

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



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

STATE OF ARIZONA, ) No. 1 CA-CR 08-0522  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) MEMORANDUM DECISION  
)  
PAUL ANDREW LOVATO, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

Appeal from the Superior Court in Navajo County

Cause Nos. CR-2007-0048 & CR-2007-0687

The Honorable Dale P. Nielson, Judge

**AFFIRMED**

Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Susanne Bartlett Blomo, Assistant Attorney General  
Attorneys for Appellee

Marsha A. Gregory Springerville  
Attorney for Appellant

J O H N S E N, Judge

¶1 Paul Andrew Lovato appeals his convictions of  
transportation of a dangerous drug for sale, unlawful flight

from law enforcement vehicle, aggravated assault, resisting arrest and two counts of misconduct involving weapons. He argues the superior court erred in failing to rule on his motion *in propria persona* for change of counsel. For the reasons that follow, we find no error and affirm his convictions and resulting sentences.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 Lovato was indicted in two consolidated cases. The details of the charges against him and the facts giving rise to those charges are not relevant to this appeal. Lovato was appointed an attorney, deputy public defender Peter Gersten, who was present at the first case management conference. According to the minute entry issued after that conference, Gersten said he would "discuss a plea offer with the State" and the State "presented defense counsel with a plea offer."

¶3 Lovato and Gersten were present at a settlement conference on March 5, 2007, at which counsel for the State presented a plea offer. At a case management conference on March 13, 2007, Gersten "advised the Court that the parties had participated in a settlement conference" and asked for additional time to review the plea offer with Lovato. At another case management conference on April 3, 2007, Gersten told the Court he had sent the State a counteroffer, which the State declined.

¶4 At issue in this appeal is a handwritten, undated one-page "Motion for change of Counsel" filed by Lovato *in propria persona* on April 16, 2007. In the motion, Lovato wrote that he wanted new counsel "due to a conflict of interest." He explained the purported conflict only by saying he had learned that Gersten had represented Lovato's fiancée. In addition, Lovato said that in discussing the prosecutor in the case with Gersten, Gersten said "he would not discuss the case with [the prosecutor] for fear of rejection." Finally, Lovato concluded, "with Mr. Gersten as council [sic] he feels that he does not have a fair chance at fair trial."

¶5 The record does not disclose that any action was ever taken on the motion. A case management conference was held eight days after Lovato filed his motion, but the minute entry contains no indication that the motion was discussed. (The minute entry reflects that Lovato rejected the State's plea offer at that time.) Lovato made four more court appearances before the court prior to trial, but the record does not disclose that Lovato's motion was discussed at any of them. According to the record, the only time the relationship between Lovato and Gersten was mentioned again was during a change-of-plea hearing on June 12, 2007, at which Lovato rejected a plea agreement. When Lovato began a statement to the court in which he appeared to incriminate himself, Gersten interrupted Lovato,

causing Lovato to tell the court that Gersten "made [him] more nervous than [he already] was." Lovato also said that during a prior settlement conference he was not able to "say what [he] wanted to say as well" because he was "rushed so quick" through the conference. Lovato, however, did not raise the matter of his motion for change of counsel at the change of plea hearing, nor did he ask the court why it had not ruled on the motion.

¶6 At trial, Lovato was convicted and was sentenced to the presumptive terms on each of the offenses. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-604 (Supp. 2008), -604.02 (2001).<sup>1</sup> We have jurisdiction of Lovato's appeal 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).<sup>2</sup>

#### DISCUSSION

¶7 A criminal defendant is entitled to competent counsel. U.S. Const. amend. VI; see also Ariz. Const. art. 2, § 24; *State v. LaGrand*, 152 Ariz. 483, 486, 733 P.2d 1066, 1069 (1987). A defendant, however, is not "entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *State v. Moody*, 192 Ariz. 505, 507, 968 P.2d 578, 580 (1998). Instead,

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<sup>1</sup> Arizona Revised Statutes § 13-604 has been renumbered. We cite the version in effect at the time Lovato was sentenced.

<sup>2</sup> Although Lovato did not timely appeal, we granted his motion for delayed appeal.

the constitutional right to counsel is violated when there has been "a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel." *State v. Torres*, 208 Ariz. 340, 342, ¶ 6, 93 P.3d 1056, 1058 (2004).

¶18 We review the superior court's failure to conduct an inquiry into Lovato's request for change of counsel for an abuse of discretion. See *id.* at 343, ¶ 9, 93 P.3d at 1059. In *Torres*, our supreme court held the superior court erred by not inquiring into the defendant's request for new counsel. *Id.* The defendant in that case, however, had "presented specific factual allegations that raised a colorable claim that he had an irreconcilable conflict with his appointed counsel." *Id.*

¶19 In this case, Lovato's motion for change of counsel contained no facts to support a colorable claim of irreconcilable conflict with Gersten. Lovato offered no facts for why Gersten's prior representation of Lovato's fiancée might create a conflict of interest. Moreover, although his motion seemed to say that Gersten had told him he would not engage in plea negotiations with the prosecutor, the minute entries belie that assertion. Our review of the record demonstrates that notwithstanding the concern stated in the motion, Gersten engaged in negotiations with the State and Lovato received a fair trial. On appeal, Lovato alleges no additional facts that he would have presented to the superior court had the court

inquired into his request for change of counsel. In sum, Lovato simply did not provide "specific factual allegations in support of the request for new counsel." *State v. Paris-Sheldon*, 214 Ariz. 500, 504, ¶ 8, 154 P.3d 1046, 1050 (App. 2007).

¶10 The fact that Lovato failed to call the court's attention to his motion supports the conclusion that no real conflict existed between him and his counsel. After filing his motion, Lovato appeared before the court on five separate occasions, then participated in the trial, but at no time did he raise his request again. It is the defendant's burden to bring a motion to the court's attention. *See State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983). Although we do not conclude Lovato waived his request for relief, his failure to call the court's attention to his motion is evidence that no significant conflict existed between him and Gersten.

**CONCLUSION**

¶11 For the foregoing reasons, we affirm Lovato's convictions and resulting sentences.

/s/ \_\_\_\_\_  
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ \_\_\_\_\_  
PATRICIA A. OROZCO, Presiding Judge

/s/ \_\_\_\_\_  
JON W. THOMPSON, Judge