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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN LESLIE DENNIS,

Defendant and Appellant.

E052695

(Super.Ct.Nos. FSB700290,
FVI026358 & FWV 040317)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M.

Christianson, Judge. Affirmed.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Steven Leslie Dennis appeals from judgment entered following jury convictions for seven robberies and two attempted robberies. (Pen. Code, §§ 211, 664.)¹ The trial court dismissed the firearm allegation as to one of the robberies, after the jury deadlocked on the allegation. Following a bifurcated trial on defendant's priors, the trial court found defendant had two prior strike convictions (§ 667, subds. (b)-(i)) and two prior serious felony convictions (§ 667, subd. (a)(1)), and had served two prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to 237 years to life in state prison.

Defendant contends the trial court abused its discretion in threatening to revoke his pro. per. status when he requested additional time to prepare for the hearing on his posttrial motions, beyond the two-week period already agreed upon. Defendant also contends the trial court committed reversible error when it told him that, if he proceeded with his motion for new trial, which was based on ineffective assistance of counsel (IAC), he would have to waive his attorney-client privilege as to everything he had told his attorney. We conclude the trial court did not commit reversible error and affirm the judgment.

II

FACTS

Since the issues raised in this appeal do not turn on the factual circumstances of

¹ Unless otherwise noted, all statutory references are to the Penal Code.

the charged crimes, it is unnecessary to summarize the facts of each of defendant's numerous crimes. Over a two-week period, between January 9, 2007, and February 14, 2007, defendant committed seven bank robberies and two attempted bank robberies. When he committed the bank robberies at various bank branches throughout San Bernardino County, he usually approached a bank teller, held up a paper or cardboard sign demanding "fifties and hundreds," took the money handed to him, and left. The United States Marshal's Fugitive Task Force arrested defendant in Arizona after a pursuit. As to each bank robbery, the bank teller identified defendant as the bank robber. Defendant testified at trial that he did not rob or attempt to rob any of the nine banks.

III

SELF-REPRESENTATION

Defendant contends the trial court erred in ruling that it would not allow defendant to represent himself unless he agreed to proceed with his posttrial motions and sentencing in two weeks. After defendant agreed and the court permitted defendant to represent himself, the trial court threatened to revoke defendant's pro. per. status when he requested additional time to prepare for the hearing on his motions. Defendant argues that these circumstances, in which he was not given additional time to prepare, violated his rights to a fair hearing, due process, and adequate time to prepare his defense motions.

Under the Sixth Amendment to the United States Constitution, a criminal defendant has a constitutional right to self-representation if he voluntarily and intelligently elects to represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 818-819; *People v. Windham* (1977) 19 Cal.3d 121, 124.) When a defendant elects to proceed

to trial represented by counsel and the trial has commenced, it is thereafter within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and represent himself. (*Windham*, at pp. 124, 128.) In exercising this discretion, “the trial court shall inquire *sua sponte* into the specific factors underlying the request Among other factors to be considered by the court in assessing such requests made after the commencement of trial are 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.” (*Ibid.*)

Defendant relies on *People v. Miller* (2007) 153 Cal.App.4th 1015 (*Miller*), for the proposition that the trial court abused its discretion in conditioning self-representation on agreeing to proceed with his motions and sentencing on December 17, 2010.

Defendant’s reliance on *Miller* is misplaced. In *Miller, supra*, the defendant requested to represent himself after the jury had returned its verdict and the trial court had denied his motion for new trial. (*Id.* at p. 1023.) The trial court in *Miller* ruled that the defendant was not entitled to self-representation as a matter of right because his request was not made before commencement of trial. (*Id.* at p. 1022.) The *Miller* court reversed the trial court, concluding that the defendant’s request for self-representation “was not made during trial for the simple reason that sentencing occurs posttrial.” (*Id.* at pp. 1023-1024.) Sentencing is “a proceeding separate and distinct from the trial.” (*Id.* at p. 1024.) Nevertheless, according to *Miller*, a defendant’s “request for self-representation at sentencing must be made within a reasonable time prior to commencement of the

sentencing hearing. (See *Mayfield* [(1997) 14 Cal.4th 668,] 810 [assuming postverdict self-representation motion may be timely if made a reasonable time before sentencing].)” (*Miller*, at p. 1024.)

In *Miller, supra*, 153 Cal.App.4th 1015, the defendant made his motion for self-representation two months before the sentencing hearing and the defendant told the court that he would be prepared at the time of sentencing. The *Miller* court held that the defendant had an absolute right to represent himself at sentencing because the request was made a reasonable time before sentencing. (*Id.* at p. 1024.) Here, unlike in *Miller*, the trial court granted defendant’s request to represent himself. Furthermore, defendant’s request to represent himself was not made well in advance of the motion and sentencing hearing.

The issue here is whether the trial court reasonably conditioned defendant’s self-representation on defendant agreeing to proceed with his posttrial motions and sentencing in two weeks, on December 17, 2010. We conclude there was no abuse of discretion or violation of defendant’s rights since defendant’s self-representation request was not timely and he did not provide any valid justification for the delay in making his request. The jury returned a guilty verdict against defendant on August 25, 2010. The trial court set defendant’s sentencing hearing on October 8, 2010. During the sentencing hearing on October 8, 2010, defense counsel informed the court he would be filing a *Romero* motion.² The motion hearing and sentencing was continued to December 3, 2010.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

It was not until the hearing on December 3, 2010, that defendant requested to represent himself. At that time, defendant had already prepared, in pro. per., numerous motions, which he filed that day. The motions included motions to set aside the verdict, to vacate the judgment, and for a new trial based on IAC. The trial court continued the *Romero* motion and sentencing to December 17, 2010, and set defendant's new motions on that same day. Despite defendant's delay in requesting to represent himself, the trial court agreed to grant his request but made it clear that defendant's self-representation was conditional upon defendant agreeing to proceed with his motions and sentencing on December 17, 2010. The court told defendant, "So before I grant your pro per status I'm telling you that you will need to be ready to go on all those possibilities [motions and sentencing] on December 17th. You understand that?" Defendant said he understood and the court granted him pro. per. status. But then, at the end of the hearing on December 3, 2010, the trial court asked defendant if he agreed to the next hearing date of December 17, 2010, and defendant requested "more time." Defendant explained: "I only get four hours a week and I'm going to have to study some case law and this case is a pretty serious case, . . ." The court responded that defendant had already agreed to proceed with his motions on December 17, 2010, and therefore the court was going to revoke his pro. per. status on the ground defendant was representing himself for the purpose of delaying the proceedings. The court reminded defendant that the court had just told him he was permitted to represent himself but only if he was willing to proceed on December 17, 2010, and defendant had agreed to this. Defendant then said he was willing to proceed on December 17, 2010.

A trial court is not required to grant a continuance after granting a request for self-representation, when a request for self-representation is untimely without good reason. (*People v. Hill* (1983) 148 Cal.App.3d 744, 759 (*Hill*)). “[T]he case law recognizes a pro. per. defendant’s entitlement to a reasonable continuance upon request.” (*Ibid.*) In determining whether the trial court abused its discretion in denying defendant a continuance, “the court should consider whether a continuance is reasonably necessary to self-representation, not merely whether a defendant, in the determination to proceed in pro. per., has acquiesced in waiving a continuance.” (*Id.* at pp. 759-760.) When denial of a requested continuance impairs the defendant’s fundamental right to prepare a defense, the court has abused its discretion. (*People v. Fontana* (1982) 139 Cal.App.3d 326, 333.)

Defendant argues it was unfair and unreasonable to condition his pro. per. status on defendant agreeing to proceed with his motions on December 17, 2010. Defendant claims he needed more time to prove his attorney was ineffective and he misunderstood the effect his refusal to waive the attorney-client privilege would have on his motion. Defendant asserts that he was entitled to a reasonable continuance to enable him to prepare, and refusal to continue the proceedings violated his right to represent himself effectively and to a fair trial: “‘To deny him that opportunity would be to render his right to appear in propria persona an empty formality, and in effect deny him the right to counsel.’ [Citations.]” (*Hill, supra*, 148 Cal.App.3d at p. 756, quoting *People v. Maddox* (1967) 67 Cal.2d 647, 653.)

The determination of whether the trial court should grant a continuance rests

within the trial court's sound discretion, "although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare."

(People v. Sakarias (2000) 22 Cal.4th 596, 646.) By this standard, there was no abuse of discretion. Defendant's request for self-representation was not timely. Defendant did not provide any justification for delaying his request to represent himself until the motion and sentencing hearing on December 3, 2010. Over four months had passed since the guilty verdict was entered in August 2010. Nevertheless, the trial court permitted defendant to represent himself, conditional upon agreeing to proceed with his motions and sentencing in two weeks. Defendant agreed to this but then requested an additional continuance.

The trial court's denial of an additional continuance was reasonable. The trial court had already continued the sentencing proceedings several times and defendant had already prepared his motions. He filed them on December 3, 2010, and the court gave defendant two weeks to prepare for oral argument. Under such circumstances, the trial court could reasonably conclude defendant's request to represent himself and request to continue the proceedings more than two weeks was merely a ploy to delay sentencing. The trial court did not abuse its discretion in conditioning defendant's self-representation on defendant agreeing to proceed with the hearing on his motions in two weeks.

IV

WAIVER OF ATTORNEY-CLIENT PRIVILEGE

Defendant contends the trial court committed reversible error by telling defendant that if he wished to proceed with his posttrial motions based on IAC, he would have to waive his attorney-client privilege as to everything he had said to his attorney.

A. Procedural Facts

On December 17, 2010, the trial court heard defendant's various posttrial motions, which included a motion "to set aside conviction," a motion "to set aside the verdict," and a "motion to vacate judgment." These motions, in effect, served as a motion for new trial. Defendant also filed a "motion for pretrial discovery of exculpatory evidence (Brady motion)." On the day of the hearing on defendant's motions, defendant filed several additional motions, including a "motion for new trial," which contained conclusionary allegations that his rights to due process and a fair trial were violated. Defendant prepared the motions himself and represented himself at the hearing on the motions. All of the motions were heard on December 17, 2010.

Defendant asserted that the verdict should be set aside because his trial attorney failed to provide effective assistance of counsel. Defendant based his motion to vacate judgment on allegations that the defense investigator retained by defendant's attorney, Joel Agron, intimidated defense witnesses and failed to interview favorable witnesses. The investigator interviewed Kathleen O'Bannon, who told the investigator defendant was at her house during the commission of one of the crimes charged against defendant. This alibi evidence was not discovered until after the trial because the investigators badgered the witness. Defendant further stated in his discovery motion that, according to defense witness O'Bannon, the defense investigator harassed and confused her, and the investigator misstated what she said.

During the hearing on defendant's motions on December 17, 2010, the trial court noted: "Mr. Dennis, a couple of the issues that you raised in your remaining motions

have to deal with either ineffective assistance of counsel or some improprieties that you allege that occurred on behalf of the public defender representation, specifically their investigators, some misconduct you claim that their investigator did in terms of interviewing one of the witnesses. In order to proceed with those two issues on these motions you would have to waive and give up your right to your attorney/client privilege in that regard so that the public defender's office would be able to respond to those issues. [¶] So I'm asking you at this time, are you willing to waive and give up your right to attorney/client privilege as to those issues so that the public defender's office and Mr. Agron can respond to those?" Defendant said, "No." The trial court then stated that "[t]hose issues then are withdrawn. And there is no waiver to the right of attorney/client privilege."

With regard to defendant's motion to vacate judgment, the court noted the motion mentioned the interviewing of witnesses and, since defendant had already stated he did not wish to waive the attorney-client privilege, the motion was denied. As to defendant's motion for new trial, the court noted it also was based on there being alibi witnesses. The court asked defendant if he was still not willing to waive his attorney-client privilege. Defendant asked the court: "If I waive it is it on that issue or with respect to anything I've ever said?" The court responded: "Depends on what comes up in your argument. But you're waiving your right to have it kept confidential in terms of all things that you have said have been done indirectly in the case." Defendant replied, "Oh, yeah. I can't waive it." The court then denied defendant's motion for new trial. With regard to defendant's "motion to set aside conviction," the court noted one of the issues was IAC,

and that issue was withdrawn because defendant did not waive his attorney-client privilege. The court then denied the motion.

B. Applicable Law

Defendant argues the trial court erroneously advised him that, if he went forward with his motion for a new trial, his attorney-client privilege would be waived as to everything his attorney said to defendant, whereas the privilege actually was waived only as to matters raised in his motions.

Under Evidence Code section 952, a “confidential communication” falls within the attorney-client privilege when “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.” As the holder of the privilege, the client may refuse to disclose and prevent others from disclosing confidential communications. (Evid. Code, §§ 953, 954; *Solin v. O’Melveny & Myers* (2001) 89 Cal.App.4th 451, 456-457.) The privilege safeguards the confidential relationship between the client and his attorney and allows the two to engage in full and open discussion about the facts and legal strategies. (*Id.* at page 457.)

Evidence Code section 958 provides an exception to the attorney-client privilege. Under Evidence Code section 958, “[t]here is no privilege under this article as to a

communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.” In other words, ““if the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged.’ [Citations.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 691.) This applies to claims of IAC. “When the defendant asks the trial court to set aside a jury verdict on the ground of ineffectiveness of counsel, he waives his attorney-client privilege as to matters he places in issue. [Citation.]” (*People v. Dennis* (1986) 177 Cal.App.3d 863, 873.)

Defendant complains that the trial court misled him into believing he would have to waive his attorney-client privilege as to everything he said to his attorney. Defendant argues the trial court erred in not explaining that the waiver was limited to issues raised in his motions and that any disclosures of privileged statements were subject to use immunity. As to use immunity, the court in *Dennis* explained: “As we have noted, on motion for a new trial the defendant bears the burden of establishing ineffectiveness of counsel and this burden cannot be met by a silent record; consequently the defendant will feel compelled to make disclosure of information. The law clearly favors such disclosure. Trial courts have the duty to ensure that defendants are accorded due process of law, and they are particularly well suited to rule on the adequacy of counsel in cases tried before them. (*People v. Fosselman* [(1983) 33 Cal.3d 572,] 582.) And justice will be expedited by presenting the issue of counsel’s effectiveness to the trial court on motion for a new trial. (*Ibid.*) These factors compel the conclusion that defendant must be granted use immunity for disclosures he may make in support of a motion for a new

trial on grounds of ineffectiveness of trial counsel.” (*People v. Dennis, supra*, 177 Cal.App.3d at p. 876.)

C. Discussion

Defendant complains that he withdrew his IAC-based motions because the trial court misled him into believing that if he proceeded with his motions, he would be required to waive the attorney-client privilege as to everything he said to his attorney. While the trial court did not explain to defendant in detail the nuances of the attorney-client privilege and, at one point, the trial court’s response to defendant’s inquiry regarding the privilege may have been somewhat unclear, the trial court’s statements regarding the privilege do not constitute reversible error. First, defendant voluntarily chose to represent himself, thus exposing himself to the vagaries and complexities of the law, at his own peril. Second, the trial court was not required to advise defendant on the law, particularly as to the application of the attorney-client privilege. (*People v. Barnum* (2003) 29 Cal.4th 1210, 1222.)

Third, the trial court’s statements regarding waiver of the attorney-client privilege were not incorrect but, rather, were generalized legal statements. The court was not required to go into greater detail. It was defendant’s responsibility to understand the applicable law. The court correctly told defendant that, in order to proceed with his motions based on IAC, he was required to waive his attorney-client privilege “in that regard so that public defender’s office would be able to respond to those issues.”

After defendant told the court he did not want to waive his attorney-client privilege, the court deemed withdrawn the IAC issues raised in defendant’s motions to set

aside the verdict, set aside the conviction, and vacate judgment. As to defendant's motion for new trial, the court again told defendant that if he wanted to proceed with the motion, he would have to waive the attorney-client privilege because defendant claimed it was also based on his attorney's failure to produce alibi witnesses at trial. The court told defendant, in response to defendant's inquiry as to the scope of the waiver, that the extent of the waiver depended on what he argued and warned defendant that the waiver would include his statements made to his attorney even as to indirect acts in the case. While this statement was somewhat unclear, defendant did not ask for any further clarification and declined to waive the privilege. Any misunderstanding defendant had as to the scope of the attorney-client privilege and exceptions was because of defendant acting at his own peril in representing himself.

We conclude the trial court's statements regarding the attorney-client privilege did not constitute reversible error. The trial court had no obligation to ensure that defendant fully understood the application of the attorney-client privilege to his own circumstances. Furthermore, the trial court did not misstate the law. The court told defendant the attorney-client privilege was inapplicable to issues raised in his motions founded on IAC, and the trial court's further statement elaborating that waiver included anything "done indirectly in the case" was accurate as well, when taken in the context of the totality of the court's statements regarding the attorney-client privilege.

V

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P.J.

MILLER
J.