

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALEJANDRO ALBERTO AGUILAR,
Appellant.

No. 2 CA-CR 2015-0431
Filed December 30, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20143381001
The Honorable Christopher Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Robb P. Holmes, Assistant Legal Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 After a jury trial, Alejandro Aguilar was convicted of two counts of weapons misconduct. The trial court sentenced him to concurrent, minimum, eight-year prison terms. Aguilar argues the court violated his right to counsel when it denied his request to replace his third appointed attorney with retained counsel and continue his trial date.¹ For the following reasons, we affirm.

¶2 We view the facts in the light most favorable to upholding the convictions, *see State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008), but discuss only those facts necessary for an understanding of the narrow legal issue presented. In August 2014, Aguilar was indicted on two counts of weapons misconduct based on an incident that had occurred at a home improvement store in Tucson. Fifteen minutes before his trial was set to begin in September 2015, Aguilar informed the trial court he could not “think” because of the medications he was taking, stated it was “hard” for him, and told the court he wanted to be “evaluated.” The court asked defense counsel if Aguilar was competent to assist in his defense. Counsel responded affirmatively, and added that he did not believe he had a good-faith basis to request a competency evaluation. Counsel also explained that the previous judge had been made aware of the medications Aguilar was taking.

¹Aguilar was represented by attorneys from the offices of the public and legal defenders before he was represented by appointed counsel at trial.

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¶3 The trial court then explained to Aguilar that, except for the decision whether or not to testify, which was up to Aguilar, his attorney was “in charge of presenting [his] case and representing [him].” Aguilar then stated, “The last two lawyers, they left. They didn’t [re]present me, I guess. I would like to be - I can’t explain it. I don’t have that knowledge. What if I get another lawyer . . . if I pay for it?” The court told Aguilar, “The time has passed for that, sir. Your case is going to trial in 15 minutes.” The court also explained that Aguilar could have contacted his attorney in a “timely manner if [he] chose to.” A conversation between Aguilar, the court, and the attorneys followed, during which Aguilar reiterated that he was not competent and that he wanted to be “evaluated.” After the court again explained that his attorney could not ask for a competency evaluation if he did not think there was a good-faith reason to do so, Aguilar stated, “Then I don’t need him. I can get a lawyer. How much [sic] can I have to get one?” The court determined that it saw “no reason why the case should not proceed” and told Aguilar he was “not going to get another lawyer today.”

¶4 On appeal, Aguilar argues the trial court violated his Sixth Amendment right to obtain counsel of his choice by denying his request for a continuance to substitute privately retained counsel for appointed counsel. He asserts the court “deprived [him] of the opportunity to make any sort of record regarding his request,” and maintains the court’s ruling was structural error. He asks that we reverse his convictions and remand for a new trial, or remand for an evidentiary hearing on his request to retain new counsel.

¶5 We view claims of the denial of the right to counsel of choice for structural error. *State v. Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d 1259, 1262 (App. 2009) (erroneous denial of right to counsel of choice structural error); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (same). We review de novo the trial court’s interpretation of a constitutional right, *Aragon*, 221 Ariz. 88, ¶ 4, 210 P.3d at 1261, and its ruling on a request for a continuance in order to substitute counsel for an abuse of discretion, *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983).

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¶6 “[A]n indigent criminal defendant possesses rights under the Sixth Amendment [of the United States Constitution] and Article 2, Section 24 [of the Arizona Constitution], to choose representation by non-publicly funded private counsel. . . .” *Aragon*, 221 Ariz. 88, ¶ 4, 210 P.3d at 1261, quoting *Robinson v. Hotham*, 211 Ariz. 165, ¶ 16, 118 P.3d 1129, 1133 (App. 2005). Nevertheless, this right “is not absolute, but is subject to the requirements of sound judicial administration.” *Hein*, 138 Ariz. at 369, 674 P.2d at 1367. “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.’” *Aragon*, 221 Ariz. 88, ¶ 5, 210 P.3d at 1261, quoting *Gonzalez-Lopez*, 548 U.S. at 152. In weighing these competing interests, courts must consider

whether 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.

Hein, 138 Ariz. at 369, 674 P.2d at 1367.

¶7 Although the trial court did not explicitly refer to the factors set forth in *Hein*, and although “the onus is on the court to create a record of its reasons for the denial” of a continuance implicating a defendant’s right to counsel, *Aragon*, 221 Ariz. 88, n.3, 210 P.3d at 1261 n.3, we nonetheless conclude the court did not err based on the record before us. At the time of his request, Aguilar apparently had not selected a new attorney, nor did he inform the court he had the funds to retain an attorney or specify the length of the delay he was requesting. On appeal he instead asserts, without factual support, that “only a brief continuance would have been needed.” See *United States v. Burton*, 584 F.2d 485, 498 n.46 (D.C. Cir. 1978) (“If the defendant has other competent counsel prepared for trial, then the court, when considering all the factors, need not

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tolerate as much inconvenience as in the case where defendant has no other counsel prepared to go to trial.”). And, Aguilar requested new counsel minutes before the trial was set to begin, on the day when the state’s three witnesses were scheduled to testify.² In addition, contrary to Aguilar’s assertion, at least one continuance had already been granted in this matter.

¶8 And notably, as the state argues in its answering brief, Aguilar’s request for a new attorney appeared to be “spontaneous . . . and apparently precipitated by the fact that he would not be receiving a competency evaluation.” We agree and conclude that Aguilar’s statements to the trial court support an inference that his purported dissatisfaction with his third appointed attorney was more likely an attempt to procure a competency evaluation.³ See *State v. Ortiz*, 117 Ariz. 264, 266, 571 P.2d 1060, 1062 (App. 1977) (affirming denial of continuance where defendant alleged feeling “ill and unprepared to stand trial”). In the absence of any facially legitimate reason for his request for a new attorney, the court could have inferred that it was a dilatory tactic. And, even assuming without deciding that the request for substitution of counsel was legitimate, as the court noted, Aguilar was dilatory in waiting until minutes before trial to make it.

¶9 In support of his argument, Aguilar primarily relies on *Aragon*, but we do not agree that case compels a conclusion the trial

²To the extent Aguilar argues in his reply brief that because the victim in this case was a corporation, thereby suggesting the witnesses, who “were police officers and loss prevention officers for the corporation,” would not suffer any inconvenience if the trial were continued minutes before it was set to begin, we find no support in the record for this theory.

³We note, however, that although Aguilar’s attorney was competent and prepared to try the case, a fact he does not dispute, this alone does not justify denial of a request for a continuance. *Gonzalez-Lopez*, 548 U.S. at 148; *Aragon*, 221 Ariz. 88, ¶ 6, 210 P.3d at 1261-62.

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court erred.⁴ Unlike Aguilar, the defendant in *Aragon* had already identified retained counsel at the time he asked for an extension, which was six days before trial, in contrast to minutes before trial in this case. *Aragon*, 221 Ariz. 88, ¶ 2, 210 P.3d at 1260. Moreover, unlike the defendant in *Aragon*, who expressed a reason for wanting new counsel, *id.* ¶ 3, it is not clear Aguilar intended to ask for a new attorney before he spoke with the court minutes before trial. Rather, that idea appears to have evolved once he understood that his current attorney could not, in good faith, request a competency evaluation on his behalf. Nor does the record support Aguilar's argument that he requested the continuance "at the last minute" partially because he had refused jail visits from his current attorney based on their poor relationship and thus could not address the court until the first day of trial. Aguilar told the court he had "been asking" for a competency examination since he "had [his] last lawyer," who had withdrawn more than three months earlier.

¶10 In addition, unlike the situation in this case, the court in *Aragon* had denied the defendant's motion based, in large part, on its incorrect belief that such a continuance would violate Rule 8, Ariz. R. Crim. P., which requires cases to be tried within a defined timeframe. *Id.* ¶¶ 2-3, 7; *see also* Rule 8.4(a) (delays occasioned by defendant excludable under Rule 8). Therefore, although this case is like *Aragon* in some ways: it is not complex and there is not an anxious victim waiting for resolution, for the aforementioned reasons, it is otherwise distinguishable from *Aragon*.

¶11 We thus conclude the denial of Aguilar's request for a continuance did not involve an "unreasoning and arbitrary" adherence to the court's schedule without regard for Aguilar's request "to exercise his right to the counsel of his choice." *Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d at 1262, quoting *Morris v. Slappy*, 461 U.S. 1,

⁴As we noted in *Aragon*, "[w]e do not suggest that the denial of a defendant's first motion for a continuance, requested to substitute counsel of choice, would necessarily violate his Sixth Amendment right in every case." 221 Ariz. 88, n.5, 210 P.3d at 1262 n.5.

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11-12 (1983). Furthermore, because the record shows Aguilar was allowed to make an adequate record concerning his reason for wanting a continuance and retained counsel, and amply supports the trial court's decision to deny the continuance, a remand for an evidentiary hearing is unnecessary.

¶12 Because the trial court was well within its discretion in denying the requested continuance to retain a new attorney, we affirm Aguilar's convictions and sentences.