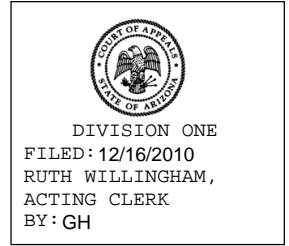


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 09-0446
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JESSE GARCIA ROCHA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-130484-001 SE

The Honorable Silvia R. Arellano, Judge (Retired)

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Bruce F. Peterson, Maricopa County Legal Advocate Phoenix
By Kerri L. Chamberlin, Deputy Legal Advocate
Attorneys for Appellant

Jesse Garcia Rocha Buckeye
Appellant

D O W N I E, Judge

¶1 Jesse Garcia Rocha ("defendant") appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Defense counsel has searched the record, found no arguable question of law, and asks that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant filed a supplemental brief *in propria persona*.

¶2 We have conducted an independent review of the record, focusing on the narrow issue before us: whether defendant was deprived of his Sixth Amendment right to counsel. Cf. *State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (the validity of an underlying conviction, previously affirmed on appeal, is beyond the scope of an appeal from remand for resentencing). Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 After a jury trial, defendant was found guilty of possession or use of marijuana and possession of dangerous drugs for sale. Defendant appealed his convictions, arguing the trial court erred by summarily denying his motion for new counsel without holding a hearing. The State confessed error, and this Court remanded, directing the trial court to conduct a hearing regarding defendant's allegations about his trial counsel. See *State v. Rocha*, 1 CA-CR 07-0979, 2009 WL 223371, slip op. at 2, ¶ 6 (Ariz. App. Jan. 29, 2009).

¶4 On May 19, 2009, the court held an evidentiary hearing to consider whether there had been a breakdown in communication or irreconcilable conflict between defendant and trial counsel. Defendant was represented by a new lawyer--Ms. Martin. Defendant testified that he filed three motions to dismiss trial counsel. He alleged that "[f]rom day one, we bumped heads, and ever since that, every time we had a contact or an encounter, it ended in one of us being angry or just one of us shutting the other one out." He also contended that trial counsel "knowingly lied and violated several of [his] rights."

¶5 As an example, Defendant testified that when he attempted to show trial counsel his copy of the supervening indictment, which he contended was different from hers, she told him it was not necessary, as she had the same document in her file. Upon further examination, defendant clarified that the charges on both documents were the same, and the differences were in formatting. Defendant testified that on another occasion, trial counsel, along with the prosecutor, "forced" him to provide fingerprints.¹ Additionally, defendant testified that trial counsel refused to pursue DNA analysis, despite his

¹ Defendant also testified about another occasion when trial counsel refused to file a motion to dismiss after DNA tests were inconclusive. He explained that the State compared his DNA to DNA found on a weapon. However, the jury found defendant not guilty of the weapons-related charge.

claim that testing could prove the officer was mistaken in testifying that he saw defendant "throw something."

¶16 During the evidentiary hearing, trial counsel testified that she met with defendant more than ten times. Although she admitted that, at times, her strategic decisions were at odds with defendant's requests, she did not feel that created an irreconcilable conflict or a breakdown of communication.

¶17 The court found that defendant was not deprived of his Sixth Amendment rights and was not entitled to a new trial. This timely appeal ensued. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

DISCUSSION

¶18 In his supplemental brief, defendant raises two issues: (1) whether Ms. Martin's representation at the evidentiary hearing on remand was inappropriate because she and trial counsel worked in the same office; and (2) whether the trial court improperly restricted his development of a record.

A. Representation at the Hearing on Remand

¶19 A defendant has a Sixth Amendment right to be represented by counsel at all critical stages. *State v. Moody*, 208 Ariz. 424, 445, ¶ 65, 94 P.3d 1119, 1140 (2004). A hearing

to determine whether a defendant has an irreconcilable conflict or a breakdown in communication with his attorney, though, is not a critical stage in the proceedings. See *LaGrand v. Stewart*, 133 F.3d 1253, 1277 (9th Cir. 1998) ("A motion to replace a criminal defendant's trial counsel admittedly creates a delicate situation for the lawyer, the defendant and the court. But bringing in a new lawyer is not required to protect the defendant's rights."); see also *State v. Paris-Sheldon*, 214 Ariz. 500, 504-05, ¶¶ 10-11, 154 P.3d 1046, 1050-51 (App. 2007) (holding the court's informal questioning of defendant and her attorney satisfied the on-the-record inquiry requirement). Thus, even assuming *arguendo* that Ms. Martin was somehow constrained in her representation, no constitutional violation would exist.

¶10 Even if defendant had a constitutional right to counsel at the hearing on remand, Ms. Martin's representation was not improperly limited by the fact that she and trial counsel were employed by the same office. At the outset of the evidentiary hearing, Ms. Martin expressed concern about her representation of defendant because a minute entry had identified ineffective assistance of counsel as an issue to be addressed at the hearing. The court clarified that it was not considering any claims of ineffective assistance and stated it would *nunc pro tunc* correct any minute entry to the contrary.

Because the effectiveness of trial counsel's representation was not at issue, Ms. Martin had no conflict in representing defendant at the evidentiary hearing. The trial court properly ruled that defendant "was not deprived of his Sixth Amendment right to counsel" and denied the motion for new trial.

B. Developing the Record

¶11 Pursuant to Arizona Rule of Evidence 611(a), the court has a duty to "exercise reasonable control over the mode and order of interrogating witnesses." When a question calls for a narrative answer and "invites a witness to give a lengthy freestyle answer," the "trial judge has discretion under Rule 611(a) to require that questions be asked in a more specific fashion." *Evidence: Cases and Materials* 67 (Jon R. Waltz & Roger C. Park eds., Foundation Press 2005) (discussing analogous federal evidence rule).

¶12 The trial court properly limited defendant's attempts to provide narrative testimony. Additionally, because the issue before the court on remand was narrow, it properly curtailed defendant's testimony when it began to exceed the scope of the hearing. The record reveals that defendant was permitted, within the bounds of the Arizona Rules of Criminal Procedure and the Arizona Rules of Evidence, to develop the record regarding his claims about a breakdown in the relationship with trial counsel.

CONCLUSION

¶13 We affirm the denial of defendant's request for new counsel and motion for new trial. We previously granted defense counsel's motion to withdraw. On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/

MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/

DONN KESSLER, Judge

/s/

PETER B. SWANN, Judge