S254862

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re LEE E. PEYTON on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

LEE EDWARD PEYTON,

Defendant and Appellant.

2d Crim. No. B283608
(Super. Ct. No. 2016004171)
(Ventura County)

Lee Edward Peyton appeals from a judgment after a jury found him guilty of one count of forcible rape (Pen. Code,[1] § 261, subd. (a)(2)) and three counts of lewd or lascivious act on a child (§ 288, subd. (c)(1)). The trial court found true allegations that Peyton suffered three prior strike convictions (§§ 667, subds. (c)-(e), 1170.12, subds. (a)-(c)) and two serious felony convictions (§ 667, subd. (a)(1)), and that he served three prior prison terms (§ 667.5, subd. (b)). It sentenced him to 76 years to life in state

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

prison. Peyton contends the court erred when it denied his six *Marsden*[2] motions and his *Faretta*[3] motion. We affirm.[4]

FACTUAL AND PROCEDURAL HISTORY

Peyton, then 37 years old, moved in with S.R. and his family in late 2015. While living there, Peyton provided drugs and alcohol to S.R.'s 14-year-old daughter, M.R. In early 2016, Peyton began asking M.R. about her sexual activity. He offered to pay her telephone bill in exchange for oral sex. He touched her buttocks and tried to kiss her.

A few nights later, M.R. smoked marijuana and drank alcohol in Peyton's vehicle. Peyton did not partake. M.R. felt "completely numb" and "really out of it." She was not "seeing straight." Peyton rubbed M.R.'s thigh and reclined her seat. He pulled down her pajama bottoms, digitally penetrated her vagina, and performed oral sex on her. He then pinned her down and raped her. M.R. told Peyton to stop several times, but he did not. He said he would tell her father she had been drinking and smoking marijuana if she told him about the assault.

The prosecution charged Peyton with one count of sexual penetration of an intoxicated person (§ 289, subd. (e)), one count of oral copulation of an intoxicated person (§ 288a, subd. (i)), one count of forcible rape (§ 261, subd. (a)(2)), one count of rape of an intoxicated person (§ 261, subd. (a)(3)), and three

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

[3] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

[4] Peyton raises similar issues in his companion petition for writ of habeas corpus, which we summarily deny by separate order filed concurrently with this opinion. (Case No. B285613.)

counts of lewd or lascivious act on a child (§ 288, subd. (c)(1)). Peyton filed his first *Marsden* motion two months later, in March 2016. He claimed a conflict because his public defender in a previous case "improperly induced [him] to accept a plea bargain while [he] was under psychotropic medication." He said that in 2008 he filed a petition for writ of habeas corpus in federal court alleging ineffective assistance of counsel against that attorney, which the court granted.[5] He said he filed a lawsuit against the public defender's office in 2010, and the office declared a conflict. The public defender who represented Peyton in this case said he was unable to find a permanent conflict between his office and Peyton. The trial court denied Peyton's motion.

Peyton filed a second *Marsden* motion three months later. Peyton told the trial court that counsel did not heed his requests to hire an investigator to interview the victim or potential alibi witnesses. He said counsel had not provided him with copies of discovery and had not arranged for independent DNA testing. Counsel replied that he was waiting to hire an investigator until a plea bargain was no longer an option. He said he was redacting discovery so he could give it to Peyton. The trial court denied Peyton's motion.

At the conclusion of the hearing, Peyton said: "[I]f this court denies this [*Marsden*] motion, then I'm going to ask this court to transfer me back downstairs. And I'm going to invoke my *Faretta* rights." The trial court transferred the case to another judge, who denied Peyton's *Faretta* motion based on his "inability . . . to conform his behavior to the rules and procedure

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[5] Contrary to his claim, the federal district court denied Peyton's petition. (*Peyton v. Adams* (C.D.Cal. Oct. 6, 2009, No. CV 05-6928-FMC) 2009 WL 3200689 (*Peyton*).)

of courtroom protocol" when he previously represented himself in another case. (See *People v. Peyton* (2014) 229 Cal.App.4th 1063.) Two weeks later, that judge denied Peyton's motion for reconsideration of his *Faretta* ruling, again citing the misconduct that occurred in Peyton's previous case. He "believe[d] that [Peyton's] self-reputation [would] disrupt court proceedings" if he were to grant his motion.[6]

Peyton made four more *Marsden* motions over the next 10 months. In each, he reiterated the claims raised in his second *Marsden* motion: He continued to assert that counsel had not provided him with discovery, investigated his case, secured an independent DNA witness, or interviewed potential alibi witnesses. Peyton also raised new claims during these *Marsden* hearings: He criticized the consent defense counsel raised during the preliminary hearing, which he deemed "no defense at all." He claimed counsel had not provided him with the transcript from his preliminary hearing, which he needed to support a petition for writ of habeas corpus he would be filing in federal court.

Counsel replied that he had examined all discovery provided by the prosecution, all of the forensic evidence, and all of the potential witnesses' testimony. He provided Peyton with redacted discovery, but withheld some documents because it was inappropriate to provide an inmate with graphic photos of a minor. He agreed that consent was not a complete defense to the charges against Peyton, but noted it would reduce the forcible

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[6] Six months later, another judge denied Peyton's second motion for reconsideration because the *Faretta* issue "ha[d] already been litigated and decided." (See *People v. Riva* (2003) 112 Cal.App.4th 981, 991 [one trial judge generally cannot reconsider and overrule another trial judge's order].)

rape charge to a nonstrike offense. The trial court denied all four of Peyton's motions.

DISCUSSION

The Marsden *motions*

Peyton contends the trial court erred when it denied his six *Marsden* motions because he demonstrated: (1) that counsel provided ineffective representation, and (2) an irreconcilable conflict with counsel. We disagree with both contentions.

A defendant's right to substitute appointed counsel is not absolute. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.) The trial court must permit the defendant to do so only if counsel provides ineffective representation or if there is an irreconcilable conflict with counsel. (*Ibid.*) To determine whether these grounds exist, the court should permit the defendant to "state any grounds for dissatisfaction with the current appointed attorney." (*People v. Sanchez* (2011) 53 Cal.4th 80, 90.) Counsel then has "the opportunity to address the defendant's concerns . . . and to explain [their] performance." (*People v. Horton* (1995) 11 Cal.4th 1068, 1123 (*Horton*).) If a credibility question arises during the hearing, the court may accept either the defendant's assertions or counsel's representations. (*People v. Myles* (2012) 53 Cal.4th 1181, 1207 (*Myles*).) We review the denial of *Marsden* motions for abuse of discretion. (*Gutierrez*, at p. 803.)

1. Ineffective representation

The trial court did not abuse its discretion when it denied Peyton's *Marsden* motions because Peyton has not shown that counsel was ineffective. Peyton first claims counsel was ineffective because he did not call alibi witnesses. But counsel interviewed the proposed witnesses and did not find them

credible. Tactical disagreements over whether to present incredible testimony to a jury do not demonstrate ineffective representation. (*People v. Dickey* (2005) 35 Cal.4th 884, 921-922.)

Peyton next claims counsel was ineffective because he did not present expert DNA testimony that would have corroborated his assertion that his DNA was in his vehicle because he had sex with several women there. But the prosecution's DNA expert testified that there was DNA from at least four different women in the vehicle, which made it "difficult . . . to ascertain who [was] a contributor to that mixture." Counsel's decision not to call a witness to provide redundant testimony was within his tactical discretion. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.)

Peyton next claims counsel was ineffective because he pursued a consent defense. Peyton is correct that consent is not a defense to sexual penetration of an intoxicated person, oral copulation of an intoxicated person, or rape of an intoxicated person. (*People v. Giardino* (2000) 82 Cal.App.4th 454, 461-462.) But consent is a defense to forcible rape (*People v. Mayberry* (1975) 15 Cal.3d 143, 155) that, if believed by the jury, would have reduced his forcible rape conviction to statutory rape (*People v. Ross* (1965) 234 Cal.App.2d 758, 765-766). And it was relevant to the sentence imposed on the lewd act on a child convictions. (*People v. Paz* (2000) 80 Cal.App.4th 293, 297-298.)

More significantly, "[a] defendant does not have the right to present a defense of [their] own choosing, but merely the right to an adequate and competent defense." (*People v. Welch* (1999) 20 Cal.4th 701, 728 (*Welch*).) Here, counsel's decision to pursue a consent defense was aimed at enhancing counsel's credibility with the jury and focused on exposing the weakest link

in the prosecution's case. (*Id.* at p. 729.) Counsel's tactical decision to enhance his credibility with the jury also complemented his successful defense to the intoxication charges against Peyton: After he exposed M.R.'s inconsistent statements about drinking alcohol on the night of Peyton's attack and returned to that theme during closing argument, the jury acquitted Peyton of those three charges. Such a successful tactical decision does not demonstrate ineffective representation. (See, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 378; *People v. Dutch* (1967) 254 Cal.App.2d 163, 167.)

Finally, Peyton claims counsel was ineffective because he did not provide him with discovery and a copy of his preliminary hearing transcript. But at Peyton's sixth *Marsden* hearing, counsel stated he had provided all of the discovery he could. The trial court was permitted to accept counsel's representation over Peyton's. (*Myles, supra*, 53 Cal.4th at p. 1207.) And it could reasonably conclude that it was proper to withhold some graphic discovery since Peyton was incarcerated. (*People v. Taylor* (2010) 48 Cal.4th 574, 600; see also *People v. Hart* (1999) 20 Cal.4th 546, 603-604 [withholding of documents may be a tactical decision in a defendant's best interests].)

2. Irreconcilable conflict

The trial court did not abuse its discretion when it denied Peyton's *Marsden* motions because Peyton has not shown a "structural conflict" with the public defender's office or a "personal conflict" with counsel based on the federal lawsuit and petitions he filed against them. A "defendant's decision to file [a lawsuit] against appointed counsel does not require disqualification unless the circumstances demonstrate an actual conflict of interest." (*Horton, supra*, 11 Cal.4th at p. 1106.) Here,

the lawsuit Peyton referenced during his first *Marsden* hearing was resolved eight years before the trial in this case. And the target of that lawsuit was no longer in the public defender's office. That eliminated any potential conflict of interest. (*Ibid.*) Even if it had not, Peyton did not support his "conclusory assertion" of ineffective assistance of counsel in that lawsuit with evidence to demonstrate that counsel's performance was deficient. (*Peyton, supra*, 2009 WL 3200689 at p. *6.) Lawsuits without legitimate bases do not create a conflict of interest. (*People v. Hardy* (1992) 2 Cal.4th 86, 137-138.)

Peyton also referenced several more recent petitions for writ of habeas corpus he purportedly filed against the public defender's office that showed "a fabric of conflict and suspicion between [him] and counsel." But the record does not include copies of these petitions. And Peyton does not cite to them in his brief. We thus have no basis to conclude that they created an actual conflict of interest. (*Philbrook v. Randall* (1924) 195 Cal. 95, 104-105 [appellant must show error on an adequate record].)

3. Cumulative error

Finally, Peyton contends the combination of *Marsden* errors, considered cumulatively, rendered his trial unfair. But the trial court did not abuse its discretion when it denied any of Peyton's *Marsden* motions. There was no cumulative error. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

The Faretta *motion*

Peyton contends the trial court erred when it denied his *Faretta* motion because it did so based on his behavior in a previous case, a purportedly improper standard. We need not discuss that contention because the record reveals that Peyton's motion was equivocal. (See *People v. Dent* (2003) 30 Cal.4th 213,

218 [appellate court will uphold the denial of a *Faretta* motion if the record reveals any proper basis for denial]; see also *People v. Zapien* (1993) 4 Cal.4th 929, 976 [appellate court reviews trial court's ruling, not its rationale].)

A defendant has a constitutional right to self-representation. (*Faretta*, *supra*, 422 U.S. at p. 819.) But that right is not absolute. (*People v. Butler* (2009) 47 Cal.4th 814, 825.) The "government's interest in ensuring the integrity and efficiency of the trial" may outweigh the right to self-representation. (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 162.) The trial court may accordingly deny a *Faretta* motion if it is "equivocal, made in passing anger or frustration, or intended to delay or disrupt the proceedings." (*Butler*, at p. 825; see also *Welch*, *supra*, 20 Cal.4th at p. 735.)

To assess whether a *Faretta* motion is equivocal, the trial court must determine "whether the defendant truly desires to represent [themselves]." (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*).) The court should examine "not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words," drawing "every reasonable inference against waiver of the right to counsel." (*Ibid.*) An ambivalent, insincere, or emotional motion may be denied. (*Id.* at p. 21.) We independently examine the entire record to determine whether Peyton unequivocally invoked the right to self-representation. (*People v. Stanley* (2006) 39 Cal.4th 913, 932.)

The entire record reveals that Peyton's *Faretta* motion was "equivocal, made in passing anger or frustration, or intended to delay or disrupt the proceedings." (*Butler*, *supra*, 47 Cal.4th at p. 825.) Peyton's *Faretta* motion was equivocal because he moved to represent himself immediately after the

trial court denied his second *Marsden* motion. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1205.) Such an "impulsive response" to the denial of a *Marsden* motion is equivocal. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087.) The record also reveals that Peyton's purpose in invoking his *Faretta* rights was to disrupt and delay proceedings because it was interspersed among his six *Marsden* motions. (*Marshall, supra*, 15 Cal.4th at p. 26 [defendant "subvert[s] the orderly administration of justice by 'juggling . . . *Faretta* rights with . . . *Marsden* motions'"].) "[T]he right of self-representation is not a license to abuse the dignity of the courtroom." (*Id.* at p. 20.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michele M. Castillo, Judge

Superior Court County of Ventura

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

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