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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.

E.S.,

Defendant and Appellant.

E061711

(Super.Ct.No. FELSS1401410)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Lorenzo R.

Balderrama, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant E.S. appeals from a judgment finding him to be a mentally disordered offender (MDO) under Penal Code section 2970 et seq.¹ Defendant contends the trial court erred in permitting him to represent himself because the evidence did not support a finding that he was competent to do so. In his reply brief, he adds the contention that the trial court erred in failing to rule on his motion to represent himself. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

Defendant's commitment offense, aggravated battery on a peace officer (§ 4501.1, subd. (a)), occurred in November 2002 when defendant spat on two correctional officers from inside his prison cell. He was admitted to Coalinga State Hospital in 2009 as an MDO, and the San Bernardino County District Attorney's Office has filed successive annual petitions to continue his commitment.

On March 25, 2014, the San Bernardino County District Attorney's Office filed its seventh petition for defendant's continued commitment as an MDO. A mental health evaluation was attached to the petition; the conclusion of the evaluation was that defendant does have a severe mental disorder as defined by section 2962. A public defender was appointed to represent defendant.

On June 16, 2014, defendant filed, in propria persona, a document titled "Motion Requesting for an Appeals Bond." A status conference took place on July 18, 2014; the

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

minute order states the hearing on the petition was “continued at request of Public Defender. [¶] For possible *Marsden*^[2] motion.” (Capitalization omitted.) A hearing was set for August 1, 2014.

On July 21, 2014, defendant filed, in propria persona, a motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806. The record contains no indication that the trial court acted on the motion.

The recommitment hearing took place on August 1, 2014. The trial court stated that a public defender was present representing defendant. The trial court asked the public defender: “[W]hat would you like to do on this case?” Defense counsel replied: “Your Honor, at this point [defendant] would like to withdraw his opposition. He would like to pursue other avenues of recourse that do not include trial at this time. But we’ll discuss it next year.” The trial court asked defendant: “[I]s it correct that you want to withdraw your opposition to this petition, mentally disordered offender petition, pursuant to [section] 2970? Is that correct, sir?” Defendant responded: “Yes, your Honor.” The trial court informed defendant that he had a right to a jury trial and “to have Ms. Israel as your attorney present evidence and cross-examine the [district attorney]’s witnesses. But on balance you wish to withdraw your opposition to the petition; is that correct?” Defendant responded: “I have, because I’m going to go to the [S]tate [B]ar on some other avenues because what’s going on—” He continued: “I had talked to Sacramento before about the [section] 2972 situation. I was going to come and represent myself, but I

² *People v. Marsden* (1989) 2 Cal.3d 118.

didn't know what type of judge I was going to be in front of. I was trying to see what the issue was. So what I'm going to do is go to the [S]tate [B]ar and see what's the avenue, 'cause I talked to Sacramento on this issue. [¶] . . . [¶] . . . And they was talking about the department—the state secretary—Secretary of State. I did my investigation when I was up there, and they said they don't have no—they don't have nothing to file under the MDO act.”

The trial court again asked defendant if he wanted to withdraw his opposition, and he responded: “Yeah, I have to, yeah.” The trial court asked defense counsel if she joined in that, and she responded affirmatively.

The trial court found that defendant suffered from a severe mental disorder that was not in remission and that could not be kept in remission without continued treatment. The court further found that as a result of that disorder, defendant presented a substantial danger of physical harm to others. The trial court ordered defendant's continued commitment until October 10, 2015. The court set the matter for a review hearing in February 2015.

III. DISCUSSION

A. *The Trial Court Did Not Grant Defendant's Faretta Motion*

Defendant contends the trial court permitted him to proceed in propria persona at the MDO recommitment hearing. He asserts the record does not indicate that the trial court considered defendant's ability to represent himself, and the record does indicate he

was not competent to do so, and the trial court therefore abused its discretion in permitting him to exercise his *Faretta* rights.

Even at an MDO commitment hearing, a timely and unequivocal invocation of *Faretta* rights should generally be granted if made with an appreciation of the risks involved. (*People v. Williams* (2003) 110 Cal.App.4th 1577, 1592.) Here, however, the record does not indicate that defendant was permitted to represent himself. He appeared with defense counsel at the recommitment hearing. While the trial court allowed defendant to address the court and questioned him as to whether he acquiesced in withdrawing his opposition to the petition, nothing in the record indicates that the trial court impliedly allowed defendant to represent himself.

B. The Record Indicates Defendant Abandoned His Faretta Motion

In his reply brief, defendant changes tactics and asserts, for the first time, that the trial court erred in failing to rule on his timely *Faretta* motion or in denying the motion without informing defendant. Defendant argues that the trial court never asked at the recommitment hearing if he still wished to represent himself, although the record indicates he was not happy with his attorney—he twice told the trial court he was going to go to the State Bar because of what was going on. When again asked if he wanted to withdraw his opposition to the recommitment petition, defendant responded: “Yeah, I have to, yeah.”

When an appellant raises an issue for the first time in a reply brief, we generally consider it forfeited. (See, e.g., *People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9.) In any

event, defendant's claim is meritless. “““In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them.””” (*People v. Braxton* (2004) 34 Cal.4th 798, 814.) Thus, a *Faretta* motion “may be waived or abandoned” by subsequent conduct. (*People v. Dunkle* (2005) 36 Cal.4th 861, 909, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22; *People v. Weeks* (2008) 165 Cal.App.4th 882, 887.) In *People v. Stanley* (2006) 39 Cal.4th 913, for example, the court stated that the defendant had abandoned his assertion of *Faretta* rights by later accepting several appointed counsel to represent him without renewing his request to represent himself. (*People v. Stanley, supra*, at p. 933.) Similarly, in *People v. Jones* (2012) 210 Cal.App.4th 355, 362 [Fourth Dist., Div. Two], this court held that a defendant had abandoned a handwritten *Marsden* motion by “never again [bringing] the matter to the trial court's attention” We observed that the defendant has “the duty of bringing his motion to the trial court's attention at a time when the oversight could have been rectified.” (*People v. Jones, supra*, at p. 362.) We conclude that defendant did not unequivocally renew his assertion of *Faretta* rights at the commitment hearing, and he therefore waived the issue.

Finally, “[b]ecause the right to counsel in MDO proceedings is a statutory, not constitutional right, we will reverse only if it is more probable than not that [the defendant] would have received a better result had he been allowed to represent himself.”

(*People v. Williams, supra*, 110 Cal.App.4th at pp. 1592-1593.) Defendant himself concedes it would have been error for the trial court to grant the *Faretta* motion because he was incompetent to represent himself—in fact, that was originally his primary contention on appeal. There is no likelihood the result would have been different had defendant represented himself.

IV. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.