

No. 39980-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Rodney Bryson,

Appellant.

Grays Harbor Superior Court

Cause No. 09-1-00299-4

The Honorable Judge Gordon Godfrey
The Honorable Judge F. Mark McCauley

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	16

TABLE OF AUTHORITES

UNITED STATES SUPREME COURT DECISIONS

Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988).....9

FEDERAL CASES

United States v. Lillie, 989 F.2d 1054 (9th Cir. 1993).....5

United States v. Garrett, 179 F.3d 1143 (9th Cir.1999).....5

Birt v. Montgomery, 725 F.2d 587(11th Cir.1984).....8

Linton v. Perini, 656 F.2d 207 (6th Cir.1981).....9

United States v. Wadsworth, 830 F.2d 1500, 1509 (9th Cir. 1987).....9

WASHINGTON CASES

State v. Varga, 151 Wash.2d 179, 86 P.3d 139 (2004).....4,5

State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004).....5

In re Stenson, 142 Wn.2d 710, 16 P.2d 1 (2001).....5,10

State v. Chase, 59 Wn. App. 501, 799 P.2d 272 (1990).....5,6,10

State v. Garcia, 92 Wn.2d 647, 600 P.2d 647 (1979).....6

In re Richardson, 100 Wn.2d 669, 675 P.2d 209 (1983).....6

State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).6

State v. Early, 70 Wn. App. 452, 853 P.2d 964 (1993).....7,10

State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991).....7,9,10

State v. Young, 11 Wn. App. 398, 523 P.2d 946 (1974).....8

State v. Wilkinson, 12 Wn. App. 522, 530 P.2d 340 (1975).....8

State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994).....8,9

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008).....15

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI.....passim

U.S. Const. amend XVI.....1

OTHER AUTHORITES

12 R. Ferguson, *Wash. Prac., Criminal Prac. and Proc.* § 1913 (1984).....8

A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The record does not demonstrate that the trial court abused its discretion when denying defense counsel's request for substitution of counsel.
2. The record does not demonstrate that the trial court abused its discretion when denying defense counsel's request for a continuance.

B.

STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. By waiting until the day before trial to request appointment of new counsel, Mr. Bryson waived any challenge to a violation of his sixth amendment right to counsel and fourteenth amendment right to due process.
2. The trial court's inquiry into the breakdown in communications between Mr. Bryson and his lawyer did not violate the Sixth Amendment.
3. The trial court did not violate Mr. Bryson's Sixth Amendment rights to compulsory process and to present a defense when it

denied Mr. Bryson's motion for continuance on the day of trial to obtain an additional expert after Mr. Bryson had refused a continuance the day before trial.

C.

STATEMENT OF THE CASE

On July 15, 2009, Rodney Bryson was arrested on two outstanding warrants. RP 39, 41. A search of Bryson incident to arrest revealed a small baggy of white crystal substance. RP 41. The baggy of white crystal substance was sent to the Washington State Patrol Crime Laboratory and tested positive for the presence of methamphetamine. RP 57, 58.

On July 16, 2009, Rodney Bryson was charged by information with one count of possession of methamphetamine. CP 1-2.

On September 3, 2009, Bryson requested that the substance be retested by a defense expert. RP 14. On September 3, 2009, Bryson entered a waiver of speedy trial with a last allowable date for trial of November 2, 2009. RP 14, 12.

On October 19, 2009, defense counsel indicated that the defense expert concluded that the substance contained methamphetamine. RP 18, 19. On October 19, 2009, Bryson indicated that he wanted a complete chemical analysis of the methamphetamine. RP 23. On October 19, 2009, defense counsel indicated that he was prepared to go to trial. RP 20. On

October 19, 2009, defense counsel indicated that Bryson intended to report him to the bar association. RP 21. Defense counsel indicated that Bryson had obtained what he believed to be the Washington State Patrol Crime Laboratory testing protocol. RP 21.

On October 20, 2009, defense counsel indicated that Bryson believed that Washington State Patrol Crime Laboratory testing protocol had not been followed. RP 25. On October 20, 2009, defense counsel indicated that he and Bryson were no longer communicating. RP 25, 26. On October 20, 2009, defense counsel indicated that he had discussed a waiver of speedy trial to obtain an expert to examine the testing protocol used in this case. RP 26. On October 20, 2009, Bryson indicated that he would not waive his right to speedy trial and remain in jail another 60 days. RP 27.

On October 21, 2009, the day of trial, defense counsel indicated that Bryson was willing to waive his right to speedy trial. RP 29. On October 21, 2009, defense counsel filed with the court the alleged Washington State Patrol Crime Laboratory testing protocol. RP 29. The court denied Bryson's request to continue the trial. RP 33.

At trial, Jane Boysen, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that she had tested the substance in question, and that it was in fact methamphetamine. She also testified

that Washington State Patrol Crime Laboratory testing protocol was followed. RP 52, 60. Boysen identified the Washington State Patrol Crime Laboratory testing protocol obtained by Bryson as a controlled substance technical review check list. RP 67. Boysen indicated that the controlled substance technical review check list was not a protocol but in fact her notes. RP 68. With the exception of peer review observations, the technical review check list was admitted at trial. RP 72.

At no time ever did Mr. Bryson indicate that he was dissatisfied with his counsel or request new counsel.

Bryson was convicted as charged. CP 28. Bryson appealed. CP 44.

D.

ARGUMENT

1. The trial court's refusal to appoint Bryson new counsel on the day of trial was not an abuse of discretion.

A defendant does not have an absolute Sixth Amendment right to choose any particular advocate. *State v. Varga*, 151 Wash.2d 179, 200, 86 P.3d 139 (2004). To justify appointment of new counsel, a defendant “must show good cause to warrant substitution of counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *Id.* A trial

court's decision to deny new court appointed counsel and motions for continuances are reviewed for abuse of discretion. *Id.* Appellate courts will not disturb a trial court's decision unless the appellant shows that the decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

The defendant's right to counsel of his choice, does not include a right to unduly delay the proceedings so it is waived if not timely asserted. *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993), overruled on other grounds, *United States v. Garrett*, 179 F.3d 1143, 1145 (9th Cir.), cert. denied, 528 U.S. 978 (1999).

The Washington Supreme Court has held that "the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that defendant will inexorably be represented by the lawyer whom he prefers." *In re Stenson*, 142 Wn.2d 710, 726, 734, 16 P.2d 1 (2001). Although a defendant has a right to retain counsel of choice, the right to retain counsel of one's own choice has limits, one of which is that the right must be timely asserted. *State v. Chase*, 59 Wn. App. 501, 506, 799 P.2d 272 (1990). The Court of Appeals has analogized to cases dealing with the right of self-

representation, where the Supreme Court had held that undue delay in the proceedings may trump the right to counsel of choice:

In order to invoke the unconditional self representation right, an unequivocal assertion of that right must be made within a reasonable time before 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. 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, 655-56, 600 P.2d 1010 (1979)) (citations omitted); see also *In re Richardson*, 100 Wn.2d 669, 674, 675 P.2d 209 (1983); *State v. Bebb*, 108 Wn.2d 515, 524, 740 P.2d 829 (1987).

In *Chase*, two co-defendants moved for a continuance after jury selection on the first day of trial. *Chase*, 59 Wn. App. at 505. One defendant argued his appointed counsel was unprepared and stated he needed more time to retain an attorney of his choice. *Chase*, 59 Wn. App. at 505. The other co-defendant also wanted to retain an attorney and asked for a continuance. *Chase*, 59 Wn. App. at 505. The trial court denied the motions. *Id.* On appeal, the court found that there was no showing that the appointed attorney was unprepared, and then turned to the issue of the request for a continuance to retain an attorney.

After outlining the limits on a defendant's right to counsel of choice discussed above, the Court held that "it was within the trial court's discretion to refuse the defendants' untimely request to retain counsel of their choice." *Chase*, 59 Wn. App. at 506-507. The Court also noted that

the one of the co-defendants had been represented by court appointed counsel since the inception of the case, had not yet retained a private attorney, and at the time of the motion had not made any showing that he had the means to do so. *Chase*, 59 Wn. App. at 507. The Court also noted that the other co-defendant had alleged that he had hired an attorney, but that attorney had not appeared in the case even though it had been pending for seven weeks. *Chase*, 59 Wn. App. at 507.

Other courts have affirmed a trial court's denial of a motion to continue and to substitute counsel when the motion was brought on or near the day of trial. In *State v. Early*, for instance, trial was set for August 1, and a notice of appearance and motion to substitute were filed on July 30. *State v. Early*, 70 Wn. App. 452, 455-56, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d. 1004 (1994). In affirming the trial court's denial of the motion, the Court cited *Chase*, explaining that "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." *Early*, 70 Wn. App. at 457 (*citing Chase*, 59 Wn. App. at 506 and *State v. Staten*, 60 Wn. App. 163, 169-70, 802 P.2d 1384, *review denied*, 117 Wn.2d 1011 (1991)). The Court also cited several other cases in which a motion to continue in order to retain private counsel made on the morning of trial was appropriately denied. *Early*, 70 Wn. App. at 458 (*citing State v.*

Young, 11 Wn. App. 398, 523 P.2d 946 (1974), and *State v. Wilkinson*, 12 Wn. App. 522, 530 P.2d 340, *review denied*, 85 Wn.2d 1006 (1975)).

Finally, the Court reiterated that the trial court may properly consider the defendant's lack of diligence:

Mr. Early, moreover, had 6 months to retain private counsel, between his February arrest and the trial date. "A motion for continuance to secure or replace counsel will routinely be denied where the accused's lack of representation is attributable to his own lack of diligence in procuring or replacing counsel"

Early, 70 Wn. App. at 458-59 (citing 12 R. Ferguson, *Wash. Prac., Criminal Prac. and Proc.* § 1913 (1984)).

Similarly in *State v. Roth*, the Court agreed that although criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice, that right to counsel of choice "is not a right of the same force as other aspects of the right to counsel." *State v. Roth*, 75 Wn. App. 808, 824, 881 P.2d 268 (1994), *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995) (citing *Birt v. Montgomery*, 725 F.2d 587, 593 & n.13 (11th Cir.), *cert. denied*, 469 U.S. 874 (1984)). In particular, one of the limitations on that right is that the right to retained counsel of choice does not include the right to unduly delay the proceedings. Therefore, "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.'" *Roth*, 75 Wn. App. at 824-25 (quoting *Linton*

v. *Perini*, 656 F.2d 207, 209 (6th Cir.1981), *cert. denied*, 454 U.S. 1162 (1982)).

The *Roth* court then outlined criteria for the court to consider beyond the issue of delay, including the following:

- 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;
- 3) Whether available, current counsel is prepared to go to trial;
- 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.

Roth, 75 Wn. App. at 825.

With respect to a defendant's dissatisfaction with counsel, the courts have also made it clear that it is competent defense counsel, and not the defendant, who controls the trial strategy, because it is the attorney who is trained in the presentation of a defense at trial, not the defendant:

[T]he lawyer has -- and must have -- full authority to manage the conduct of the trial.... Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decisions, such as to forgo cross-examination, or decide not to put certain witnesses on the stand.... [A]ppointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of the defense.

Stenson, 142 Wn.2d at 734 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988), and *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987)) [internal quotations and citations omitted, initial ellipsis]

inserted by the Court].

Furthermore, the Washington Supreme Court has emphasized the discretion that must be afforded counsel in the preparation of a defense. “[T]he law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactic. For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney’s judgment.” *Stenson*, 142 Wn.2d at 734.

In the present case, Mr. Bryson’s attorney moved to be discharged of his duties as Mr. Bryson’s counsel on the day before of trial. Defense counsel indicated that there was a complete breakdown in communications between himself and Mr. Bryson. RP 25, 26. However, “[i]n 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; *see also Staten*, 60 Wn. App. at 169-70; and *Early*, 70 Wn. App. at 457.

All of the criteria discussed in *Roth* are present in this case:

1. The trial had previous been continued to obtain an expert at Mr. Bryson’s request. RP 14.

2. Mr. Bryson had no legitimate cause for dissatisfaction with present counsel. In fact Mr. Bryson never requested appointment of new counsel.
3. Defense counsel indicated he was prepared for trial. RP 20.
4. Mr. Bryson was not prejudiced in any way by denial of the motion to appoint new counsel.

Mr. Bryson argues that the defense counsel is in the best position to determine whether a motion for new counsel should be granted. Appellant Brief at 10. In this case the record reflects that while defense counsel had grounds to make a motion for new counsel, the trial court was not required to appoint new counsel. At no time did Mr. Bryson request new counsel. After defense counsel informed the court that there was a complete breakdown in communications, defense counsel informed the court the following day that Mr. Bryson was requesting a continuance and explained the defense strategy that Mr. Bryson wished to pursue. RP 25, 26, 29, 30, 31. This record in fact shows that any breakdown in communications was fleeting and that defense counsel and Mr. Bryson did not have a conflict that required appointment of new counsel.

Mr. Bryson argues that the court failed in its duty to inquire into the nature of the conflict between Mr. Bryson and his attorney and that this requires a new trial. Appellant Brief at 17. A review of the record

reveals the following undisputed facts. The trial had previous been continued to obtain an expert at Mr. Bryson's request. RP 14. Defense counsel's expert found that the substance contained methamphetamine. RP 18, 19. Two days before the trial Mr. Bryson indicated that he wanted a complete chemical analysis of the methamphetamine. RP 23. Defense counsel indicated he was prepared for trial. RP 20. Later that same day defense counsel indicated that Mr. Bryson intended to report him to the bar association. RP 21.

The day before trial defense counsel indicated that Mr. Bryson believed that Washington State Patrol Crime Laboratory testing protocol had not been followed. RP 25. Defense counsel indicated that he and Bryson were no longer communicating. RP 25, 26.

This record reveals that Mr. Bryson had no legitimate cause for dissatisfaction with present counsel, and present counsel was prepared for trial. What this record does show is that Mr. Bryson is an unreasonable and difficult client for any defense attorney. Any court faced with this record would find as the trial court did that the motion to appoint new counsel was without merit.

Finally, the State and all of its witnesses were prepared for trial as it was currently set. Given the fact that Mr. Bryson did not make the motion in a reasonable amount of time before trial, that Mr. Bryson had no

legitimate or compelling reason for the delay in bringing the motion, and that Mr. Bryson was not prejudiced in any way, the trial court's decision to deny the motion of Mr. Bryson's counsel was proper. Mr. Bryson has failed to show that the decision of the trial court was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. The trial court did not abuse its discretion in refusing to appoint new counsel.

2. The trial court's refusal to continue the trial on the day of trial was not an abuse of discretion.

On the day of trial Mr. Bryson moved to continue the trial date. RP 29. Over three month had passed since Mr. Bryson's arraignment in this case and the trial date. CP 1-2, RP 35. Mr. Bryson had previously requested and been granted a continuance to obtain an expert. RP 14. Defense counsel's expert confirmed that the substance in question was methamphetamine. RP 18. The record reveals that defense counsel and Mr. Bryson had extensively communicated about the case prior to the trial. Defense counsel cross examined the State's expert in a manner consistent with Mr. Bryson's allegation that the putative Washington State Patrol Crime Laboratory testing protocol had not been followed. RP 60-73. What Mr. Bryson indentified as the Washington State Patrol Crime Laboratory testing protocol turned out to be the chemist's notes. RP 68.

It would have been abuse of discretion by the trial court to grant Mr. Bryson's request for a continuance in this case. Mr. Bryson's request for a complete chemical analysis of the methamphetamine is totally irrelevant to any potential defense. The record is completely devoid of any evidence to indicate that Mr. Bryson was prejudiced in any way by the trial court's refusal to continue the trial date.

Mr. Bryson argues that the test results performed by the defense expert confirming the presence of methamphetamine would not be automatically admissible if Mr. Bryson confined the scope of the expert testimony to evaluating the putative Washington State Patrol Crime Laboratory testing protocol. Appellant Brief at 11. However, defense expert's findings that the substance contained methamphetamine would have been automatically admissible if the State had called the defense expert in its case and chief. Additionally, the record clearly indicates that Mr. Bryson's unsubstantiated opinion regarding the applicability of the putative Washington State Patrol Crime Laboratory testing protocol is not supported by the record. The State's expert testified that the testing procedures of the Washington State Patrol Crime Laboratory were followed and that the item identified by Mr. Bryson as the Washington State Patrol Crime Laboratory Testing Protocol was in fact the expert's notes. RP 52, 60, 67-68.

3. The evidence in this case proves beyond a reasonable doubt that the result would have been the same had the court granted Bryson's request for new counsel and motion to continue.

If the court determines that the trial court abused its discretion by failing to appoint new counsel or failing to continue the trial, the state asserts that any such error is harmless. Defense counsel was prepared and cross examined the forensic chemist from the crime laboratory in a manner consistent with Mr. Bryson's wishes. Defense counsel's own expert concluded that the substance was methamphetamine and Washington State Patrol Crime Laboratory Testing Protocols were followed.

Constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222 P.3d 1 (2008).

In this case there is no reason to believe that the ultimate result would have changed if Mr. Bryson was assigned a different lawyer or if the case had been continued or both. Hence, any purported error is harmless.

E.

CONCLUSION

For the reasons listed above, the Appellant's assignments of errors should be rejected and the relief sought by the Appellant should be denied. The Appellant's conviction for possession of a controlled substance (methamphetamine) should be upheld.

RESPECTFULLY SUBMITTED:



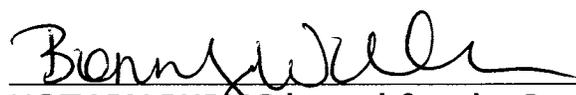
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VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 7th day of
June, 2010.



NOTARY PUBLIC in and for the State
of Washington, residing at:
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