Filed 10/2715 P. v. Crosby CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. BRANDON MARQUEASE CROSBY, Defendant and Appellant.	2d Crim. No. B260039 (Super. Ct. No. TA133525) (Los Angeles County)

Brandon Marquease Crosby appeals his conviction by jury of assault on a peace officer (Pen. Code, § 245, subd. (c))[1] with a great bodily injury enhancement (§ 12022.7, subd. (a)). In a bifurcated proceeding, the trial court found that appellant had suffered a prior violent felony conviction (§ 667, subd. (a), a prior strike conviction (§§ 667, subd. (d); 1170.12, subd. (b)) and a prior prison term (§ 667.5, subd. (b)). Appellant was sentenced to 17 years state prison. We strike the one-year prior prison term enhancement and reduce the sentence to 16 years state prison. (*People v. Jones* (1993) 5 Cal.4th 1142, 1152-1153.) As modified, the judgment is affirmed

Facts and Procedural History

On May 28, 2014, Los Angeles County Deputy Sheriff Keelan Chan detained appellant at the Wilmington Train Station for fare evasion. (§ 640, subd. (c)(1).) Appellant resisted a pat down search and punched the deputy in the face, breaking his nose.

[1] All statutory references are to the Penal Code.

Security Assistant Iris Avalos saw Deputy Chan fall and hit a metal stairway with blood gushing out his mouth. Avalos radioed for help as appellant ran to a Denny's restaurant. Responding to the call, Sheriff's Deputies Aguiano and Atilano found appellant hiding in a bathroom stall. Appellant charged and kicked the deputies as he was "extracted" from the bathroom.

In a *Miranda* interview (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]), appellant admitted punching Deputy Chan. Appellant said that he "two pieced" the deputy - street slang for a one-two punch in rapid succession.

A month before trial, the trial court granted appellant's *Faretta* motion (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562]) and discharged the deputy public defender. Appellant defended on the theory that he resisted arrest but never hit Deputy Chan. The jury returned a guilty verdict on count 1 for assault on a peace officer and acquitted on counts 2 and 3 for resisting an officer (Deputies Aguiano and Atilano). At the sentencing hearing, the trial court denied appellant's request to withdraw the *Faretta* waiver and sentenced appellant to 17 years state prison.

Faretta Waiver

Appellant argues that the *Faretta* waiver is invalid because he was not advised of the charges against him or the potential penal consequences. At a pretrial conference, appellant initialed and signed a 28 box *Faretta* form before waiving his right to counsel. The trial court questioned appellant about the form and warned "this is a very, very serious case. If it goes to trial and it does not go your way, you don't get a second bite. You can't say, 'Now can I have an attorney? Can I do a do-over?' It is none of that. So it is very serious charge. It is a very serious case."

The record shows that appellant was warned of the dangers and disadvantages of self-representation, both orally and in writing, before waiving his right to counsel. " 'No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation.' [Citation.] Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.' [Citations.]" (*People v. Blair*

(2005) 36 Cal.4th 686, 708.) The burden is on appellant to show that he did not knowingly and intelligently waive his right to counsel. (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1824.) "[T]his burden is not satisfied by simply pointing out that certain advisements were not given." (*Ibid*.)

Relying on *People v. Jackio* (2015) 236 Cal.App.4th 445, appellant argues that the *Faretta* waiver is invalid because he was not advised of the maximum possible sentence. In *Jackio*, defendant waived his right to counsel and proceeded to trial on first degree burglary, two counts of assault with a firearm, attempted murder, two counts of first degree robbery, and felon in possession of a firearm with various arming and great bodily injury allegations. (*Id.*, at p. 449.) When the *Faretta* waiver was taken, defendant was warned of the dangers of self-representation and that he could receive a life sentence if convicted. (*Id.*, at p. 451.)

The Court of Appeal conceded that no decision of the United States Supreme Court or California Supreme Court "directly answers the specific question posed in this case: whether a defendant wishing to represent himself at trial must be advised of the full range of punishments he could face if convicted." (*Id.*, at p. 452.) The court acknowledged that advisement of the maximum punishment is important when a *Faretta* defendant waives his right to counsel and enters a plea of guilty. (*Id.*, at p. 454.) But in those cases where the defendant makes a *Faretta* waiver and proceeds to trial, it is difficult to predict what sentence terms will be imposed if the jury convicts on some counts and acquits on other counts. (*Ibid*.) The more reasonable solution "is to require the trial court to advise a defendant desiring to represent himself at trial of the maximum punishment that could be imposed if the defendant is found guilty of the crimes, with enhancements, alleged at the time the defendant moves to represent himself." (*Id.*, at pp. 454-455.) The court in *Jackio* concluded that the *Faretta* warning and general reference to "life in prison" was adequate and did not violate defendant's Sixth Amendment right to counsel. (*Id.*, at p. 456.)[2]

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[2] In *U.S. v. Erskine* (9th Cir. 2004) 355 F.3d 1161, defendant was mistakenly informed during the *Faretta* colloquy that the maximum sentence was one year rather than five years. (*Id.*, at p. 1165.) The *Erskine* court held that defendant's *Faretta* waiver was not knowing and voluntary because the misadvisement "quintupled the stakes of self-representation. . . ."

Appellant complains that the trial court did not advise him of the charges and maximum punishment other than say it was a very serious case. But appellant had a copy of the information which listed the charges and the maximum punishment on each count and enhancement. Appellant confirmed that he reviewed the *Faretta* form with his attorney and would not re-consider his decision to represent himself. The trial court warned appellant that it was not in his best interest to represent himself but would honor "your constitutional right, to represent yourself in this case." Appellant requested that the matter be set for jury trial.

A month later, the trial court asked about settlement discussions. The prosecution stated there "is no offer from the People at this time" and that "the max Mr. Crosby is facing is 21 years and eight months in state prison." Appellant did not claim surprise or try to revoke his *Faretta* waiver. Based on the totality of the circumstances, we conclude that appellant was aware of the dangers and disadvantages of self-representation, including the maximum punishment if convicted, and waived his right to counsel with eyes open. (*People v. Burgener* (2009) 46 Cal.4th 231, 241; *People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) "If the trial court's warnings communicate powerfully to the defendant the 'disadvantages of proceeding pro se,' that is all '*Faretta* requires.' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 546.)

Assuming, arguendo, that the *Faretta* colloquy was inadequate, the error was harmless beyond a reasonable doubt. (See *People v. McArthur* (1992) 11 Cal.App.4th 619, 629-630 [applying *Chapman v. California* (1967) 386 U.S. 18, harmless error standard]; *People v. Wilder* (1995) 35 Cal.App.4th 489, 496 [same].) The failure to advise on the maximum possible sentence did not prejudice appellant or affect the guilty verdict which was based on overwhelming evidence. (*People v. Wilder, supra,* 35 Cal.App.4th at p. 502.) Deputy Chan's testimony was corroborated by a surveillance video and the testimony of

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(*Id.*, at p. 1165.) Here, there was no misstatement about the maximum possible punishment. Nor is *Erskine* binding on us. (*People v. Zapien* (1993) 4 Cal.4th 929, 989 [decisions of lower federal courts are not binding on state courts].) "Neither the United States Supreme Court nor any California case we have reviewed *requires* the trial court to specifically advise a defendant seeking to represent himself of the penal consequences. . . ." (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 149.)

Security Assistant Avalos who witnessed the assault. In a *Miranda* interview, appellant admitting hitting Deputy Chan with a one-two punch. Had the trial court warned appellant about the maximum possible sentence when the *Faretta* waiver was taken, it would have led to the same result: appellant would have voluntarily proceeded without counsel and the trial would have occurred with appellant representing himself. (*People v. Wilder*, *supra*, 35 Cal.App.4th at p. 502.)

Sentencing Hearing: *Request for Counsel*

Appellant argues that the trial court erred in denying his request for counsel at sentencing. We review for abuse of discretion. (*People v. Lawrence* (2009) 46 Cal.4th 186, 192.) Appellant said, "I would like to give up my pro per status today and talk to an attorney due to the things that are going on right now . . . ." Dissatisfied with the jury verdict, appellant wanted to relitigate the court's pretrial rulings and the facts concerning the assault. Appellant argued that Deputy Chan was not the person who stopped him and that "[a]ll of this has been a big lie, everything. I have been set up." Appellant complained that he was "denied everything, my discovery, my private investigator, now I'm giving up my [*Faretta*] status, you're denying that. I can't go any further, so I don't have anything to say until I can speak with an attorney."

Appellant was playing "the *Faretta* game" to delay and disrupt the sentencing hearing. (See e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 94; *People v. Wilder*, *supra*, 35 Cal.App.4th at p. 503.) The request for counsel was intended to delay the proceedings until counsel familiarized himself/herself with the case. Appellant argues that the trial court could have appointed the deputy public defender who represented him at the preliminary hearing but makes no showing that counsel was available or could proceed with sentencing. Appellant wanted to talk to counsel about pretrial discovery and other matters not relevant to sentencing. Speculative arguments as to what appointed counsel may have perceived as grounds for new trial do not establish prejudice. (*People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1127.)

Assuming, arguendo, that the trial court erred in denying appellant's motion to withdraw the *Faretta* waiver, the error was harmless. Appellant was sentenced to 17 years

state prison, two years less than the 19-year term sought by the prosecution.[3] Appellant argues that counsel, if appointed, could have moved to strike the great bodily injury enhancement based on the theory that the blow to the head did not cause Deputy Chan's injuries. It is uncontroverted that appellant punched Deputy Chan and broke his nose. That alone is sufficient to impose a great bodily injury enhancement. (See e.g., *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498-1499.) The force of the blow caused the deputy to fall back and strike his head on a metal stairway. Deputy Chan suffered a concussion, a fractured nose, cuts and bruises, a blood clot near the collarbone, a dent on the back of his head, and severe "halo-like" headaches.

> Appellant asserts that counsel, if appointed, could have argued that appellant's mental history, as referenced in the probation report, was grounds for reducing the sentence. The probation report states that appellant was asked by his parole officer to enroll in a mental health program but absconded and never submitted to a mental health evaluation. The trial court read and considered the probation report, was aware of appellant's mental history, and decided that the great bodily injury enhancement should be imposed. Appellant makes no showing that the trial court abused its discretion in denying his request to withdraw the *Faretta* waiver or that there is a reasonable probability that counsel, if appointed, would have obtained a more favorable sentence. (*People v. Lawrence, supra,* 46 Cal.4th at p. 188.)[4]

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[3] The trial court imposed a 17-year aggregate sentence based on the following sentence calculation: a four year midterm for assault on a peace officer, doubled to eight years based on the prior strike; plus three years on the great bodily injury enhancement (§ 12022.7, subd. (a)); plus five years on the prior serious felony conviction (§ 667, subd. (a)(1)); plus one year on the prison prior enhancement (§ 667.5, subd. (b)).

[4] Appellant, in his reply brief, argues that the deputy public defender who represented appellant at the preliminary hearing obtained an ex parte order for the appointment of a confidential "expert." We have taken judicial notice of the August 18, 2014 ex parte order which reflects that a psychologist was appointed to examine appellant and consult with defense counsel. Appellant brought his *Faretta* motion eight days later. It is unknown whether appellant was ever evaluated by the psychologist or whether a report was prepared. We reject the speculative argument that counsel, if appointed to represent appellant, could

One Year Prison Term Enhancement

Appellant contends, and the Attorney General agrees, that the one-year prior prison enhancement must be stricken because it is based on the same felony strike prior which was used to impose a five-year enhancement pursuant to section 667, subdivision (a). (See *People v. Jones*, *supra*, 5 Cal.4th at pp. 1152-1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805.)

Conclusion

The one-year prior prison term enhancement is ordered stricken and the sentence is reduced from 17 years to 16 years state prison. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J

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PERREN, J.

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have argued that appellant's mental health issues warranted a lesser sentence or rendered the *Faretta* advisements inadequate.

Ronald V. Skyers, Judge

Superior Court County of Los Angeles

Jerry Smilowitz, 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, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Shira Seigle Markovich, Deputy Attorney General, for Plaintiff and Respondent.