

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
) No. _____
)
) No. Z123456
Plaintiff and Respondent,)
) Los Angeles County
) Sup.Ct.No. X123456
v.)
)
JOHN SMITH,)
)
)
Defendant and Appellant.)
_____)

PETITION FOR REVIEW TO EXHAUST STATE REMEDIES

TO THE HONORABLE RONALD GEORGE, CHIEF
JUSTICE, AND THE HONORABLE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE STATE
OF CALIFORNIA

Pursuant to rule 33.3 (a)(1) of the California Rules of Court, petitioner,
John Smith, respectfully files this petition for review for the sole purpose of exhausting
his state remedies prior to presenting his claims for federal habeas corpus relief. The case
presents no grounds for review under California Rules of Court rule 28 (b)(1).

A copy of the unpublished decision of the Court of Appeal, Second
Appellate District, Division Six, which affirmed his conviction and was filed January 20,
2004, is attached as Exhibit A. No Petition for Rehearing was filed.

STATEMENT OF THE CASE

An Information filed in Los Angeles County Superior Court alleged that petitioner unlawfully drove a vehicle (Veh. Code, § 10851, subd. (a)). A prior strike and prior prison term were also alleged (Pen. Code, §§ 667, subd. (b)-(i), 667.5, subd. (b)).

After a jury trial, petitioner was found guilty as charged (CT 68). He admitted the prior strike and prior prison term (RT 1205-1206). The court struck the prior prison term, sentenced petitioner to six years and awarded 172 days of presentence custody credit (CT 74; RT 1207, 1209).

Petitioner timely appealed from the judgment. (CT 76) On January 20, 2004, the Court of Appeal affirmed the judgment.

STATEMENT OF FACTUAL AND LEGAL BASIS FOR THE FEDERAL CLAIM

THE TRIAL COURT DENIED PETITIONER HIS
FEDERAL CONSTITUTIONAL RIGHT TO SELF
REPRESENTATION BY DENYING HIS TIMELY AND
UNEQUIVOCAL MOTION TO PROCEED IN PRO. PER.

On the day of trial, petitioner told the court that he wanted to proceed in pro. per. When asked by the judge if he was ready to begin trial that day, petitioner indicated that he needed to do legal research. Relying only on the timing of the motion, the trial court denied the request as untimely (RT 302). Under federal law, the motion was timely. Reversal is required.

A defendant has a federal constitutional right to represent himself (*Faretta v. California* (1975) 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562), and the right is unconditional if it is made within a reasonable time before trial is to begin. (*People v. Burton* (1989) 48 Cal.3d 843, 852; *People v. Windham* (1977) 19 Cal.3d 121, 128.) “The ‘reasonable time’ requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.” (*People v. Windham, supra*, at p. 128, fn.5.) Although a *Faretta* motion made on the day of trial is generally regarded as untimely in California (e.g., *People v. Perez* (1992) 4 Cal.App.4th 893, 903), the Ninth Circuit is more generous and deems motions made before the jury is impaneled as timely, unless it is made for the purpose of delay. (*Avila v. Roe* (9th Cir.) 298 F.3d 750; *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261; *Armant v.*

Marquez (9th Cir. 1985) 772 F.2d 552).¹

Petitioner's *Faretta* motion was made before the jury was impaneled (RT 302). Thus, absent a showing that petitioner made the request as a delay tactic, the motion was timely as a matter of federal law and should have been granted. (*Avila v. Roe, supra*, at p. 753.) Nothing in this record indicates that petitioner made the request in order to delay proceedings. He appeared in court only three times before the motion was made: October 18, 2002, when he was arraigned; November 13, 2002 when trial conference was taken off calendar and discovery was discussed; and December 12, 2002 when a plea offer was rejected (CT 15, 17, 24). Petitioner made the *Faretta* motion five days later. (CT 26)

At the time petitioner made his motion, a little over a month had passed since the hearing at which discovery issues were left still to be resolved. Presumably, trial counsel and petitioner could not have had a full discussion about the case until all discovery was received by trial counsel. Although petitioner was in court five days before he made his request, it is illogical to infer that he intended to delay proceedings

¹Indeed, the timeliness requirement imposed by both the Ninth Circuit and California is not mandated by *Faretta*. As Judge Ferguson pointed out in his concurring opinion in *Moore v. Calderon, supra*, at p. 265, *Faretta* "did not make the constitutional right of self-representation subject to any conditions except knowledge and intelligence. The Court did not require that the right be exercised before trial. During the course of a trial, counsel may become incapable for many reasons—injury, disbarment, misconduct. For any number of reasons a defendant in that instance may not want a mistrial—he perceives that the trial has proceeded in his favor and doesn't want the prosecution to start all over again with rehabilitated witnesses. He may want to represent himself during the balance of the trial. *Faretta* grants him that right."

because he did not make his *Faretta* request on the 12th; making the motion on the 12th instead of the 17th would not have appreciably delayed the proceedings longer than it would have had the motion been granted on the 17th.

In *Avila v. Roe, supra*, the defendant made a *Marsden* motion several weeks before trial, then on the day of trial, he moved to represent himself when he was told that all objections needed to be made through his attorney. The defendant was told at the *Marsden* hearing that there were limitations on a defendant's role in trial when represented by counsel. The Ninth Circuit found that there were no facts that supported a finding that the defendant's request was a dilatory tactic. (*Avila v. Roe, supra*, at p. 752-753.) As in *Avila*, the record in this case contains no facts that show that petitioner made the request for purposes of delay, and the trial court made no such finding. Petitioner's motion was timely and should have been granted. The improper denial of the motion requires that the judgment be reversed.

CONCLUSION

For these reasons, petitioner is seeking review of his federal constitutional claim.

Dated: _____

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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WORD COUNT CERTIFICATION
People v. John Smith

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 1149 words.

JILL ISHIDA

EXHIBIT A