continue the trial in December as a myopic and misguided insistence on expedition when he had ample time to secure representation if he desired private counsel and the financial wherewithal to pay. On this record, we can find no abuse of discretion.

Defendant's lackadaisical approach to hiring a lawyer stands in stark contrast to the diligence the defendant exhibited in trying to secure a lawyer in *Courts, supra*, 37 Cal.3d 784, a case upon which defendant relies. In *Courts*, the defendant approached a lawyer six weeks before the trial setting conference. He met with him multiple times and, while the lawyer was on vacation, attempted to raise the retainer the lawyer required. (*Id.* at p. 787.) Immediately following the trial setting conference, the defendant paid the full retainer and the lawyer agreed to take the case if the trial date was continued. (*Id.* at p. 788.) The court denied the continuance despite the fact the public defender was inexperienced and the defense investigation had just recently begun. (*Id.* at p. 789.)

The Supreme Court reversed, finding that the trial court's failure to grant a continuance constituted an abuse of discretion "in the face of [the defendant's] well-documented desire to be represented by private counsel and counsel's willingness to

undertake that task.” (*Courts, supra*, 37 Cal.3d at p. 789.) The court acknowledged that a “continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.]” (*Id.* at pp. 790-791.) In *Courts*, the defendant “engaged in a good faith, diligent effort to obtain the substitution of counsel *before* the scheduled trial date.” (*Id.* at p. 791.) Nearly two months before trial, the defendant contacted the lawyer and discussed the representation and the fee. Thus, by the time he requested a continuance the court was “not confronted with the ‘uncertainties and contingencies’ of an accused who simply wanted a continuance to *obtain* private counsel. [Citation.] Therefore, it cannot be said that [the defendant] was ‘unjustifiably dilatory’ in attempting to obtain the services of counsel of his own choosing.” (*Ibid.*)

In this case, however, the participation of a “particular private attorney was still quite speculative” at the time the continuance was requested. (*Courts, supra*, 37 Cal.3d at p. 791, fn. 3.) Although defendant had at least six weeks to secure private counsel, he dithered. The lawyer he identified reported they could not reach a financial agreement. But defendant had another month to retain a different lawyer and did not. Unlike Mr. Courts, defendant was “unjustifiably dilatory” in obtaining counsel. Under these circumstances, it cannot be said the trial court abused its discretion.

### **Self-Representation**

It was not until the first day of trial, however, that defendant moved to represent himself. (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*)). He minimizes the significance of his belated request, emphasizing that the jury had not been seated. He also argues that even if the request was untimely, the trial court abused its discretion by failing to conduct a meaningful inquiry into his request. Neither contention has merit.

Although a criminal defendant has an unfettered right to represent himself if he exercises that right in a timely fashion, when he makes his *Faretta* motion either on the

eve of or during trial, the motion is subject to the exercise of the court's sound discretion. (*Windham, supra*, 19 Cal.3d at pp. 127-128.) "The timeliness requirement 'serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice.' [Citation.]" (*Doolin, supra*, 45 Cal.4th at p. 454.)

In exercising its discretion, the court should consider a number of factors, including "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.) The consideration of the *Windham* factors need not be explicit. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) As long as the reasons for the denial of a *Faretta* motion are clear from the record, we are able to assess whether the trial court abused its discretion and an express inquiry is unnecessary. (*People v. Perez* (1992) 4 Cal.App.4th 893, 904.)

The trial court evaluated the adequacy of trial counsel's representation, not once but twice, in denying both of defendant's *Marsden* motions. Moreover, while defendant was distressed about his inability to review the X-rays of one of the victims, his lawyer believed he could effectively cross-examine the treating physician without seeing the X-rays and that it might inure to defendant's benefit. Thus, a competent and prepared lawyer was ready to proceed to trial on defendant's behalf.

By contrast, defendant conceded he was not prepared and would need a continuance in order to represent himself. The court observed that had defendant invoked his right to self-representation at the time he first expressed dissatisfaction with appointed counsel, he would have had ample time to prepare for trial. By dallying, he would obstruct the orderly administration of justice, for as the court pointed out, the case had been pending for over a year. We cannot say the trial court abused its discretion by

denying a *Faretta* request that was not made until the start of trial when defendant had ample opportunity to make the request earlier and a competent lawyer stood ready to move an old case forward.

### **Adequacy of Counsel**

Defendant complains that his lawyer failed to move to strike one of the three injury enhancements, and as a result, he suffered an additional year of imprisonment. He asserts there had been no testimony at the preliminary hearing that the 14-year-old victim had sustained any injury. At trial, however, she testified she had sustained a whiplash injury. Following her testimony, defense counsel moved to strike the injury allegation from the information. The court denied the motion. Defendant contends he was denied his Sixth Amendment right to counsel because his lawyer made the motion too late. Not so.

To support his ineffectiveness claim, defendant must demonstrate not only that his lawyer's performance was unreasonable under prevailing professional norms, but also that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable for defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [80 L.Ed.2d 674]; *In re Scott* (2003) 29 Cal.4th 783, 811.) We agree with the Attorney General that defendant has failed to demonstrate prejudice.

Had defense counsel moved to strike the injury allegation, the prosecutor could have simply sought to correct the omission. Penal Code section 995a, subdivision (b)(1) provides: "Without setting aside the information, the court may, upon motion of the prosecuting attorney, order further proceedings to correct errors alleged by the defendant if the court finds that such errors are minor errors of omission, ambiguity, or technical defect which can be expeditiously cured or corrected without a rehearing of a substantial portion of the evidence. The court may remand the cause to the committing magistrate for further proceedings, or if the parties and the court agree, the court may itself sit as a magistrate and conduct further proceedings. When remanding the cause to the

committing magistrate, the court shall state in its remand order which minor errors it finds could be expeditiously cured or corrected.”

Defendant argues that it is sheer speculation to suggest what the prosecutor might have done if faced with a motion to strike. We disagree. The failure to ask the young victim during the preliminary hearing whether she had been injured was a minor omission that was easily curable. The prosecutor would have done then what he ultimately did at trial and that was simply to ask her if she was hurt in the accident. Thus, it is not reasonably likely that the ultimate result would have been any more favorable to the defense. We therefore reject his ineffectiveness claim.

## II

### *Sentencing*

#### **County Jail or State Prison?**

The jury found defendant guilty of driving under the influence, resulting in injury, in violation of Vehicle Code section 23153, subdivision (a) and driving with a blood alcohol level over .08 percent, resulting in injury, in violation of section 23153, subdivision (b). Because this was defendant’s second conviction for violating section 23153 within 10 years, the trial court sentenced him to state prison pursuant to Vehicle Code section 23560. Defendant, distancing himself from more serious, violent, or sex offenders, insists he should be allowed to serve his time in county jail pursuant to the Criminal Justice Realignment Act of 2011 (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1). He is mistaken.

Defendant acknowledges that the Second District Court of Appeal rejected a nearly identical argument in *People v. Guillen* (2013) 212 Cal.App.4th 992, 995-996 (*Guillen*). He concedes that if we adopt the court’s analysis, he loses. Yet he pins his hopes on the unlikely possibility that we will reject *Guillen* because it is not binding on us. We find the logic of *Guillen* compelling and apply the same rationale to an analogous statute.

Guillen, like defendant, is a recidivist drunk driver. The trial court concluded that pursuant to Vehicle Code section 23550.5, Guillen was statutorily ineligible to serve his sentence in county jail despite the realignment legislation. (*Guillen, supra*, 212 Cal.App.4th at p. 994.) Guillen, like defendant, relied on Penal Code section 1170, subdivision (h), providing that “a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years” (Pen. Code, § 1170, subd. (h)(1)), and Vehicle Code section 42000, providing that “[u]nless a different penalty is expressly provided by this code, every person convicted of a felony for a violation of any provision of this code shall be punished . . . by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code . . . .”

As part of the realignment legislation, the Legislature amended many statutes defining substantive offenses to provide for felony punishment pursuant to section 1170, subdivision (h). (*Guillen, supra*, 212 Cal.App.4th at p. 995.) But neither Vehicle Code section 23550.5, under which Guillen was sentenced, nor Vehicle Code section 23560, under which defendant was sentenced, was amended. The court in *Guillen* concluded, “Thus, by failing to include language in section 23550.5 authorizing punishment pursuant to Penal Code section 1170, subdivision (h), the Legislature intentionally excluded defendants convicted of that offense from eligibility for a county jail sentence.” (*Guillen*, at p. 996.)

Vehicle Code section 23560 is a wobbler; that is, it allows for either a county or a state prison commitment. It provides that the offender “shall be punished by imprisonment in the state prison, or in a county jail for not less than 120 days nor more than one year, and by a fine of not less than three hundred ninety dollars (\$390) nor more than five thousand dollars (\$5,000).” Penal Code section 18, subdivision (a) clarifies that unspecified term as follows: “Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony is punishable by

imprisonment for 16 months, or two or three years in the state prison unless the offense is punishable pursuant to subdivision (h) of Section 1170.”

As already discussed, Vehicle Code section 23560 is not punishable pursuant to Penal Code section 1170, subdivision (h) because it does not specify a specific term and it does not reference section 1170, subdivision (h). Thus, as the court found in *Guillen*, defendant does not benefit from the realignment statutes and the trial court properly sentenced him to state prison.

### **Upper Term**

Disappointed that the trial court sentenced him to the upper term of three years for driving under the influence, causing bodily injury, over the probation department’s recommendation to impose the middle term, defendant contends the trial court failed to take into account his poor mental health and punished him for urging mercy. We review the trial court’s imposition of the upper term for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

The trial court cited three aggravating factors to justify the upper term: 1) the crimes involved great monetary damage, 2) defendant’s prior convictions are of increasing seriousness, and 3) his prior performance on probation had been poor. All three factors are well documented, are proper under the sentencing rules (see Cal. Rules of Court, rule 4.421(a)(9), (b)(2), and (b)(5)), and any one alone would have been sufficient to support the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728). As a result, the court did not abuse its discretion.

Moreover, we must take issue with defendant’s characterization of the record. During the sentencing hearing, defendant went on at some length minimizing his conduct by comparing his crimes to far more egregious conduct and by observing that he had no reason to suspect the traffic would be at a stop. The court interrupted his litany of excuses and stated, “All right. Mr. Saechao I don’t know that what you’re telling me is actually persuading me to give you what you’re asking me to do. It is actually probably

giving me pause to go the opposite direction.” We detect nothing improper or punitive in the court’s remarks. Rather, if the trial court inferred a lack of remorse and a failure to assume responsibility for the harm he caused, as we do, then certainly it was justified in rejecting defendant’s plea for mitigation. And there is nothing in the record to suggest that the court did not consider any of the alleged mental health issues defendant asserted. Given the number of aggravating factors and the attitude defendant continued to demonstrate at the hearing, the trial court was within the bounds of its considerable discretion to impose the upper term.

**DISPOSITION**

The judgment is affirmed.

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RAYE, P. J.

We concur:

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BLEASE, J.

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HOCH, J.