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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JORGE E. BIANCHI, Defendant and Appellant.	B291407 (Los Angeles County Super. Ct. No. KA117478)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed as modified.

Andrea Keith, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Bianchi appeals from his judgment of conviction on one count of unauthorized use of another's personal identifying information and one count of possession of such information with a prior conviction. He contends the offenses should have been charged and sentenced as misdemeanor shoplifting under Penal Code section 459.5[1] rather than as wobbler offenses under section 530.5. He also argues the trial court erred by denying his motion to represent himself at the sentencing hearing pursuant to *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Faretta*). Finally, he contends that under Senate Bill No. 136 (Stats. 2019, ch. 590, § 1), passed on October 8, 2019 and effective January 1, 2020, which amended section 667.5, subdivision (b), we must strike the four one-year prison prior terms imposed under that provision. We affirm Bianchi's convictions but strike the four one-year terms imposed for each of his prior prison terms, effective January 1, 2020.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

On February 23, 2018, Bianchi and Kevin Tapia entered a department store and spent a short time browsing in the electronics department. Bianchi then approached the customer service desk while Tapia stood nearby. Desiree Moreno, the store's customer service supervisor, was working at the desk.

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[1] Subsequent undesignated statutory references are to the Penal Code.

Bianchi told Moreno he was there to pick up an online order and presented order information. He seemed "kind of nervous."

Moreno went to the back room to retrieve the order, which she saw was for two expensive razors and men's clothing, with a total value of approximately $400. Moreno thought something seemed "odd." She came back and asked Bianchi for his identification, which he provided. The order was under the name Judith Rook and listed Bianchi as an "alternate person." Moreno called the store's loss prevention officer, Natalie Dillon, who instructed Moreno to get more information from Bianchi while Dillon looked up Rook's account.

Moreno asked Bianchi who the order was for, and Bianchi said it was for "his aunt Judy." As a stall tactic, Moreno told him it would take some time to find the order, and Bianchi said he and his friend would get something to eat and then return.

Meanwhile, Dillon researched Rook's account and discovered another order had been placed under Rook's name listing Bianchi as the alternate pickup person. That second order, for men's clothing and men's fragrance, was not yet ready for pickup.

The two men returned after approximately 25 minutes. Dillon had instructed the customer service employee to place her walkie-talkie on the counter and turn up the volume. When Bianchi returned to the customer service desk, Dillon announced over the walkie-talkie that the police were on their way. Dillon wanted to see if Bianchi would abandon the order once he heard the police had been called. Dillon observed via the store's surveillance system that Bianchi appeared nervous. Bianchi walked over to Tapia, and the two men left the store, got into a car and drove away.

Dillon called the police. Joel Cloud, a City of Glendora police officer, stopped the car Tapia was driving. Bianchi was in the passenger seat. In the car's passenger side door compartment, Cloud found an open white envelope with Bianchi's name on the outside. Inside the envelope, Cloud found a checkbook bearing the name Rosa Bianchi, a debit card with the name Rocio Castaneda, bank documents and a debit card that belonged to Omar Guzman Santana, and bank documents bearing the name Melissa Rodriguez. The envelope also contained two lists of various names, birthdays and social security numbers, including Rosa Bianchi's. In speaking with Cloud, Bianchi denied the contents of the envelope belonged to him and said he had not seen them before. He denied knowing anyone named Rosa Bianchi.

In Bianchi's wallet, Cloud found a debit card that belonged to Nicholas Garcia and a driver's license belonging to Rocio Castaneda. Bianchi stated Castaneda was his friend and they had gone to a casino the night before, and Castaneda had left her driver's license behind. Bianchi said Garcia was his ex-boyfriend.

Rook testified she did not know Bianchi. She had never created an online account at the department store and had never ordered anything online. She verified the order that Bianchi tried to pick up listed her address and telephone number. Two weeks before the police contacted her about the fraudulent order in her name at the department store, someone had stolen mail that included her personal information from her mailbox.

B. *Defense Evidence*

Bianchi testified on his own behalf. After a night out with Tapia at a casino, the next morning Tapia asked him to pick up an order from the department store. Tapia told Bianchi it was a

gift of socks and underwear from his aunt, and all Bianchi had to do was go to the store and show his identification. Tapia said he himself could not pick up the order because he did not have identification. Bianchi agreed to pick up the order.

When Bianchi was at the customer service counter of the store and heard over the radio that the police were on their way, Bianchi thought to himself, "This is starting to sound fishy to me." He inquired of Tapia whether there was something questionable with the order, but Tapia assured him there was no problem. However, Bianchi decided to leave because he did not want to be there when the police came due to an outstanding warrant for his arrest.

Bianchi indicated that the envelope found in the car belonged to him; he had accidentally left it in Tapia's room one day. He did not know how the envelope came to be in Tapia's car. He denied any knowledge of the contents of the envelope, except for the card belonging to his friend Guzman.

PERTINENT PROCEDURAL HISTORY

Bianchi was charged in count 1 with the unauthorized use of Rook's personal identifying information (§ 530.5, subd. (a)), and in count 2 with possession of Rook's personal identifying information with the intent to defraud and with a prior conviction (§ 530.5, subd. (c)(2)), both wobbler offenses. The prior conviction was for a violation of section 530.5, subdivision (c)(1) that occurred in 2016. As to counts 1 and 2, it was further alleged Bianchi had four prior prison term convictions (§ 667.5, subd. (b)) and two prior felony convictions (§ 1203, subd. (e)(4)). Bianchi pleaded not guilty to counts 1 and 2.

At his arraignment hearing on March 23, 2018, Bianchi requested to represent himself. He then withdrew his request, but after counsel was appointed, he asked for a different lawyer pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The court denied his *Marsden* request, at which point Bianchi again invoked his right to self-representation after wavering back and forth on whether he wanted counsel to represent him. Bianchi represented himself during the pretrial proceedings, but on the day the trial was to begin, he requested to "withdraw his *Faretta* waiver and ask[ed] for appointed counsel." The court asked Bianchi if he understood that, having withdrawn his request to represent himself, he would "not be permitted to go back," and Bianchi stated he understood. The court thus granted his request and appointed counsel to represent him.

In bifurcated proceedings, Bianchi waived his right to a jury trial on, and admitted he had suffered, the prior conviction for a violation of section 530.5, subdivision (c)(1) alleged as to count 2, and the four prior prison term convictions (§ 667.5, subd. (b)) alleged as to counts 1 and 2.

In his opening statement, the prosecutor argued as to count 1 that evidence that Bianchi made an online order using Rook's information and then picked up the order demonstrated that Bianchi "willfully obtained" and then "used" her personal identifying information. As to count 2, the prosecution contended Bianchi "possessed" Rook's personal identifying information because the online orders he made included Rook's name, phone number, and address. The "intent to defraud" element was satisfied by the fact that Bianchi's name was listed on the order as the approved alternate person; the lies he told the store employee about picking up the order for his "Aunt Judy";

Bianchi's fleeing the store; and evidence that he possessed the personal identifying information of multiple other people.

The jury convicted Bianchi of counts 1 and 2. After the verdict was read and the sentencing hearing set for approximately three weeks later, Bianchi's counsel indicated Bianchi was requesting a *Marsden* hearing. The court responded it would take up the motion on the next date. Bianchi followed up with a written *Marsden* motion.

The day of the sentencing hearing, the court heard and denied Bianchi's *Marsden* motion. Immediately thereafter, Bianchi's counsel stated, "The defendant would like to renew his *Faretta* motion, wants to go pro per for the sentencing part." The court responded, "That will be denied outright. I told him when I appointed you to represent him that he would not have a second chance."

The trial court sentenced Bianchi to a total of seven years in prison. As to count 1, the court imposed the upper term of three years, plus a consecutive term of four years – one year for each of the prior prison term convictions. The court imposed the same sentence as to count 2, but stayed it pursuant to section 654. The court imposed a restitution fine in the amount of $1,400 (§ 1202.4, subd. (b)), a court operations assessment of $40 for each count (§ 1465.8, subd. (a)(1)) and a court facilities assessment of $30 for each count (Gov. Code, § 70373, subd. (a)(1)). Bianchi filed a timely notice of appeal from the judgment.

Bianchi then brought a petition under section 1170.18, subdivision (a) to reduce counts 1 and 2 to misdemeanors pursuant to Proposition 47. At the August 14, 2018 hearing on that petition, the prosecutor conceded, and the trial court agreed,

that Bianchi qualified for relief as to count 1 for unlawful use of personal identifying information, but not as to count 2 for possession of such information with a prior conviction for identity theft. The court ordered the "information deemed amended to allege count 1 as a misdemeanor" and recalled and set aside the seven-year sentence as to count 1. The court lifted the stay on the sentence of seven years imposed for count 2. The court declined to impose any additional jail time as to count 1.

Approximately two weeks later, Bianchi filed another motion pursuant to Proposition 47 to reduce count 2 to a misdemeanor. The trial court denied the petition, and Bianchi filed another notice of appeal from the ruling. We consolidated the two appeals.

DISCUSSION

I. *Bianchi's Conviction Under Section 530.5, Subdivision (c)(2) Is Ineligible for Reclassification as Misdemeanor Shoplifting Under Proposition 47*

Bianchi was convicted of the second count alleged in the information for a violation of section 530.5, subdivision (c)(2), which provides: "Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information[2] . . . of another person, and who has previously been convicted of a violation of this section, upon conviction therefor shall be punished by a fine, by imprisonment in a county jail not

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[2] As relevant here, "personal identifying information" includes names, addresses and telephone numbers of an individual. (§ 530.55, subd. (b).)

to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170."[3] The court imposed a felony prison sentence for this wobbler offense. Bianchi contends his offense should be reclassified as misdemeanor "shoplifting" pursuant to Proposition 47 (the 2014 Safe Neighborhoods and Schools Act), which reduced the punishment for certain theft and drug-related offenses, making them punishable as misdemeanors rather than felonies or wobblers.

Proposition 47 created the new crime of "shoplifting" by adding section 459.5 to the Penal Code. (See *People v. Gonzales* (2017) 2 Cal.5th 858, 862, 863 (*Gonzales*).) Subdivision (a) of section 459.5 provides: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950) . . . ." Section 459.5, subdivision (a) further provides "[s]hoplifting shall be punished as a misdemeanor" unless the

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[3] Bianchi was also convicted of count 1 for violating section 530.5, subdivision (a), which provides: "Every person who willfully obtains personal identifying information . . . of another person, and uses that information for any unlawful purpose . . . without the consent of that person, is guilty of a public offense." Bianchi argues that the court should not have imposed a felony sentence for this offense based on Proposition 47, but we agree with the Attorney General that Bianchi's argument is moot because the trial court granted Bianchi's request to reclassify that offense as a misdemeanor.

defendant has previously been convicted of a specified offense not at issue here. In addition, "[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).) We review de novo whether Proposition 47 requires reclassifying Bianchi's offense as misdemeanor shoplifting.[4] (See *People v. Gonzales* (2018) 6 Cal.5th 44, 49.)

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[4] Bianchi argues the trial court erred in denying his petition under section 1170.18, subdivision (a) to have his offense under section 530.5, subdivision (c) reduced to misdemeanor shoplifting. Section 1170.18, subdivision (a) provides: "A person who, *on November 5, 2014, was serving a sentence for a conviction* . . . of a felony or felonies who would have been guilty of a misdemeanor . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . Section 459.5, 473, 476a, 490.2, 496, or 666 . . . ." (Italics added.) Bianchi was not serving a sentence for his felony convictions on November 5, 2014 – he was charged and sentenced in 2018 – and thus he was not eligible for relief under section 1170.18. (See *People v. Lara* (2019) 6 Cal.5th 1128, 1135 ["[w]here a defendant had not been sentenced when Proposition 47 became effective on November 5, 2014, "'the resentencing provision in section 1170.18 does not apply"']; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 855.) However, we may properly consider on appeal from Bianchi's judgment of conviction whether, pursuant to Proposition 47, he should have been charged with and tried for misdemeanor shoplifting in lieu of a violation of section 530.5, subdivision (c). (See *Lara,* at p. 1135 ["the applicable ameliorative provisions of

In *Gonzales*, the California Supreme Court addressed whether Proposition 47 required reducing a burglary count to misdemeanor shoplifting where the defendant had stolen his grandmother's checkbook and then on two separate occasions gone into banks and cashed checks he made out to himself for $125 each. (*Gonzales, supra*, 2 Cal.5th at p. 862.) The Supreme Court concluded that a "defendant's act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute." (*Ibid.*)

The court rejected the Attorney General's argument that the electorate intended to limit the offense of "shoplifting" to "the 'common understanding' . . . [of] taking goods from a store." (*Gonzales, supra*, 2 Cal.5th at pp. 868-869.) The court held, "[B]y defining shoplifting as an *entry* into a business with an intent to steal, rather than as the taking itself, section 459.5 already deviates from the colloquial understanding of that term." (*Id.* at p. 871.) The court also disagreed with the Attorney General's assertion that, "even if defendant engaged in shoplifting, he is still not eligible for resentencing because he also entered the bank intending to commit identity theft" under section 530.5, subdivision (a). (*Gonzales,* at p. 876.) The court held that even if the defendant "entered the bank with an intent to commit identity theft, section 459.5, subdivision (b) would have precluded a felony burglary charge because his conduct also constituted shoplifting." (*Ibid.*)

Proposition 47 . . . apply directly in trial and sentencing proceedings held after the measure's effective date"].)

In *People v. Jimenez* (2018) 22 Cal.App.5th 1282 (*Jimenez*), review granted July 25, 2018, No. S249397, Division Six of this court applied *Gonzalez* in addressing whether, pursuant to Proposition 47, the trial court properly reduced the defendant's felony convictions for unlawful use of another's personal information under section 530.5, subdivision (a) to misdemeanor shoplifting under section 459.5.[5] (*Id.* at p. 1285.) On two occasions the defendant in *Jimenez* entered a commercial check-cashing business and cashed stolen checks made payable to himself for amounts under $950. (*Ibid.*)

In concluding that the defendant's offenses under section 530.5, subdivision (a) were eligible for reduction to misdemeanor shoplifting, the appellate court found that the defendant's conduct – entering a business for the purposes of cashing stolen checks worth less than $950 – was "identical" to the conduct of the defendant in *Gonzalez*. (*Jimenez, supra*, 22 Cal.App.5th at p. 1289.) "Both defendants committed 'theft by false pretenses,' which 'now constitutes shoplifting under [section 459.5, subdivision (a)].' [Citation.] Section 459.5, subdivision (b) makes it clear that "'[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting,'" and that "'[n]o person who is charged with shoplifting may also be charged with burglary *or* theft of the same property.'" [Citation.]

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[5] The Supreme Court has granted review of *Jimenez* on the issue whether a felony conviction for the unauthorized use of personal identifying information of another may be reclassified as a misdemeanor under Proposition 47 on the ground that the offense amounted to section 459.5 shoplifting. The court denied a request for depublication of the opinion in *Jimenez*.

The trial court properly concluded that [the defendant's] acts of shoplifting could not be charged as felony identity theft under section 530.5, subdivision (a). [Citation.] Under section 459.5, subdivision (b), they could be charged only as misdemeanor shoplifting.'" (*Id.* at pp. 1289-1290.)

The court further held, "That [the defendant] committed identity theft in the course of the shoplifting does not alter the fact that he committed shoplifting. 'A given act may constitute more than one criminal offense. It follows that a person may enter a store with the intent to commit more than one offense – e.g., with the intent to commit both identity theft and larceny.' [Citation.] Section 459.5, subdivision (b) explicitly addresses this situation by curtailing the prosecution's charging discretion when the conduct qualifies as shoplifting. [Citation.] In sum, section 459.5, subdivision (b) barred the People from charging [the defendant] with identity theft under section 530.5, subdivision (a) when his underlying conduct constituted shoplifting." (*Jimenez, supra*, 22 Cal.App.5th at pp. 1290-1291; see also *People v. Brayton* (2018) 25 Cal.App.5th 734, review granted Oct. 10, 2018, S251122 [Division Six, following *Jimenez* in case involving similar facts and reversing denial of Proposition 47 petition to reclassify section 530.5, subdivision (a) offense as misdemeanor shoplifting]; *People v. Washington* (2018) 23 Cal.App.5th 948, 954 [Division Eight of this court suggesting without analysis that a violation of section 530.5, subdivision (a) may constitute shoplifting under *Gonzales*].)

Bianchi contends the analysis in *Jimenez* compels the conclusion that his offense is eligible for resentencing as misdemeanor shoplifting. However, *Jimenez* is distinguishable.

In *Jimenez*, as in *Gonzales*, the defendant entered a business establishment and then passed a bad check. The unauthorized use of another's personal identifying information took place once the defendant was inside the establishment. Because there was "an entry to commit a nonlarcenous theft," the shoplifting statute applied. (*Gonzales, supra*, 2 Cal.5th at p. 862.) By contrast, Bianchi acquired and possessed Rook's personal identifying information before ever entering the department store. After someone (not necessarily Bianchi) stole Rook's mail containing her personal identifying information, Bianchi acquired or retained the information with the intent to create an online account at the department store in Rook's name and place an order to be billed to Rook. Bianchi's possession of Rook's information with the intent to defraud took place before the unauthorized account was created and unauthorized charges to the account were made, and certainly before he entered the department store.[6] Although Bianchi continued to possess Rook's personal identification at the time he entered the department store, his entry into that store was not the actus reus of the crime. As such, his offense is distinguishable from shoplifting, which the Legislature has defined "as an *entry* into a business with an intent to steal." (*Gonzales*, at p. 871; see *People v. Chatman* (2019) 33 Cal.App.5th 60, 65-66 (*Chatman*), review granted June 26, 2019, S255235 [First District finding the conduct underlying possession charges under section 530.5, subdivision (c)(2) "did not include entry into a commercial

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[6] Evidence was introduced at trial that, for online orders, the payment is made online at the time the order is made, not at the time of pickup at the store.

establishment and simply does not constitute a violation of section 459.5"].) The fact that Bianchi's possession of Rook's personal information was detected, and his fraudulent intent exposed, when he entered the department store to pick up the online order previously made does not mean that his offense should be treated as shoplifting.

In addition, as the court found in *Chatman, supra,* "[s]ubdivision (c)(2) includes the element of recidivism, which itself justifies the inapplicability of the new shoplifting provision to the conduct the subdivision proscribes." (*Chatman, supra,* 33 Cal.App.5th at p. 66.) A defendant must have previously suffered a conviction under section 530.5 to be found guilty of section 530.5, subdivision (c)(2), a "wobbler" offense. In the absence of such a prior conviction, subdivision (c)(1) of section 530.5 makes it only a misdemeanor to acquire or retain possession of another's personal identifying information with an intent to defraud. The Legislature thus decided that a defendant's prior commission of identity theft may justify a greater punishment of his or her subsequent crime for possession of personal information with a fraudulent intent. The additional element of a prior conviction takes offenses under section 530.5, subdivision (c)(2) outside the scope of section 490.5, the elements of which do not include the prior commission of a similar offense. (Cf. *People v. Soto* (2018) 23 Cal.App.5th 813, 823-824 [for offense of theft from an elder, in violation of section 368, subdivision (d), the additional element that the victim was an elder renders the defendant's offense ineligible for reclassification as a misdemeanor under Proposition 47].)

Accordingly, Bianchi's conviction under section 530.5, subdivision (c)(2) is not eligible for reclassification as misdemeanor shoplifting pursuant to section 459.5.[7]

Proposition 47 also created the new crime of petty theft in section 490.2, which states that "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor," unless the defendant has certain prior convictions. (§ 490.2, subd. (a).) One court has found that offenses described in section 530.5 may be reducible to misdemeanors as "petty theft" under section 490.2 (see *Chatman, supra,* 33 Cal.App.5th at pp. 66-69 [finding acquisition or possession of another's personal identifying information as described in section 530.5, subdivision (c)(2) may constitute petty theft under section 490.2]), while other courts have reached the opposite conclusion. (See *People v. Weir* (2019) 33 Cal.App.5th 868, 873-881, review granted June 26, 2019, S255212 [concluding possession of

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[7] Because Bianchi's conviction on count 1 for unauthorized use of Rook's information (§ 530.5, subd. (a)) was reduced to a misdemeanor by the trial court, we need not address whether a different analysis should apply to determine if a "use" offense under subdivision (a), as opposed to a "possession" offense under subdivision (c), qualifies for reduction to shoplifting. (See *Jimenez, supra*, 22 Cal.App.5th at p. 1292 [distinguishing *People v. Liu* (2018) 21 Cal.App.5th 143, because that case concerned the classification of a conviction under section 530.5, subdivision (c), and "[t]he court had no occasion to consider whether a conviction under section 530.5, subdivision (a) may qualify as shoplifting under section 459.5, subdivision (a)"].)

personal identifying information pursuant to section 530.5, subdivision (c) is a nontheft offense not eligible for Proposition 47 reclassification under section 490.2]; *People v. Sanders* (2018) 22 Cal.App.5th 397, 400, review granted July 25, 2018, S248775 [holding violations of section 530.5, subdivision (a) were not theft offenses and thus were not subject to reclassification as misdemeanors under section 490.2]; *People v. Liu* (2018) 21 Cal.App.5th 143, 150-152, review granted June 13, 2018, S248130 [holding conviction under section 530.5, subdivision (c) did not qualify for resentencing under section 490.2 because it is not a theft crime].) However, Bianchi did not argue in his opening brief that his offense under section 530.5, subdivision (c) should be reclassified as petty theft pursuant to section 490.2. Bianchi raised this argument only in his reply brief, in cursory fashion. Accordingly, we deem the argument forfeited and have focused our analysis on Bianchi's contention that his offense for unauthorized acquisition or possession of Rook's personal identifying information constituted misdemeanor shoplifting under section 459.5. (See *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 352 [holding an appellant forfeits an argument by failing to raise it until his reply brief].)

II. *Substantial Evidence Supports the Trial Court's Denial of Bianchi's* Faretta *Motion Made at Sentencing*

Bianchi argues the trial court erred in denying his motion to represent himself at his sentencing hearing because the motion was timely made. Even if the motion was untimely, he further contends the court erred by failing to consider the factors set forth in *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*), before denying his *Faretta* motion.

A defendant has the constitutional right to self-representation if he or she is competent to undertake the representation, and knowingly, voluntarily and intelligently invokes that right a reasonable time prior to the commencement of trial (*People v. Lynch* (2010) 50 Cal.4th 693, 721-722, overruled on other grounds in *People v. McKinno*n (2011) 52 Cal.4th 610, 637) or sentencing proceedings (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024). "[W]hen the self-representation motion is untimely, 'self-representation is no longer a matter of right but is subject to the trial court's discretion.'" (*People v. Boyce* (2014) 59 Cal.4th 672, 702; see *Windham, supra*, 19 Cal.3d at p. 124.) Under *Windham*, the trial court must consider a number of factors when considering a request for self-representation that is not made within a reasonable time prior to trial, including: (1) the quality of counsel's representation of defendant; (2) the defendant's prior proclivity to substitute counsel; (3) the reasons for the request; (4) the length and stage of the proceedings; and (5) the disruption or delay which might reasonably be expected to follow the granting of the motion. (See *Windham,* at p. 128; *People v. Marshall* (1996) 13 Cal.4th 799, 827.)

A. *Bianchi's* Faretta *Motion Was Untimely*

Although Bianchi suggests he requested a *Faretta* hearing at the conclusion of the trial, approximately three weeks before sentencing, that is incorrect. He and his counsel notified the court he intended to make a *Marsden* motion for substitute counsel, not that he wanted to represent himself. Bianchi first made his *Faretta* motion at the sentencing hearing itself, after the court had denied his *Marsden* motion.

The day of the sentencing hearing was not "a reasonable time prior to commencement of the sentencing hearing." (*Miller, supra*, 153 Cal.App.4th at p. 1024; see *People v. Doolin* (2009) 45 Cal.4th 390, 454 [holding defendant's request to represent himself was untimely where he sought self-representation at sentencing hearing only after his *Marsden* motion was denied]; cf. *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205 (*Scott*) ["[m]otions made just prior to the start of trial are not timely"].) Accordingly, Bianchi's motion to represent himself was untimely.

B. *The Trial Court Did Not Abuse Its Discretion in Denying Bianchi's Untimely* Faretta *Motion*

Bianchi also complains the trial court did not apply the *Windham* factors as required before denying his motion to represent himself. Bianchi erroneously suggests the record was silent as to the court's reasons for denying his motion. At the end of the *Marsden* hearing conducted at the outset of the sentencing hearing, the court partially explained its denial of Bianchi's *Faretta* motion, stating it had previously advised Bianchi that if he revoked his right of self-representation, he would not be "permitted to go back" to representing himself.

We may affirm the trial court's exercise of discretion in denying an untimely *Faretta* motion if substantial evidence in the record supports the inference the court had the *Windham* factors in mind when it ruled. (*Scott, supra,* 91 Cal.App.4th at p. 1206.) The court's statements accompanying its denial of the *Faretta* motion suggest it applied the *Windham* factor regarding the defendant's prior proclivity to substitute counsel. Bianchi had made several *Marsden* hearings over the life of the case. (See *Scott*, at p. 1206 [finding the defendant demonstrated a proclivity for trying to substitute counsel by making at least two *Marsden*

motions); *People v. Perez* (1992) 4 Cal.App.4th 893, 904 [finding the trial court was presumably aware of the defendant's proclivity to substitute counsel given his three previous *Marsden* motions].) Further, Bianchi had gone back and forth over whether to represent himself, and ultimately had done so at his pretrial proceedings before revoking his request to represent himself on the first day of trial. The court's discretion extended to forming the judgment that Bianchi was fickle when it came to his representation, and his decision in one moment to represent himself would not necessarily be a long-lasting and considered wish.

The court's reference to Bianchi's proclivity to reverse himself suggests it considered the *Windham* factors. (See *Scott, supra*, 91 Cal.App.4th at p. 1206 ["[w]hile the trial court may not have explicitly considered each of the *Windham* factors, there were sufficient reasons on the record to constitute an implicit consideration of these factors"].) The trial court was well aware of the quality of defense counsel's representation based upon both its observations of counsel during the trial over which it presided and the issues raised by Bianchi during the *Marsden* hearing immediately preceding his *Faretta* motion. (See *Scott,* at p. 1206 ["as a result of the *Marsden* motions, the trial court was aware of the quality of defense counsel's representation"]; *Perez, supra,* 4 Cal.App.4th at p. 904.) From the timing of Bianchi's *Faretta* motion immediately after the denial of his *Marsden* motion, it can be inferred that his reason for requesting to represent himself was that he was unhappy with his appointed counsel. Disagreements with counsel over strategy, however, are "an insufficient reason to grant an untimely *Faretta* request." (*Scott*, at p. 1206.) Finding substantial evidence in the record supports

the inference the court considered the *Windham* factors, we affirm its denial of the *Faretta* motion.

III. *Bianchi's One-year Prison Terms Imposed Pursuant to Section 667.5, Subdivision (b) Are Stricken Based on Recent Amendments to the Provision*

In October 2019 the Legislature passed Senate Bill No. 136 (Stats. 2019, ch. 590, § 1) (S.B. 136) amending section 667.5, subdivision (b). Prior to these amendments, "[i]n sentencing a defendant for a new felony offense, a one-year sentence enhancement under section 667.5, subdivision (b) [was] applied 'for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 889.) The only exception was for defendants who had remained free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. (*Ibid.*)

S.B. 136 amends section 667.5, subdivision (b) to state that a one-year term under that section shall be imposed "for each prior separate prison term for a sexually violent offense. . . ." Thus, S.B. 136 eliminates the prior prison term enhancement except in cases involving sexually violent offenses. None of Bianchi's prior convictions was for a sexually violent offense. Accordingly, under section 667.5, subdivision (b), as amended, Bianchi would not qualify for the imposition of the one-year enhancements for his four prior prison terms.

S.B. 136 is effective January 1, 2020. (Cal. Const., art. IV, § 8, subd. (c)(2).) As of that date, Bianchi's conviction will not yet be final, and the remittitur will not have issued. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 ["for the purpose of determining

retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].) Accordingly, as the Attorney General concedes, section 667.5, subdivision (b), as amended, applies retroactively to Bianchi, because the amended statute leads to a reduced sentence. (See *People v. Brown* (2012) 54 Cal.4th 314, 323-324; *In re Estrada* (1965) 63 Cal.2d 740, 745 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no savings clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"].)

We would ordinarily remand for resentencing so the trial court could reconsider the entire sentencing scheme when striking the one-year priors. (See *People v. Hill* (1986) 185 Cal.App.3d 831, 834 [on remand for resentencing a trial court is "[n]ot limited to merely striking illegal portions" of a sentence but "may reconsider all sentencing choices," "because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components"]; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 [trial courts are generally "afforded discretion by rule and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"].) However, the Attorney General concedes that where, as here, the trial court originally imposed the maximum sentence available, there is no reason to remand for resentencing. Thus, we strike the four one-year prison prior terms, effective January 1, 2020.

DISPOSITION

We modify Bianchi's sentence to strike the four one-year prison prior terms imposed under section 667.5, subdivision (b), effective January 1, 2020. We remand the matter to the trial court for the limited purpose of directing the trial court to ensure a corrected abstract of judgment is prepared and forwarded to the California Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

STONE, J.*

We concur:

PERLUSS, P. J.

FEUER, J.

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