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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DONALD WIEGE, JR, Defendant and Appellant.	B178654 (Los Angeles County Super. Ct. No. BA264628)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Charles Brian Holzhauer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Kenneth N. Sokoler and Susan Lee Frierson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part 1 of the Discussion.

Defendant and appellant, Donald Wiege, Jr, appeals from the judgment entered following his conviction, by jury trial, for receiving stolen property (Pen. Code, § 496d, subd. (a)).[1] Sentenced to state prison for two years, he now appeals, claiming there was trial error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, the evidence established the following.

1. *Prosecution evidence.*

On May 4, 2004, Ana Robles drove her 1995 Chevy Tahoe S.U.V. to her 6:00 a.m. shift at the Robinson-May distribution center in the City of Industry. She parked in the company parking lot. Around 10:00 a.m., Robles was notified her S.U.V. had been stolen. She checked, and found it was missing from the parking lot. She had not given anyone permission to use it. When she retrieved her vehicle that afternoon, she found the dashboard frame broken and her car's stereo equipment ripped out and thrown into the back.

At about 9:35 a.m. that same morning, police officers went to East 25th Street in Los Angeles. At the rear of this residence, they found Robles's stolen S.U.V. Defendant Wiege was in the back seat and he appeared to be busy doing something. As one officer described the scene, "The interior of the vehicle was obviously stripped. The stereo equipment was pulled out -- was laying on the seats inside the vehicle. It looked like somebody had ransacked the interior of the vehicle."

Wiege asked one of the arresting officers, "You got me with Lo-Jack, huh?" Wiege said he was going to get $2,000 for the car, but "he wanted to keep the rims because they were nice rims." As he was being taken to a patrol car, Wiege said he couldn't get a job because he had been shot in the leg the year before, "and that's why he does this."

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[1] All further statutory references are to the Penal Code unless otherwise specified.

2. *Defense evidence.*

Wiege did not testify.

Deise Calderon testified she and Wiege were living together in May 2004. On the day he was arrested, she had given him a ride to a friend's house at about 9:25 or 9:30 a.m. on her way to work. The friend's house was on 25th Street, just a few blocks from where she and Wiege were living.

CONTENTIONS

1. The trial court erred by denying Wiege's *Faretta* motion to represent himself.

2. The trial court erred by requiring that Wiege either be the first defense witness or not testify at all.

DISCUSSION

1. *The trial court did not err by denying the Faretta motion.*

Wiege contends the trial court erred by denying his motion for self-representation under *Faretta v. California* (1975) 422 U.S. 806 [142 L.Ed.2d 311]. This claim is meritless.

"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, the United States Supreme Court has held that 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. . . . [¶] . . . [¶] . . . unlike the right to be represented by counsel, the right of self-representation is not self-executing. In *Faretta, supra*, 422 U.S. 806, the court held that a knowing, voluntary, and unequivocal assertion of the right of self-representation, made weeks before trial by a competent, literate defendant, should have been recognized [citation]; subsequent decisions of lower courts have required expressly that the defendant make a timely and unequivocal assertion of the right of self-representation. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21.)

" '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.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) "In exercising that discretion, a trial court is required to consider (1) the quality of counsel's representation, (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 such a motion. (*People v. Windham* (1977) 19 Cal.3d 121, 128 . . . .)" (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1204.) "When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]" (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

Wiege pled not guilty to the information on June 1, 2004.[2] Over the next three months, he made a series of pretrial court appearances in Department 130. He asked for, and was granted, several continuances. After a *Pitchess* motion[3] was denied on September 3, the trial court told Wiege he could go to trial the following day. The case was put over until September 15, however, because defense counsel was leaving for vacation. In making this request, defense counsel commented, "Maybe one last chance at settlement." The trial court said there would be no more continuances.

On Wednesday, September 15, both parties announced ready for trial, and the case was transferred to Department 100 to be sent out for trial on September 21. At 8:30 a.m. on Tuesday, September 21, the parties having announced ready for trial, the case was transferred to Department 132 "forthwith for trial." At 9:00 a.m. that same morning, the case was called for trial in Department 132. The court and the parties conferred about possible dispositions. As later described on the record by the trial court: "This was sent to me for trial. We had some brief discussions off the record where we discussed the

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2 All further calendar references are to the year 2004 unless otherwise specified.

3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

possible disposition. Apparently, we're not going to reach a disposition in this matter." The following colloquy then occurred:

"[The Court:] The latest development that occurred was that [defense] counsel, Mr. Lopez, said to me -- and I've ordered the jury so we can start the trial -- that the defendant had a request.

"Mr. Lopez, do you want to indicate what that was?

"Mr. Lopez: Yes, Your Honor. To be clear, my client, at our last pretrial -- which was last Wednesday, I believe -- after we had the hearing he indicated that he would like to go pro per, and I said: 'Well, we've already heard your case. I said that we could address it at the next court hearing.'

"I'm not familiar with the procedural process here downtown. So we came here today, and in [Department] 100 we declared ready. I forgot he requested pro per status until just right now when I went to talk to him. He said: 'Hey, what about me going pro per?'

"I said: 'Oh, that's right.' I came back into the court, and I'm expressing my client's interest, that he wants to represent himself under the rights that he has under *Faretta*. And I'm requesting that right now on behalf of my client."

After the trial court indicated the *Faretta* request was untimely, defense counsel said, "I do want to be candid to the court. [Wiege] did ask me at the last pretrial. That's the first time he asked me, and I told him we would address it at Division 100." The trial court asked the attorneys how long they expected the trial to last, and if Wiege was prepared to represent himself now. Wiege said he was not. The trial court said, "You know, it just seems to me that . . . there's no real good reason for the request, except he does not like the deals being offered, and that's almost like judicial forum shopping, and I don't see why it should be put over when we're ready to go today."

However, following an off-the-record discussion between Wiege and defense counsel, the prosecutor left the courtroom so the trial court could entertain a *Marsden* motion[4] from Wiege.

The following colloquy occurred as the prosecutor left the courtroom:

"[Defense counsel]: Again, for the record, [Wiege] did ask [to represent himself] last week.

"The Court: He did not ask for it on any record I'm aware of. I have no notations in the file. So as far as the Court is concerned, he didn't ask.

"[Defense counsel]: That would be the error of his counsel -- me -- Your Honor. Just to be fair to him.

"The Court: He asked after the proceeding was in court, based on your own statements.

"The Defendant: It was before the proceedings, sir.

"The Court: Well, I don't know about that. I mean, you [i.e., defense counsel] said it was at the conclusion of the matter, and . . . now we have a variance between what you're saying and he's saying."

The trial court asked Wiege why he wanted to represent himself. Wiege said, "Because I feel, Your Honor, that . . . I haven't been receiving, basically, representation that I feel I deserve. I . . . say that because during this whole time no detectives, no investigators, have gone to talk to the witnesses. They haven't went to the house. They haven't talked to nobody. They haven't gone to talk to the victim. There's no investigation going on . . . . [¶] And . . . also, him being a public defender is, in my eyes -- and I'm sure in a lot of other people's eyes -- a sign that he's not as good as somebody that has their own firm or own practice." (*Sic.*)

In response, the trial court said it was treating the hearing "as a combination pro per and *Marsden*," and asked defense counsel to respond. Defense counsel said he had asked Wiege for witness names, but Wiege never gave him any. Defense counsel

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4 *People v. Marsden* (1970) 2 Cal.3d 118.

said that, after the *Pitchess* motion was denied and it was clear trial was imminent, "I told [Wiege] to give me names of any witnesses. I had one witness, [Calderon], who is going to be coming to court to testify . . . . And that's the only name, of all the witnesses, I have."

The trial court denied the *Marsden* motion and then moved to an open hearing to consider Wiege's *Faretta* request.

The trial court properly concluded Wiege's *Faretta* motion was untimely because it had not been made until September 21, the very day of trial. (See *People v. Burton* (1989) 48 Cal.3d 843, 853 ["Defendant did not invoke his right to self-representation until after the case had been called for trial, both counsel had answered ready, and the case had been transferred to a trial department for pretrial motions and jury trial. Voir dire began the next day; the jury was impaneled three court days later. Defense counsel had represented defendant for six months, since the preliminary hearing, and defendant had had several court appearances in which he could have invoked his right to represent himself. Defendant asserted he was not ready to go to trial and needed an unspecified period for preparation. Under the circumstances, the motion was clearly directed to the sound discretion of the trial court."]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 626 ["motions for self-representation made on the day preceding or on the trial date have been considered untimely"].)

Wiege argues that if his *Faretta* motion was untimely, it was defense counsel's fault for having forgotten Wiege had asked him to make the request earlier. Not so. According to defense counsel, it was only *after* the September 15 proceeding had already ended that Wiege said he wanted to represent himself. Hence, even had defense counsel remembered to raise the issue at the very next hearing, that would not have caused the trial court to be notified before September 21. The only difference is the trial court would have been notified a little earlier *that same morning*.[5]

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[5] Wiege also argues, "Had defense counsel made the [*Faretta*] application before the hearing on September 15, 2004, as requested by appellant, it would not have been on the morning of trial and would have been before the parties announced that they were

Because Wiege's *Faretta* motion was untimely, the trial court had discretion to grant or deny it. The trial court stated it had considered the *Windham* factors,[6] (*People v. Windham* (1977) 19 Cal.3d 121) and the record discloses the following information relating to those factors.[7] Although Wiege may not have shown a prior proclivity for substituting counsel and the trial was going to be relatively short, the record showed: Wiege was not ready to go to trial; defense counsel had been representing him properly; Wiege had not given a good reason for wanting to represent himself; and, the trial court believed Wiege was trying to manipulate the system in order to get a better plea bargain offer.

Wiege argues there was a good reason for his *Faretta* request because he was "only [trying] to avoid being represented by an attorney he did not trust." This argument is entirely unpersuasive. Although Wiege complained defense counsel had not done any investigation into the case, defense counsel told the trial court that when he asked Wiege for witness names, Wiege only gave him Calderon's name. Calderon testified at trial and provided Wiege with an alibi for the counts charging him with stealing Robles's S.U.V., and those counts were subsequently dismissed at the People's request. Given that Wiege was caught red-handed inside the stolen vehicle, and given the admissions he made to the arresting police officers, there was little else for defense counsel to do but have Calderon

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ready for trial." But Wiege's statement to the trial court, that he had alerted defense counsel to his desire for self-representation *before* the September 15 hearing, was directly contradicted by defense counsel and the trial court reasonably chose to believe defense counsel rather than Wiege. In any event, a *Faretta* motion made six days prior to the start of trial would also have been untimely. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [*Faretta* motion made five days before trial was untimely and within trial court's discretion to deny]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [*Faretta* motion made six days before trial was untimely].)

6 It does not matter if a trial court fails to expressly consider each of the *Windham* factors so long as "there were sufficient reasons on the record to constitute an implicit consideration of these factors." (*People v Scott*, *supra*, 91 Cal.App.4th at p. 1206.)

7 The trial court pointed out that, as part of its *Windham* analysis, it was considering some of the information which came out during the *Marsden* hearing.

testify. Wiege does not challenge defense counsel's assertion he asked for, but never received, the names of any other potential witnesses. Wiege's mistaken belief that all public defenders are necessarily less competent than private attorneys is not a valid reason for granting a *Faretta* request.

The trial court did not abuse its discretion when it denied Wiege's *Faretta* request.[8]

2. *The trial court did not require Wiege to testify first or not at all.*

Wiege contends the trial court violated his Sixth Amendment and fair trial rights by requiring that he either be the very first defense witness or that he not testify at all. This claim is meritless.

a. *Procedural background.*

Before the start of jury voir dire on Tuesday, September 21, defense counsel told the trial court he had a witness who could only testify on Thursday morning. The trial court said, "We'll wait for Thursday morning, if you have a witness. No problem with that." The People finished presenting their witnesses on Wednesday in the mid-afternoon. The trial court then expressed its displeasure about losing the rest of the afternoon:

"The Court: I'm not totally happy that we're adjourning now. What was the story why your witness was not able to come today?

"[Defense counsel]: I planned -- I thought they were going to talk longer, and she's working. So I said she could come tomorrow morning.

"The Court: Is there any other witnesses you intend to call?

"[Defense counsel]: To be candid, her and, if it doesn't go well, I may have to put my client on.

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8 Wiege also argues *Faretta* requires us to adopt the Ninth Circuit rule that a *Faretta* request made anytime before jury impanelment is timely. Not so. (See *People v. Clark* (1992) 3 Cal.4th 41, 99 [rejecting argument trial court was without discretion to deny *Faretta* motion before actual commencement of trial, because California has not "adopted a rigid rule that any *Faretta* motion made before the actual commencement of trial is deemed timely"].)

"The Court: Well, you have to put your client on now. If you're going to call him, you have to put him on now, because I agreed that she could come tomorrow, but there's no reason for him -- for me to just stop and do this tomorrow.

"If you want me to take a break, and you want to talk to him, you can talk to him, but I'm not waiting until tomorrow for him. I only agreed that this last witness could testify . . . tomorrow."

After discussing some other issues, the trial court said, "I'll take a brief break. You talk to him. I want to know this afternoon if he's going to testify."

Following this recess, the following colloquy occurred:

"The Court: We're on the record. I indicated to the defense to let me know whether his client is going to take the stand. Is he going to []take the stand?

"[Defense counsel]: Your Honor, for the record, I'm going to object to . . . being forced to decide whether today he has to testify or not. I was going to determine whether the witness tomorrow was sufficient. If the witness tomorrow is not sufficient, then I was considering putting him on tomorrow.

"The Court: I'll consider that, Mr. Lopez, but . . . [¶] . . . [¶] . . . can you explain to me: What is it about that witness that will change whether your client is going to testify or not? What is it he's going to say? I mean, whether he's going to be a good witness?

"[Defense counsel]: Your Honor, it just depends on what comes out in testimony. If the Court is asking me to decide today, my decision is he won't testify.

"The Court: You'll have to convince me tomorrow that there's some need to put him on. It's 3:05. We have another hour and 20 minutes.

"[Prosecutor]: I talked to that witness and . . . it's kind of what counsel said. I mean, what she's going to testify to is she's the girlfriend of the defendant . . . and she dropped him off about 9:20 in the morning, which would be about 15 minutes before the officers responded. And so, therefore, that's sort of counts 1 and 4 that it's an alibi for. I can't imagine what else --

"[Defense counsel]: That should be sufficient. If that is what comes out, Your Honor, probably the odds are I won't call him. I just don't want anything -- I don't want to be precluded in case something -- cases have gone bad before, Your Honor.

"The Court: I don't know. As I said, I asked you to put him on now. I don't think you get to decide the order of testimony. You made your record. I made my record, and I reserve the right not to allow him to testify tomorrow if I choose not to, because I'm prepared right now to hear him, and you're not calling him now; is that right?

"[Defense counsel]: Correct."

After asking Wiege if he understood he had a right to testify, the trial court said, "Anyway, I'll hold off. If there's not some changed circumstance told to me why he didn't testify today, he isn't testifying, because I'm ready to go right now."

The next morning, Deise Calderon testified she gave Wiege a ride to his friend's house at about 9:25 or 9:30 a.m. on the day Robles's S.U.V. was stolen. After Calderon was excused, the following colloquy occurred:

"[The Court:] Does the defense have any additional witnesses?

"[Defense counsel]: No, Your Honor.

"The Court: Does the defense rest?

"[Defense counsel]: Yes, we do."

On the People's motion, the trial court subsequently dismissed the two counts[9] that were contradicted by Calderon's alibi testimony, and Wiege was convicted only on the charge of receiving stolen property.

b. *Discussion*.

Brooks v. Tennessee (1972) 406 U.S. 605 [32 L.Ed.2d 358], struck down a Tennessee statute which required any criminal defendant who wanted to testify to do so before any other defense testimony could be heard by the jury. *Brooks* concluded the statute violated the defendant's Fifth Amendment right against self-incrimination and his due process right to have the full assistance of his attorney in planning his defense.

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9 Count 1 had charged grand theft auto; count 4 had charged burglary of a vehicle.

"Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may fail to impress the jury as honest and reliable witnesses." (*Id*. at p. 609.) "Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice 'in the unfettered exercise of his own will.' [The statute] exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand. The rule, in other words, 'cuts down on the privilege [to remain silent] by making its assertion costly.' [Citation.]" (*Id*. at pp. 610-611, fns. omitted.)

Wiege argues the trial court's requirement that he testify first or not at all violated *Brooks*. The People argue there was no violation of *Brooks* because, although the trial court initially said Wiege had to testify on Wednesday afternoon or not at all, the trial court effectively revised this ruling after defense counsel objected. The People argue, "In response [to defense counsel's objection], the trial court indicated it would entertain a request to call appellant as a witness the next day . . . . The trial court thus left open a door for appellant's counsel to call appellant as a witness the following day -- if there was some need to do so. On the next day, however, after [Calderon] completed her testimony, appellant's counsel did not raise the subject of calling appellant as a witness. Moreover, when the trial court asked whether the defense had any additional witnesses, appellant's counsel said it did not and rested . . . . [¶] By not requesting to testify in spite of the trial court's indication that it would entertain such a request, appellant has forfeited [his *Brooks* claim]."

Wiege disputes this interpretation of the trial court's comments and argues the trial court never changed its ruling that he had to testify before Calderon. We disagree. It appears to us that, although the trial court was unhappy with losing part of an afternoon's court time, the trial court said it would reconsider the matter following Calderon's testimony. The record shows that immediately after defense counsel objected, the trial court retreated, saying: "I'll consider that, Mr. Lopez," "You'll have to convince me tomorrow that there's some need to put him on," and "I reserve the right not to allow him to testify tomorrow if I choose not to." Then, after further argument, the trial court clearly signaled it would entertain a request to have Wiege testify after Calderon, saying: "*Anyway, I'll hold off. If there's not some changed circumstance* told to me why he didn't testify today, *he isn't testifying*, because I'm ready to go right now." (Italics added.) As it turned out, there appears to have been no reason for defense counsel to put Wiege on the stand after hearing Calderon's testimony. If anything, Calderon gave testimony that was even more favorable to Wiege than what he had expected. Hence, there was no reason to put Wiege on the stand after his alibi witness testified.[10]

Because the trial court ultimately retreated from its initial directive that Wiege either testify first or not at all, the trial court did not violate the United States Supreme Court's holding in *Brooks* that a defendant's constitutional right against self-incrimination cannot be so burdened.

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10 Defense counsel indicated he thought it would be "sufficient" if Calderon testified she dropped Wiege off at his friend's house at 9:20 a.m. on the day of the offense. In fact, Calderon testified she drove Wiege to the friend's house at 9:25 or 9:30 a.m. The later she fixed the time of dropping him off, the better for Wiege.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.