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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 68459-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KOREY TAYLOR,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

JOHN J. JUHL
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

Defendant brought a motion that would require a continuance on the first day of trial so he could attempt to hire new counsel. The court found defendant was adequately represented by counsel who was prepared for trial. The court resolved the balance between defendant's right to counsel of choice with the fair and efficient administration of justice in light of the substantial prejudice the delay that a continuance would cause to the other parties, in favor of denying the motion. Was it an abuse of discretion for the trial court to deny defendant's untimely motion to continue on the day of trial so he could attempt to hire new counsel?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS.

On May 24, 2011, the state filed an information charging defendant, Korey Taylor, with third degree assault. On July 29, 2011, defendant was arraigned; trial was set for October 7, 2011, and an omnibus hearing set for September 2, 2011. CP 337-338, 347-348, 349.

1. First Continuance.

On September 2, 2011, the omnibus hearing was continued by agreement to September 22, 2011. The State gave notice of intent to add second degree assault with a deadly weapon enhancement. CP 345-346.

2. Second Continuance.

On September 22, 2011, the trial was continued by agreement to December 9, 2011, a 3.5 hearing and motion for arraignment on amended information were set for November 4, 2011. CP 343-344.

3. Third Continuance.

On November 4, 2011, the 3.5 hearing and motion for arraignment on amended information were re-set to December 1, 2011. The trial remained set for December 9, 2011. CP 341-342. On December 1, 2011, the parties entered a stipulation to admissibility of statements of the defendant. CP 331-333; 12/1/11 RP 1-2.

4. Fourth Continuance.

On December 9, 2011, the trial was continued by agreement to January 20, 2012. CP 339-340. On January 20, 2012, the case was set out for trial to begin Monday, January 23, 2012.

5. Defendant's Motion To Continue On The Day Of Trial.

On January 23, 2012, the morning of trial, defendant requested to hire a new attorney. Defense counsel stated that he was not aware of any problem defendant was having with his representation. Defendant stated his reasons for wanting a new attorney was that he had been given money for an attorney by his family because the State was going to file a more serious charge. Defendant had not contacted any attorneys, did not know who he would be hiring to represent him, and did not know how long it would take him to hire a new attorney. Defendant stated that he was not having any trouble cooperating with his current counsel, but did not to feel confidence in his attorney because he had been told that he was going to lose. RP¹ 3-5, 7.

The prosecutor objected to the motion noting that defendant had known for months that the State intended to amend the charges; notice was included in the plea offer dated May 18, 2011, and in the omnibus order entered on September 2, 2011. Further, the State had not been given notice of the motion until that morning, and the state had scheduled witnesses, including three medical doctors, to testify that week. Defense counsel told the

¹ RP refers to the three volume continuously paginated report of proceeding. All other reports of proceedings are referenced by date of the hearing.

court that he was prepared for trial. The trial court found that granting the motion for new counsel would necessitate a trial continuance. Since there was no substitute attorney present to inquire how long that attorney would need to prepare for trial, the court could not determine how long the trial would need to be continued. The court found that the delay of trial would result in a continuance long enough to require defendant's waiver of his time for trial. RP 5-6, 8.

The court found that there was no evidence that defendant was not cooperating with counsel or not accepting counsel's advice; there was no antagonism between defendant and counsel; and the only disagreement was that defendant was not happy with counsel's opinion that his chances at trial were not good. The court denied defendant's motion. RP 8-9.

6. Amended Information.

On January 23, 2012, the State filed an amended information and defendant was arraigned on the charges of second degree assault with a deadly weapon allegation and third degree assault with a deadly weapon allegation. CP 320; RP 9.

7. Verdict And Sentence.

The jury found defendant guilty as charged. CP 289-292; RP 295-298. The court granted the State's motion to dismiss count II, third degree assault with a deadly weapon CP 285-286; 2/8/12 RP 4-5. Defendant was sentenced to serve 34 months, 22 months plus 12 months for the deadly weapon enhancement; placed on 18 months community custody; ordered to pay \$600.00 in legal financial obligations; and have no contact with the victim for ten years. CP 2-12; 3/8/12 RP 19-21.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO CONTINUE ON THE FIRST DAY OF TRIAL SO HE COULD ATTEMPT TO HIRE NEW COUNSEL.

A trial court's denial of a criminal defendant's motion for a continuance sought to preserve the right to counsel violates the defendant's right only if it is "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005). The trial court has broad discretion in ruling on a motion for a continuance sought to obtain new counsel. Id. "The trial court must balance the defendant's interest in counsel of his or her choice against the public's interest in prompt and efficient

administration of justice.” State v. Roth, 75 Wn. App. 808, 824-825, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995). The factors to be considered include (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 of a material or substantial nature.² Roth, 75 Wn. App. at 825.

1. Previous Continuances Granted By The Court.

Prior to defendant's motion on the day of trial, the trial had been continued twice; pretrial hearings had also been continued two times. See II, A, 1-4, above.

2. Defendant's Cause For Dissatisfaction With Counsel.

A breakdown of a relationship between attorney and defendant from irreconcilable differences can result in the complete denial of counsel. In re Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). Washington courts have adopted the Ninth Circuit's test to

² It is arguable that the fourth Roth factor was disapproved in United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (holding that “[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an in-effectiveness or prejudice inquiry...”).

determine whether an irreconcilable conflict exists. Stenson, 142 Wn.2d at 723-24, citing United States v. Moore, 159 F.3d 1154, 1158-1159 (9th Cir.1998). Under this test, courts consider the following factors: (1) the extent of the conflict, (2) the adequacy of the court's inquiry into the conflict, and (3) the timeliness of the motion. In re Stenson, 142 Wn.2d at 724. While this test covers some of the same ground as the test for substitution of counsel, the courts have recognized that “the differences are substantial enough to constitute a new ground for relief.” Id. In the present case, defendant failed to show anything approximating a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication. At the court’s inquiry defendant aired his concerns regarding his attorney. Defendant’s concerns related primarily to tactics or strategy and his lost confidence in his attorney. RP 7. Counsel has wide latitude to control strategy and tactics. In re Stenson, 142 Wn.2d at 733. The court properly focused on the extent of a breakdown and the effect on the representation. The court gave sufficient weight to defendant’s ability to have an adequate defense and a fair trial and balanced that with the timing of the request—made on the day of trial. RP 8.

3. Whether Available Counsel Was Prepared To Go To Trial.

The trial court properly denied defendant's request for new counsel when he failed to demonstrate that he could actually retain a new attorney. Price, 126 Wn. App. at 633 (the court properly denied the defendant's request for new counsel on the second day of trial when he offered no evidence to support his claim that he could afford to hire a new attorney and no other competent counsel appeared who was prepared to go to trial). Here, defendant offered no evidence to support his claim that he could afford to hire a new attorney and no other competent counsel appeared who was prepared to go to trial.³ RP 4.

Rather, on the day of trial defendant told the court that he would like to have a new attorney because he had been given money for an attorney. RP 4. The court properly found that the request made on the day of trial was untimely and that granting it would entail substantial delay of the trial. RP 7-8; see Price, 126 Wn. App. at 633; State v. Chase, 59 Wn. App. 501, 506-507, 799 P.2d 272 (1990) (the court properly denied the defendant's request for new counsel on the day of trial when he claimed that he had retained another attorney, but that attorney had not appeared in the

³ In ruling on defendant's motion to hire new counsel, the court said that if another attorney was present that would have been a different reason. RP 8-9.

case). The trial court properly exercised its discretion when it denied defendant's untimely request to hire new counsel on the day of trial.

4. Whether The Denial Of The Motion Was Likely To Result In Identifiable Prejudice Of A Material Or Substantial Nature To Defendant's Case.

While the existence of actual prejudice to the case "is not a prerequisite to a constitutional violation in this context" the inability of defendant to establish likely prejudice at the motion weighs heavily in the trial court's balance of the competing considerations. Roth, 75 Wn. App. at 826.

The record in the present case is sufficient to conclude that the trial court reasonably balanced the competing considerations and concluded that the fair and efficient administration of justice outweighed defendant's right to choice of counsel. Defendant's request was made on the day of trial, after the court had already continued the trial two times. Granting defendant's request would have required an undetermined delay in the proceedings; initially to determine whether defendant could actually retain new counsel; then if counsel was retained, while new counsel prepared for trial. Defendant's articulated dissatisfaction with his appointed counsel did not go to counsel's fundamental preparedness or ability to

proceed with the case and did not show a fundamental breakdown of the attorney-client relationship or the ability to communicate with each other. The trial court did not abuse its discretion in denying defendant's request for a continuance on the first day of trial so he could attempt to obtain new counsel.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO HIRE NEW COUNSEL ON THE FIRST DAY OF TRIAL.

"It is settled law that under the Sixth Amendment criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice." State v. Roth, 75 Wn. App. 808, 824, 881 P. 2d 268 (1994), review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995), quoting United States v. Washington, 797 F.2d 1461, 1465 (9th Cir.1986). "However, 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. A criminal defendant does not have an absolute, Sixth Amendment right to choose any particular advocate. State v. Stenson, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998); State v. DeWeese, 117 Wn.2d 369, 375-376, 816 P.2d 1 (1991); State v. Price, 126 Wn. App. 617, 632, 109 P.3d 27 (2005), review denied, 155 Wn.2d 1018 (2005). In particular, a

defendant may not insist upon representation by an attorney he cannot afford. State v. Roberts, 142 Wn.2d 471, 516, 14 P.3d 713 (2000). “[T]he 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, citing Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

A defendant seeking to substitute counsel “must show good cause ... such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication.” In re Stenson, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). A trial court's decision to deny a motion to substitute counsel is reviewed for abuse of discretion. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). “An abuse of discretion exists when no reasonable person would take the position adopted by the trial court.” State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1018 (1993); Stenson, 132 Wn.2d at 701.

Moreover, the request for counsel of choice must be timely asserted. State v. Chase, 59 Wn. App. 501, 506, 799 P.2d 272 (1990) (holding it is within the trial court's discretion to refuse the

defendant's untimely request to retain counsel of their choice). A request for a continuance to obtain new counsel made on the day of trial is untimely. Chase, 59 Wn. App. at 506. "A defendant's right to retained counsel of his choice doesn't include the right to unduly delay the proceedings." Roth, 75 Wn. App. at 824, quoting United States v. Lillie, 989 F.2d 1054, 1056 (9th Cir.1993). "[D]ay-of-trial continuances are not favored." Price, 126 Wn. App. at 633. "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, quoting State v. Garcia, 92 Wn.2d 647, 656, 600 P.2d 1010 (1979).

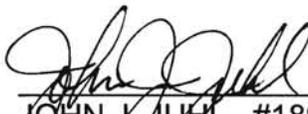
The record amply demonstrates that the trial court applied the correct test in determining whether to grant defendant's untimely motion to hire new counsel on the first day of trial. A defendant's loss of confidence or trust in a court-appointed attorney is not a sufficient reason to substitute counsel. Varga, 151 Wn.2d at 200. The court found that granting the motion would require a continuance and cause a delay of the trial. RP 8. The trial court properly exercised its discretion in denying defendant's motion when it determined that granting the motion would unduly delay the trial. RP 7-9.

IV. CONCLUSION

For the reasons stated above, the appeal should be denied and defendant's conviction affirmed.

Respectfully submitted on November 8, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

JOHN J. JUHL, #18951
Deputy Prosecuting Attorney
Attorney for Respondent