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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH CRAWFORD ROBINSON,

Defendant and Appellant.

C039311

(Super. Ct. No.  
0026978)

A jury convicted defendant Joseph Crawford Robinson of possessing marijuana for sale, transporting marijuana, and offering to sell, furnish, or give away marijuana, all while being armed with a firearm. (Health & Saf. Code, §§ 11359, 11360, subd. (a); Pen. Code, § 12022, subd. (a)(1).) Defendant was sentenced to the middle term of two years in prison for possessing marijuana for sale, and an additional year for being armed. Sentence was stayed on the remaining counts.

On appeal, defendant contends the trial court erred by denying his motion to bar the prosecution from introducing his preliminary hearing testimony at trial. Defendant argues his preliminary hearing testimony was inadmissible because the court

refused to appoint counsel to represent him, and he did not waive counsel before testifying.<sup>1</sup> The People claim defendant actually waived representation by counsel. We conclude defendant did not waive the assistance of counsel at his preliminary hearing and was erroneously denied appointed counsel. We hold the admission of defendant's preliminary hearing testimony at trial was reversible error.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant was arrested on September 27, 2000. On October 2, defendant appeared in court and sought to represent himself. Counsel was appointed to represent him after defendant asked to "remain silent" concerning a financial form. On October 3, 2000, defendant appeared for a bail review hearing. Appointed counsel was not present. Defendant again sought to represent himself, and signed a written waiver of counsel.

Defendant's brother, an attorney from back East, posted bail for him on October 12, 2000.<sup>2</sup>

Over the next few weeks, defendant filed several pro per motions and appeared in court seeking a variety of orders. On

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<sup>1</sup> Defendant also argues the court erred by refusing to allow him to present a "legal necessity" defense, and by refusing to instruct the jury on medical marijuana "compassionate use" defense. Because we have concluded that the admission of the preliminary hearing testimony requires reversal, we do not reach defendant's additional contentions.

<sup>2</sup> Defendant repeatedly explained to the court that he believed he could handle some legal matters on his own, but, if needed, his brother would represent him.

October 26, defendant filed a written motion for appointment of counsel to assist him, asserting he could not afford a lawyer. The motion was set for hearing on November 22, 2000, because defendant had filed repeated challenges for cause against Judge Kaufman.

On November 22, defendant requested Judge Olney to appoint counsel to "assist" him, although he desired to retain full control over his case. Judge Olney announced he would first determine whether defendant was eligible for court-appointed counsel before he determined whether he was entitled to "stand-by counsel." The prosecutor claimed defendant was ineligible for court-appointed counsel because he had posted bail and owned property in Plumas County.

Judge Olney questioned defendant about his finances in the presence of the prosecutor. Defendant stated he owned two pieces of property, one valued at \$150,000 with a \$110,000 mortgage on it, and one estimated at \$100,000 with a \$60,000 mortgage on it. The court opined that defendant could go to a bank, get a second mortgage, and pay for an attorney. Defendant stated the bank would not make such a loan, and that it could take two or three years to sell the property. Defendant admitted receiving some income from investments, enough to live on, but could not estimate the amount of income he received. The court informed defendant that he could not get court-appointed counsel unless he was "basically at about the same income level as people that are receiving welfare assistance." Although conceding he supported himself better than welfare,

defendant stated he did not have the \$15,000 to \$40,000 cash demanded by private attorneys whom he had contacted to represent him. The court found defendant did not qualify for court-appointed counsel.

On November 30, defendant again filed a written motion stating he had no money to pay an attorney, and objected to the court's refusal to appoint counsel to assist him.

On December 7, 2000, the day set for the preliminary hearing, Judge Pangman, sitting as a magistrate, advised defendant he had a right to an attorney, and that one would be appointed for him if he could not afford counsel. The magistrate told defendant he could be asked to reimburse the county if he could afford some or all of the attorney's fees. Defendant requested the appointment of counsel to "assist" him. The prosecutor complained that defendant had "declined to fill out" a financial declaration, and argued that defendant had "refused" the assistance of counsel. Defendant asked if he had the right to remain silent about his funds. Defendant filled out the financial declaration, putting "N/A" on the form. Defendant reiterated that he had no cash. He told the magistrate that all trial attorneys he had contacted wanted money in advance to take his case. He stated that no attorney was willing to take a lien against defendant's property. The magistrate found defendant ineligible for court-appointed counsel based on defendant having written "not applicable" upon his financial declaration, and based on Judge Olney's decision

that "[d]efendant is not financially eligible for [a] Court-appointed attorney . . . ."

The preliminary hearing then began, but defendant continued to request an appointed attorney to represent him.

Defendant stated he wanted to testify. The magistrate told defendant he had no obligation to testify and that the "statements . . . may, in fact, incriminate you, and can be held against you." The magistrate advised defendant that his sworn testimony could be used against him in future proceedings, including in his trial.

Defendant then testified that he began growing marijuana for his own medical use after the passage of the Compassionate Use Act in 1996.<sup>3</sup> In 2000, he obtained written approval from a physician to use marijuana. Defendant testified he was growing more marijuana than he or his coworkers could use. He planned to sell the excess marijuana to the California Medical Research Center for between \$2,000 and \$3,000 per pound -- less than the market price of \$4,000 per pound -- in order to provide medical marijuana to patients who could not grow it themselves. He

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<sup>3</sup> The "Compassionate Use Act of 1996" is codified in Health and Safety Code section 11362.5. We are cognizant of the United States Supreme Court's decision barring distribution of "medical marijuana" under federal law. (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483 [149 L.Ed.2d 722].)

expected to be paid for the crop.<sup>4</sup> The prosecutor questioned defendant about his finances, and federal tax status.<sup>5</sup>

On January 17, 2001, after the preliminary hearing and before trial, defendant's relatives retained attorney John Duree for the purpose of pretrial motions on the "medical necessity" marijuana defense.

On May 1, 2001, attorney Duree sought court permission to withdraw after completion of the motions. Defendant immediately requested appointment of counsel. Judge Olney requested that defendant fill out a financial declaration. Defendant asked:

"[THE DEFENDANT]: Judge, is this form confidential?"

"THE COURT: That's a good question.

"THE CLERK: Yes, it is.

"[THE DEFENDANT]: Because the last one I filled out --

"THE COURT: The Clerk tells me it is.

"[THE DEFENDANT]: The last time I filled one out in front of you, you shared the information with the D.A."

The trial court then conducted an ex parte hearing on defendant's financial status. Defendant explained his real and

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<sup>4</sup> Defendant's preliminary hearing was not his first incriminatory statement. Pro per pleadings filed before the preliminary hearing demonstrate defendant's belief that he could legally provide medical marijuana to patients.

<sup>5</sup> The record is replete with references to companion forfeiture proceedings. Among the items initially scheduled for forfeiture were \$6,000 in cash retained by the prosecution and defendant's vehicles. At sentencing, the prosecutor dismissed the forfeiture proceedings.

personal property was in forfeiture proceedings, and was subject to liens. The trial court found defendant did qualify for court-appointed counsel.

On June 5, the trial court appointed attorney Douglas Prouty to advise and appear with defendant, although defendant was permitted to act as counsel. Prouty continued as advisory counsel throughout trial and sentencing.

Before trial, defendant filed a motion to exclude his preliminary hearing testimony from trial because he had requested appointed counsel at the preliminary hearing, was erroneously found not to qualify for appointed counsel, and had not waived the assistance of counsel. Defendant argued that both Judge Olney (on November 22) and Judge Pangman (on December 7) failed to permit defendant to provide confidential financial data, and incorrectly ruled that defendant must qualify for welfare in order to receive court-appointed counsel. Defendant's testimony, he argued, was elicited in violation of Penal Code section 866.5, and must be excluded at trial.

The prosecution responded that defendant had sought "advisory" counsel and had waived counsel. Judge Olney denied defendant's motion to exclude the testimony, finding that Judge Kaufman denied defendant's request for counsel because defendant wanted to represent himself. Judge Olney did not refer to his own ruling of November 22, quoted by defendant, which was based on defendant's financial disqualification. Judge Olney stated he did not recall the hearing.

Jury trial began on July 30, 2001. Defendant represented himself with the assistance of attorney Prouty.

The prosecution presented testimony that property occupied by defendant was searched pursuant to a search warrant obtained by Plumas County Sheriff's deputies. The prosecution introduced photographs of approximately 50 pounds of marijuana in various stages of processing, \$6,000 in cash from defendant's person, two vehicles, and a variety of personal property. Defendant and three other people on the premises had valid medical certificates to use marijuana for medicinal purposes.

The prosecution also introduced transcripts of defendant's preliminary hearing testimony. Defendant admitted cultivating and transporting marijuana, and described his intent to sell the amount he did not need for his personal use. The investigating officer opined that defendant possessed the marijuana for sale due to the quantity of drugs, the packaging of marijuana in one pound bins, and the amount of cash in defendant's pockets.

Defendant did not testify at trial. Dr. Marion Fry, a physician and cancer survivor, testified that she had authorized defendant's use of marijuana to treat degenerative arthritis. Attorney Dale Schafer, founder and president of the California Medical Research Center, had 6,000 clients authorized to use medical marijuana under the Compassionate Use Act, many of whom could not cultivate or obtain marijuana by themselves. Schafer testified defendant had expressed an interest in distributing his excess marijuana to Schafer's clients. Schafer indicated numerous marijuana clubs and distribution centers existed for

patients to obtain marijuana for medical use, although he believed that it was illegal for defendant to sell medicinal marijuana.

Defendant made his own final argument to the jury, admitting he intended to provide medical marijuana for people who had the right to use it. Defendant asked the jury to follow the intent of the Compassionate Use Act.

The trial court instructed the jury that the corpus delicti of the crime could be proved by defendant's testimony at the preliminary hearing, and that defendant's statements were admissions.

#### DISCUSSION

##### A.

Before trial, defendant moved to exclude evidence of his "judicial confession" during the preliminary hearing because it was obtained in violation of Penal Code section 866.5. Section 866.5 provides:

"The defendant may not be examined at the examination, unless he is represented by counsel, or unless he waives his right to counsel after being advised at such examination of his right to aid of counsel."

Defendant was not represented by counsel at the preliminary hearing, and defendant contended he did not waive counsel. Defendant contended the record showed the trial court and the magistrate failed to appoint counsel for him when he requested counsel because each judge improperly determined he did not financially qualify for appointed counsel. In denying

defendant's motion to exclude the testimony from the trial, the trial court ruled the magistrate had determined defendant wanted to represent himself.

We conclude the record of defendant's November 22, 2000, appearance before the trial court and his December 7, 2000, appearance before the magistrate do not support the trial court's ruling that defendant waived the assistance of counsel at the time of his preliminary hearing testimony. Therefore, we hold defendant's preliminary hearing testimony violated Penal Code section 866.5 because there was no valid waiver of counsel.

It is well-settled that, as a critical stage of the criminal process, there is a federal constitutional right to counsel a preliminary hearing. A right to counsel is self-executing, requiring no affirmative request. Courts should indulge every presumption against a waiver of counsel. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069; see *Faretta v. California* (1975) 422 U.S. 806, [45 L.Ed.2d 562].) Enabling statutes require that a defendant be informed of his right to appointed counsel at the time of the filing of the complaint, and be given time to hire private counsel if able to do so. (§§ 858, 859; *People v. Crayton* (2002) 28 Cal.4th 346, 360.)

The duration of a valid waiver of a right to counsel was recently explained in *People v. Crayton, supra*:

"Federal authority holds that once a defendant gives a valid waiver, it continues through the duration of the proceedings unless it is withdrawn or is limited to a particular phase of the case. 'While it is true that the Sixth Amendment

right to counsel applies at all critical stages of the prosecution, including the sentencing stage, it does not follow that once the assistance of counsel in court has been competently waived, a new waiver must be obtained at every subsequent court appearance by the defendant. A competent election by the defendant to represent himself and to decline the assistance of counsel once made before the court carries forward through all further proceedings in that case unless appointment of counsel for subsequent proceedings is expressly requested by the defendant or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings.' (*Arnold v. United States* (9th Cir. 1969) 414 F.2d 1056, 1059.)" (*People v. Crayton, supra*, 28 Cal.4th at p. 362-363.)

Unlike *Crayton*, this case does not present evidence of a continuing valid waiver of counsel. A valid waiver of counsel loses its continuing presumption of validity when the defendant requests counsel, contrary to the claim of the prosecution. (*People v. Crayton, supra*, 28 Cal.4th at p. 365.) Assuming that defendant's oral and written waiver of counsel on October 3 was valid, on October 26, defendant filed a written motion seeking the assistance of counsel. On November 22, the trial judge conducted a lengthy hearing on defendant's request for counsel. On December 7, the first day of the preliminary hearing, defendant continued to request appointed counsel. These continuous and repeated requests for appointed counsel cannot

support the trial court's later finding of a valid waiver of counsel at the time of the preliminary hearing.

The People's argument is that defendant's requests for the "assistance" of counsel were requests for advisory counsel, which they contend is a waiver of counsel. We recognize the trial court seems to have relied on this argument at the time of the pretrial motion to exclude the evidence. However, the record is otherwise. Although the trial court did not recall hearing the motion before the preliminary hearing, the trial court expressly stated, on November 22, that it would not reach the issue whether defendant could receive advisory or stand-by counsel because it intended to determine defendant's financial inability to receive any appointed counsel. At the preliminary hearing, the magistrate ruled that it was defendant's financial status, not his perception of counsel's role, that disqualified him for court-appointed counsel. Accordingly, we cannot find a valid waiver of counsel at the preliminary hearing when defendant decided to testify.

There are certain specific statutes in California that bar proceedings entirely unless counsel is present or waived. For example, a defendant may not plead guilty and waive a preliminary hearing unless he is represented by counsel. (Pen. Code, § 859a, subd. (a).) (Thus, theoretically, a wealthy defendant who refuses to waive counsel, and fails to retain counsel after an opportunity to do so, may be held to answer at a preliminary hearing, but may not plead guilty.) And, as applicable here, a defendant may never testify without counsel,

or an explicit waiver of counsel after being expressly advised of his right to counsel in the same proceeding. (*In re Jones* (1968) 265 Cal.App.2d 376, 381.)

The testimony was obtained in violation of Penal Code section 866.5. Before *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, and before the adoption of Penal Code section 866.5 in 1953, this court held that admission of a defendant's preliminary hearing testimony in the prosecution's case in chief absent a valid waiver of counsel automatically violated constitutional rights to counsel and all the rules of fair play. (*People v. Mora* (1953) 120 Cal.App.2d 896, 899-904, overruled on another ground in *People v. Van Eyk* (1961) 56 Cal.2d 471, 477.)

Arguably, if the trial court had erred in admitting the evidence because it was simply obtained in violation of a state statute, we would apply the state miscarriage of justice standard found in article I, section 13 of the California Constitution. (*People v. Flood* (1998) 18 Cal.4th 470, 483; *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, as shown below, there was federal constitutional error at the preliminary hearing which was not harmless beyond a reasonable doubt.

B.

Defendant also argued at his motion to exclude that his lack of counsel at the preliminary hearing was a result of the trial court's and magistrate's use of an improper standard of indigency and failure to conduct proceedings in accord with statutory mandates. Assuming, as the People argue, that the trial court and magistrate were willing to use "discretion" to

appoint "advisory" counsel (as the trial court finally did on May 13, 2001), the denial of counsel at the preliminary hearing was a constitutional violation.

Documents concerning a defendant's financial eligibility are confidential. (Gov. Code, § 27707; Pen. Code, § 987, subd. (c).) Although a trial court may make the decision concerning indigency, the data is to remain confidential and privileged. A defendant's financial declaration is not open to the prosecution except under limited circumstances after conviction, and is not admissible into evidence. (Pen. Code, § 987, subd. (c).)

On November 22 and December 7, prosecutors participated in the hearings. Both courts asked the prosecutors for input. Both prosecutors argued against the appointment of counsel, claiming that defendant had waived counsel and that he did not qualify for court-appointed counsel. Defendant's reluctance to specify his financial status in front of the prosecution conducting a forfeiture proceeding is understandable. The trial court did not appear familiar with the statutory requirement for a confidential financial statement from the defendant until May 13, when the court clerk confirmed defendant's assertion that the financial statement was confidential. When the trial court did hold an ex parte hearing, it determined defendant did not have funds to retain counsel.

Most importantly, the trial court's November 22 determination that defendant's financial status had to be such that he, in effect, qualified for welfare in order to qualify for appointed counsel, although not recalled by the trial court

on May 13, is without support in California law. While trial courts have discretion to determine whether there are available ready funds to retain counsel, the test is not whether a defendant is a pauper or on public assistance. "In *Williams [v. Superior Court of County of Stanislaus* (1964) 226 Cal.App.2d 666, 672], the court stated the standard in determining indigency is a flexible one. It contemplated consideration of such factors as amount of income, bank accounts, ownership of a home or a car, outstanding debts, number of dependents, and the seriousness of the charge. (*People v. Longwith* (1981) 125 Cal.App.3d 400, 411.) The test of indigency is whether or not a private attorney would be interested in representing a defendant in his present economic circumstances. (*In re Smiley* (1967) 66 Cal.2d 606, 620.) Furthermore, the law provides for proceedings to recoup the cost of counsel if a defendant does have the ability to pay. (See, e.g. Pen. Code, § 987.8.)

Defendant repeatedly presented plausible arguments concerning private counsel's lack of interest in appearing in a legally complex proceeding without up-front cash payments. Defendant's explanation that private counsel were not interested in liens or in IOU's in lieu of fees of \$15,000 to \$40,000, is credible. Defendant met the test of indigency.

### C.

The taking of defendant's testimony at the preliminary hearing, absent a waiver of counsel, was statutory error. Plus, because defendant was explicitly denied counsel at the preliminary hearing for improper reasons, he was denied his

constitutional right to the assistance of counsel. However, when there is error of constitutional dimension at a preliminary hearing, including the denial of counsel, it does not require reversal on appeal absent a showing of prejudice under the harmless error rule. (*People v. Pompa-Ortiz, supra*, 27 Cal.3d at pp. 529-530.)

The error is prejudicial in this case, and not harmless beyond a reasonable doubt. Defendant's judicial confession at the preliminary hearing, admitting all the elements of possession for sale, offering to sell, and transport, formed the crux of the prosecution's case. The jury was instructed that defendant's testimony was the "corpus delicti" of the case.<sup>6</sup> Without defendant's confession, the jury had evidence of somewhere between 30 and 50 pounds of drying marijuana, and four arrestees with medical marijuana certificates. There was, however, equivocal evidence of sales or intent to sell. The evidence of transporting, offering to furnish, and intent to sell marijuana came from defendant's own preliminary hearing testimony made in his mistaken belief that he was legally entitled to provide marijuana to medical marijuana users without sources of their own. While there apparently were similar

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<sup>6</sup> "The corpus delicti described in [CALJIC No. 2.72] may be proved by the Defendant's testimony at the Preliminary Hearing." The trial court also instructed the jury that defendant's statement was an admission.

admissions made elsewhere in the proceedings (see fn. 4, *supra*)<sup>7</sup>, the prosecution chose to base its case on the preliminary examination evidence, which makes the error reversible.

DISPOSITION

The judgment is reversed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

HULL, J.

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<sup>7</sup> We express no opinion of the admissibility of those apparent admissions.