DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ERIC JOSEPH FLOYD, SR., Appellant.	)	1 CA-CR 09-0746 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR 2003-0660

The Honorable Richard Weiss, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

John A. Pecchia, Mohave County Public Defender — Kingman
by Jill J. Evans, Mohave County Appellate Defender
Attorneys for Appellant

B A R K E R, Judge

¶1 Defendant Eric Floyd appeals from the superior court's order declining to appoint him new counsel. Floyd contends that he had an irreconcilable conflict and a complete breakdown of communication with his appointed attorney during his sentencing hearing. Upon this appeal – Defendant's fourth – he requests that this court either reduce his sentence or remand his matter for a sentencing hearing with newly appointed counsel. For the reasons set forth below, we affirm.

Facts and Procedural Background

¶2 Defendant was charged and convicted of first-degree murder, aggravated assault, and burglary in the first degree. At his first sentencing hearing, the superior court imposed consecutive sentences of natural life for the first-degree murder conviction, seven and a half years for the aggravated assault conviction, and ten and a half years for the burglary conviction. Initially, in imposing the first-degree murder sentence, the court considered aggravating factors under Arizona Revised Statutes ("A.R.S.") section 13-702 as well as one A.R.S. § 13-703 aggravating factor. On appeal, this court affirmed the sentences for the burglary and assault, but held that the § 13-702 aggravating factors should not have been considered when sentencing the first-degree murder charge. *State v. Floyd*, 1 CA-CR 04-0282, slip op. at 22-23, ¶¶ 31-32 (Ariz. App. Aug. 25, 2005). This case was remanded for a new sentencing hearing on

the murder conviction because this court could not determine if the same sentence would have been imposed based on the one remaining § 13-703 aggravating factor. *Id.*

¶3 On remand, the superior court again sentenced Floyd to natural life. But because the court could only consider § 13-703 aggravating factors, it believed it was limited to considering only specifically listed § 13-703 mitigating factors as well. On appeal for the second time, this court held that the superior court abused its discretion by failing to consider Floyd's age and lack of prior criminal history, which were not specifically listed as § 13-703 mitigating factors. *State v. Floyd*, No. 1 CA-CR 06-0395, 2007 WL 5187930, at *4, ¶ 22 (App. 2007). We again remanded for resentencing because we could not determine whether the sentence would have been the same had the court considered those factors. *Id.*

¶4 Prior to his third sentencing hearing, Floyd sent a letter to the trial court requesting that he be appointed new counsel. In his letter, Floyd alleged an irreconcilable conflict with his attorney because she allegedly misrepresented him at trial and resentencing, threatened him, lied during trial, and directed Floyd to lie on the stand. Floyd also noted that he had filed several bar complaints against his attorney.

¶5 Floyd requested a hearing at which he could be present to determine whether he should be appointed new counsel. His

attorney also filed a motion to determine counsel. The court held a status hearing, but Floyd was not present. The court ultimately denied Floyd's request to appoint new counsel for the sentencing hearing. In doing so, it relied in part on its determination that the resentencing would be "narrowly confined" to reweighing the aggravating and mitigating factors already discussed, and therefore the attorney's role would be minimal.

¶6 Floyd appeared in person at his third sentencing hearing. His attorney did not present evidence of any additional mitigating factors. The court reweighed the previously assessed aggravating and mitigating factors and issued the same sentence as previously imposed. Floyd again appealed.

¶7 As to this third appeal, we remanded again. *State v. Floyd*, No. 1 CA-CR 08-0125, 2009 WL 532623, at *4, ¶ 16 (App. 2009). We held that the superior court erred in failing to hold a hearing to address Floyd's request for new counsel pursuant to *State v. Torres*, 208 Ariz. 340, 93 P.3d 1056 (2004). *Id.* at *3, ¶ 14. We also noted that, contrary to the belief of the superior court, the State, and (evidently) Floyd's attorney, this court had not intended the resentencing hearing to be "for clarification only." *Id.* at *2 n.3, ¶ 7. Rather, "the sentence was vacated and the matter was remanded for resentencing." *Id.* On remand of the third appeal, however, we made clear that the

first issue was to determine whether Floyd had "'a completely fractured relationship with his appointed counsel either because of an irreconcilable conflict or because of a breakdown in communication' before his resentencing hearing." *Id.* at *3, ¶ 14 (quoting *Torres*, 208 Ariz. at 345, ¶ 18, 93 P.3d at 1061). Floyd bore the burden. *Id.* If such a conflict was proved, then the court was to vacate the first-degree murder sentence, appoint new counsel, and conduct a resentencing. *Id.* at *4, ¶ 15.

¶8 Floyd appeared at the remanded *Torres* hearing telephonically. He testified that during preparation for the resentencing in August 2007, his attorney had failed to respond to two letters that he had sent her. Further, she had allegedly failed to return his file to him when he requested it.

¶9 Floyd also claimed that he had wanted to raise several additional mitigation factors at his hearing and that he had requested a mental health examination. His attorney had instead informed him that the resentencing hearing would be for clarification purposes only, and therefore Floyd would not be able to discuss mitigation factors beyond those already raised. Floyd also claimed that he did not testify during his resentencing hearing despite his right to do so due to his attorney's representation that the hearing was merely a clarification.

¶10 Floyd also alleged that his attorney had improperly pressured him into accepting his plea agreement, claiming that she had threatened to make sure that he received a life sentence if he did not accept it. He noted that he had filed two bar complaints against his attorney and claimed she had indicated that she was upset that he had filed the complaints. Floyd stated that after these events he did not trust his attorney. He also accused his attorney of other misconduct during his trial, including lying to the trial judge and directing Floyd to lie on the stand.

¶11 The State requested to make an offer of proof, stating that Floyd's attorney denied threatening Floyd and lying in court. The superior court assessed the evidence, weighing all factors that it was required by Arizona law to weigh, and determined that Floyd did not meet his burden of showing that he was entitled to new counsel. Although the court was concerned with the attorney's misinterpretation of the resentencing hearing's scope, the court believed that this error evidenced grounds for Rule 32 relief rather than a fractured relationship. In fact, it reasoned, this conversation demonstrated that Floyd's attorney was still communicating effectively with him, even though the message may have been erroneous. As to the claims of misconduct and breached trust during trial, the court

determined that these were "water under the bridge."[1] Ultimately the court found that Floyd did not "sustain[] his burden in showing that there were irreconcilable conflicts or a breakdown of communications."

¶12 Floyd timely appealed the trial court's determination that he was not entitled to new counsel. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(2) (Supp. 2008).

Discussion

¶13 All criminal defendants have a right to representation by competent counsel, and indigent criminal defendants therefore have a right to State-provided counsel. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *State v. LaGrand*, 152 Ariz. 483, 486, 733 P.2d 1066, 1069 (1987). But indigent criminal defendants are not "entitled to counsel of choice, or to a meaningful relationship with" their attorneys. *Torres*, 208 Ariz. at 342, ¶ 6, 93 P.3d at 1058 (quoting *State v. Moody*, 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998)). For a trial court to be required to appoint substitute counsel, the defendant must establish a "severe and pervasive conflict" with the appointed attorney or

[1] This court previously held that Floyd had waived any claims of an irreconcilable conflict during trial by failing to raise them in prior appeals. *Floyd*, No. 1 CA-CR 08-0125, 2009 WL 532623, at *1 n.1, ¶ 1.

"such minimal contact with the attorney that meaningful communication was not possible." *State v. Peralta*, 221 Ariz. 359, 361, ¶ 5, 212 P.3d 51, 53 (App. 2009) (quoting *State v. Paris-Sheldon*, 214 Ariz. 500, 505, ¶ 12, 154 P.3d 1046, 1051 (App. 2007)).

¶14 In determining whether to grant a request for new counsel, the trial court must evaluate several factors developed to balance the rights and interests of the defendant with judicial economy and efficiency concerns. *State v. Cromwell*, 221 Ariz. 181, 187, ¶ 31, 119 P.3d 448, 454 (2005). These factors include:

> [W]hether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

LaGrand, 152 Ariz. at 486-87, 733 P.2d at 1069-70. We will not overturn the trial court's evaluation of these factors absent a clear abuse of discretion, *Moody*, 192 Ariz. at 507, ¶ 11, 968 P.2d at 580, and we "assume the trial court made all necessary . . . findings required to support its ruling . . . ." *Peralta*, 211 Ariz. at 361-62, ¶ 9, 212 P.3d at 53-54.

¶15 Here, Floyd alleges that he should have been appointed new counsel because (1) he had an irreconcilable conflict with

his attorney, and/or (2) communication with his attorney had completely broken down. The superior court expressly weighed all factors set forth in *LaGrand*.[2] It found that the instances of conflict that Floyd had presented did not amount to an irreconcilable conflict or a total breakdown in communication.

¶16 Disagreements over trial strategy alone do not deprive a criminal defendant of the right to a fair trial. *Cromwell*, 211 Ariz. at 187, ¶ 30, 119 P.3d at 454. Floyd and his attorney did disagree over whether Floyd would be able to present evidence of additional mitigating factors at his resentencing hearing. Moreover, Floyd's attorney was incorrect in her determination that Floyd would not be able to do so. But such a disagreement, although perhaps grounds for a Rule 32 violation, does not by itself prove irreconcilable conflict. Disagreement over interpretation of case law or the meaning of an order is akin to a disagreement over trial strategy. Although the

[2] This was more than we required in our mandate. *LaGrand* set forth broader considerations going to whether a court should grant a motion for new counsel. 152 Ariz. at 486-87, 733 P.3d at 1069-70. An irreconcilable conflict was one of those factors. *Id.* Our mandate was narrower. If, as to the resentencing on February 5, 2008, the trial court found either an irreconcilable conflict or a total breakdown in communication then the court was to appoint new counsel. *Floyd*, No. 1 CA-CR 08-0125, 2009 WL 532623, at *4, ¶¶ 14-15. Despite using broader factors, however, the superior court also undertook the specific inquiry as to whether there was such a conflict or breakdown in communication. The court stated: "This is not a question of whether . . . Mr. Floyd received effective assistance of counsel under the *Strickland* standards but whether . . . there is an irreconcilable conflict or a total breakdown of communication."

attorney may ultimately be incorrect in determining the best strategy, incorrectness — or even incompetence — does not necessarily demonstrate irreconcilable conflict. *See Torres*, 208 Ariz. at 345, ¶ 17, 93 P.3d at 1061 ("[T]he issue at the hearing will *not* be whether Torres received effective assistance of counsel . . . . Ineffective assistance of counsel is a separate issue that can be raised only in a proceeding for post-conviction relief.").

¶17 Similarly, a defendant's filing of a bar complaint against the attorney does not "mandate removal of that attorney." *State v. Henry*, 189 Ariz. 542, 549, 944 P.2d 57, 64 (1997) (quoting *State v. Michael*, 161 Ariz. 382, 385, 778 P.2d 1278, 1281 (App. 1989)). Although here Floyd filed bar complaints against his attorney during his trial, and although his attorney may have been upset by the filings, this does not necessarily satisfy Defendant's burden of proving an irreconcilable conflict.

¶18 Finally, a trial court has considerable discretion in assessing matters of witness credibility. *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 305, ¶ 19, 173 P.3d 463, 469 (App. 2007) ("[E]valuating the credibility of witnesses is left to the sound discretion of the trial court . . . ."). Floyd alleged that his attorney, among other things, threatened him during trial and told him to lie on the stand. The trial court,

however, is not obligated to believe a defendant's claims. Ultimately, the court here decided that Floyd did not meet his burden.[3]

¶19 As to lack of communication with his attorney, the trial court also did not abuse its discretion in finding that Floyd had not met his burden of showing "such minimal contact with the attorney that meaningful communication was not possible." *See Peralta*, 221 Ariz. at 361, ¶ 5, 212 at 53 (quoting *Paris-Sheldon*, 214 Ariz. at 505, ¶ 12, 154 P.3d at 1051). Although Floyd asserted that he sent a few letters to which he did not receive a response, a few lapses in communication do not amount to a complete breakdown in communications. As the trial court noted, the evidence that Floyd presented as to the arguments with his counsel over whether he would be able to present additional mitigating evidence at his sentencing hearing tended to show that

[3] The trial court noted that "what happened between the second and the third resentencing" was critical and that what occurred during trial was "water under the bridge." We put those statements in the context of our direction that Floyd had waived his claims as to any irreconcilable conflict during the trial itself. *See Floyd*, No. 1 CA-CR 08-0125, 2009 WL 532623, at *1 n.1. We do not think the statement precludes the trial court's consideration that Floyd's previous interactions with his attorney during his trial may conceivably have impacted the relationship during resentencing. Rather, the statements reflect a determination that the prior asserted conduct did not have that impact. The trial judge stated that he was giving his ruling orally rather than written "as disjointed as it may turn out."

communication with counsel was sufficient. The trial court did not abuse its discretion in finding that Floyd did not meet his burden in showing that he had neither an irreconcilable conflict with his attorney or a total breakdown in communication.

Conclusion

¶20 For the reasons set forth above, the decision of the trial court is affirmed.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
DONN KESSLER, Presiding Judge

/s/
_____
JON W. THOMPSON, Judge