DIVISION ONE
FILED: 03/30/2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0271
	)	1 CA-CR 08-0272
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT D
	)	
JASON LEE CEPEDA,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR 2007-048251-001 DT and CR 2007-127211-001 DT

The Honorable Rosa Mroz, Judge
The Honorable Cari A. Harrison, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Jason Lee Cepeda (Defendant) appeals from his convictions and sentences for unlawful use of means of transportation, attempted burglary in the third degree, criminal damage, possession or use of dangerous drugs, and possession of drug paraphernalia. The sole issue on appeal is whether the trial court erred in not appointing Defendant new counsel, or alternatively, in denying Defendant's request to proceed *in propria persona*. For the reasons that follow, we find no error and therefore affirm.

BACKGROUND

¶2 We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against Defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). On April 21, 2007, Defendant attempted to pry open a drive-thru ATM with a crowbar. Failing in this endeavor, Defendant tried to knock over the ATM with a stolen commercial truck. The ATM incurred significant damage, but no money was missing. Based on this incident, the State charged Defendant with theft of means of transportation, a class 3 felony; attempted burglary in the third degree, a class 5 felony; and criminal damage, a class 4 felony because the State alleged damages in an amount of $10,000.00 or more (the ATM Case).

¶3 On April 29, 2007, police arrested Defendant for trying to cash a forged check. During a search incident to the arrest, police discovered in Defendant's wallet a small baggie containing a substance that Defendant admitted was methamphetamine. The State subsequently charged Defendant with forgery, a class 4 felony; possession or use of dangerous drugs, a class 4 felony; and possession of drug paraphernalia, a class 6 felony (the Drug Case).

¶4 The matters proceeded to separate jury trials, and the ATM Case was tried first before Judge Harrison. On October 9, 2007, the day before trial commenced, Defendant filed on his own behalf, a motion for change of counsel. The morning of trial, the court addressed Defendant and his appointed counsel regarding the concerns Defendant set forth in his motion. The court denied Defendant's motion. On October 16, 2007, the jury found Defendant guilty as charged except it found him guilty of unlawful use of means of transportation as a lesser-included offense of theft of means of transportation.[1] The parties agreed to continue sentencing until after the Drug Case trial. On

[1] Regarding the criminal damage offense, the jury found the damage to be $5,000.00 or over; thus, the criminal damage conviction is a class 5 felony, not a class 4 felony. *See* Arizona Revised Statutes (A.R.S.) section 13-1602.B.1, 3 (Supp. 2009) (we cite to the current version of the applicable statutes because no revisions material to this decision have occurred).

October 19, 2007, Defendant filed another motion for change of counsel.

¶5 The Drug Case proceeded to trial on October 30, 2007 with Judge Mroz presiding. On November 2, 2007, the jury found Defendant not guilty of forgery, but guilty of the two drug counts. On November 15, 2007, Defendant filed a pro per motion to extend time for filing a motion for new trial, which the trial court denied because Defendant was represented by counsel and it would not permit hybrid representation. On December 14, 2007, Defendant filed a motion to proceed *in propria persona*. At a hearing conducted on January 16, 2008, the court addressed Defendant, and once he understood the only proceedings remaining were sentencing and filing an appeal, Defendant withdrew his motion.

¶6 At sentencing, the court found Defendant had two prior felony convictions and sentenced him to presumptive five-year concurrent terms of imprisonment for the convictions in the ATM Case. For the convictions in the Drug Case, Defendant was sentenced to the presumptive term of ten years' incarceration for the possession/use charge, to be served concurrently with the presumptive term of 3.75 years' incarceration for the paraphernalia charge and consecutive to the sentences in the ATM Case. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S.

§§ 12-120.21.A.1 (2003), 13-4031 (2001), and -4033.A.1 (Supp. 2009).

DISCUSSION

Change of Counsel

¶7 Defendant argues that he and his appointed trial counsel had "an irreconcilable conflict and/or a complete breakdown in communication such that the trial court erred in forcing him to proceed through two trials and sentencing without appointing him new counsel."

¶8 We review a superior court's decision to deny a request for new counsel for an abuse of discretion. *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 27, 119 P.3d 448, 453 (2005). Although a criminal defendant has the right to be represented by competent counsel, he is entitled neither to counsel of his choice nor to a meaningful relationship with his attorney. *Id.* at ¶ 28. Ordinarily, only the presence of an "irreconcilable conflict or a completely fractured relationship" between trial counsel and an accused will require the appointment of new counsel. *Id.* at ¶ 29.

¶9 "A single allegation of lost confidence in counsel does not require the appointment of new counsel, and disagreements over defense strategies do not constitute an irreconcilable conflict." *Id.* To establish a colorable claim, a defendant must allege more than personality conflicts or

disagreements with counsel about trial strategy. *Id.* at 187, ¶ 30, 119 P.3d at 454. "[A] defendant must allege facts sufficient to support a belief that an irreconcilable conflict exists warranting the appointment of new counsel in order to avoid the clear prospect of an unfair trial." *Id.*

¶10 If a defendant makes sufficient factual allegations that raise a colorable claim of an irreconcilable conflict or of a complete breakdown in communication with counsel, the court must conduct a hearing. *State v. Torres*, 208 Ariz. 340, 343, ¶ 8, 93 P.3d 1056, 1059 (2004). However, not every complaint voiced by a defendant requires a formal hearing or an evidentiary proceeding. *Id*. "For example, generalized complaints about differences in strategy may not require a formal hearing or an evidentiary proceeding." *Id*. Thus, the nature of the inquiry is directly dependent on the nature of a defendant's allegations and complaints. *Id.*

¶11 In the ATM Case, Defendant alleged the following in his motion for change of counsel:

> that [defense counsel] As My Counsel has not helped me nor inform [sic] me, of any Matter And Has not Completely analized [sic] Matters In My police Report and I did'nt [sic] Receive the police Report until Recent of [sic] my incarceration I Jason Lee Cepeda Came to the Conclusion that [defense counsel] does not work or represent me to the best of his knowledge [sic][.]

¶12 The trial court inquired on the record into the basis for Defendant's request. Defendant responded that his lawyer told him he would not ask questions of witnesses that Defendant wanted posed and had not collected evidence Defendant had requested. Defense counsel informed the court he was prepared for trial, and, noting there was strong evidence against Defendant,[2] had asked Defendant numerous times what his defense was going to be. Defense counsel also stated the conflict with Defendant concerned Defendant's insistence on filing frivolous motions and asking witnesses irrelevant questions. In denying Defendant's motion, the court noted, correctly, that disagreements between a client and counsel regarding assessments of a case and trial strategy do not require appointment of new counsel. We find nothing improper in the trial court's informal procedure for inquiring into the basis of Defendant's complaints. *See State v. Paris-Sheldon*, 214 Ariz. 500, 505, ¶ 11, 154 P.3d 1046, 1051 (App. 2007).

¶13 Unlike in *Torres*, in which the defendant claimed he no longer trusted his lawyer and felt threatened and intimidated by him, 208 Ariz. at 342, ¶ 2, 93 P.3d at 1058, Defendant never alleged a breakdown in the attorney-client relationship; he only alleged a disagreement related to defense strategy. Therefore,

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[2] A date and time-stamped surveillance videotape played at trial clearly showed Defendant attempting to break into the ATM. Defendant viewed the tape before trial.

because Defendant did not present any other specific, factual allegations in support of his request for new counsel, the trial court did not abuse its discretion by denying Defendant's motion without further inquiry into Defendant's request for new counsel. Under the circumstances, the trial court's actions properly balanced Defendant's concerns and the need for judicial economy. *See State v. Moody*, 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998). Accordingly, we discern no abuse of discretion in the court's denial of Defendant's first motion for change of counsel.

¶14 Regarding Defendant's October 19, 2007 motion for change of counsel, the record does not reveal whether the trial court ruled on the motion. However, we find no error in the trial court's implicit denial of the motion. As with his first motion for change of counsel, Defendant did not allege any factual basis for finding he had an irreconcilable conflict or a completely fractured relationship with his lawyer. Indeed, the absence of an irreconcilable conflict or complete breakdown in communication between Defendant and counsel is established by the consistency between counsel's opening statement to the jury in the Drug Case and Defendant's testimony at trial.[3]

[3] In his opening brief, Defendant also refers to instances during pretrial hearings in which he contends the court should have inquired into whether Defendant and his lawyer had a fractured relationship necessitating appointment of new counsel.

¶15 To the extent Defendant argues the court erred in not granting his post-trial motion to proceed *in propria persona*, Defendant expressly withdrew the motion. As a result, the trial court made no ruling on which Defendant could object or appeal. Nevertheless, Defendant argues that the trial court forced counsel upon him by allegedly expressing animosity towards Defendant's motion. However, nothing in the record indicates the trial court expressed any hostility toward Defendant regarding his motion to proceed *in propria persona*. The trial court merely informed Defendant of the advantages and disadvantages of either remaining represented by counsel or proceeding *in propria persona*. Even after Defendant stated he wanted to remain represented, the trial court said "[y]ou know, really think about this issue." Defendant then formally withdrew his motion. Rather than pressuring Defendant into withdrawing his motion, we believe the trial court was ensuring Defendant was making an informed decision regarding his representation. Accordingly, we find the trial court did not err in allowing Defendant to withdraw his motion to proceed *in propria persona*.

Defendant, however, does not point out where he requested new counsel based on those pretrial examples. Further, he does not argue the courts' inaction resulted in fundamental error; thus, we do not address the propriety of the courts' failure in those instances to *sua sponte* inquire into Defendant's relationship with his counsel.

Orders of Confinement

¶16 As a final matter, the parties request we amend the sentencing minute entries and orders of confinement.[4] We agree that, under the facts of this case, unlawful use of means of transportation as committed by Defendant is a class 5 felony. A.R.S. § 13-1803.A.1, B (2001). Accordingly, we order the sentencing minute entry and order of confinement in CR2007-048251-001 DT amended to refer to the conviction for unlawful use of means of transportation as a class 5, not class 3, felony. *See State v. Vandever*, 211 Ariz. 206, 210, 119 P.3d 473, 477 (App. 2005) (amending minute entry to correctly identify offense as a class 6, not class 3, felony). We also agree with the parties that Defendant's sentences were imposed pursuant to A.R.S. § 13-604.C (2005)[5] because the trial court found he had two historical prior felony convictions. Accordingly, we order the sentencing minute entries and orders of confinement in CR2007-048251-001 DT and CR2007-127211-001 DT amended to reflect that Defendant was sentenced pursuant to A.R.S. § 13-604.C based on two historical prior felony convictions.

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[4] *See* Arizona Rule of Criminal Procedure 24.4.

[5] We cite the statute's version in effect at the time of the offense. The relevant portions of § 13-604.C are currently found at A.R.S. § 13-703.C, J (Supp. 2009). *See* 2008 Ariz. Sess. Laws, ch. 301, § 28 (2nd Reg. Sess.).

CONCLUSION

¶17 Defendant's convictions and sentences are affirmed as modified above.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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DIANE M. JOHNSEN, Judge

/S/
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JON W. THOMPSON, Judge