

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LARANZO CALHOUN,

Defendant-Appellant.

UNPUBLISHED

June 11, 1999

No. 205280

Jackson Circuit Court

LC No. 97-079948 FH

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(a)(iv). Defendant was sentenced as an habitual offender, MCL 769.10; MSA 28.1082, to eight to thirty years' imprisonment to be served consecutively to the felony sentence for which defendant was on parole at the time the instant case arose. We affirm.

Defendant's first issue on appeal is that the trial court erred in denying defendant's request for an adjournment of trial to retain new counsel. Defendant was represented by appointed counsel. Defendant and his appointed counsel participated in a number of pretrial proceedings, including a final pretrial conference conducted five days before trial. Defendant never indicated any reservations about the quality of his appointed counsel. On the morning of trial defendant announced a desire to retain new counsel. Defendant had not, in fact, retained counsel at that point in time. The trial court, noting that the jury, witnesses and attorneys were ready to proceed, refused to adjourn the trial. Defendant was convicted by jury trial.

We review a trial court's decision to deny an adjournment of trial under the abuse of discretion standard. *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified 457 Mich 883 (1998). This standard suggests that deference be given to the trial court's decision. It is not enough that the reviewing court, considering the same facts and issues, might have reached a different conclusion. An abuse of discretion exists only when the result is found palpably violative of fact and

logic so as to undermine the decision under review. *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

The following factors should be considered when reviewing a trial court's decision to deny a defendant's motion for continuance:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; ____NW2d____(1999).]

The court should weigh these factors under the circumstances of each case. No single factor is dispositive.

The first factor, whether defendant is asserting a constitutional right, weighs in favor of granting an adjournment of trial. The right to counsel is an unfettered right. US Const, Am VI; Const 1963, art 1, § 20. Our Supreme Court has recognized that the right to counsel "has been jealously protected by the courts and is of critical importance to any defendant in a criminal trial." *People v Charles O Williams*, 386 Mich 565, 576; 194 NW2d 337 (1972).¹ We note, however, that the United States and Michigan Constitutions guarantee the right to competent counsel. Competent counsel is not always counsel of defendant's choice. While each defendant can retain counsel of her or his choice, the ability to retain counsel is not an absolute right and can be restricted where, as here, a defendant's request to retain counsel is untimely and adversely impacts the administration of the court. There is no mechanical test for deciding whether a denial of an adjournment to allow counsel to be retained is so arbitrary as to violate due process. *Id.* at 575. "The answer must be found in the circumstances present in every case, particularly the reasons presented to the trial judge at the time the request is denied." *Id.*, quoting *Ungar v Sarafite*, 376 US 575, 589; 89 S Ct 841; 11 L Ed 2d 921 (1964).

The second factor, whether defendant has a legitimate reason for asserting the request for new counsel, weighs against granting an adjournment. Defendant informed the trial court that he "did not feel that he was being represented properly." Defendant failed to articulate a factual basis for his belief.² We have held that "a mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause, particularly when the request is belated." *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989), remanded sub nom *People v Musick*, 437 Mich 867; 462 NW2d 586 (1990). Here, defendant did not support his request with a substantial reason.

Next, we find that defendant was negligent in asserting his request. Defendant was in court for a final pretrial conference five days before trial. Defendant was informed of his trial date. Defendant raised no concerns regarding the quality of his counsel.³

The fourth factor, whether defendant was attempting to delay trial, is a neutral factor that neither assists nor harms defendant's position. There is no direct evidence that defendant was motivated by a desire to delay trial. Defendant made no prior requests for any adjournments and only five weeks elapsed from the date of his circuit court arraignment to the trial date. Nonetheless, requests to adjourn trial made on the day of trial should be viewed with suspicion. In this case, the fact that defendant never before raised concerns about the quality of his counsel's representation, together with the fact that neither defendant nor his counsel articulated a factual basis to support a finding that an adjournment was warranted, may be viewed as circumstantial evidence that the request for adjournment was asserted for dilatory reasons.

Finally, and most significantly, we find that defendant failed to demonstrate prejudice resulting from the trial court's refusal to grant an adjournment. Defendant argues that counsel's failure to bring a motion to suppress evidence seized from defendant; counsel's failure to call witnesses during the trial; and counsel's failure to present a "viable defense" demonstrate prejudice which denied defendant a fair trial. We disagree. Defendant has failed to argue that any motion to suppress evidence would have been successful. Interestingly, it appears that the heroin possessed by Mr. Calhoun was discovered in a pat down search. Pat down searches under similar circumstances have long been held to be permissible. *Terry v Ohio*, 392 US 1; 20 L Ed 2d 889; 88 S Ct 1868 (1968). While defendant criticizes his trial counsel's failure to call witnesses, defendant has not identified the witnesses that allegedly should have been called and has failed to inform us how these witnesses would have assisted his defense. Defendant also argues that trial counsel's strategy should have been that defendant did not knowingly possess heroin and that the drugs were placed in defendant's pocket without defendant's consent or knowledge. However, testimony from the arresting officer established that defendant admitted that he possessed the drugs for a friend and that defendant would make \$2 for each packet of heroin sold. Simply put, defendant has utterly failed to demonstrate prejudice from the trial court's refusal to grant an adjournment of trial.

In sum, we find that the trial court did not abuse its discretion when it denied defendant's request to adjourn trial made on the morning of trial.

Defendant next argues that he was denied a fair trial because he was forced to wear leg chains during the trial. Prior to the start of trial, the trial court ordered the court officer to take defendant's handcuffs off but to "leave the leg chains on." Defense counsel did not object to the leg chains being left on defendant and there is no record to establish that the leg chains were visible to the jurors. We find that this issue was not properly preserved for our review and, therefore, we decline to address whether the trial court abused its discretion by requiring defendant to wear leg chains during this one day trial. Cf. *People v Solomon*, 220 Mich App 527, 531-32; 560 NW2d 651 (1996).

Lastly, defendant argues that the sentence of eight to thirty years for possession with intent to deliver 2 ½ grams of heroin is disproportionate to the offense and constitutes cruel and unusual punishment. We disagree.

A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record.

People v Milbourn, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The trial court considered both the offense and the offender before pronouncing defendant's sentence. The trial court specifically recounted the details of defendant's two prior convictions and the fact that defendant was on parole for involuntary manslaughter at the time of this incident. The trial court discussed the rehabilitative potential of defendant, which it evaluated as limited given that defendant was unable to stay out of trouble while on parole. The trial court also emphasized safety to the community and the difficulties defendant brings to drug users and their families by selling heroin as important factors in the sentencing decision. In considering the factors outlined by the trial court and defendant's status as an habitual offender, we find that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra

¹ Defendant relies heavily upon *Charles O Williams, supra*, to support his position. We find that case factually distinguishable from the instant case. In *Charles O Williams*, defense counsel filed a motion to withdraw before trial, informed the court of a breakdown in the attorney client relationship and concluded that it would be unjust to require counsel to represent defendant. Further, defendant had, in fact, already retained new counsel. *Charles O Williams, supra* at 568-571. In the present case, defendant's trial counsel, an officer of the court duty bound to disclose to the court the existence of a breakdown in the attorney client relationship, did not substantiate defendant's concerns. Moreover, defendant had not yet retained new counsel on the morning of trial.

² When a defendant expresses concern over his attorney's performance, it is good practice for a trial court to develop a record exploring the basis for defendant's concern. The failure to develop such a record, however, is not reason in and of itself to reverse an otherwise valid conviction.

³ Defendant argues that appointed counsel represented that on the morning of trial he would bring a motion to challenge the search of defendant. On appeal, defendant claims it was the failure of counsel to bring this trial day motion that made him concerned over the quality of his representation. We again note that defendant failed to articulate this concern at the time he sought his trial adjournment. More significantly, however, we note that counsel never represented to the court that he would bring a motion to challenge the pat down search of defendant that resulted in discovery of the heroin defendant possessed. Rather, counsel indicated an intent to research the viability of such a motion and reserved the right to bring such a motion on the morning of trial. Thus, the failure to bring such a motion does not evidence neglect on the part of counsel. To the contrary, the failure to bring a motion may well evidence that counsel researched the issue and concluded that there was no basis upon which to challenge a routine pat down search.