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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HENRY MICHAEL BARNHILL,

Defendant and Appellant.

D058591

(Super. Ct. No. SCD22053)

APPEAL from a judgment of the Superior Court of San Diego County, Gale E. Kaneshiro, Judge. Affirmed.

This appeal addresses the adequacy of a defendant's assertions of the right of self-representation during trial, and to reappointment of counsel during sentencing proceedings. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)). Following a jury trial in which his request for self-representation was denied, and he was represented by counsel, defendant and appellant Henry Barnhill was convicted of three counts each of

pimping (Pen. Code,¹ § 266h) and of human trafficking (§ 236.1, subd. (a)). He was also convicted of one count of using a tear gas weapon other than in self-defense (§ 12403.7, subd. (g)).

After the convictions but before sentencing, Barnhill's renewed request to represent himself was granted, and he brought a new trial motion and numerous discovery requests. After several continuances of sentencing, his motion for new trial was denied. At the same hearing he requested the reappointment of counsel for sentencing, but the trial court denied the request and imposed sentence. At the outset of trial, he had admitted three prison priors (§ 667.5, subd. (b)). He received an aggregate term of 12 years four months.

On appeal, Barnhill challenges the judgment of conviction, contending his requests for self-representation made at the outset of trial should have been granted. He additionally challenges the imposition of sentence, arguing that although he was acting in propria persona during the hearing on his new trial motion, he was nevertheless entitled to the reappointment of counsel for sentencing purposes. He contends the trial court acted contrary to law or abused its discretion in denying all his requests.

We find no abuse of discretion or error and affirm the judgment.

¹ All statutory references are to the Penal Code unless otherwise noted.

BACKGROUND

Although Barnhill does not challenge the sufficiency of the evidence to support his convictions, we briefly summarize the facts presented at trial to provide some background for later discussion. As to his conduct toward each of three young women victims (K.B., L.B., and K.F.), he was convicted of one count of pimping and one count of human trafficking, each. (§§ 266h, subd. (a); 236.1, subd. (a).) As to one of the women (K.F.), he was convicted of forcing her in a nondefensive manner to inhale pepper spray, causing her pain and to cough up blood. (§ 12403.7, subd. (g).) The evidence presented at trial included not only testimony from the three victims and investigators, but also corroborating evidence such as computer records of escort services, photographs, motel receipts and DMV records.

During trial, Barnhill made two sets of motions relating to his legal representation, which we will describe in more detail in the discussion portion of this opinion. Four times, he sought to have his counsel removed pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and each request was denied.²

² On appeal, Barnhill represents that he is not challenging the rulings on the *Marsden* motions.

Contemporaneously with the *Marsden* applications, Barnhill asserted a right to self-representation and sought to make a *Lopez*³ waiver of counsel. (*Faretta, supra*, 422 U.S. 806.) The initial requests, made before the jury returned its verdict of convictions, were denied for reasons to be explained in the discussion portion of this opinion. Another such request, made shortly after the verdict was returned, was denied as equivocal in nature.

However, at a subsequent hearing that included a renewed *Marsden* request, the court allowed Barnhill to represent himself, effective July 19, 2010, for purposes of pursuing discovery, his new trial motion and the continued sentencing hearing. The court provided him with ancillary services, including appointment of a legal runner and funding to conduct discovery. Several hearings were held concerning his preparation for the new trial motion in September and October 2010, and the sentencing date of July 29, 2010 was delayed. In October, the court indicated that the last continuance of the sentencing matters would be granted to October 22 and then to November 5, 2010.

On November 5, 2010, the new trial motion was argued and denied. When the court indicated it would proceed to sentencing, Barnhill replied that he did not know anything about sentencing and wanted to have counsel reappointed for that purpose. His request was denied and sentence imposed.

³ *People v. Lopez* (1977) 71 Cal.App.3d 568 (*Lopez*).

On appeal, Barnhill contends the trial court violated his Sixth Amendment rights to counsel, either by erroneously denying his motion to represent himself during trial (pt. II, *post*), and/or by denying his request to be relieved of self-representation at the sentencing stage (pt. III, *post*).

II

BARNHILL'S REQUEST FOR SELF-REPRESENTATION

A. Applicable Standards

Under the Sixth Amendment, a defendant in a criminal case has a right to represent himself or herself, provided the decision to do so is voluntarily and intelligently made. (*Faretta, supra*, 422 U.S. 806.) Such a right of self-representation is not absolute and is subject to certain limitations. To be valid, a request for self-representation must be made within a reasonable time prior to the commencement of trial and must be unequivocal. (*People v. Mayfield* (1997) 14 Cal.4th 668, 809.) An erroneous denial of such a timely, well supported request is reversible per se. (*People v. Dent* (2003) 30 Cal.4th 213, 217.) However, if the record shows the trial court had valid reasons for denying the request, a statement of denial for an improper reason is not reversible error. (*Id.* at p. 218.)

In *People v. Marshall* (1997) 15 Cal.4th 1, the Supreme Court explained the criteria to be applied in determining whether a defendant's *Faretta* request qualifies as valid and unequivocal: "The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the

defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*People v. Marshall, supra*, at p. 23; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1087.)

The trial court retains discretion to grant even an untimely request. (*People v. Burton* (1989) 48 Cal.3d 843, 852; *People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*).) In exercising its discretion, the court should consider such factors as 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.' " (*People v. Clark* (1992) 3 Cal.4th 41, 98-101 (*Clark*).) Review of such a ruling examines if abuse of discretion occurred. (*Windham, supra*, at p. 128.)

B. Sequence of Events; Ruling

To review the nature of Barnhill's initial requests, the record shows his counsel notified the court during the second full day of trial that Barnhill wanted to represent himself. The court construed the matter as a *Marsden* motion, held a hearing, and denied it. The court then inquired why Barnhill wanted to represent himself, and he responded that he thought he would do the best job and it would be in his best interest. The court

initially denied the request, then heard from defense counsel that at the conclusion of the previous day of trial (Friday, May 28, 2010), counsel now realized that Barnhill had been asking him during their discussions to notify the court that Barnhill wanted to represent himself, although counsel did not understand it at the time as being such a request.

The court pointed out that the prosecution had already presented testimony from an expert witness about various aspects of the sex trade, and one of the three victims had begun her direct testimony. Even though there had evidently been some confusion between Barnhill and his attorney, the court stated that either request was still untimely, because testimony had begun. Even if the court had been aware that there was any such previous request, it would not have been granted at that time. There was no basis to allow a finding of timeliness, to allow Barnhill to exercise a constitutional right to represent himself in this matter.

On the merits of the motion, the court discussed the legal representation that Barnhill had been provided, and found it to be proper, especially in light of the facts that were being presented in this case (they "don't give [Defense counsel] very much room to wiggle, so to speak"). The court stated, "In this matter, the Court also finds that there is not really a definitive reason as to why Mr. Barnhill wishes to represent himself . . . [the three] victims in this matter . . . may properly [be] cross-examine[d] [by counsel]" and that "*the Court will not give Mr. Barnhill a chance to allegedly victimize them again in front of the jurors.*" The request for self-representation was denied.

C. Issues Properly Presented

We first seek to clarify the scope of the issues properly presented for review by this record. Although Barnhill appears to be claiming an absolute right of self-representation, based upon his first request that was made at the close of the jury voir dire process to his attorney (which seems to be equated by him with the *Faretta* request expressly made during the next court day of trial), the record does not support such a claim, and no basis exists for reversal on that ground. (*Dent, supra*, 30 Cal.4th at pp. 217-218.) At the time the first *Faretta* requests were brought to the court on June 1, 2010, in connection with a *Marsden* motion, the court acknowledged defense counsel earlier may have been confused about what Barnhill wanted. However, even if the self-representation motion had been made the previous court day, it would not have been deemed timely, after jury voir dire and in limine proceedings were completed.

Because the record does not support any conclusion that Barnhill unequivocally and timely asserted an absolute right to self-representation, before the commencement of trial, we next examine the basis of the trial court's discretionary decision to deny the mid-trial request. (*Windham, supra*, 19 Cal.3d at p. 128.)

D. Application of Rules

Even accepting that his motion was not timely, Barnhill argues the trial court abused its discretion in denying it. He first complains that the court chiefly relied on an impermissible factor, when it commented that it did not intend to let Barnhill revictimize the three victims by cross-examining them, which would occur if he were allowed to act

as his own defense attorney. We agree with Barnhill that this was an inappropriate and intemperate comment, because the right of cross-examination is afforded equally to defense counsel or to defendants acting in propria persona. Nevertheless, the record reveals that the court had other, valid reasons for denying the request as untimely and unsupported, and the comment alone does not require or support reversal. (*Dent, supra*, 30 Cal.4th at p. 218.)

Specifically, the record shows the trial court was exercising its discretion in view of several relevant factors, including the related *Marsden* requests, and there are several supporting factors for its decision. The court was allowed to take into account the " 'quality of counsel's representation of the defendant,' " and " 'the reasons for the request.' " (*Clark, supra*, 3 Cal.4th at pp. 98-101.) In that connection, the court commented that Barnhill had not given any particular reason why he wanted to represent himself, although he thought he would do a better job because he knew the victim-witnesses. Later, his attorney cross-examined the witnesses and sought to impeach their credibility. Barnhill does not challenge the rulings on the *Marsden* motions. The trial court could reasonably have concluded his motives for seeking self-representation were suspicious or manipulative, even though Barnhill had not committed the kind of misconduct that will justify denial or termination of a self-representation request. (*Clark, supra*, at p. 117.)

Barnhill complains that the trial court did not expressly address the relevant criteria of "the length and stage of the proceedings, and the disruption or delay"

potentially caused by a grant of the request. (*Clark, supra*, 3 Cal.4th at pp. 98-101.) In view of the timing of the request, this court must take into account the context and circumstances surrounding the case. The trial court had allowed 11 days for this trial, several days of voir dire and trial proceedings had taken place, and the witnesses had already begun their testimony. The court could reasonably have considered those factors as weighing against the granting of self-representation at that time. (*Ibid.*)

Moreover, Barnhill cannot show prejudice in the sense that he would have been able to achieve a better result if he had been allowed to represent himself. He does not argue there was insufficient evidence, and in any case, exhibits were admitted that corroborated the testimony of the three victims, such as computer records and photographs. While represented by counsel, he had already admitted three prison priors, and he does not show that erroneous sentencing decisions were made about priors. A review of the relevant factors in light of this record convinces us that the court did not abuse its discretion in denying the untimely motion. (*Clark, supra*, 3 Cal.4th at p. 100.)

III

BARNHILL'S LATER REQUEST TO BE RELIEVED OF SELF-REPRESENTATION

A. Relevant Standards

At the November 5, 2010 hearing on the pending new trial motion and sentencing issues, Barnhill responded to the denial of his new trial motion by requesting reappointment of counsel for sentencing purposes. He argues the court erred in denying this request, and contends this was structural error that requires per se reversal analysis.

(*Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, 701, fn. 7; *Holloway v. Arkansas* (1978) 435 U.S. 475, 55; *People v. Stewart* (2004) 33 Cal.4th 425, 462.)

To determine if there was any error in this respect, we consider the relevant circumstances for analyzing the ruling on a pro per defendant's request, during trial, for revoking pro per status and obtaining reappointment of counsel, as those criteria have been identified in case law. Similar to the *Faretta* criteria, the trial court's analysis in this instance is discretionary and should include the: "(1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994; *People v. Lawrence* (2009) 46 Cal.4th 186, 192-193.)

The trial court's decision on such a request must take into account all the relevant facts and circumstances. (*People v. Smith* (1980) 109 Cal.App.3d 476, 484.) This decision is properly reviewed for abuse of discretion, and only if abuse occurred under that standard, constituting error, would the reviewing court be required to apply a more stringent standard of review. (*Lawrence, supra*, 46 Cal.4th at pp. 192-193.)

B. Sequence of Postverdict Events

The day before the verdict was returned, Barnhill made a second *Marsden* motion to relieve counsel, and it was denied. Additional *Marsden* and *Faretta* requests were made on June 25, 2010, and were denied. The court ruled that Barnhill's request to represent himself was interrelated with the *Marsden* motion and was equivocal in nature. Sentencing was set for July 29, 2010.

At a hearing on July 19, 2010, Barnhill again sought to have a *Marsden* motion granted and to represent himself. The court heard the *Marsden* matter and denied it. However, the court granted the request for self-representation, and confirmed that sentencing would take place July 29, 2010. However, Barnhill was preparing a new trial motion, so the case was continued several times, from September 3, to October 1, 6, and 7. Some of these hearings took place in the presiding department on his requests for discovery and for payment of defense costs.

On October 7, 2010, the trial court held another hearing to clarify the proceedings on the new trial motion, because its exhibits were missing and it was unclear which grounds were being asserted. After addressing those matters, the court set sentencing for October 22, 2010, as "one last continuance." Next, the probation hearing, sentencing, and new trial motion hearing were again continued to November 5, 2010.

At the November 5 hearing, the new trial motion was argued and denied. The court then began the sentencing process, but Barnhill replied that he did not know too much about sentencing, needed time to study the matter, and requested an attorney for the

sentencing part. The court pointed out that new trial motions were heard before sentencing, and sentencing would proceed, based on the numerous continuances that had been granted and agreed to by Barnhill. Barnhill professed his innocence, said he wanted to file an appeal, did not know what to say and did not know anything about sentencing.

The deputy district attorney argued that sentencing was appropriate at that time, and that Barnhill was attempting to manipulate the court in seeking another continuance. Sentence was imposed, including terms for the prison priors that had previously been admitted when Barnhill was represented by counsel.

C. Application of Rules

According to Barnhill, he was not prepared to represent himself at sentencing and had no idea what to do, and therefore, "his request for counsel at that stage was reasonable and should have been granted." However, the applicable law and the record do not support his claims. Once Barnhill decided to represent himself, he was held to the same standards as an attorney, as the court repeatedly told him throughout the postverdict proceedings. The court provided him with ancillary services, including a legal runner and funding to conduct discovery, and he prepared the new trial motion accordingly. He was present during the continuances of the other hearings and apparently made a decision to ignore the pending sentencing issues.

Barnhill argues that it was nevertheless prejudicial error not to reappoint him counsel for sentencing, and that counsel might have been able to obtain a better result, such as the striking of one of his three prison priors. However, there is no reasonable

basis in the record for those arguments. Barnhill had already admitted to the prison priors at the outset of trial, while represented by counsel. The court imposed the upper term on the first count of pimping, stating that the reasons for doing so included the defendant's prior criminal history, being on parole at the time of the incident, and being unable to successfully complete probation and parole. The court constructed the remainder of the sentence accordingly, and as already noted, Barnhill has not pointed to any error in that respect. Nor has he challenged the sufficiency of the evidence to support any of the convictions.

On this record, the trial court had an adequate basis to determine that this request for counsel was not only untimely, but in view of the history of the case, potentially manipulative in nature and not well grounded in the facts or the law. The trial court carefully explained its reasoning, based upon the numerous continuances that had been granted and agreed to by Barnhill, including the sentencing portion of the hearing. The court properly found the request for reappointment of counsel to be untimely, and had an adequate basis in the record for denying it. (*Dent, supra*, 30 Cal.4th at p. 218.) There was no error or abuse of discretion.

DISPOSITION

The judgment and sentence are affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.