

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

---

STATE OF ARIZONA, *Appellee*,

*v.*

JW CARLSON, *Appellant*.

No. 1 CA-CR 16-0186  
FILED 2-28-2017

---

Appeal from the Superior Court in Maricopa County  
No. CR2015-117695-001  
The Honorable Carolyn K. Passamonte, Judge *Pro Tempore*

**AFFIRMED**

---

COUNSEL

Arizona Attorney General's Office, Phoenix  
By David A. Simpson  
*Counsel for Appellee*

Maricopa County Legal Advocate's Office, Phoenix  
By Consuelo M. Ohanesian  
*Counsel for Appellant*

**MEMORANDUM DECISION**

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Patricia A. Orozco joined.<sup>1</sup>

---

**T H U M M A**, Judge:

¶1 J.W. Carlson appeals from his felony conviction and resulting prison sentence for aggravated assault, arguing the superior court abused its discretion in failing to inquire about the basis for his motion for new counsel and bar complaint against one of his trial attorneys. Because Carlson has shown no error, his conviction and sentence are affirmed.

**FACTS<sup>2</sup> AND PROCEDURAL HISTORY**

¶2 Carlson was charged with aggravated assault, a Class 5 felony, based on an allegation that Carlson sprained the arm of a detention officer while being booked in an unrelated incident in April 2015. Motion practice followed, including addressing Carlson's competency; based on expert reports, Carlson was found competent in December 2015.

¶3 At a Wednesday, February 3, 2016 pretrial conference, Carlson rejected a revised plea offer after an advisement pursuant to *State v. Donald*, 198 Ariz. 406 (App. 2000) and the parties discussed motions in limine. At that hearing, Carlson asked to speak with the prosecutor and when he did, asked about motions his attorneys filed, stating they were filed "without my knowledge" and he did not know what they addressed. These motions sought to sanitize Carlson's prior felony convictions if he elected to testify at trial and to preclude evidence of the underlying reasons for his arrest or statements about his arrest and subsequent events. Carlson stated "I don't want to get nobody in trouble. I just want to know what the

---

<sup>1</sup> The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

<sup>2</sup> On appeal, this court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against the defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

STATE v. CARLSON  
Decision of the Court

motions say.” Carlson added “I just don’t want . . . there to be a conflict of interest, you know, and in . . . they’re just being here because I have to sit – I have to not go through with trial.”

¶4 After it was clear Carlson was not going to accept the plea offer, he again said “there were motions filed without me knowing or asking me - . . . - and - . . . I believe - . . . – it’s a conflict of interest.” When Carlson interrupted the court by again mentioning the motions,<sup>3</sup> the court stated “[w]e’ve talked about that” and confirmed the trial setting. When Carlson again interrupted, the court reminded him that he had attorneys and he needed to speak through his attorneys, with Carlson responding “[a]nd she’s not listening - . . . - to me, Your Honor.” Carlson then referred to “the motion that I don’t want - . . . - filed – I don’t want granted or filed.” When he continued to interrupt, the court eventually stated “Sir, I am - . . . – not speaking with you. I’m talking with the attorneys.” When he persisted, the court stated “Sir - . . . Sir - . . . – if you have issues you want to discuss, you talk with your attorney. I’m not doing a free-for-all here. You have an attorney who is talking for you.”

¶5 When the prosecutor needed to leave for the return of a verdict in an unrelated case, the hearing ended rather quickly with the following exchange:

THE DEFENDANT: Your Honor, there’s a conflict of interest – I didn’t –

THE COURT: All right.

THE DEFENDANT: I need a –

THE COURT: Sir –

THE DEFENDANT: -motion for a different counsel.

THE COURT: Sir –

THE DEFENDANT: I need different –

THE COURT: – we need to –

---

<sup>3</sup> Carlson’s argument on appeal that “[t]he court kept cutting off Appellant” is not supported by the record; it was Carlson who kept interrupting the court.

STATE v. CARLSON  
Decision of the Court

THE DEFENDANT: - counsel -

THE COURT: - address - we need to adjourn so that [the prosecutor] can get to her other court. I've given you the time . . . . We've kind of got a schedule about the motions in limine.

THE DEFENDANT: It's probably gonna [sic] go on -

THE COURT: I think those -

THE DEFENDANT: - in trial.

THE COURT: - are the only three that I saw, so you can jointly email me if you think there's other things that we need to address.

All right. Then we are adjourned on this matter.

It is undisputed that Carlson never filed a written motion for change of counsel.

¶6 On Tuesday, February 9, 2016, the first day of trial, one of Carlson's attorneys told the superior court that Carlson had "submitted a bar complaint" against her "sometime on Friday," adding she was "not sure if that creates a conflict of interest at this time, me continuing to represent him in going forward in this trial since he has already filed a bar complaint on my behalf." The court noted it did not "have anything" in the file "to indicate any request for a change in counsel and the mere fact that a bar complaint has been filed does not in and of itself require the Court to excuse the defense attorney from the case." The court also noted Carlson had two attorneys defending him. Accordingly, trial proceeded as scheduled and, after deliberations, the jury found Carlson guilty as charged.

¶7 At a priors trial and sentencing, the court found the State had proven that Carlson had two prior felony convictions that were not historical prior felony convictions. *See* Ariz. Rev. Stat. (A.R.S.) § 13-105(22) (2017).<sup>4</sup> After considering a presentence report, and information provided by the State and Carlson, the court sentenced him to two years in prison, a

---

<sup>4</sup> Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

STATE v. CARLSON  
Decision of the Court

slightly mitigated term, awarding him 327 days of presentence incarceration credit. This court has jurisdiction over Carlson's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

**DISCUSSION**

¶8 Carlson argues the superior court abused its discretion in failing to inquire about the basis of his (1) "motion for new counsel made on February 3, 2016" and (2) bar complaint referenced on February 9, 2016, resulting in a denial of justice and a violation of his Sixth Amendment right to counsel. *See also State v. Moore*, 222 Ariz. 1, 15 ¶ 77 (2009) ("A trial court's decision to deny a request for new counsel will not be disturbed absent an abuse of discretion.").

¶9 The premise for Carlson's first argument -- that he made a motion for new counsel at the February 3, 2016 hearing -- is not supported by the record. It is true that Carlson expressed concern about his counsel filing motions purportedly without his knowledge and a possible conflict. But it is undisputed that Carlson never filed a written motion for change of counsel as required. *See Ariz. R. Crim. P. 35.1(a), 35.3*. Nor is there any suggestion that the court waived the writing requirement. *See Ariz. R. Crim. P. 35.4*. The transcript from the February 3, 2016 hearing does not indicate that Carlson moved for new counsel at that time. And the transcript from February 9, 2016 contains the superior court's statement that it did not "have anything in the Court file to indicate any request for a change in counsel." Nor has Carlson shown that the superior court abused its discretion by not considering his statements as a request to waive the writing requirement and that he orally moved for a change of counsel.

¶10 Because no such motion was made, the authority cited by Carlson about what should happen when such a motion is made is inapplicable. *See State v. Torres*, 208 Ariz. 340, 343 ¶ 7 (2004) (discussing superior court's duty to inquire "as to the basis of a *defendant's request for substitution of counsel.*") (emphasis added); *State v. LaGrand*, 152 Ariz. 483, 486-87 (1987) (discussing factors to consider in ruling on motion for change of counsel). Accordingly, the superior court could not have erred in failing to inquire about the basis of such a motion at the February 3, 2016 hearing.

¶11 The premise for Carlson's second argument -- that the superior court did not inquire about the basis of his bar complaint referenced on the first day of trial -- is supported by the record. But as the superior court noted, and as Carlson concedes, "[a]s a matter of public

STATE v. CARLSON  
Decision of the Court

policy, a defendant's filing of a bar complaint against his attorney should not mandate removal of that attorney.'" *State v. Henry*, 189 Ariz. 542, 549 (1997) (quoting *State v. Michael*, 161 Ariz. 382, 384 (App. 1989)). "A rule to the contrary would encourage the filing of such complaints solely for purposes of delay." *Henry*, 189 Ariz. at 549. Although Carlson argues that, when the issue of the bar complaint arose on the first day of trial, "the court should have inquired about the basis of the complaint" sua sponte, he cites no authority for that proposition. Neither Carlson nor the attorney against whom he apparently filed the bar complaint disclosed anything about the complaint. And there is no evidence of record showing an irreconcilable conflict or a complete breakdown of communication between Carlson and the attorney. Compare *Torres*, 208 Ariz. at 343 ¶ 8 ("If a defendant establishes a total breakdown in communication, or an irreconcilable conflict with his attorney, then the trial judge must grant the request for new counsel."). Accordingly, and because no timely objection was made to how the superior court proceeded at trial, on this record, Carlson has not shown fundamental error resulting in prejudice. *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (noting fundamental error requires defendant "to establish that '(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice.'" (citations omitted)).

CONCLUSION

¶12 Because Carlson has shown no error, his conviction and sentence are affirmed.



AMY M. WOOD • Clerk of the Court  
FILED: AA