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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WAYNE TRUVOLL EVANS,

Defendant and Appellant.

D060227

(Super. Ct. No. SCD229300)

APPEAL from an order of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed.

Defendant William Evans pleaded guilty to forging a financial document unlawfully and with the intent to defraud (Pen. Code, § 475, subd. (a)). On appeal, Evans contends his pretrial request to represent himself was erroneously denied and that the

denial was constitutional error requiring reversal of his conviction without analysis of prejudice.<sup>1</sup> We reject this contention and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Evans was originally represented by the Public Defender's Office. On September 28, 2010, Evans requested a *Marsden*<sup>2</sup> hearing. The court granted Evans's motion and appointed the Alternate Public Defender (APD) to replace the Public Defender's Office as Evans's counsel.

On November 2, 2010, Evans made a *Marsden* motion to replace counsel appointed from the APD. The court held a hearing on the request, but denied the motion.

On December 14, 2010, Evans made another *Marsden* motion to replace his appointed counsel from the APD. After a hearing, the court again denied the motion. Evans then immediately requested to represent himself. Evans filled out and signed an "Acknowledgement Regarding Self-Representation and Waiver of Right to Counsel (*Faretta/Lopez* waiver)" and the court granted Evans's request.

On December 22, 2010, Evans indicated he wanted to give up his pro per status and have an attorney from the Office of Assigned Counsel (OAC) appointed to represent him. Evans told the court, "I believe last time you was going to appoint me OAC because I think MacNeil [the prosecutor] said I had a problem with the last." The court agreed,

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<sup>1</sup> Denial of a defendant's request to represent himself may be challenged on appeal notwithstanding a subsequent guilty plea. (*People v. Marlow* (2004) 34 Cal.4th 131, 146-147.)

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

stating "I think we agreed if the attorney -- if counsel is going to be appointed then it either goes through OAC, because we thought both the Public Defender and the Alternate Public Defender would be conflicted." The court granted Evans's request for counsel and scheduled a hearing for December 28 "to affirm the appointment of counsel through the [OAC]."

On December 28, 2010, representatives of both the OAC and the APD appeared on behalf of Evans before a different judge than the week before. To clarify who should represent Evans, the parties were sent back to the judge who presided over the December 22 proceedings. The court concluded that appointing the OAC was a mistake and that the APD would be the appropriate agency at that stage. The court confirmed counsel from the APD as the correctly appointed counsel for Evans. Evans immediately objected, stating that he would rather represent himself. The court denied Evans's request, stating that it was "too late" and that Evans was "gaming the system." Evans argued that he only gave up his pro per status "on the grounds [he] get OAC," to which the court responded that Evans relinquished his pro per status and did not have the right to choose who the court appointed to represent him.

Evans proceeded through the rest of the litigation process, including at least four more court appearances, represented by counsel from the APD's office. During that time, Evans did not bring a *Marsden* motion or make a request to discharge his counsel and proceed pro se. On July 7, 2011, while being represented by the APD's office, Evans pleaded guilty to forging a financial document unlawfully and with the intent to defraud and was sentenced to three years in prison, concurrent with his sentence in a related case.

On appeal, Evans insists that his request to try his case pro se was not untimely, equivocal, made for the purpose of delay, or otherwise improper. Though Evans's request, made a month before trial was scheduled to begin and without an accompanying request for a continuance, was timely, a thorough examination of the record shows it was not unequivocal.

## DISCUSSION

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to represent himself or herself without the assistance of counsel. (*Faretta v. California* (1975) 422 U.S. 806, 819.) Because a criminal defendant also has a constitutional right to effective assistance of counsel, a right that secures the protection of many other constitutional rights, "courts must draw every inference against supposing that the defendant wishes to waive the right to counsel." (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*)).) When a defendant voluntarily and intelligently makes a timely, unequivocal assertion of the right to proceed pro se, however, the court must honor that request regardless of how unwise the decision may seem. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*)).)

The requirement that a *Faretta* motion be timely is meant to prevent a defendant from unjustifiably delaying trial or obstructing the orderly administration of justice, not to limit the defendant's constitutional right to self-representation. (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) For that reason, courts have generally found *Faretta* motions to be timely when made before the start of trial and without an accompanying request for a continuance. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 593 (*Nicholson*) [finding

only two reported decisions denying *Faretta* motions as untimely when unaccompanied by requests for continuances and noting that both decisions were reversed].)

The requirement that a *Faretta* motion be unequivocal "is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation." (*People v. Williams* (2003) 110 Cal.App.4th 1577, 1586 quoting *Marshall, supra*, 15 Cal.4th at p. 22.) To determine whether a request was unequivocal, a reviewing court should examine a defendant's words and conduct to decide whether that defendant truly desired to give up counsel and represent himself or herself. (*Marshall, supra*, at pp. 25-26.) "Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration." (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002 (*Lewis*).) A *Faretta* motion made "in passing anger or frustration" or "to frustrate the orderly administration of justice" is not unequivocal and may be denied. (*Marshall, supra*, at p. 23.) A *Faretta* motion made immediately following an unsuccessful *Marsden* motion may be seen as equivocal if the circumstances show the defendant's true desire was actually different representation and not self-representation. (See *People v. Valdez* (2004) 32 Cal.4th 73, 99 [defendant's single reference to right of self-representation, made immediately following denial of *Marsden* motion, supports conclusion that defendant did not make an unequivocal *Faretta* motion]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1203-1206 [request was equivocal where defendant made clear he did not want to be represented by his current counsel and was

requesting self-representation because the court would not replace his attorney with a different public defender].)

To determine whether the defendant invoked the right to self-representation, we review the entire record, including facts following the *Faretta* ruling, de novo. Even if the trial court denied the request for an improper reason, if the record as a whole establishes the request would properly be denied on other grounds we will nonetheless affirm the judgment. (*People v. Dent* (2003) 30 Cal.4th 213, 218.)

The court's stated grounds for denying Evans's *Faretta* request were that it was "too late" and made for the purpose of "gaming the system." If by stating the request was "too late" the court meant that it was "untimely," that basis for rejecting the request was improper. Evans did not indicate that he would require a continuance if his request was granted, nor is there any other sign that the request was made for the purpose of delay. The California Supreme Court in *Windham, supra*, 19 Cal.3d 121, made clear that the requirement of a timely request should not limit a defendant's right to self-representation where it does not delay a trial or obstruct justice, and the *Nicholson* court emphasized that a *Faretta* request unaccompanied by a continuance request should be accepted. (*Nicholson, supra*, 24 Cal.App.4th 584 at p. 593.) Here, the record does not show any delay would have resulted had Evans been permitted to represent himself, so we conclude that his request was not untimely.

Viewing Evans's request in light of his actions and the court's rulings, rejection of his motion on the basis that Evans was attempting to manipulate the system makes sense. In the preceding months, Evans had difficulties with attorneys appointed for him from the

Public Defender's Office and the APD's office. After successfully dismissing the attorney from the Public Defender's Office through a *Marsden* hearing, Evans twice brought unsuccessful *Marsden* motions against the attorney from the APD before requesting permission to represent himself. Eight days later, Evans changed his mind, requesting an attorney be appointed for him. The next week, when Evans was appointed an attorney from the APD rather than from the OAC, he changed his mind again and requested to proceed pro se.

Evans's actions indicate that he was frustrated with his counsel and the court and that he was not unequivocal in his request to represent himself. Rather, as the court implied by stating that Evans did not have the right to choose his court-appointed representation, the record strongly suggests that Evans did not want to represent himself, he wanted the court to appoint counsel from the OAC. Since the California Supreme Court indicated in *Lewis, supra*, 39 Cal.4th 970, that switching between requests for counsel and for self-representation could be a sign of equivocation and that a request made out of frustration could be equivocal, we conclude the trial court was correct in finding that Evans's renewed request for self-representation, made immediately after being denied the appointed attorney he wanted, was not unequivocal. This interpretation of Evans's actions is strengthened by the fact that he did not renew his *Faretta* motion at a later date or otherwise show dissatisfaction with his appointed attorney despite his proclivity to do so with his previously appointed attorneys.

Examined as a whole, Evans's statements and actions did not represent a sincere invocation of the right to self-representation. Rather, they were made out of frustration

and in an attempt to "game the system" to secure appointed counsel of his choice.

Accordingly, we conclude that the *Faretta* request was not unequivocal and was properly denied.

#### DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.