

MA 02 2012

29325-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EMORY E. REEVES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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I.

APPELLANT'S ASSIGNMENT OF ERROR

- A. Appellant assigns error to the Court's denial of his motion to substitute counsel and continue trial date on July 30, 2010.

II.

ISSUE PRESENTED

- A. Did the trial court abuse its discretion in denying a motion to change to private counsel with requested two month continuance brought on Friday before a Monday trial date?

III.

STATEMENT OF THE CASE

For the purposes of this appeal the State accepts the defendant's version of the Statement of the Case with the following additions:

The date of the hearing requesting to substitute defense counsel was on July 30, 2010. This was a Friday. The trial was set for August 2, 2010. This was the following Monday.

According to the prosecutor, the defendant was arraigned on October 28, 2009. RP 6. At that time the defendant was represented by

Mr. Jeff Leslie. The first trial setting was January 19, 2010. RP 6. The case was then continued to March 8, 2010. The next continuance was to April 19, 2010 and Mr. Leslie withdrew after interviewing the victim. RP 6. New counsel was appointed and the trial was set for May 24, 2010. RP 6. The trial was then continued a 5th and 6th time to August 2, 2010. RP 6.

At the hearing on July 30, 2010, the defense sought to substitute in Mr. Tracy Collins who was requesting a 60-day continuance because he was not prepared for trial.

The trial court asked the defendant for his reason for seeking new counsel. RP 8. The defendant stated: "My reasoning for seeking another counsel is the simple fact that I have not been represented how I should have been represented." RP 8. The defendant continued with general complaints that his counsel was not taking care of certain items, and the defendant did not feel that his self-defense issues had been pursued properly. RP 9.

The trial court determined from court administrators that there was a courtroom available on the following Monday. RP 11. Mr. Ryan, the current defense counsel indicated that he was ready to proceed to trial. RP 11.

Mr. Ryan reminded the court that he could not communicate with the defendant and the defendant felt “uncomfortable” with Mr. Ryan and “lacked confidence” in his defense counsel. RP 12.

IV.

ARGUMENT

“The determination of whether an indigent's dissatisfaction with his court-appointed counsel warrants appointment of substitute counsel rests within the sound discretion of the trial court.” *State v. Lytle*, 71 Wn.2d 83, 84, 426 P.2d 502 (1967); *State v. Shelton*, 71 Wn.2d 838, 840, 431 P.2d 201 (1967); *State v. Sinclair*, 46 Wn. App. 433, 436, 730P.2d 742 (1986). *State v. Stark*, 48 Wn. App. 245, 738 P.2d 684 (1987).

The trial court asked the defendant why he wanted to replace his counsel but the basis appeared to be “communications difficulties.” “A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Smith v. Lockhart*, 923 F.2d 1314, 1320 (1991).

Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). “[D]isputes over trial strategy or a general dissatisfaction with counsel’s performance are generally not sufficient reasons to appoint new counsel.” *State v. Price*, 126 Wn. App. 617, 634, 109 P.3d 27 (2005).

One factor given short shrift by the defense in his briefing is the connected two-month continuance that would have accompanied the substitution of counsel. This case had gone on for many months and the defendant submitted his request to substitute counsel (plus a connected continuance) on the business day prior to a preset trial date. The trial court was not simply being asked to substitute counsel. The trial court was also being asked to grant a two-month long continuance. This case had been ongoing for nearly a year and the State had already lost one witness. RP 7-8.

It is undisputed that a defendant who can afford private counsel has a qualified right to retain chosen counsel. *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir.1986). However, this right to choose private counsel is not without restrictions. A defendant’s choices cannot unduly delay the proceedings. *State v. Roth*, 75 Wn. App. 808,

824, 881 P.2d 268 (1994). In this case, the trial had already been assigned, a courtroom and trial judge were available and appointed defense counsel stated that he was ready.

The decision on a motion for a continuance rests within the sound discretion of the trial court. *State v. Purdom*, 106 Wn.2d 745, 748, 725 P.2d 622 (1986); *State v. Williams*, 84 Wn.2d 853, 529 P.2d 1088 (1975).

The requests in this case, were made on the business day prior to trial and would have substantially delayed the trial. If the request is made shortly before or as the trial is to begin, the existence of the right depends on the facts with a measure of discretion in the trial court. *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978). 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. *State v. Garcia*, 92 Wn.2d 647, 655-56, 600 P.2d 1010 (1979) (referring to right to proceed *pro se*)¹

Interestingly, the defendant assigns error to the trial court's denial of the substitution of a private counsel, but that is the last mention of the issue in the trial transcript. At no point does the defendant complain of his

¹ An analogy can be directly drawn between the defendant's right to represent himself and the right to choice of counsel.

representation by appointed counsel. The defendant does not raise an ineffective counsel claim on appeal. The fact that the defendant did not raise any issues on the question of representation gives some justification to the idea that the defendant was less concerned about his appointed counsel and more concerned with disrupting and delaying the trial to the detriment of the State.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 2nd day of March, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line.

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