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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
ROBERT KEENAN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE SHARON S. ARMSTRONG

---

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Both the federal and Washington constitutions provide that a defendant in a criminal prosecution shall be afforded the right to counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. It is also well-settled that under the Sixth Amendment a criminal defendant who can afford to hire counsel of his or her choosing has the right to exercise that choice. This right, however, is not without limits with respect to whether a defendant is entitled to a motion to continue a trial to seek counsel-of-choice. When the defendant's motion to continue was made four days before the scheduled trial date, where he had made no showing that he had previously contacted an attorney, or was otherwise ready to proceed to trial with counsel prepared to do so, where he was unable to articulate a legitimate claim that his relationship with assigned-counsel had broken down, and where he had continued his case on several occasions previously, did the trial court abuse its discretion in denying the motion to continue?

B. STATEMENT OF THE CASE

1. FACTS

The State charged Robert Keenan, the Appellant, with one count of Violation of the Uniform Controlled Substances Act – Possession of Cocaine, Driving While License Suspended or Revoked in the Second Degree, and Driving without Ignition Interlock based on his conduct on November 26, 2009. CP 1-6. On December 15, 2009, the Appellant appeared in King County Superior Court for arraignment, and waived his right to a case-scheduling-conference within fifteen days, signing a waiver of time for trial. CP 37-38. The waiver provided for a case-scheduling-conference on January 11, 2010, and an expiration for time for trial of April 11, 2010. CP 38.

At the January 11, 2010 case-scheduling-conference, the Appellant moved to continue the hearing until February 8, 2010, again waiving his time for trial right an additional 90 days beyond the February 8th hearing, with expiration set for May 9, 2010. CP 39. The court granted the motion. CP 42.

On February 8, 2010, the parties again appeared for a case-scheduling-conference, and the Appellant moved for a one-week continuance, to which the court granted. CP 43. The Appellant

again waived his time for trial rights an additional 90 days beyond the next hearing date, with an expiration date of May 18, 2010.

CP 44. At this hearing, the State confirmed that an offer to resolve the case short of trial was communicated to counsel on January 15, 2010, but that counsel was unable to convey that offer to the Appellant prior to the hearing. CP 45-46.

On February 17, 2010, the parties appeared, and set the matter for trial on May 11, 2010. CP 47. The parties were scheduled to appear for an "Omnibus Hearing" on April 30, 2010. CP 48. The expiration of time for trial remained May 18, 2010. CP 48.

On April 30, 2010, the parties appeared for the Omnibus Hearing and indicated to the court that the State had extended an offer to the defense to resolve the matter short of trial. CP 50. The court granted the parties' joint request to continue Omnibus one week to May 7, 2010. CP 50.

On May 7, 2010, a Friday, the parties answered ready for trial through the filing of an Omnibus Order, confirming the May 11th trial date. CP 51-54; 1RP 2. The Appellant, through his attorney, indicated to the court that he intended to hire a private attorney to represent him. 1RP 2-3. The court replied that it was

“too late” and that “[t]he trial is Tuesday.” 1RP 3. After this exchange, the Appellant told the court that:

And me and my attorney have gotten into a few disagreements. I don't feel like it could be – our relationship could be repaired, Your Honor. I feel it's been damaged beyond repair. I sincerely feel that way. I don't feel at all comfortable with going to trial (inaudible) significant amount (inaudible).

Id. The court, having been told of a breakdown, asked the Appellant to further explain. Id. To this, the Appellant replied:

We haven't – it's – well, I think it started because I – I missed a meeting, you know, maybe two meetings. Then – then we had a (inaudible) and we talked about the case. You know, I don't feel that we can get along (inaudible). I feel – you know, I don't feel comfortable with a lady.

Id.

After this inquiry the court declined to discharge defense counsel, or otherwise delay the trial. 1RP 3-6. The court noted that the case had been pending for close to six months, a period that the court believed was “a long time for this kind of case.” 1RP 4. The Appellant then complained that his attorney had not allowed for “our side to get the drugs tested and stuff.” 1RP 4. The court then reiterated that the case was, at this point, close to six months beyond the date of arraignment. 1RP 6. The Appellant then tried to explain that the previous continuances were not attributable to

his requests; the court did not accept this explanation, and confirmed the trial date. 1RP 6-7.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO DISCHARGE HIS ATTORNEY TO PROVIDE HIM TIME TO HIRE COUNSEL.
  - a. The Right To Counsel Is Absolute, Although The Right To Counsel-Of-Choice Is A Qualified Right, Permitting A Criminal Defendant A Reasonable Opportunity To Obtain Counsel Of One's Choosing.

Both the federal and Washington Constitution accord a person accused of a crime the right to be represented by counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Among the components of the constitutional right to counsel is "the right to a reasonable opportunity to select and be represented by chosen counsel." State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27 (2005), *review denied*, 155 Wn.2d 1018 (2005); State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016 (1995). Like most rights, however, the right to retain counsel of one's own choice has limits, and one of which is that the right must be timely asserted. State v. Chase, 51 Wn. App.

501, 506, 799 P.2d 272 (1990). A defendant's right to retained counsel of his choice doesn't include the right to unduly delay the proceedings. Id.

The right to retained counsel of choice is not a right of the same force as other aspects of the right to counsel. Roth, 75 Wn. App. at 824. The essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, not to ensure that a defendant will inexorably be represented by his or her counsel of choice. Price, 126 Wn. App. at 631. To supplement these constitutional standards, CrR 3.1(e) states that "[w]henver a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient cause shown." CrR 3.1(e).

The trial court is granted broad discretion for continuances sought to preserve the right to counsel; only an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay" violates the defendant's right. Roth, 75 Wn. App. at 824, *citing* Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610 (1983). In the absence of substantial reasons, a late request should generally be denied, especially if the granting of such a request may result in delay of the trial. Chase, 59 Wn. App. at 506.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO CONTINUE.

- a. The Appellant Fails To Demonstrate That The Request For A Continuance Was Justified Under Well-Established Washington Case Authority.

In determining whether the trial court has abused its discretion, Washington courts consider the following factors: (1) whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case as a material or substantial nature. Price, 126 Wn. App. at 622, *citing* Roth, 75 Wn. App. at 825.

Here, the Appellant continued his case on numerous occasions during the course of the case, and waived his right to a speedy trial on three separate instances. The court took this fact under consideration during its May 7, 2010 colloquy with the Appellant. 1RP at 6. The Appellant had more than adequate time to consult with private counsel during this period. The law requires

that a defendant be afforded “reasonable opportunity” to obtain counsel of one’s choosing. See Price, 126 Wn. App. at 631. The Appellant had not only a reasonable opportunity to do so, but had nearly six months to exercise this right.

Additionally, the trial court afforded the Appellant an opportunity to address his grievances with his assigned counsel. The Appellant did not cite to any specific instance nor did he provide any legitimate basis to support a finding that his relationship with Ms. Odama had broken down so as to render the attorney-client relationship broken. Notably, Ms. Odama introduced this as the Appellant’s motion to hire private counsel, and at no time did counsel indicate that there was a significant breakdown in her relationship with her client. To the contrary, Ms. Odama answered ready for trial for May 11, 2010. Beyond the Appellant’s assertion that he “did not feel comfortable” with counsel due to missing a meeting and the fact that counsel did not see it necessary to have an independent test of the cocaine, the Appellant provided no adequate basis to justify an eleventh-hour continuance of the trial date to afford him time to hire an attorney.

The Appellant’s request for additional time was not supported by adequate good-cause. Nor did he give the court any

assurance that he had already consulted with outside counsel, or had someone in mind. The Appellant did not tell the court that he had been in contact with a private attorney, nor did he give any assurances that he would be able to afford to hire one, let alone have counsel who would be ready to assume representation and be prepared for trial within a reasonable time period. Rather, this request came the Friday before a trial scheduled to begin the following Tuesday.

Finally, under the fourth factor cited in Price and Roth, the Appellant cites to no identifiable prejudice in the denial of this request. The record indicates no prejudice, as Ms. Odama was prepared to go to trial, and represented him vigorously in pre-trial matters, including bringing a successful motion to dismiss the “Violation of Ignition Interlock” charge reflected in Count Three of the Information. 2RP at 131-33, 174-75. Notably, the Appellant does not raise issues such as “ineffective assistance of counsel” nor does he challenge the trial court’s denial of his motion to suppress. Ms. Odama was prepared for trial, and represented the Appellant competently.

Rather, the Appellant relies upon United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557 (2006), for the proposition

that the denial of the motion to continue was wrongful, a “structural defect,” thus he need not make the additional showing of prejudice. Brief of App. at 4. But as will be discussed *infra*, the facts of Gonzalez-Lopez are quite distinguishable from the Appellant’s case, nor does Gonzalez-Lopez depart from the United States Supreme Court’s previous holdings as to the interpretation of a defendant’s rights under the Sixth Amendment. Gonzalez-Lopez, 548 U.S. at 151.

b. The Appellant’s Reliance Upon Gonzalez-Lopez Is Misguided, As The Case Is Distinguishable On Its Facts.

In 2006, the United States Supreme Court held that when a criminal defendant is wrongfully denied then there need be no inquiry into whether he or she was competently represented, or whether prejudice can be identified. Gonzalez-Lopez, 548 U.S. at 148. The Court focused its inquiry on whether a person’s right to counsel-of-choice is “errorneously” denied and, if so, there need be no further inquiry as to harmless error. Id.

The facts of Gonzalez-Lopez are unique. The defendant was charged with conspiracy to distribute large quantities of marijuana. Id. at 142. The defendant’s family hired an attorney,

John Fahle, to represent him. Id. After being formally arraigned of the charge, the defendant began consulting with a second attorney, Joseph Low, to determine whether Mr. Low would be able to represent him in conjunction with or in lieu of Mr. Fahle. Id. The defendant actually hired Mr. Low. Id.

At a pre-trial evidentiary hearing, both Low and Fahle appeared on behalf of the defendant. Id. The magistrate judge presiding over the matter allowed Mr. Low to appear on the condition that he file a formal motion to allow him admission to the Eastern District of Missouri, since Mr. Low practiced in the State of California. Id. The defendant then informed Mr. Fahle that he wished to only be represented by Mr. Low; Mr. Low moved unsuccessfully to be granted admission *pro hac vice* on two occasions, with the court denying each request without explanation. Id.

Mr. Fahle then tried to withdraw from the case and moved the court to sanction Mr. Low for violating a Missouri rule of professional conduct, alleging that Mr. Low improperly had contact with a client previously represented by counsel. Id. at 142-43. The District Court permitted Mr. Fahle to withdraw from representing the defendant, and then clarified that it denied Mr. Low's motion to

appear *pro hac vice* because he had violated the aforementioned rule of professional conduct. Id. at 143. The defendant then hired a third attorney, Karl Dickhaus, to represent him at trial. Id. Despite Mr. Dickhaus's motion to allow Mr. Low to sit at counsel table during the trial, the trial court rejected the request, instead ordering Mr. Low to remain in the audience during the proceedings. Id. The defendant had no meaningful interaction with Mr. Low during trial. Id.

The defendant challenged the denial of his right to counsel of his choice, arguing that he was wrongfully denied the opportunity to be represented by Mr. Low. Id. at 143-44. The Eighth Circuit reversed the conviction, holding that the Sixth Amendment right to counsel was violated. Id. at 143-44. On appeal to the Eighth Circuit, the government conceded that the trial court improperly denied the defendant the right to be represented by Mr. Low. Id. at 144. The Supreme Court considered whether the defendant was required to demonstrate prejudice, and determined that under the harmless error standard did not apply under the facts of the case. Id. at 148. The Court reasoned that the "choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." Id. at 150. The Court further noted that "the effect of wrongful denial of

choice of counsel” is pervasive to the entire process of representation, from voir dire, to relations with opposing counsel, and the relationship with the client. Id. at 150-51.

But the crucial factor considered by the Court in declining to conduct a harmless error/prejudice analysis in Gonzalez-Lopez is that the denial of the motions for Mr. Low to represent the defendant was that the denial was “wrongful.” The Court makes clear that it was not divesting the trial courts the discretion to determine matters such as appointments, balancing the defendants’ rights against other factors, including the “demands of its calendar.” Id. at 151-52. The Court reiterated that none of those factors applied to the case before it, thus the denial was error and not subject to harmless-error analysis. Id. at 152.

The facts of Gonzalez-Lopez and the facts before the Honorable Judge Sharon Armstrong on May 7, 2010 could not be more different. The defendant in Gonzalez-Lopez, and his attorney-of-choice, acted with diligence in bringing timely motions, being prepared to litigate the case, and otherwise gave the trial court plenty of legitimate reasons to allow Mr. Low to participate as counsel. The Appellant, Mr. Keenan, did not.

Mr. Keenan appeared before Judge Armstrong on the eve of trial, having previously continued the case numerous times, and not providing an adequate explanation as to why a late-request to obtain counsel should be granted. Unlike Gonzalez-Lopez, the Appellant did not provide a name of his attorney of choice, nor did he give any indication that he had taken any steps to facilitate a substitution of counsel in a timely fashion. Judge Armstrong gave the Appellant ample opportunity to elaborate as to what specifically was causing him concern with his assigned counsel, and he gave the judge no reasonable explanation so as to justify a further delay in the proceedings.

Under the Price and Roth factors cited *supra*, the trial court did not abuse its discretion. The facts of the Appellant's case do not support his reliance on the Gonzalez-Lopez case, a case with unique facts that, evident by the government's concession, constituted error.

D. CONCLUSION

Mr. Keenan was fully and fairly provided ample opportunity to seek private counsel, but failed to do so in a timely fashion. The trial court had previously granted numerous continuances and was

not provided an adequate basis to grant a continuance four days before trial. Trial counsel was prepared for trial, the Appellant did not have counsel ready to step in, did not give the court assurances that he would be able to obtain or afford counsel, nor was he prejudiced by the court's denial of his motion. The trial court did not abuse its discretion. The Respondent respectfully requests that this court affirm the Appellant's conviction.

DATED this 3rd day of March, 2011.

Respectfully submitted,

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