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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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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0930
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
GUADALUPE PEREZ-BOJORQUEZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-139694-001 DT

The Honorable Arthur T. Anderson, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals Section/Capital Litigation Section
And William Scott Simon, Assistant Attorney General
Attorneys for Appellee

Janelle A. McEachern Chandler
Attorney for Appellant

O R O Z C O, Judge

¶1 Guadalupe Perez-Bojorquez (Bojorquez) appeals from his convictions and sentences. He argues that the trial court committed fundamental error by denying his August 4, 2008 motion

for continuance and change of counsel. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Bojorquez was charged with one count of second degree murder, a class 1 dangerous felony; one count of aggravated assault, a class 2 dangerous felony; one count of aggravated assault, a class 6 felony; one count of leaving the scene of a fatal injury accident, a class 3 felony; one count of resisting arrest, a class 6 felony; and one count of possession or use of a narcotic drug, a class 4 felony.

¶13 The State indicted Bojorquez on June 27, 2007 and trial was initially scheduled to begin on May 5, 2008. On September 20, 2007, the trial court granted Bojorquez's request to designate the case as complex, basing its decision on the amount of scientific evidence, discovery, and the number of witnesses and experts involved. On April 28, 2008, Bojorquez and the State each filed motions to continue trial. The trial court reset trial for July 31, 2008, based in part on the need for more time for Bojorquez's expert witness to prepare a collision reconstruction and crash analysis. On July 31, 2008, the first scheduled day of trial, Bojorquez's proposed counsel (Proposed Counsel) filed a motion for substitution of counsel in open

court.¹ The trial court then asked Proposed Counsel if he would be ready for trial. Ultimately, Proposed Counsel could not avow that he would be prepared for trial by the August 11, 2008 start date. As a result, the trial court denied Bojorquez's motion for substitution of counsel.

¶4 On August 4, 2008, thirty minutes before jury selection, Bojorquez filed a motion *in propria persona* for a continuance and substitution of counsel. Bojorquez argued he had the right to counsel of his choice and that if the trial court denied his motion he would not have an opportunity to address issues of ineffective assistance of counsel until post-conviction proceedings. The trial court struck the motion as untimely, unwarranted, and filed without authority. The trial court reasoned that Bojorquez had no standing to file the motion *in propria persona* because he was represented by counsel. Additionally, the trial court reasoned that Bojorquez's argument regarding ineffective assistance of counsel was improper to consider before trial.

¶5 The jury found Bojorquez guilty as charged, and Bojorquez was sentenced to a term of twenty-seven-and-one-half years' imprisonment. Bojorquez filed a timely notice of appeal

¹ For reasons that are unclear in the record, the trial court reset trial for August, 4, 2008. Voir dire began on August 4, 2008 and ended on August 5, 2008; however, opening statements began on August 12, 2008.

and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031, and -4033.A (2010).²

DISCUSSION

¶16 Bojorquez raises one issue on appeal: whether the trial court abused its discretion in denying his motion for a continuance and for substitution of counsel filed August 4, 2008.³ “The granting of a continuance is within the discretion of the trial court, and its decision will only be disturbed upon a showing of a clear abuse of such discretion and prejudice to defendant.” *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). A trial court’s denial of a motion for change of counsel is reviewed for a clear abuse of discretion. *State v. Moody*, 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998).

Hybrid Representation

¶17 The trial court denied Bojorquez’s motion as untimely, unwarranted and filed without authority. The trial court explicitly reasoned that Bojorquez had no standing to file the motion *in propria persona* because he was represented by counsel.

² We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

³ Bojorquez does not argue on appeal that the trial court erred in denying his first motion for substitution of counsel filed July 31, 2008. Bojorquez only appeals the trial court’s denial of his motion filed August 4, 2008.

¶18 "When a defendant concurrently has self-representation and representation by counsel, hybrid representation results." *State v. Roscoe*, 184 Ariz. 484, 498, 910 P.2d 635, 649 (1996). It is well established law that a criminal defendant has no constitutional right to hybrid representation. *State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994); *State v. Rickman*, 148 Ariz. 499, 504, 715 P.2d 752, 757 (1986); *State v. Stone*, 122 Ariz. 304, 307-08, 594 P.2d 558, 561-62 (App. 1979). "Although hybrid representation is not a constitutional right and is disfavored, it is permitted at the discretion of the court." *Roscoe*, 184 Ariz. at 498, 910 P.2d at 649. In this case, the trial court effectively prohibited Bojorquez from the use of hybrid representation. Because Bojorquez was represented at all times by counsel, the trial court acted within its discretion in denying Bojorquez's motion filed *in propria persona*. *Id.*

Right to Counsel

¶19 Nevertheless, Bojorquez cites *State v. Aragon*, 221 Ariz. 88, 210 P.3d 1259 (App. 2009) to support his argument that the trial court improperly denied his motion for continuance and for substitution of counsel. A trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006) (citation omitted). The Arizona Supreme Court has stated that "[w]hether

an accused's constitutional rights are violated by the denial of a request for a continuance depends on the circumstances present in the particular case." *State v. Hein*, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983). As a result, we consider the following factors:

[W]hether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Id.

¶10 In *Aragon*, this Court concluded that the trial court violated the defendant's right to counsel by denying his request for a continuance to substitute appointed counsel. 221 Ariz. at 91, ¶ 9, 210 P.3d at 1262. In *Aragon*, we noted that the defendant "had neither sought nor been granted any prior continuances," and the State did "not argue the case was particularly complex or dispute [the defendant's] assertion that 'all of the witnesses . . . were law enforcement personnel . . . or law enforcement-related professionals, who routinely juggle their calendars to accommodate court appearances.'" *Id.* at 90, ¶ 6, 210 P.3d at 1261.

¶11 In this case, the trial court had already granted one continuance, because of Bojorquez's need to prepare an accident reconstructionist. The trial court had also granted Bojorquez's

motion to designate the case as complex. Furthermore, numerous civilian witnesses, including one who traveled from out of state, were to testify during trial. Additionally, Bojorquez's motion for continuance was filed only thirty minutes before jury selection.

¶12 The Arizona Supreme Court has held that denying a motion for continuance under similar facts is not an abuse of discretion. See *Hein*, 138 Ariz. at 369-70, 674 P.2d at 1367-68 (finding no abuse of discretion in denying a motion to continue after noting that a jury was present and a continuance would place a "great burden" on out of state witnesses); *State v. Miller*, 111 Ariz. 321, 323, 529 P.2d 220, 222 (1974) (upholding a trial court's decision to compel a defendant to proceed with appointed counsel where trial had already been postponed twice and defendant waited until the day before trial to move for a substitution and continuance). We have found similar support in the Ninth Circuit. *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986) (finding no abuse of discretion in denying a motion to continue for substitution of counsel filed on the first day of trial). In *Aragon*, we cited to *Miller* and *Hein* to contrast the facts of *Aragon* with facts sufficient to uphold a trial court's denial of a defendant's untimely motion for continuance. 221 Ariz. at 90, ¶¶ 5-6, 210 P.3d at 1261. We find

the facts in this case are more analogous to the facts found in *Miller* and *Hein* rather than those found in *Aragon*.

¶13 After considering the *Hein* factors, *see supra* ¶ 9, we hold the trial court did not abuse its discretion in denying Bojorquez's motion for continuance and for substitution of counsel.⁴

CONCLUSION

¶14 For the reasons previously stated, we affirm Bojorquez's convictions and sentences.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

DIANE M. JOHNSEN, Judge

/S/

JON W. THOMPSON, Judge

⁴ To the extent Bojorquez argues that his motion for continuance should have been granted based on a claim of ineffective assistance of counsel, we reject it. We agree with the trial court that ineffective assistance of counsel is an inappropriate reason for granting a motion for continuance. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) (holding "that a defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding - not before trial, at trial, or on direct review.").