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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNEST R. MORALES,

Defendant and Appellant.

B234304

(Los Angeles County
Super. Ct. No. BA380081)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patricia Schnegg and Alex Ricciardulli, Judges. Affirmed.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

An information, dated March 8, 2011 and amended on June 7, 2011, charged Ernest R. Morales with two counts: (1) assault by means of force likely to produce great bodily injury on Pedro Escobar (Pen. Code, § 245, subd. (a)(4))¹; and (2) resisting a peace officer (§ 148, subd. (a)(1)). The information specially alleged that Morales had a prior serious or violent felony conviction for assault with a deadly weapon that qualified as a strike under the “Three Strikes” law and had served a prior prison term within the meaning of section 667.5, subdivision (b). The jury found Morales guilty on both counts. Morales admitted that he had a prior serious or violent felony conviction, qualifying as a strike, and had served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Morales to nine years in state prison, consisting of the upper term of four years on count 1 for assault by means of force likely to produce great bodily injury, doubled pursuant to the Three Strikes law, plus one year for the prior prison term under section 667.5, subdivision (b). On count 2, the court sentenced Morales to one year in the county jail, to be served concurrently with his state prison term. Morales appealed. He contends that the judgment should be reversed because the court deprived him of his constitutional right to represent himself at trial by declining to continue the trial after granting him pro. per. status. We disagree and affirm the judgment.

DISCUSSION

The case against Morales was tried jointly with charges against his sister, Christina Morales, for assault by means of force likely to produce great bodily injury on Escobar, stemming from the same incident.² At a hearing on May 13, 2011, the trial court (Judge Ricciardulli), at the request of counsel, continued the matter to June 1 for trial readiness and indicated that trial could start within nine days of that date. The court addressed Morales’s sister, asking her, “Ms. Morales, do you understand that you have a right to have a trial within 5 days of today?” Morales’s sister replied, “Yes.” The court

¹ Statutory references are to the Penal Code.

² The jury found Christina Morales not guilty.

then asked, “And do you agree to give up that right and continue your case to June 1, 2011, understanding that your trial could start within 9 days of June 1, 2011?” Morales’s sister again replied, “Yes.” Addressing Morales, the court asked, “Mr. Morales do you understand that you have a right to have a trial within five days of today?” Morales said, “Yes, I do, your honor.” The court then inquired, “And do you agree to give up that right and continue your case to June 1, 2011, understanding that your trial could start within 9 days of June 1, 2011?” Morales then stated, “At my last court hearing . . . I addressed the court and said I wanted to invoke my right to have a speedy trial, which was denied. My lawyer disagreed, and the lawyer to my sister, my codefendant, disagreed. So against my will that time they got me to waive time, which I didn’t want to waive time in regards to my right to a speedy trial. To this date [my appointed counsel] hasn’t come to see me. I left numerous messages on her phone. I spoke to her supervisor prior. And pretty much basically . . . I cannot trust her, because she wants me to plead out to 80 percent on this case, to six years. . . . She told me, you know, I had no defense but she’d be there for me in trial. And so I feel that, you know, in the interests of justice at this time I wish to invoke my . . . rights [pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)] and to represent myself at this moment, your honor. I would like to exercise that right, sir.” The court continued the matter to June 1 and denied Morales’s request to represent himself, finding the request was equivocal and used as grounds to object to the continuance. The court stated, “So what we’ll do is this. I’m going to deny your request to represent yourself right now. I’m going to consider that you are objecting to the continuance, I’m going to find that there is good cause to continue. And we’ll see you back here on June 1, 2011. On that day if you’re still interested in representing yourself, bring it to the court’s attention again, and I may reconsider.”

On June 1, the matter was continued to the following day. On June 2, Morales’s counsel stated: “[M]y client would like to address the court in that he does not have any prescription eyeglasses. He had them in the jail. He had them at the preliminary hearing, and in fact there are references to them at the preliminary hearing They were taken

away from him in the jail, and he's unable to see properly without them. He does have a prescription from a medical doctor I assume he got while in the jail on his person, and he would like to address the court about having the jail prescribe eyeglasses to him. And I know it's unusual and not often granted, but because of the fact he had them in jail originally, I believe there should be some consideration given to that. Finally, he's requesting to represent himself. And if so, he will be requesting a continuance. I have a copy of discovery ready to provide to him if the court does grant that." Counsel represented that Morales wanted a 60-day continuance, although he originally had told her he required 45 days.

The trial court responded, "When we were here on May 13, 2011, [Morales] was upset that his trial was going to get continued to the date that it wound up getting continued, that being the June 7th date. And [Morales] at that time asked to proceed in pro[.] per[.] because . . . he didn't want a continuance, he wanted the case to proceed to trial as soon as possible. I considered that to be an equivocal request to proceed in pro[.] per[.], because it was solely due to his [dis]satisfaction that the case was going to get continued. At that time we had to continue the case, because co-counsel had requested a continuance. . . . Now that the People are ready and we have a trial set, [Morales] is now requesting to proceed in pro[.] per[.] and is now seeking a continuance . . . of 45 to 60 days. I consider [Morales's] request to proceed pro[.] per[.] and demand a speedy trial and now a request to proceed in pro[.] per[.] and then demand a continuance, now that we have a trial date set and the People are ready, to be trifling with the court, and I am denying [Morales's] request to proceed pro[.] per[.]" Morales indicated that, even if the trial court were to deny the request for a continuance, he still wanted to represent himself and said he would be ready for trial on June 7. The court granted Morales pro. per. status, appointed standby counsel for him and permitted standby counsel, who received discovery and work product from former defense counsel, to interview Morales.

On June 7, Morales represented to the trial court (Judge Schnegg) that he had not received the file or been granted access to the law library or appointed an investigator. He also did not have eyeglasses. Regarding eyeglasses, the court told Morales that "[w]e

don't provide eyeglasses in county jail. If someone gave you a prescription, then you have to have somebody like a family member on the outside that will go and have that prescription filled for you." Morales represented that he had no one to fill a prescription for him, and the court said that he then would not get eyeglasses. Morales replied that he was nearsighted, so he could read up close, and would do the best he could in representing himself. He repeated his request for a continuance to review the file and have access to the law library and an investigator. Morales's sister's counsel indicated that she was opposed to any continuance beyond a one- or two-day period. Recognizing the prior denial of a continuance and Morales's sister's objection to a further continuance, the court transferred the matter back to Judge Ricciardulli for trial.

Before Judge Ricciardulli later that day, the parties began preparation for jury selection. The trial court, before taking a break, noted, "So let's work on getting Mr. Morales the discovery that he still needs and make sure that both defendants are dressed and ready to go at 1:30." After jury selection, Morales's standby counsel represented that Morales wished to relinquish his pro. per. status. Morales addressed the court, "In that regards, sir, I'm [currently] on a diagnosis of Triple C, and that's my mental health. And the court has deprived me of substantial constitutional rights, and my rights have been infringed and denied by the trial court. And you ha[ve] not made an order to recognize my pro[.] per[.] [status], no access to law library, no investigator assigned, no continuance allowed to prepare for this. Due to this, my constitutional right to due process has been violated. I charge miscarriage of justice. Your honor has shown extreme prejudice towards my constitutional right to pro[.] per[.] status. Your honor has caused prejudice to denying my constitutional right for pro[.] per[.] in this case." The court replied, "I think [Morales's] change of tactics, once again, is demonstrating a pattern of trifling with the courts. And I'm not going to go back and repeat the court's previous statements on this topic, but [Morales] previously was granted pro[.] per[.] status. However, he failed to articulate good cause for continuing the case for 30 to 45 days. And so the court allowed him to represent himself but did not grant a continuance. He had a lawyer, which was a different lawyer. We appointed a standby attorney,

because the alternate public defender's office does not accept standby representation. He has shown dissatisfaction with that previous lawyer that he had in the past, and at this point he has succeeded in having that lawyer replaced, even though there was no good cause to replace that lawyer under *People v. Marsden* [(1970) 2 Cal.3d 118]. So, in any event, I am accepting [Morales's] renunciation of his pro[.] per[.] status, albeit under protest, and am now appointing [standby counsel] to represent [Morales] in this trial."

After the jury convicted Morales on the charges against him, he moved for a new trial on the ground that the trial court did not give him adequate time to prepare a defense after granting him pro. per. status. In a declaration, Morales stated, "At the time I went on pro[.] per[.] status, I had received no papers regarding my case from my prior attorney; I did not have copies of the police reports, of the preliminary hearing transcript, nor did I have any information concerning any investigation that had or had not been conducted by my prior attorney." Morales continued, "After beginning trial, and after the jury selection process was finished, I realized that I was in over my head because I was totally unprepared, and the reason I was unprepared is because I knew nothing about my case other than what I had heard in court." Morales's standby counsel, who represented him at trial after jury selection, declared that, "[b]ecause there was insufficient time to prepare this case either by myself or by Mr. Morales, I believe the defendant did not receive a constitutionally adequate defense." Nevertheless, standby counsel indicated that he, at the time the court granted Morales pro. per. status, "was given a copy of the discovery in this case by prior counsel, an Alternate Public Defender, which consisted of police investigation reports, the Felony Complaint and Information, a copy of the preliminary hearing transcript, 911 recordings, and a copy of the defendant's probation report."

The trial court denied the new trial motion, concluding that "[t]here was no error in conditioning [Morales's] request to go pro[.] per[.] with his going forward with the trial. I think it's important to put that request [for a continuance] in context with what happened the time before, when [Morales] was not here with [standby counsel], and that is when he made an equivocal request to go pro[.] per[.] because he wanted to start

immediately, and he was prepared at that time to proceed to go to trial even without any preparation. I denied that request, because I believed that was an equivocal request conditioned upon the trial starting on time. Then, when the case was set for trial, four days before the trial was going to start and after the People indicated that they were ready to proceed for trial, [Morales] again renewed his request to go pro[.] per[.], but this time asked for a lengthy continuance in order to prepare, which in the court's opinion indicated to this court that he was trifling with the court and trying to build in error by vacillating in his request to go pro[.] per[.] in order to proceed quickly to trial and then by requesting pro[.] per[.] in order to slow down proceedings. And I believe this again was accentuated by when [Morales] decided to go to trial representing himself and then, after jury selection, renounced his pro[.] per[.] status and decided to go with [standby] counsel, which has a side benefit, by the way, of something which [Morales] wanted all along, which was to get rid of his alternate public defender [who] was appointed. So, all-told, I think it was clear that [Morales] was just playing games with the court. And the fact that [standby] counsel . . . had to proceed, in his opinion, in a less than prepared fashion was the consequence, an unfortunate consequence perhaps, but a consequence that [Morales] understood."

Contrary to Morales's contention, the trial court did not deprive him of his constitutional right to represent himself by granting him pro. per. status yet finding no good cause to continue the trial for 45 to 60 days as he had requested. (See § 1050, subd. (e) [continuance may be granted only on showing of good cause].) On May 13, 2011, Morales requested to represent himself in part because he was unhappy that his appointed counsel wanted him to agree to a short continuance to June 1, 2011 based on the scheduling needs of his sister's counsel. Morales represented that he was concerned about enforcement of his right to a speedy trial. On June 1, when Morales again requested to represent himself, he then wanted a continuance of 45 to 60 days, despite his previous opposition to even a short continuance to accommodate his sister's counsel. When the court denied the request for a continuance, Morales said that, even with the denial of a continuance, he still wanted to represent himself and would be ready on the

trial date of June 7. Given these circumstances, the court's denial of a continuance at the time Morales became pro. per. does not amount to deprivation of a constitutional right. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1038-1039 [no error in denying continuance when defendant represented he was prepared for trial and accepted pro. per. status with understanding that trial court would not grant additional time].)

Indeed, as the trial court noted, after requesting pro. per. status, Morales ultimately chose to have standby counsel represent him at trial, which allowed Morales to obtain counsel other than his appointed counsel, whom he had been unable to replace by making arguments under *People v. Marsden, supra*, 2 Cal.3d 118. Employment of such tactics does not later constitute grounds for reversal of a judgment based on the denial of a continuance. (See *People v. Jenkins, supra*, 22 Cal.4th at p. 1038 [within trial court's discretion to deny "requested continuances on the ground the court reasonably believed the requests were based upon a desire to delay the proceedings in an effort to affect the composition of the jury or to cause a mistrial"]; see also *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1689 [trial court has discretion to deny continuance and require defendant to proceed to trial as scheduled, either represented by counsel or in pro. per., if it determines continuance request is tactical].)

Although Morales complains that he did not receive the file in his case before his trial started, and thus could not have been prepared to defend himself, he told the trial court on June 2 that he would be ready for trial on June 7. He also does not demonstrate he made any effort to obtain the file. His standby counsel, who became his counsel after jury selection, received on June 2 "a copy of the discovery in this case . . . , which consisted of police investigation reports, the Felony Complaint and Information, a copy of the preliminary hearing transcript, 911 recordings, and a copy of the defendant's probation report." And, on June 2, the court afforded standby counsel permission to interview Morales before trial. As a result, although the court cautioned standby counsel that he could not advise Morales how to proceed in the case, the materials Morales claims he lacked were within standby counsel's possession, and Morales does not suggest he was unable to retrieve the information from standby counsel to prepare for trial.

Morales's claim that he did not have time to properly investigate his case does not assist him. As noted, standby counsel received the police investigation reports, so Morales had access to such reports, and standby counsel presumably used them when he began representing Morales. In addition, Morales cannot establish constitutional error based on his contention that additional discovery was needed to locate witnesses or investigate the potential use of prior crimes committed by the victim, given he does not specify the witnesses or demonstrate that they would have provided evidence to buttress his defense. (*People v. Riggs* (2008) 44 Cal.4th 248, 297 [no abuse of discretion in denying continuance when defendant's offer of proof regarding "missing witnesses" did not demonstrate the witnesses would have bolstered his alibi]; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1038 ["to the extent defendant contends a continuance should have been granted to permit his penalty phase consultant to undertake an open-ended investigation of his character and background, the court was within its discretion in refusing to grant a continuance, because defendant had not demonstrated that a continuance would be useful in producing specific relevant mitigating evidence within a reasonable time"].) To the extent Morales suggests that the need for further investigation was due to a failure of his former counsel to properly investigate the case, such a suggestion would amount to a claim of ineffective assistance of counsel, which is not supported factually or legally by the appellate record and thus cannot be established on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [ineffective assistance of counsel claim based on matters outside the record on direct appeal are more appropriately raised by habeas corpus].)³

³ Morales refers to the fact that he was without eyeglasses as an additional reason the trial court should have granted a continuance once it afforded him pro. per. status. Morales, however, represented that he was nearsighted and could read documents without eyeglasses and chose to represent himself despite knowing that he would not receive new eyeglasses while in jail unless a family member provided them to him, which he said would not happen. Moreover, Morales has cited no authority suggesting that a trial court must grant a continuance to a defendant in jail to obtain eyeglasses upon affording pro. per. status.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.