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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ALLEN, Defendant and Appellant.	D060211 (Super. Ct. No. SCD230891)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

A jury convicted Richard Allen of transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a)); possession of cocaine base for sale (§ 11351.5); resisting a peace officer (Pen. Code, § 148, subd. (a)(1)); and destroying evidence (Pen. Code, § 135). The court found true four prison priors within the meaning of Penal Code section 667.5, subdivision (b); four prior convictions for violation of section 11352 (within the meaning of § 11370.2, subd. (a)), and a prior conviction for transportation of a controlled substance within the meaning of Penal Code section 1203.07, subdivision (a)(11).

Allen was sentenced to a determinate term of 11 years in prison.

Allen appeals contending the trial court prejudicially erred in denying his motion, on the day of trial to terminate his pro per status and again appoint defense counsel. We will find no abuse of discretion by the trial court based upon this record, which supports the trial court's view that this last minute request was but one in a series of delays and manipulation of the system by Allen. We will affirm the judgment.

STATEMENT OF FACTS

This appeal does not challenge either the admissibility or sufficiency of the evidence to support Allen's convictions. Accordingly, we will adopt the brief statement of facts from the appellant's opening brief:

On November 23, 2010, Narcotics Detective Joseph Harper called appellant in a sting operation and set up a meeting to purchase $100 worth of cocaine. Appellant arrived with his girlfriend at the agreed upon location and appellant and Detective Harper began talking. Appellant did not recognize Detective Harper and because he did not know him, appellant refused to sell him any drugs. Appellant drove away from the location and was almost immediately stopped by officers and arrested.

Appellant was searched at the scene and an officer felt a lump around the area of his buttocks. During a strip search at the police station officers found a plastic baggie in his pants. Detective Harper, who participated in the search, testified that the baggie smelled like cocaine base. Inside the bag were approximately 30 small rocks which Detective Harper believed was cocaine base. Detective Harper placed the cocaine base on the interview table and while he was pulling up appellant's pants, appellant bent

himself over and started eating the bag. Detective Harper tried to stop him but appellant swallowed the substance, which left a white residue around his mouth. Detective Harper used two DNA swabs to take samples of the residue.

Appellant began having seizures while in custody and was taken to the hospital. Appellant's urine tested positive for consumption of marijuana, sedatives, and cocaine. An expert testified for the prosecution that the seizures and medical condition was most likely caused by a reaction to cocaine ingestion or overdose.

A presumptive test completed by Detective Harper on one of the swabs was positive for cocaine base. Lab tests revealed the presence of cocaine base on the swab.

Officers also found $265 and a cell phone in appellant's clothing. The cell phone listed Detective Harper's calls in the history section and while Detective Harper was reviewing and monitoring the phone, he received two calls from a person asking to purchase $50 of cocaine.

In Detective Harper's opinion appellant possessed the drugs for purposes of sale.

The prosecution presented evidence that in 2004, appellant sold an undercover narcotics officer cocaine base, which he had hidden in a baggie in his pants.

DISCUSSION

A. Background

In November 2010, Allen was arraigned and the public defender was appointed to represent him.

On December 27, 2010, Allen substituted retained counsel in place of the public defender. Allen discharged his retained counsel on February 8, 2011, and the public

defender was again appointed to represent him. A week later Allen successfully moved the court under *People v. Marsden* (1970) 2 Cal.3d 118, to replace appointed counsel.

On February 15, 2011, Allen made his first request for self-representation. He declined however, to sign the "*Lopez* waiver" (*People v. Lopez* (1977) 71 Cal.App.3d 568) evidencing a waiver of his right to counsel. On February 25, 2011, Allen made his second request for self-representation and again refused to sign a written waiver of his right to counsel. At that hearing the court observed that Allen "has demonstrated [a] proclivity both to seek to substitute counsel as well as to manipulate the system whenever things don't go the way he thinks they ought to go . . . ." Allen's request for self-representation was denied and the case set for trial on April 25, 2011.

On March 21, 2011, the court granted defense counsel's request to be relieved and new counsel was appointed. On April 22, 2011, Allen made his second *Marsden* motion, which was denied. Then on May 6, 2011, Allen made his third motion for self-representation. This time he did make a knowing waiver of his right to counsel as required by *Faretta v. California* (1975) 422 U.S. 806 and signed the appropriate written waiver. The court granted Allen's request and also granted his request to set the trial for June 20, 2011.

When the case was assigned to the trial department (Judge Wells), Allen, representing himself, made a number of motions, including a motion to suppress evidence and to dismiss counts. The trial court denied those motions. Allen informed the court he was not ready for trial because he had not prepared for the actual trial. Evidently, Allen's plan was to get the case dismissed. If that did not happen, he planned to again ask for

counsel for the trial. Accordingly, Allen requested the court to again appoint counsel and continue the trial. The court denied Allen's request finding he was attempting to manipulate the system and that he did not have a valid reason to once again have counsel appointed.

B. Legal Principles

A defendant in a criminal case has a Sixth Amendment right to self-representation, provided the person makes a timely request and provides a knowing and intelligent waiver of the right to counsel. (*Faretta v. California, supra,* 422 U.S. at pp. 820-821; *People v. Windham* (1977) 19 Cal.3d 121, 124; *People v. Stanley* (2006) 39 Cal.4th 913, 931-932.) However, when a defendant who has elected self-representation decides to forego that status and again seek appointed counsel, the decision to grant or deny that request is within the discretion of the trial court. (*People v. Lawrence* (2009) 46 Cal.4th 186, 188 (*Lawrence*); *People v. Gallego* (1990) 52 Cal.3d 115, 163-164.) We therefore review such decisions under the abuse of discretion standard.

The court in *Lawrence* determined that review of the trial court's decision must include the totality of circumstances presented to the trial court. Five factors have been identified as proper considerations in evaluating a request to set aside pro per status. Those factors are: (1) the defendant's history of substituting counsel; (2) the reasons the defendant gives for requesting reappointment of counsel; (3) the length and stage of the trial court proceedings; (4) the disruption or delay that might reasonably result from granting the request; and (5) the likelihood the defendant would be effective in defending against the charges if required to proceed as his or her own attorney. (*Lawrence, supra,*

46 Cal.4th at p. 192.) While the court has set out criteria for evaluating requests to be relieved from pro per status, the court recognized they are no absolutes because the trial court's decision must be evaluated based on the totality of circumstances. (*Id.* at p. 196.)

C. Analysis

We have set out in tedious detail the history of the case as it relates to representation by counsel in order to provide context for this discussion. Two different trial court judges found that Allen was attempting to manipulate the system. Allen denies that in his appeal. However, one of the best indicators of Allen's motives may be found in his statement, made in the trial court when he was asking for delay and new counsel. Allen said: "Your Honor, the thing is, you asked me was I ready for trial earlier, and I told you no, I wasn't, because I based everything on these motions. Well, for trial itself, I was going to give up my right as pro per and have counsel reappointed."

Allen's somewhat remarkable statement indicates that at the time he asked for, and was granted self-representation, he never intended to represent himself at trial. Although he was very thoroughly warned of the consequences and responsibilities when he made his third request, Allen never intended to actually go to trial without counsel. If we consider the timing of his request for reappointment of counsel, his statement of reasons and his history in this case, we can certainly understand why a reasonable trial judge would think Allen was manipulating the system. In fact, it would be difficult to reach a contrary conclusion.

Allen was very experienced in the criminal justice system, having four prior prison commitments. He tried to destroy the evidence when arrested by eating it. He was facing

a lengthy prison sentence if convicted and appears to have taken every opportunity to delay the process. Perhaps most telling, however, is the fact he made three motions for self-representation, although he refused to make an intelligent waiver of his right to counsel on the first two attempts. Once being granted the right, and given the trial date he requested, he waited until trial and then advised the trial judge that he never intended to actually try the case, because he was only going to deal with the motions. Simply put, Allen was playing the system in an attempt to avoid what would be his fifth prison commitment. The trial court was not required to allow that conduct. Applying the totality of circumstances set forth in *Lawrence, supra,* 46 Cal.4th at page 192, we are satisfied there was no abuse of discretion in this case.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.