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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED EDDIE GAMBOA,

Defendant and Appellant.

B282370

(Los Angeles County  
Super. Ct. No. KA112973)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Robert M. Martinez, Judge. Affirmed.

David Y. Stanley, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant  
Attorney General, Paul M. Roadarmel, Jr. and John R. Prosser,  
Deputy Attorneys General, for Plaintiff and Respondent.

Fred Eddie Gamboa was convicted after a jury trial of evading a peace officer while driving recklessly (Veh. Code, § 2800.2) and driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)) with special findings by the court in a bifurcated proceeding that he had suffered one prior serious or violent felony conviction within the meaning of the three strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and had served three prior prison terms for felonies (Pen. Code, § 667.5, subd. (b)).<sup>1</sup> On appeal Gamboa contends the court erred in denying his midtrial request to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*). We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. *Gamboa's Arrest for Recklessly Evading an Officer and Taking a Vehicle Without Consent***

West Covina Police Officers Justin Schienle and Adrian Del Haro responded in the early morning of May 16, 2016 to a call reporting stolen beer from a convenience store. Del Haro spoke to Gamboa, who matched the description of the suspect, near the store. Gamboa appeared to be intoxicated and had what looked like recently inflicted facial injuries. Because the officers could not confirm a crime had been committed, Gamboa was not arrested.

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<sup>1</sup> Gamboa was sentenced to an aggregate state prison term of seven years four months: the upper term of three years, doubled as a second strike, for reckless evading, plus a consecutive term of eight months (one-third the middle term), doubled, for driving or taking a vehicle without consent. The court struck the prior prison term enhancement allegations.

Gamboa walked to Queen of the Valley Hospital, several blocks away, where the two officers again spoke to him and filled out a field interview card. Gamboa reported he had been in a fight at a nightclub earlier that evening. An examination revealed his nose had been shattered. A short time later Gamboa left the hospital against medical advice.

At 3:45 a.m. on May 16, 2016 Gabriel Pichardo reported his truck, which he had left running with the key in the ignition, had been stolen from a gas station while he was purchasing a cup of coffee inside the station office. The gas station is next door to the convenience store where Officers Schienle and Del Haro had encountered Gamboa earlier that night.

After speaking to Pichardo, Officer Schienle decided to look on the street Gamboa had given the officers as his home address. As he and Officer Del Haro approached Gamboa's residence, they saw the taillights of a truck, which ran a stop sign and sped away. Schienle activated his marked patrol car's lights and siren, but the truck did not stop.

A chase ensued, which ultimately involved five patrol cars with lights and sirens activated and covered more than 20 miles on the freeway and surface streets with speeds up to 90 miles per hour. The pursuit ended after a spike strip was deployed.

Once the truck was stopped, Gamboa got out in an aggressive stance and refused to obey the officers' commands. He was finally subdued with the use of a beanbag shotgun and a police dog. Gamboa's arm was injured by the dog.

## 2. *Gamboa's Requests To Replace Counsel and To Represent Himself*

### a. *The Marsden requests*

On October 19, 2016, prior to a scheduled pretrial conference, Gamboa asked the court to replace the deputy public defender who was representing him. (See *People v. Marsden* (1970) 2 Cal.3d 118.) Gamboa expressed frustration that his counsel intended to seek a January 2017 trial date; he told the court, "I'm really trying to get this case to trial, so we can get it over with and see how the trial comes [out]." <sup>2</sup> Gamboa also voiced dissatisfaction with the pace of counsel's investigation of a possible psychiatric defense. The motion was denied.

Gamboa again sought to replace his counsel on January 11, 2017, explaining, "I don't think my public defender is actually trying to help me." Following a hearing at which the court heard from Gamboa and defense counsel, the motion was denied.

A jury was empaneled on March 3, 2017. The prosecutor gave her opening statement on March 6, 2017; defense counsel reserved opening statement. Officer Schienle then testified as the People's first witness. At the conclusion of Schienle's testimony, the court excused the jurors for the noon recess. After the jurors left, defense counsel stated, "Your Honor, I think Mr. Gamboa indicates his desire to go pro per." Gamboa interrupted, "I ain't asking to go pro per. I'm just asking you to specify something." As Gamboa started to explain what argument he

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<sup>2</sup> At a final pretrial hearing on February 28, 2017, Gamboa again expressed his desire to have the trial completed quickly: "The Court: Do you want to wear civilian clothing during the trial? The Defendant: Nah. I just want to get it over with already."

wanted his counsel to make, the court asked the prosecutor to leave the courtroom and conducted another *Marsden* hearing.

The court asked Gamboa what he wanted his attorney to do. Gamboa explained he had been assaulted at the nightclub, was intoxicated and, by the time he was at the hospital, was delusional. He took the truck because he was trying to find a way home. He wanted his lawyer to make the point, if the officers had arrested him for being drunk in public when they first contacted him outside the convenience store, he never would have been in the situation that led to taking the truck and the police chase that followed. Gamboa said it was important for the jury to understand what had happened from his perspective.

The court responded that, through her cross-examination of Officer Schienle, defense counsel had already made the point that Gamboa had been intoxicated during the incident. The court then told Gamboa, “You’re going to have to decide what you want to do. You can represent yourself, or you can ask for your attorney to listen to what you have to say. But, ultimately, she would have to make the decision how to proceed in the trial.” The court advised Gamboa that the decision whether to testify was his to make, but cautioned that, if he did, the jury would learn certain aspects of his prior criminal history. The court also told Gamboa, “[I]f you’re going to represent yourself, we’re just going to keep on going.” The court directed Gamboa to let it know after the noon recess whether he was going to represent himself or to continue the trial with his current counsel.

b. *The Faretta request*

Following the noon recess, defense counsel asked the court to have Gamboa's decision placed on the record. The court asked, "You going to proceed with counsel?" Gamboa responded, "Yeah. For the day, yeah." Pichardo then testified, followed by David Saavedra, a physician's assistant at Queen of the Valley Hospital, who was called as a defense witness out of order because of scheduling issues. Saavedra described his examination of Gamboa in the early morning hours of May 16, 2016 and Gamboa's condition at that time.

After Saavedra's testimony and outside the presence of the jury, the prosecutor and defense counsel discussed the People's remaining witnesses and an evidentiary issue relating to a photograph of the police dog used to subdue Gamboa. Defense counsel then requested a further hearing regarding Gamboa's representation.

The court asked, "Mr. Gamboa, do you want to represent yourself?" Gamboa responded, "Yes, sir." The court advised Gamboa of the serious disadvantages of self-representation and asked him why he wanted to represent himself. Gamboa explained he wanted to see the video recording from the patrol car's dashcam, insisted he had been attacked by the police dog for no reason and asserted the description of his arrest in the police report was a lie. He again complained if he had been arrested for being drunk in public during the officers' initial contact with him, none of this would have happened. The court told him he could make these points in his own testimony.

The court again inquired, "You want to represent yourself?" Gamboa replied, "I want a dashcam. I want these things done right." The court stated, "They say there is no dashcam"; and

Gamboa answered, “There’s always a dashcam.” The following colloquy then took place:

“The Court: Well, how ‘bout if I tell you there isn’t a dashcam?

“The Defendant: How do you figure? That’s why I want to look –

“The Court: You see what we’re doing?

“The Defendant: I want to look at the (inaudible) to make sure if that’s legal.

“The Court: We don’t have time. We’re in the middle of trial. We’re going to wrap this up tomorrow.

“The Defendant: I don’t think it’s right, at all; but if that’s the way you want to go.

“The Court: You want to represent yourself?

“The Defendant: Let’s get it over with, man. You and I know it ain’t right, but if that’s the way you rule, let’s see what the jury says.

“The Court: You want your attorney, or you want to represent yourself?

“The Defendant: What was that?

“The Court: You want your attorney?

“The Defendant: I just want to get it over with. . . .

“The Court: What do you want to do? You want to represent yourself?

“The Defendant: I want to get it over with already. Let’s see what happens. [¶] . . . [¶]

“The Court: Who’s going to represent you?

“The Defendant: I don’t know, but I want to get on the stand.

“The Court: Well, that’s your privilege. Absolutely. That’s your decision. Your privilege to do that.

“The Defendant: Yeah.

“The Court: You want to continue with this attorney?

“The Defendant: Yeah, I guess.

“The Court: I can’t hear you.

“The Defendant: We’ll do it. Since they already proved I got assaulted and all that stuff. Hopefully, the jury sees it my way.”

At this point the jury returned, and the trial continued with testimony from Officer Del Haro. The following day the People rested.

Testifying in his own defense, Gamboa was able to explain on the night of the pursuit he had been drinking heavily and then was injured during an altercation with a bouncer at a club. He claimed he now had difficulty remembering many of the events of that night, but said he thought it was all right for him to “just jump in” the truck in an effort to get home. He recalled the police chase and admitted he did not stop until the truck was disabled by the police. Gamboa also presented medical testimony concerning his condition that night.

## **DISCUSSION**

### *1. Governing Law*

A criminal defendant has the right under the Sixth and Fourteenth Amendments to the United States Constitution to waive his or her right to counsel and to represent himself or herself. (*Faretta, supra*, 422 U.S. at p. 819 [“[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense”]; *People v. Mickel* (2016) 2 Cal.5th 181, 205



[[“i]f a defendant has validly waived the right to counsel, a trial court must grant a defendant’s request for self-representation”]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1069 [“A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time . . . because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.”].)

This right to represent oneself in a criminal case, however, is not absolute. (*Indiana v. Edwards* (2008) 554 U.S. 164, 171 [128 S. Ct. 2379, 171 L.Ed.2d 345]; see *People v. Butler* (2009) 47 Cal.4th 814, 825.) A *Faretta* motion invokes the nondiscretionary constitutional right to self-representation only if it is both timely and unequivocal. (*People v. Lawrence* (2009) 46 Cal.4th 186, 191-192; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1001-1002.) To be timely, the right to self-representation must be invoked a reasonable time prior to the start of trial. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 [“in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial”]; accord, *Lawrence*, at pp. 191-192.)

Unlike a timely *Faretta* motion, an untimely motion for self-representation is subject to the trial court’s discretion. (*People v. Lawrence, supra*, 46 Cal.4th at p. 192; *People v. Windham, supra*, 19 Cal.3d at p. 128.) ““When a motion for self-representation is not made in a timely fashion prior to trial, self-

representation no longer is a matter of right but is subject to the trial court's discretion." [Citation.] In exercising this discretion, the trial court should consider factors such as "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." (People v. Valdez (2004) 32 Cal.4th 73, 103; accord, Windham, at p. 128.) A midtrial motion, as here, is necessarily untimely and "may be denied on the ground that delay or a continuance would be required." (People v. Clark (1992) 3 Cal.4th 41, 110.) "A trial court may also condition the grant of an untimely Faretta motion on a defendant's ability to immediately proceed to trial." (People v. Espinoza (2016) 1 Cal.5th 61, 80.)

The right to self-representation, moreover, "once asserted, may be waived or abandoned." (People v. Trujeque (2015) 61 Cal.4th 227, 262; accord, People v. Dunkle (2005) 36 Cal.4th 861, 909, disapproved on another ground in People v. Doolin (2009) 45 Cal.4th 390, 421, fn. 12.) The waiver or abandonment "should be voluntary, knowing and intelligent," but "may be inferred from a defendant's conduct." (Trujeque, at pp. 262-263; accord, People v. D'Arcy (2010) 48 Cal.4th 257, 284-285; see People v. Stanley (2006) 39 Cal.4th 913, 929.)

## 2. Gamboa Abandoned His Request To Represent Himself

Gamboa contends the trial court erred in denying what he describes as a timely and unequivocal request to represent himself. In response the Attorney General argues Gamboa

abandoned his request for self-representation during his extended colloquy with the court.<sup>3</sup> We agree.

As discussed, at both the *Marsden* hearing immediately before lunch on March 6, 2017, which evolved into a discussion whether Gamboa desired to represent himself, and the hearing later that afternoon after he asked to self-represent, Gamboa expressed dissatisfaction with his counsel because he wanted the jury to know he had contact with the police prior to the pursuit, while intoxicated and injured, and to understand he could have been (and, in his view, should have been) taken into custody at that time. He also questioned the reasonableness of using a police dog to subdue him after he emerged from the disabled truck. The court responded that defense counsel had already established Gamboa was intoxicated that night and told Gamboa he could testify in his own defense and make all these points; he did not need to represent himself to do so. Then, when the court indicated it would not interrupt the trial to allow him to seek dashcam video of the arrest or to determine whether it was legal for the patrol car not to have a dashcam, Gamboa—who had earlier expressed his strong desire to have the trial over quickly—answered the court’s repeated questions whether he

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<sup>3</sup> The Attorney General also argues, if the trial court is deemed to have denied Gamboa’s untimely request, doing so was not an abuse of discretion and, even if it were, any error was harmless in light of the overwhelming evidence of Gamboa’s guilt, including Gamboa’s own testimony. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058 “[t]he erroneous denial of an untimely *Faretta* motion is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836”]; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050 [same].)

still sought to represent himself by stating he intended to testify and just wanted “to get it over with already.” Finally, when asked if he “want[ed] to continue with this attorney,” he responded, “Yeah, I guess. . . . We’ll do it.” The trial then proceeded with defense counsel still representing Gamboa.

The court’s statement to Gamboa that there was not time during trial for him to explore the dashcam issue on his own and that the case would be completed the following day was well within its discretion. (See *People v. Espinoza*, *supra*, 1 Cal.5th at p. 80.) By thereafter stating he was willing to proceed with his current counsel, albeit expressed without much enthusiasm, and by permitting the trial to continue without seeking a definitive ruling on his earlier request to represent himself, Gamboa knowingly and voluntarily waived his right to self-representation. (See *People v. Dunkle*, *supra*, 36 Cal.4th at pp. 909-910 [defendant’s confirmation he wished to be represented by counsel constituted waiver of request for self-representation despite earlier statements to the contrary]; *People v. Skaggs* (1996) 44 Cal.App.4th 1, 7-8 [“If a *Faretta* motion was made, it was not ruled upon. By failing to request such a ruling and never raising the issue again, [defendant] abandoned the motion he now claims he made”]; see also *People v. Butler* (2009) 47 Cal.4th 814, 825 [“the *Faretta* right may be waived by failure to make a timely request to act as one’s own counsel [citation], or by abandonment and acquiescence in representation by counsel”].)

**DISPOSITION**

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.\*

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\* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.