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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY MCCLELLAN,

Defendant and Appellant.

F063262

(Super. Ct. No. BF131041A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Charles R. Brehmer, Judge.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Kane, J. and Detjen, J.

Pursuant to a plea agreement, appellant, Gregory McClellan, representing himself, pled no contest to failure to update sex offender registration upon change of address (Pen. Code, § 290.013, subd. (a)),¹ failure to register as a sex offender (§ 290, subd. (b)), and delaying, resisting or obstructing a peace officer (§ 148, subd. (a)(1)), and admitted allegations that he had suffered two “strikes”² and that he had served three separate prison terms for prior felony convictions (§ 667.5, subd. (b)). Thereafter, appellant moved to withdraw his pleas on the ground that the court, prior to taking appellant’s plea, did not adequately advise him of his right to counsel. The court denied the motion, struck one of appellant’s strikes, and imposed a prison term of eight years.

Appellant filed a timely notice of appeal in which he requested that the court issue a certificate of probable cause. The court granted that request.

On appeal, appellant argues that the court did not “fully inform” (§ 1018) him of his right to counsel at the time he entered his no contest pleas, and therefore the court erred in denying his plea withdrawal motion. We affirm.

PROCEDURAL BACKGROUND

A criminal complaint was filed on February 19, 2010, charging appellant with the instant offenses and setting forth the strike and prior prison term enhancement allegations. Appellant appeared in court that same day. The minute order for that proceeding states the court “advised [appellant] as to the perils, pitfalls, dangers and disadvantages of self-representation,” and that appellant thereafter “waived counsel and knowingly and intelligently elected to represent himself,” entered pleas of not guilty, and denied the special allegations. (Unnecessary capitalization omitted.)

¹ All statutory references are to the Penal Code.

² We use the term “strike,” in its noun form, as a synonym for “prior felony conviction” within the meaning of the “three strikes” law (§§ 667, subds. (b)-(i); 1170.12), i.e., a prior felony conviction or juvenile adjudication that subjects a defendant to the increased punishment specified in the three strikes law.

On April 26, 2011 (April 26), appellant, representing himself, executed an “Advisement of Rights, Waiver, and Plea Form for Felonies” (plea waiver form) and thereafter entered his no contest pleas and admissions as set forth above. (Unnecessary capitalization omitted.)

The plea waiver form is a pre-printed form, consisting in large part of a series of statements, followed by a space in which the defendant can write his initials to indicate adoption of the statement. Appellant initialed, inter alia, the following statement on the plea waiver form: “I understand that I have the right to be represented by an attorney throughout the proceeding. I understand that I can hire my own attorney or the Court will appoint an attorney for me free of charge if [I] cannot afford to hire one.” He also signed and dated the plea waiver form, immediately beneath the statement: “I declare under penalty of perjury that I have read, understood, and initialed each item above and everything on the form is true and correct.” (Unnecessary capitalization omitted.)

Thereafter, that same day, in open court, prior to accepting appellant’s pleas and admissions, the court asked appellant, “You understand that you do have a right to be represented by an attorney. You’ve previously given up that right and you want to stick with representing yourself. Is that correct?” Appellant responded, “Correct.”

On June 15, 2011, the court granted appellant’s motion for appointment of counsel. On August 23, 2011, appellant, represented by counsel, moved to withdraw his plea, and on that same day the court denied the motion and imposed sentence.

DISCUSSION

In analyzing appellant’s claim that the court erred in failing to fully inform him of his right to counsel at the change of plea proceeding, we begin with article I, section 13 of the California Constitution, which guarantees that “In criminal prosecutions, in any court whatever, the party accused shall have the right ... to have the assistance of counsel for his defense” A number of statutory provisions implement this right, including section 1018, which requires the court to advise an unrepresented criminal defendant of

the right to counsel before taking a plea of guilty or no contest.³ Moreover, “This guarantee (of the right to counsel), of course, is meaningless unless the defendant is made fully aware of it” (*In re Smiley* (1967) 66 Cal.2d 606, 614-615 (*Smiley*)). Therefore, “not only must he be advised of his right to counsel, he must also be advised that the court will appoint an attorney to represent him if he is unable to afford one.” (*Ibid.*; accord, *In re Fresquez* (1967) 67 Cal.2d 626, 629 (*Fresquez*)).

Appellant acknowledges that at the April 26 change of plea proceeding, the court advised him that he had the right to counsel. He argues, however, that this advisement did not satisfy the requirements of section 1018 because the court did not also inform him that an attorney would be appointed at government expense to represent appellant if appellant could not afford to hire an attorney. Therefore, he asserts, the court did not fully inform him of his right to counsel. We disagree.

As indicated above, on the day appellant entered his plea, before doing so, he explicitly acknowledged in writing that he understood the right to counsel included the right to appointment of counsel at state expense if he could not afford to hire an attorney. This acknowledgement, considered in conjunction with the court’s oral advisement, shows substantial compliance with section 1018.

“[Section 1018] was designed to ensure that a defendant appearing without counsel is aware of his right to counsel at the time he pleads guilty.” (*In re Martinez* (1959) 52 Cal.2d 808, 814 (*Martinez*)). That purpose is served where, as here, a plea waiver form executed near the time of the plea, considered in conjunction with the

³ Section 1018 provides, in relevant part, that a defendant who “does not appear with counsel” may plead guilty to any felony for which the maximum punishment is less severe than death or life imprisonment without the possibility of parole, but only if “the court ... first fully inform[s] him of his ... right to counsel and ... find[s] that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he ... does not wish to be represented by counsel.” Section 1016 provides that a plea of no contest “shall be considered the same as a plea of guilty.

court's on-the-record advisement at the time of the plea, demonstrates that the defendant understood the full scope of the right to counsel. We note that another provision of section 1018 provides that a guilty plea "shall be entered ... by the defendant *himself or herself* in open court." (Italics added.) "Earlier cases literally applied this rule to require specific plea by a defendant, without inquiring as to whether he had adopted the plea by words spoken in open court [citations]. In 1959, however, the Supreme Court pointed out that the purpose of the statute is to assure that the plea is the defendant's own, and that this end is served if the defendant 'authorized or adopted counsel's statement of his plea' [*Martinez*, at p. 815]." (*People v. Martin* (1964) 230 Cal.App.2d 62, 63.) By a parity of reasoning, literal adherence to the advisement requirement of section 1018 at issue here is not required where, as here, the record shows that the purpose of that requirement is satisfied.

Appellant argues that "substantial compliance" with section 1018 is "not sufficient." He bases this claim, in part, on *People v. Ector* (1965) 231 Cal.App.2d 619 (*Ector*.) In that case, a defendant who was represented by counsel and who had previously pled not guilty, appeared in court without his attorney and informed the court he wished to change his plea to guilty. (*Id.* at pp. 622, 623, fn. 1.) The trial court questioned the defendant, focusing on whether the defendant wanted to proceed with changing his plea without counsel present, but did not advise him of the right to counsel. Thereafter, the court accepted the defendant's guilty plea. (*Id.* at p. 623, fn. 1.) The appellate court held that the trial court erred in accepting a guilty plea from the defendant "without fully complying with section 1018" (*Id.* at p. 623.) The court stated: "While the colloquy [between the defendant and the trial court that preceded the defendant's guilty plea] shows substantial compliance with the requirement of that section that the defendant state to the court 'that he does not wish to be represented by counsel' there was no adequate compliance, however, with the requirement that the court 'first fully inform him of his right to counsel....' As the Supreme Court said in [*Martinez*,

supra, 52 Cal.2d at p. 814], ‘The statute ... was designed to ensure that a defendant appearing without counsel is aware of his right to counsel *at the time he pleads guilty.*’ (Italics added.) It is not met by having been so advised when he was arraigned on December 19, 1963, almost 11 weeks before that time.” (*Id.* at p. 624.)

Ector is distinguishable. First, the *Ector* court, in its colloquy with the defendant prior to accepting the plea, made no mention of the right to counsel. (*Ector, supra*, 231 Cal.App.2d at p. 623, fn. 1.) Second, a previous proceeding at which appellant was so advised occurred 11 weeks prior to the change of plea. Here by contrast, as indicated earlier, the court, at the April 26 change of plea proceeding, advised appellant of his right to counsel and appellant executed the plea waiver form that same day, acknowledging he understood the full extent of that right. Therefore, unlike in *Ector*, the record here shows appellant was aware of his right to counsel at the time he entered his no contest plea.

Appellant also relies on *Smiley, supra*, 66 Cal.2d 606 and *In re Johnson* (1965) 62 Cal.2d 325. In *Smiley*, the court, relying on *Johnson*, held there was “[no] showing that petitioner [who was convicted after a trial at which he represented himself] effectively waived his right to counsel,” where the Attorney General conceded that “[t]he minutes do not show that petitioner waived counsel and there is no evidence that petitioner said he was waiving a lawyer.” (*Smiley*, at p. 620.) Similarly, in *Johnson*, where, as summarized in *Smiley*, an unrepresented defendant, charged with a number of offenses, pled guilty and “the record was devoid of any statement by him expressly waiving his right to counsel,” the court “concluded that the proceedings were “constitutionally defective” because “Presuming waiver from a silent record is impermissible. The record must show ... that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.” (*Smiley*, at p. 621.)

Thus, as appellant correctly states, our Supreme Court in these two cases “made it clear that an ‘implied’ waiver of the right to counsel is not sufficient” The question of implied waiver of the right to counsel, however, is not before us; appellant explicitly

waived his right to counsel at the April 26 hearing. Here the issue involves compliance with a statute. And although *Johnson* and *Smiley* each hold that the constitutional requirement that a criminal defendant proceeding *in propria persona* must expressly waive the right to counsel, neither case holds, as appellant suggests, that substantial compliance with a statutory directive cannot be “sufficient.” Thus, neither case supports appellant’s claim that section 1018 requires strict, literal compliance with the directive that an unrepresented defendant be advised of the right to counsel before entry of a guilty plea.

Our conclusion finds support in *Fresquez, supra*, 67 Cal.2d 626. In that case, a habeas corpus proceeding, the appellate court referred the matter to a referee for an evidentiary hearing in superior court, and directed the referee to address the following question: “Did [the petitioner, who had pled guilty to four felony charges] intelligently and understandingly waive his right to the assistance of counsel in the trial court ...?” (*Id.* at p. 628.)

Evidence was adduced at the hearing before the referee that the petitioner entered his pleas at his arraignment⁴ and that the following colloquy occurred in that proceeding before he did so:

“The Court: I hand you a copy of the indictment, Mr. Fresquez. You are entitled to the benefit of legal counsel at all stages of the proceedings. Do you want an attorney?

“The Defendant: I can’t afford one - - no I can’t afford one at all, no.

“The Court: If you want one I would have to appoint one for you.

“The Defendant: No, I don’t.

“The Court: You don’t want one?

“The Defendant: No.

⁴ The court noted that “the trial court [is required to] inform an accused of his right to counsel when he is arraigned before the trial court (Pen. Code, § 987)” (*Fresquez, supra*, 67 Cal.2d at p. 629.)

“The Court: All right. Are you prepared to enter a plea to the charges at this time?

“The Defendant: Yes.” (*Fresquez, supra*, 67 Cal.2d at p. 630.)

The petitioner testified at the hearing before the referee “that the judge did not tell him he had the right to an attorney appointed by the court *at the expense of the state*, that he was then indigent and thought he would have to pay for an attorney appointed to represent him, and that it was not until [much later] that he first understood from correspondence with his present counsel that the trial court meant ‘free appointed counsel.’” (*Fresquez, supra*, 67 Cal.2d at pp. 630-631.)

The referee determined the petitioner freely and intelligently waived his right to counsel. The appellate court, in upholding this determination, stated: “Although the trial court’s statements were ambiguous, they could reasonably have been understood as an offer to furnish counsel without charge, *especially in light of the context in which they were made.*” (*Fresquez, supra*, 67 Cal.2d at p. 631, italics added.) That “context” included the following factors relevant to the question of whether the petitioner understood he would not be charged for the services of appointed counsel: There was evidence that petitioner, who was 27 years old and had had prior involvement with the criminal justice system, “was not an inexperienced youth, unfamiliar with courts and legal procedure” (*Ibid.*) From this evidence, the court stated, “it may be inferred that he was at least aware of the possibility that Butte County had a public defender or the equivalent.” (*Ibid.*, fn. omitted.) Second, on the day of his arraignment, the petitioner was present in court when “the court advised [other defendants] of their right to counsel, appointed counsel for some after asking questions which revealed their lack of resources, and told one who had assets to obtain her own attorney.” (*Ibid.*) Finally, “[i]t also appears that concern over paying an attorney’s fee did not deter [the petitioner] from accepting a court-appointed attorney upon in arraignment [in a previous case].” (*Id.* at p. 632.)

Thus, the record in *Fresquez* shows the following: Although the trial court advised the petitioner he was “entitled to the benefit of legal counsel at all stages of the proceeding,” (*Fresquez, supra*, 67 Cal.2d at p. 630) the court did not expressly state an attorney would be appointed if the petitioner could not afford to hire one. However, the “context” of the court’s advisement, i.e., evidence in the record, supported the inference that the petitioner nonetheless understood this. (*Id.* at pp. 633-634.)

Here too, although at the April 26 proceeding the court did not mention that an attorney would be appointed at state expense if appellant could not afford to hire an attorney, in executing the plea waiver form earlier *that very day*, appellant expressly acknowledged he understood that he had the right to counsel *and* that this right included free appointed counsel if appellant could not afford an attorney. As in *Fresquez*, consideration of the context in which the court delivered its section 1018 advisement demonstrates that the advisement was sufficient. Therefore, because there was no violation of section 1018, the trial court did not err in denying appellant’s plea withdrawal motion. Moreover, as we explain below, any error in failing to adequately comply with section 1018 was not prejudicial.

Appellant argues that such error is reversible per se. He bases this contention on *Smiley*. There, as indicated above, the court “conclude[d] there was no effective waiver [of the right to counsel] . . . , and hence that petitioner was denied his constitutional right to the assistance of counsel.” (*Smiley, supra*, 66 Cal.2d at p. 625.) The People argued the error was harmless because the evidence of guilt was overwhelming and ““There is nothing . . . to demonstrate any line of defense that seems to have the slightest possibility of success.”” (*Ibid.*) The court rejected this argument, explaining in the portion of the opinion upon which appellant relies: “We may not constitutionally engage in [a prejudice] inquiry, for no showing of prejudice is required when the error is of the dimensions of denial of counsel. (*Ibid.*)

Smiley is inapposite because here the error, if any, is one of failure to comply with a statute. Such error is reviewed under the *Watson* standard of prejudice, which provides that reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) On these points we are guided by *People v. Crayton* (2002) 28 Cal.4th 346 (*Crayton*).

In that case, the defendant was fully advised of his right to counsel when he was brought before the magistrate at the time of the filing of the complaint, as required under section 859, but, in violation of section 987, he was not readvised of that right when later he was arraigned in superior court on the information. In discussing the correct standard of review, the court stated: “Although a reversible per se rule may apply under California Constitution, article VI, section 13, when a defendant erroneously is denied the right to counsel or never has knowingly or voluntarily waived that right [citation], ... the *Watson* standard applies to the superior court’s error in failing to follow the *statutory* command that the court, at the arraignment in superior court, *readvise* a defendant of his or her right to counsel and obtain a renewed waiver of that right.” (*Crayton*, supra, 28 Cal.4th at p. 364.)

Similarly, failure to follow section 1018’s statutory command that an unrepresented defendant pleading guilty to a felony be advised of the right to counsel should be reviewed under the *Watson* standard.

We recognize that in *Crayton*, (1) the court emphasized that the defendant had been advised of that right at an earlier stage of the proceeding, and (2) the error at issue was the failure to comply with a statutory mandate to *readvise* the defendant of his right to counsel. (*Crayton*, supra, 28 Cal.4th at pp. 350, 365). We further recognize that here it is by no means clear that appellant was advised of his right to counsel at any time prior to the entry of his plea and that therefore the court’s advisement at the April 26 hearing

was not a readvisement as in *Crayton*.⁵ But assuming for the sake of argument that the record does not establish that appellant was advised of his right to counsel at any time prior to April 26, the court’s reasoning in *Crayton* supports our conclusion that the *Watson* standard is applicable here, as it was in *Crayton*.

Specifically, the *Crayton* court also stated, “[w]e believe that a trial court’s error in failing to comply with section 987 clearly is susceptible to harmless error analysis. *The complete record of the trial court proceedings often will shed light upon whether a defendant, despite the absence of an explicit readvisement by the superior court at arraignment, nonetheless was aware that he or she had the right to appointed counsel at the subsequent proceedings and whether an explicit advisement at the arraignment would have been likely to lead the defendant to reconsider the decision to represent himself or herself and request that counsel be appointed.*” (*Crayton, supra*, 28 Cal.4th at p. 365, italics added.) In our view, this reasoning applies to review of error in an initial advisement or right to counsel, as well as a readvisement error.

With the standard for determining prejudice established, the application of that standard is straightforward. Because appellant explicitly acknowledged in writing before

⁵ As indicated above, a minute order of an earlier proceeding indicates that the court “advised [appellant] as to the perils, pitfalls, dangers and disadvantages of self-representation,” and that appellant “waived counsel and knowingly and intelligently elected to represent himself.” (Unnecessary capitalization omitted.) The minute order does not specifically state appellant was advised of his right to counsel. On a similar record, the court in *Smiley* found that the record did not show the petitioner had been adequately advised of his right to counsel. The “official docket entries” showed that the petitioner was “‘duly arraigned,’” but “[t]here is no entry specifically reflecting that petitioner was given the necessary advice as to his constitutional and statutory rights.” (*Smiley, supra*, 66 Cal.2d at p. 616.) The court stated, “In view of the importance of the constitutional and statutory guarantees in issue, it does not appear too great a burden on the trial judges or clerks under their direction to require minute or docket entries *specifically listing the rights* of which the defendant is actually advised.” (*Id.* at p. 617, italics added, fn. omitted.) As indicated above, the relevant minute order here did not reflect that the court specifically advised appellant of his right to appointed counsel at the earlier proceeding.

he entered his plea, and on the same day he entered his plea, that he understood he had the right to counsel and that a lawyer would be appointed if he could not afford to hire a lawyer, any error in the court's section 1018 advisement was not prejudicial under the *Watson* standard, there being no reasonable probability that appellant was unaware of the full scope of the right to counsel.

DISPOSITION

The judgment is affirmed.