No. _____

_____ ◆ _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2020 TERM

_____ ◆ _____

EDGAR GOMEZ,
PETITIONER

v.

RAYMOND MADDEN, Warden
RESPONDENT

_____ ◆ _____

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE UNITED STATES

_____ ◆ _____

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EDGAR GOMEZ

INDEX TO APPENDICES

NOT FOR PUBLICATION

FILED

JUN 4 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDGAR GOMEZ, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 18-55722 D.C. No. 2:17-cv-04678-SJO-AFM MEMORANDUM*

Appeal from the United States District Court
For the Central District of California
S. James Otero, District Judge, Presiding

Submitted June 2, 2020**
Seattle, Washington

Before: CALLAHAN and NGUYEN, Circuit Judges, and R. COLLINS,*** District Judge.

Plaintiff-Appellant Edgar Gomez appeals the district court's order denying his 28 U.S.C. § 2254 habeas petition. We have jurisdiction under 28 U.S.C. § 2253. Reviewing the denial of a habeas petition de novo, *Hernandez v. Holland*,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

750 F.3d 843, 852 (9th Cir. 2014), we affirm.

This Circuit has concluded that the holding in *Faretta v. California*, 422 U.S. 806 (1975), requires that a request to proceed pro per be timely, and that a timely request is one that is made "weeks before" trial. *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004); *Moore v. Calderon*, 108 F.3d 261, 265 (9th Cir. 1997). Appellant's request was made moments before trial, not weeks before. Accordingly, Appellant has not shown that the state court's decision was "contrary to, or involved an unreasonable application of," *Faretta*. 28 U.S.C. § 2254(d)(1); *see Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005) ("Because the Supreme Court has not clearly established when a *Faretta* request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely.").

Furthermore, the trial court was not required to conduct further questioning after finding the pro per request untimely because the *Faretta* requirements are inclusive, meaning the failure of any factor may be reason for denial. *See Erskine*, 355 F.3d at 1167 ("A defendant's decision to forgo counsel and instead to defend himself . . . is valid if the request is timely, not for the purposes of delay, unequivocal, *and* knowing *and* intelligent." (emphasis added)). In addition, no clearly established federal law exists creating this requirement. Therefore, the trial court's actions cannot be a basis for habeas relief. *See Stenson v. Lambert*, 504

F.3d 873, 881 (9th Cir. 2007); *Kane v. Espitia*, 546 U.S. 9, 10 (2006).

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDGAR GOMEZ,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 17-04678 SJO (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file and the Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted and adopted; (2) petitioner's request for an evidentiary hearing is denied; and (3) Judgment be entered denying the Petition and dismissing the action with prejudice.

DATED: May 3, 2018

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDGAR GOMEZ,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 17-04678 SJO (AFM)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: May 3, 2018

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDGAR GOMEZ,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 17-04678 SJO (AFM)

ORDER RE CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks omitted).

Here, after duly considering Petitioner's contentions in support of the claims alleged in the Petition, including in his objections to the Report and Recommendation, the Court finds that Petitioner has not satisfied the requirements for a Certificate of Appealability. Accordingly, the Certificate is DENIED.

DATED: May 3, 2018

S. James Otero

S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EDGAR GOMEZ,

Petitioner,

v.

RAYMOND MADDEN, Warden,

Respondent.

Case No. CV 17-04678 SJO (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On June 26, 2017, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254. Petitioner was convicted at trial of multiple crimes for participating in a gang-related assault on three men, and for kidnapping a motorist during a carjacking. Petitioner's sole claim for federal habeas relief is that the trial court erred in denying his motion for self-representation.

As discussed below, it was not objectively unreasonable for the California Court of Appeal to conclude that petitioner's self-representation motion, brought on the first day of trial, was properly denied as untimely. The Court therefore recommends that the Petition be denied and that this action be dismissed with prejudice.

PROCEDURAL BACKGROUND

On November 19, 2013, a Los Angeles County Superior Court jury convicted petitioner of three counts of assault with a deadly weapon and one count each of kidnapping, carjacking, and kidnapping during the commission of a carjacking. The jury acquitted petitioner of one count of robbery but found true allegations of gang affiliation. He was sentenced to state prison for 16 years 4 months plus life with the possibility of parole. (8 Reporter's Transcript ["RT"] 1016-19, 1042; 1 Clerk's Transcript ["CT"] 204-10; 2 CT 296-99.)

Petitioner appealed. (Respondent's notice of lodging, Lodgment A.) In an unpublished decision filed on December 14, 2015, the California Court of Appeal reversed petitioner's convictions for kidnapping and carjacking because they were both lesser-included offenses of petitioner's other crime of conviction, kidnapping during the commission of a carjacking. (Lodgment D.)[1] The judgment of conviction was otherwise affirmed. (*Id.*) On February 24, 2016, the California Supreme Court summarily denied a Petition for Review. (Lodgments E and F.) On July 14, 2016, petitioner was resentenced to the same sentence of 16 years 4 months plus life with the possibility of parole. (Lodgment I at 3-5.)

Petitioner filed this Petition on June 26, 2017. On December 1, 2017, respondent filed an Answer. Petitioner did not file a Reply within the allotted time or seek an extension of time to do so.

[1] Respondent's Lodgment D is misidentified in the electronic docket. It is located in ECF No. 6-3.

PETITIONER'S CLAIM

In his sole claim for federal habeas relief, petitioner contends that his convictions must be reversed because the trial court erroneously denied his request to represent himself, in violation of the Sixth Amendment. (Petition at 6.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See Williams*, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *See*

Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *See Early*, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *See Early*, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d)) (emphasis added). A state-court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. *See Williams*, 529 U.S. at 406-10, 413 (*e.g.*, the rejected decision may state the *Strickland* standard correctly but apply it unreasonably); *Woodford v. Visciotti*, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Visciotti*, 537 U.S. at 24-27; *Williams*, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. *See Williams*, 529 U.S. at 409-10; *Visciotti*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699 (2002). Moreover, review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 102 (2011):

> "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [i.e., where there was no reasoned state-court decision], could have supported, the state court's decision; and

> then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Furthermore, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Petitioner's claim was denied by the California Court of Appeal in a reasoned decision on direct appeal. Petitioner then presented the claim in his Petition for Review, and the California Supreme Court summarily denied it. Thus, the California Court of Appeal's decision on direct appeal constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review. *See Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (where state supreme court denied discretionary review of decision on direct appeal, the decision on direct appeal is the relevant state-court decision for purposes of the AEDPA standard of review).

DISCUSSION

A criminal defendant has a federal constitutional right to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 832 (1975). But the right to self-representation is not absolute. *Martinez v. Court of Appeal*, 528 U.S. 152, 161 (2000). Not only must a defendant voluntarily and intelligently elect to conduct his own defense, but the request for self-representation must be unequivocal and timely. *See Martinez*, 528 U.S. at 161-62 (2000); *Stenson v. Lambert*, 504 F.3d 873, 882, 884 (9th Cir. 2007).

A. Background.

On the first day of trial, when petitioner requested self-representation, the trial court conducted a hearing (1 RT 1-2):

The Court: [The] matter has been transferred here for trial. Are there any 402's we need to deal with before we bring a jury panel down?

[Counsel for petitioner]: Your Honor, before we do that, my client has indicated to me that he wishes to proceed pro per.

The Court: Well, the matter is here for trial. Is he ready to continue with the trial today?

[Petitioner]: No. No, Your Honor.

The Court: I mean, today is eight of ten, sent out for trial. I take it it's eight of ten.

[Counsel for petitioner]: Eight of ten, Your Honor.

The Court: Eight of ten, sent out for trial. This case has been going on since April of 2012, so it's a year and a half. Are you ready to start picking a jury on your own?

[Petitioner]: Umm, I don't think I'm fully prepared for that.

The Court: Well, then you waited too long to go pro per. The request to go pro per is denied.

B. Analysis.

1. The California Court of Appeal's untimeliness determination.

The California Court of Appeal concluded that the trial court had correctly denied petitioner's motion for self-representation as untimely (Lodgment D at 7-8):

The trial court correctly determined that [petitioner's] motion to represent himself was untimely because he made it on the day of trial, just as the trial was about to begin and the prospective jurors were about to enter the courtroom. As the California Supreme Court stated in *Windham*, "a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself . . . without some showing of reasonable cause for the lateness of the request."

> (*Windham*, *supra*, 19 Cal. 3d at p. 128, fn. 5; see *People v. Valdez* (2004) 32 Cal. 4th 73, 102 [motion for self-representation made "moments before jury selection was set to begin" was untimely]; *People v. Frierson* (1991) 53 Cal. 3d 730, 742 [motion for self-representation made "on the eve of trial over 10 months after counsel had been appointed" was untimely]; *People v. Moore* (1988) 47 Cal. 3d 63, 79 ["we specifically stated in *Windham*, that 'a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request'"]; *People v. Howze* (2001) 85 Cal. App. 4th 1380, 1397 [motion for self-representation made "on the eve of trial" or "within three calendar days of the commencement of trial" was untimely]; *People v. Rudd* (1998) 63 Cal. App. 4th 620, 626 [although there is no bright line rule, "[w]hen California Supreme Court authority has been applied, motions for self-representation made on the day preceding or on the trial date have been considered untimely"].) Other circumstances supporting the trial court's finding that [petitioner's] request was untimely included that [petitioner's] attorney was ready to proceed to trial, as evidenced by the fact that he did so a few moments later, and the fact that [petitioner] had multiple pretrial opportunities (at least 10 pretrial hearings at which he was present) to assert his right of self-representation. (*People v. Lynch*, *supra*, 50 Cal. 4th at p. 726.)

The California Court of Appeal's rejection of petitioner's federal constitutional claim on the ground of untimeliness was not objectively unreasonable. "The only Supreme Court decision to discuss the timeliness of a request to proceed pro se is the *Faretta* decision itself." *Moore v. Calderon*, 108

F.3d 261, 265 (9th Cir. 1997), *abrogated on other ground as recognized by Baker v. City of Blaine*, 221 F.3d 1108, 1110 n.2 (9th Cir. 2000). The Ninth Circuit has construed *Faretta* as holding that a request for self-representation is timely if it is made "weeks before trial" or "well before the date of trial." *Moore*, 108 F.3d at 265. Thus, the only "clearly established federal law" in this context is that a criminal defendant has an unqualified right of self-representation if he makes the request weeks before trial or well before the date of trial. *Id.* Because of the general nature of this standard, other courts are free to reject a *Faretta* request as untimely "so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely." *Marshall v. Taylor*, 395 F.3d 1058, 1061 (9th Cir. 2005).

Based on the circumstances here, the California Court of Appeal's untimeliness determination comported with *Faretta*. Petitioner requested self-representation on the first day of trial, not weeks before trial or well before the date of trial. *See Marshall*, 395 F.3d at 1061 (*Faretta* request was untimely when it was made on the morning the trial began, which "fell well inside the 'weeks before trial' standard for timeliness established by *Faretta*"); *Stenson*, 504 F.3d at 884 (holding that a state court's untimeliness determination was not objectively unreasonable under the AEDPA because the Supreme Court has never held that *Faretta*'s "weeks before trial" standard requires courts to grant requests made on the eve of trial); *see also Burton v. Davis*, 816 F.3d 132, 1141 (9th Cir. 2016) (holding that a petitioner was not entitled to relief under *Faretta* where his self-representation motion was denied because it was made three days before the jury was impaneled).

Although the belated timing of petitioner's self-representation request is sufficient to conclude that the untimeliness determination was not objectively unreasonable, the California Court of Appeal properly considered additional factors consistent with *Faretta*'s general untimeliness standard. *See Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway

courts have in reaching outcomes in case-by-case determinations."); *see also Faultry v. Allison*, 623 F. App'x 315, 316 (9th Cir. 2015) (noting that the absence of precise contours in *Faretta*'s timeliness standard means that it does not "preclude a consideration of factors other than the number of weeks before trial a self-representation motion was made"). One of the factors here was that petitioner's counsel was ready to proceed to trial, while petitioner was not. *See United States v. Farias*, 618 F.3d 1049, 1052 (9th Cir. 2010) (noting that a *Faretta* request that was made on the eve of trial and that would require a continuance "would be strong evidence of a purpose to delay"). Another factor was petitioner's failure to assert his right of self-representation earlier, during the multiple pretrial hearings at which he was present. *See Marshall*, 395 F.3d at 1062 (holding that a state court could find a *Faretta* request was untimely where the petitioner "could have made his request much earlier than the day of trial").

In sum, the California Court of Appeal's conclusion that petitioner's request for self-representation was untimely did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, nor did it result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

2. The trial court's failure to conduct an additional inquiry required by state law.

Citing *People v. Windham*, 19 Cal. 3d 121, 128 (1977), petitioner complains that the trial court failed to conduct an additional inquiry into his request. (*See* ECF No. 18 at 6-7.).

Under California law, even if a defendant's motion for self-representation is untimely, the trial court still must conduct an additional inquiry into the reasons for the motion, in order to determine whether to grant the motion as an exercise of discretion notwithstanding the motion's untimeliness. *See Windham*, 19 Cal. 3d at 128. After determining that petitioner's self-representation motion was untimely,

the trial court ended the hearing without conducting the additional inquiry required by *Windham*. (1 RT 2.) The California Court of Appeal concluded, however, that the trial court's error was harmless because it was not reasonably probable that petitioner would have achieved a more favorable result had he represented himself, and because the evidence of petitioner's guilt was compelling and virtually undisputed. (Lodgment D at 10-12.)

Federal habeas relief is unavailable for alleged errors in the application of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The inquiry required by *Windham* into the reasons for an untimely self-representation request is a state law requirement and does not implicate a federal constitutional right. *See Burton*, 816 F.3d at 1144 (describing *Windham* as a state law standard for evaluating a *Faretta* request); *Avila v. Roe*, 298 F.3d 750, 753 n.3 (9th Cir. 2002) (noting the distinction between California and federal standards for evaluating *Faretta* requests); *Alander v. McGrath*, 216 F. App'x 644, 646 n.1 (9th Cir. 2007) ("The *Windham* rule, however, is purely a creature of California state law and has no bearing on the instant habeas petition."); *see also Hill v. Curtin*, 792 F.3d 670, 678 (6th Cir. 2015) ("[T]he U.S. Supreme Court has never held that a court must inquire into the basis of a defendant's request before denying it as untimely."). Thus, petitioner's allegation that the trial court's failed to conduct the sort of inquiry required by California law is not cognizable on federal habeas review.

C. Petitioner's request for an evidentiary hearing.

Petitioner requests an evidentiary hearing for his claim. (Petition at 1.)

As noted above, review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180. By its express terms, § 2254(d)(2) restricts federal habeas review to the record that was before the state court. *See also Pinholster*, 563 U.S. at 185 n.7 (noting that an unreasonable determination of fact under § 2254(d)(2) must be unreasonable "in light of the evidence presented in the

State court proceeding," and stating that "[t]he additional clarity of § 2254(d)(2) on this point . . . does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record."). Thus, federal courts may not consider new evidence on claims adjudicated on the merits in state court unless the petitioner first satisfies his burden under § 2254(d) and then satisfies his burden under § 2254(e)(2). *See Pinholster*, 563 U.S. at 181-85; *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). The Court's findings above that petitioner is not entitled to federal habeas relief under the AEDPA standard of review are dispositive of petitioner's request for an evidentiary hearing.

The Court therefore recommends that petitioner's request for an evidentiary hearing be denied.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: February 7, 2018

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

Appellate Courts Case Information

Supreme Court

Change court

Court data last updated: 09/01/2020 02:17 PM

Disposition

PEOPLE v. GOMEZ
Division SF
Case Number S231983

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation:
none

Date	Description
02/24/2016	Petition for review denied

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Filed 12/14/15 P. v. Gomez CA2/7

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. EDGAR GOMEZ, Defendant and Appellant.	B257511 (Los Angeles County Super. Ct. No. BA398363)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed in part and reversed in part.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Edgar Gomez of three counts of assault with a deadly weapon, and one count each of kidnapping, carjacking, and kidnapping during the commission of a carjacking. The jury also found true the criminal street gang enhancement allegations related to the assaults. Gomez argues that all of the convictions should be reversed because the trial court erroneously denied his motion on the first day of trial to represent himself, and that his kidnapping and carjacking convictions should be reversed because they are lesser included offenses of kidnapping during the commission of a carjacking. We conclude that any error in the denial of Gomez's motion for self-representation was harmless, but that the convictions for kidnapping and carjacking should be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Assaults*

On April 28, 2012, at approximately 3:45 a.m., Rico Hayes, his boyfriend Raymel Turner, and Turner's friend Jerry Garnett were walking on Pico Boulevard from a roller skating rink to a bus stop. All three men were African-American. At some point Garnett stepped away from Hayes and Turner, and went around the corner to make a private phone call. Suddenly, Hayes and Turner saw Garnett running back around the corner, followed by a Latino man, Gomez, who was chasing him. Garnett was calling Turner's name and screaming for help. Hayes and Turner ran from the bus stop to come to Garnett's aid.

Garnett ran into a wall or gate and collided with Gomez, who put his hands on Garnett as if he was frisking him. Gomez, who initially was outnumbered three to one, kicked Turner in the knee, as two more Latino men came running around the corner to join Gomez. Gomez said he was a member of the 18th Street criminal street gang and assumed a fighting stance. Using derogatory terms for members of Blood and Crip

criminal street gangs, Gomez said, "Fuck slobs" and "Fuck crabs." Hayes, who was wearing red clothing generally associated with Blood gangs, and Turner, who was wearing blue clothing generally associated with Crip gangs, told Gomez they were gay and did not "gangbang."[1] According to Turner, telling gang members they were gay usually diffused a potential gang confrontation and allowed him and his friends to leave without incident. When Turner's statement did not dissuade Gomez from wanting to fight, Hayes told Gomez he had a friend in the 18th Street Gang. Gomez, however, continued to threaten the three of them.

At this point a white mini-van drove up to the six men as they faced each other on the street. Two men came out of the mini-van, and the driver handed out knives to Gomez and his companions. Gomez got a knife, waved or "flashed" it at Hayes, and made slicing motions in an attempt to put the knife in Hayes' chest. Gomez also swung his knife at Turner. Hayes, who was much taller than Gomez, stood his ground for a moment to protect Turner and Garnett, who were smaller men. Now that Gomez had a knife, and Hayes, Turner, and Garnett were surrounded and outnumbered five to three, a "red flag went off" in Hayes' mind and he knew "nothing good could come from the situation [they] were in." Hayes said he was not afraid of Gomez, but he was afraid of what Gomez could do with a knife. Turner yelled "Run!" and the three friends started running down the middle of Pico Boulevard, followed by Gomez and his associates. Hayes, Turner, and Garnett ran to a house with a locked gate, jumped over the gate, hid behind some cars, and called the police.

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[1] Hayes testified that he was wearing red clothing that night "because I'm comfortable with what I wear and I like red and I believe I should be able to wear whatever I want." Hayes said that Turner was dressed in "all blue." As for Garnett, Hayes testified, "I don't remember how he was dressed, but the way he dressed is more, how do I say it, white boyish . . . . He likes to wear colored shirts and plaid shirts." Turner testified, "I don't wear red. I don't wear blue. I don't wear . . . large clothes. I don't hang out with gang members, so I do everything to prevent that."

Several months later, Hayes identified Gomez in a photographic line up and wrote, "This guy in this picture chased [Garnett] first and put him up against the gate. He also kicked [Turner]. Then he was handed a knife to stab me." Turner also identified Gomez and wrote, "He ran up, kicked me, and he pulled out a knife." At trial, the People presented expert testimony that Gomez's attack on Hayes, Turner, and Garnett was for the benefit of and in association with the 18th Street criminal street gang.

B. *The Kidnapping and Carjacking*

A warrant issued for Gomez's arrest. Law enforcement conducted surveillance and found him on June 7, 2012, riding as a passenger in the back seat of a green and tan Toyota near the Santa Monica Freeway, Interstate 10. When the officers in one of the police cars following the Toyota activated the exterior overhead lights to initiate a stop, the Toyota drove to a dead-end street, made a U-turn, and stopped. Gomez, wearing a black T-shirt, black shorts, and black socks without shoes, jumped out of the car and ran into a tunnel under the freeway. Officers gave chase, yelled at Gomez to stop running, but lost him in some bushes.

Gomez made it onto the freeway, where Miriam Sheriff was driving in heavy traffic, about to exit at La Brea Avenue. Her front windows were down, and she could hear police helicopters above her. Suddenly, Gomez jumped into her car through the passenger window, landed on the floor, pushed her foot on the accelerator, and told her to "go." Sheriff told Gomez she had a husband and daughter, and begged him not to hurt her. Gomez said he would not hurt her. Gomez stayed on the floor for a while, finally climbed up on the seat, and, after borrowing her phone, told Sheriff to exit at Fairfax Avenue and drive him to a fast food restaurant on Vermont Avenue and Martin Luther King Boulevard.

Sheriff, who has a background in social work and described herself as "empathetic," testified at trial that during the ride she began to talk to Gomez about his life and his problems. She testified that Gomez did not threaten her and was not aggressive towards her, and that once Gomez said he was not going to hurt her, she did

not feel threatened by or afraid of him. When they arrived at the restaurant, Gomez obtained $30 from a friend, gave it to Sheriff for gas, and thanked her.

Sheriff did not call the police. She was surprised when the police found her and came to her father's home to interview her. Police officers testified that Sheriff was afraid of Gomez and had pleaded with him not to hurt her because she had a family. Sheriff told the officers that she did not call the police because Gomez told her not to and she feared that Gomez knew her license plate and would be able to harm her if she contacted the police. One of the officers testified that Sheriff was nervous, frightened, worried, and shaken up during his interview with her. Sheriff identified Gomez in a photographic line up.

C. *The Charges, Verdict, and Sentence*

The People charged Gomez with three counts of assault with a deadly weapon, in violation of Penal Code section 245, subdivision (a)(1),[2] for Gomez's attacks on Garnett, Turner, and Hayes. The People also charged Gomez with kidnapping, in violation of section 207, subdivision (a), carjacking, in violation of section 215, subdivision (a), and kidnapping during the commission of a carjacking, in violation of section 209.5, subdivision (a), for his encounter with Sheriff. The People alleged in connection with the assaults against Garnett, Turner, and Hayes that Gomez committed the assaults for the benefit of, at the direction of, and in association with a criminal street gang with the intent to promote, further, and assist criminal conduct by gang members, pursuant to section 186.22, subdivision (b)(1). The information also included four counts of robbery, three of which the court dismissed before trial because the People announced they were unable to proceed. The People also alleged that Gomez was released from custody on bail or recognizance, within the meaning of section 12022.1, when he committed the kidnapping and carjacking crimes.

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

The jury found Gomez guilty on the three counts of assault with a deadly weapon against Garnett, Turner, and Hayes, and found true the criminal street gang allegations. The jury also found Gomez guilty of kidnapping, carjacking, and kidnapping during the commission of a carjacking, with respect to Sheriff. The jury acquitted Gomez of the remaining count of robbery.

The trial court sentenced Gomez to a total of 16 years 4 months, plus life in prison with the possibility of parole on the conviction for kidnapping during the commission of a carjacking. Gomez appealed.

DISCUSSION

A. *The Right to Self-Representation and the Standard of Review*

A defendant has the right under the Sixth and Fourteenth Amendments of the United States Constitution to waive his or her right to counsel and to represent himself or herself if he or she is competent to do so and invokes that constitutional right voluntarily, knowingly, and intelligently. (*Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*); *People v. Lynch* (2010) 50 Cal.4th 693, 721-722, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; see *People v. Stanley* (2006) 39 Cal.4th 913, 931-932.) The defendant must unequivocally assert the right of self-representation within a reasonable time prior to the start of trial. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*).) If the motion for self-representation is timely, unequivocal, knowing, and intelligent, the court must grant it. (*People v. Williams* (2013) 58 Cal.4th 197, 252-253; *People v. Lynch*, *supra*, 50 Cal.4th at p. 721; *People v. Jackson* (2009) 45 Cal.4th 662, 689.)

While a timely, unequivocal motion for self-representation invokes "the nondiscretionary right to self-representation" under *Faretta*, an untimely motion for self-representation does not. (*People v. Lawrence* (2009) 46 Cal.4th 186, 191-192; see *People v. Lynch*, *supra*, 50 Cal.4th at pp. 721, 722 ["[a] trial court must grant a defendant's request for self-representation" if it is timely, but has discretion to deny the

request "if untimely"]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1365 [if the motion is untimely, "self-representation no longer is a matter of right but is subject to the trial court's discretion"].) Finally, although an erroneous denial of a timely motion for self-representation is reversible per se (*People v. Williams*, *supra*, 58 Cal.4th at p. 253; *People v. Butler* (2009) 47 Cal.4th 814, 824), an erroneous denial of an untimely motion for self-representation is reviewed for harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.)

B. *Gomez's Motion for Self-Representation Was Untimely*

In assessing whether a motion for self-representation is timely, the court considers the totality of the circumstances. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 725.) "Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*Id.* at p. 726.) The court may also consider whether the defendant will need a continuance. (See *Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.) "Moreover, a trial court rarely should grant such a motion on the day set for trial. [The California] Supreme Court has 'held on numerous occasions that *Faretta* motions made on the eve of trial are untimely.' [Citation.] A motion made that close to the day set for trial is 'extreme' [citation] and now is disfavored." (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1277.)

The trial court correctly determined that Gomez's motion to represent himself was untimely because he made it on the day of trial, just as the trial was about to begin and the prospective jurors were about to enter the courtroom. As the California Supreme Court stated in *Windham*, "a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself . . . without some showing of

reasonable cause for the lateness of the request." (*Windham, supra,* 19 Cal.3d at p. 128, fn. 5; see *People v. Valdez* (2004) 32 Cal.4th 73, 102 [motion for self-representation made "moments before jury selection was set to begin" was untimely]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [motion for self-representation made "on the eve of trial over 10 months after counsel had been appointed" was untimely]; *People v. Moore* (1988) 47 Cal.3d 63, 79 ["we specifically stated in *Windham*, that 'a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial without some showing of reasonable cause for the lateness of the request'"]; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1397 [motion for self-representation made "on the eve of trial" or "within three calendar days of the commencement of trial" was untimely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 626 [although there is no bright line rule, "[w]hen California Supreme Court authority has been applied, motions for self-representation made on the day preceding or on the trial date have been considered untimely"].) Other circumstances supporting the trial court's finding that Gomez's request was untimely included that Gomez's attorney was ready to proceed to trial, as evidenced by the fact that he did so a few moments later, and the fact that Gomez had multiple pretrial opportunities (at least 10 pretrial hearings at which he was present) to assert his right of self-representation. (*People v. Lynch, supra,* 50 Cal.4th at p. 726.)

C. *Any Error in Denying Gomez's Untimely Motion for Self-Representation Was Harmless*

As Gomez correctly contends, where, as here, the court determines the defendant's request for self-representation is untimely, the trial court must inquire into the reasons for the request and exercise its discretion in light of several factors identified in *Windham*. Those factors include "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham, supra,* 19 Cal.3d at p. 128;

accord, *People v. Lynch*, *supra*, 50 Cal.4th at p. 722, fn. 10.) Although the court must make the *Windham* inquiry, the court's failure to do so does not necessarily mean the court abused its discretion. (See *Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354-1355.) A reviewing court will affirm an exercise of discretion in denying an untimely motion for self-representation if there is substantial evidence in the record supporting the inference that the trial court considered the *Windham* factors, even if the trial court failed to make the inquiry *Windham* requires. (See *People v. Dent* (2003) 30 Cal.4th 213, 218; *People v. Marshall* (1996) 13 Cal.4th 799, 827-828; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.)

The transcript of the hearing on Gomez's request to represent himself is as follows:

"The Court: [The] matter has been transferred here for trial. Are there any 402's we need to deal with before we bring a jury panel down?

"[Counsel for Gomez]: Your Honor, before we do that, my client has indicated to me that he wishes to proceed pro per.

"The Court: Well, the matter is here for trial. Is he ready to continue with the trial today?

"[Mr. Gomez]: No. No, Your Honor.

"The Court: I mean, today is eight of ten, sent out for trial. I take it it's eight of ten.

"[Counsel for Gomez]: Eight of ten, Your Honor.

"The Court: Eight of ten, sent out for trial. This case has been going on since April of 2012, so it's a year and a half. Are you ready to start picking a jury on your own?

"[Mr. Gomez]: Umm, I don't think I'm fully prepared for that.

"The Court: Well, then you waited too long to go pro per. The request to go pro per is denied."

The court did not make the required *Windham* inquiry into the reasons for the request or ask questions to obtain information that would allow the court to exercise its discretion in light of the *Windham* factors. The court asked Gomez if he was ready to proceed with the trial at the time and pick a jury, and Gomez answered both questions in the negative. But the court did not ask Gomez whether he would have been ready to pick a jury and start the trial the next day ("nine of 10") or the day after that ("10 of 10"). The court did not ask Gomez any questions about his attorney's representation, any prior requests to substitute counsel or represent himself, how soon Gomez could be ready to proceed with the trial if he represented himself, or anything else about the circumstances of his request. Nor, other than noting how long the case had been pending, did the court make any findings or comments on the *Windham* factors, such as the quality of the representation by Gomez's attorney, prior requests by Gomez to represent himself, or any disruption or delay that would result from granting Gomez's motion.

As noted, even in the absence of a proper inquiry into and an explicit discussion of the *Windham* factors, a reviewing court will not find an abuse of discretion if the record contains substantial evidence to support an inference that the trial court considered the *Windham* factors. Here, however, there is no substantial evidence that the trial court considered the *Windham* factors, and the People do not cite to any. There is no evidence that counsel for Gomez's representation was deficient or inconsistent with Gomez's wishes and instructions in any way, that Gomez's reasons for requesting to represent himself were invalid or designed to cause delay, or that Gomez had any prior proclivity to substitute counsel. It would be a stretch on this record to conclude, despite the court's failure to inquire into or make any findings on the *Windham* factors, that there is substantial evidence from which we can infer the court did consider those factors.

Nevertheless, any error in the trial court's denial of Gomez's untimely motion for self-representation was harmless because it is not reasonably probable that Gomez would have achieved a more favorable result had he represented himself. (See *People v. Rogers*, *supra*, 37 Cal.App.4th at p. 1058; *People v. Nicholson*, *supra*, 24 Cal.App.4th at pp. 594-595.) As a practical matter, self-represented defendants are rarely able to obtain a better

outcome than an experienced attorney can obtain. (See *Faretta*, *supra*, 422 U.S. at p. 834 ["[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts"]; *People v. Rivers*, *supra*, 20 Cal.App.4th at p. 1051 ["[i]t is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel"].) Gomez does not argue that his attorney was ineffective or deficient, or suggest what he would have done differently than his attorney did in order to obtain a more favorable result. Indeed, Gomez's attorney was able to obtain an acquittal of the one robbery charge that remained after the People had dismissed the other three. Moreover, although Gomez did not represent himself at trial, he did testify and was able to give his version of the events and tell his side of the story to the jury in his words. It is hard to see how he could have made a better presentation to the jury by representing himself while he was testifying.

Finally, the evidence against Gomez relating to the assaults on Hayes, Turner, and Garnett, and the kidnapping and carjacking of Sheriff, was compelling and virtually undisputed. The testimony of Hayes and Turner was detailed and uncontradicted. In his testimony, Gomez did not dispute any of the material facts of the attacks with the knife, but merely explained he was "high that day" and was unsure about how the specific events of that evening unfolded. Similarly, there was little conflict or ambiguity in the evidence of Gomez's flight from police and kidnapping and carjacking of Sheriff. Gomez testified that he ran onto the freeway after he had been chased because it was "just what I do," that he dove into Sheriff's car and put his hand on her leg and told her to "go," and that Sheriff asked him not to hurt her because she had a husband and a daughter. Although Gomez testified that his unsolicited and unwanted freeway encounter with an unsuspecting driver, who happened to have a background in social work and enjoyed talking to strangers, somehow blossomed into a voluntary ride for a newfound friend, the investigating officers who interviewed Sheriff explained that she was concerned for her physical safety because Gomez could use her license plate number to find her. The jury

did not believe Gomez's version of these events, and it is not reasonably probable they would have if Gomez had represented himself at trial. [3]

D. *Gomez's Convictions for Kidnapping and for Carjacking, Both Lesser Included Offenses of Kidnapping During the Commission of a Carjacking, Must Be Reversed*

The jury convicted Gomez of kidnapping during the commission of a carjacking in violation of section 209.5, subdivision (a), and the trial court sentenced him to life in prison with the possibility of parole. The jury also convicted Gomez of kidnapping in violation of section 207, subdivision (a), and carjacking, in violation of section 215, subdivision (a), and the trial court sentenced Gomez to one year eight months on each count and stayed both sentences under section 654.

Gomez argues, the People agree, and we conclude this was error. As the People concede, kidnapping and carjacking are lesser included offenses of kidnapping during the commission of a carjacking. (See *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1416 ["[i]t is well settled that carjacking is a necessarily included offense of kidnapping during a carjacking"]; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1368 [the elements of kidnapping "appear to be included within the elements of kidnapping during a

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[3] Gomez cites language from the court's opinion in *People v. Nicholson, supra,* 24 Cal.App.4th 584 stating "it might have been to [the defendants'] advantage to conduct voir dire and to present opening statements and closing arguments, thereby giving the jury an opportunity to hear from them (without the inconvenience of cross-examination)." (*Id.* at p. 595.) Perhaps. But the standard under *People v. Watson*, *supra*, 46 Cal.2d 818 is not whether it might have been advantageous, but whether it is reasonably probable that, had Gomez conducted voir dire and presented his opening statement and closing argument, he would have obtained a better result. And, as the court in *People v. Percelle* (2005) 126 Cal.App.4th 164 explained in distinguishing *Nicholson*, even if Gomez had personally participated in voir dire, opening statement, and closing argument, "the jury was still bound to decide the case on the evidence, the greater part of which was undisputed." (*People v. Percelle*, at p. 177.)

carjacking"]; see also *People v. Medina* (2007) 41 Cal.4th 685, 701 [attempted kidnapping is a lesser included offense of kidnapping during a carjacking].) Therefore, Gomez's convictions for the lesser included crimes of kidnapping and carjacking must be reversed. (See *People v. Pearson* (1986) 42 Cal.3d 351, 355 ["multiple convictions may *not* be based on necessarily included offenses"]; *People v. Dowdell, supra*, 227 Cal.App.4th at p. 1416 ["[w]hen a defendant is convicted of a greater and a lesser included offense, reversal of the conviction for the lesser included offense is required"].)

DISPOSITION

The convictions for kidnapping and for carjacking are reversed, and the judgment is otherwise affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS.
COUNTY OF MONTEREY)

I am employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action. My business address is 71 Via Paraiso, Monterey, California 93940.

On September 1, 2020, I served the within entitled documents described as MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, PETITION FOR WRIT OF CERTIORARI and APPENDIX TO PETITION FOR WRIT OF CERTIORARI on the interested parties in said action through the electronic filing system of the United States Supreme Court and placing a true copy thereof in the United States mail enclosed in a sealed envelope with postage prepaid, addressed as follows:

David E. Madeo
Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 1, 2020, at Monterey, California.

By: */s/ Jan B. Norman*
JAN B. NORMAN