

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL BARTON HARRIS,

Defendant-Appellant.

UNPUBLISHED

August 21, 2001

No. 224552

Genesee Circuit Court

LC No. 98-003025-FC

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

PER CURIAM.

Defendant appeals by delayed leave granted his sentences imposed on his plea-based convictions of second-degree murder, MCL 750.317, and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a second habitual offender, MCL 769.10, to consecutive sentences of life imprisonment for the murder conviction and 20 to 30 years' imprisonment for the home invasion conviction. We vacate defendant's sentences and remand for resentencing.

I. Facts and Proceedings

On January 12, 1999, defendant pleaded guilty to second-degree murder and first-degree home invasion in return for the dismissal of other charges pending against him. In establishing a factual basis for the plea, defendant stated that he entered the home of his mother's neighbor to steal money to purchase drugs. Defendant further stated that he had used drugs on the day of the incident, and that he did not clearly recall the events. He also acknowledged that he struggled with the victim, and stated that he believed the victim was stabbed during the struggle. In addition, defense counsel indicated that he intended to have defendant examined by a neuropsychologist before sentencing, but that he had not yet been able to schedule the examination. The court agreed to finance the examination, and scheduled sentencing for February 9, 1999. In this regard, because family members of the victim were coming from out of state in order to be present at the sentencing hearing, the prosecutor stressed the importance of knowing whether that was a firm date.

On January 29, 1999 defense counsel filed a motion requesting an adjournment of sentencing. The motion stated that the psychologist would be able to examine defendant between the dates of February 16 and 28, 1999. The motion also indicated that defendant had not given

an accurate history of his mental health background to the Forensic Center, that little information was known about his psychological status, and that it was possible defendant suffered from physical and psychological abnormalities that influenced his behavior.

The trial court scheduled a hearing on defense counsel's motion for February 8, 1999. However, defense counsel, who was retained, did not appear to argue it that day; instead, on February 4, 1999, he informed the prosecutor, but not the court, that he would rely on his written motion. He also informed the prosecutor that if his motion was denied, he would ask a different attorney to stand in for him at sentencing. According to the prosecutor, defense counsel informed her that he would not be present for either hearing because he had received an unexpected deal on a trip to Jamaica and was leaving on February 6, 1999. Following the hearing, the court denied the motion and refused to adjourn sentencing, scheduled to proceed the next day.¹

At sentencing, held on February 10, 1999,² defense counsel was not present. The court therefore informed the parties that it had reappointed defendant's former counsel, who was appointed counsel for defendant at his preliminary examination, to represent defendant during his sentencing hearing. The court noted that he had specifically reappointed defendant's former counsel to represent him at sentencing, because, having represented him at the preliminary examination, she was familiar with both defendant and the necessary particulars of the case. Nonetheless, defendant objected to being represented by appointed counsel, stating that she was not his lawyer and that that he had previously fired her because he believed her to be "no good." In denying defendant's request to adjourn the hearing, the trial court stated:

What prompts me to go forward here today is the fact that I did not have any advance notice, and more importantly, the victim's family did not have any advance notice, and under the circumstances, balancing all the interests and considering the fact that [appointed counsel] had [sic] represented [defendant] in the past, I concluded that this sentencing should go forward.

The court then recessed in order to allow appointed counsel the opportunity to review the presentence investigation report with defendant.

After recess, the court allowed family members of the victim and a police officer involved in the case to comment. The court then allowed appointed counsel to comment on behalf of defendant, at which time she stated that given defendant's history of head injuries and institutionalized mental health treatment, a neuropsychological examination would have provided the court with a more complete and accurate understanding of defendant's mental status. The court then sentenced defendant as a second habitual offender to consecutive terms of life and 20 to 30 years' imprisonment. In sentencing defendant, the court commented on defendant's lack of

¹ Defendant has not provided us with a transcript of the motion hearing; therefore, we are unable to recite the reasons given for the denial.

² The record is not clear as to why the sentencing hearing was rescheduled from February 9, 1999 to February 10, 1999.

remorse and found that the crime was cold, calculating, insensitive and callous and that he agreed with the presentence investigation report that defendant's actions were reprehensible and self-indulgent.

II. Analysis

Defendant first argues that his constitutional rights were violated when the trial court failed to adjourn the sentencing hearing so that he could be represented by retained counsel. We agree.

A trial court's decision whether to grant an adjournment is reviewed for an abuse of discretion. See *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737; *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), mod on other grounds 457 Mich 885; 586 NW2d 925 (1998); see also *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). An abuse of discretion occurs when the result was so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Echavarria, supra*; *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). In making a determination as to whether a trial court abused its discretion with regard to a motion to adjourn, we consider whether the defendant (1) is asserting a constitutional right, (2) has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney (3) was negligent in asserting his right, (4) is merely attempting to delay the proceedings, and (5) has demonstrated prejudice resulting from the trial court's decision. *Echavarria, supra* at 369; *Peña, supra* at 661; see also *Sinistaj, supra*.

Defendant unequivocally stated that he had hired his own counsel and that he did not want to be represented by an attorney he had previously fired. A defendant who can afford retained counsel has a constitutional right to defend an action through the attorney of his choice. *People v Portillo*, 241 Mich App 540, 542, 543; 616 NW2d 707 (2000). See also *Echavarria, supra*, and *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993), citing Const 1963, art 1, § 13 and MCL 600.1430. Thus, defendant has met the burdens of factors one and two. Defendant has also shown that he was not negligent in making his request for an adjournment. In addition, because defendant's counsel ignored at least an implied court directive to appear for sentencing, and since defendant had not sought prior adjournments, it does not appear as if defendant was merely attempting to delay the proceedings. See *id.* Finally, since defendant's claim "relates to an arbitrary and improper infringement of the Sixth Amendment right to counsel . . . a showing of prejudice is not required." *People v Durfee*, 215 Mich App 677, 682-683; 547 NW2d 344 (1996); *People v Johnson*, 215 Mich App 658, 667-668; 547 NW2d 65 (1996).

Whether appointed counsel adequately represented defendant at the sentencing hearing is irrelevant. As stated in *Durfee, supra* at 682-683:

[A] trial court's arbitrary removal of a defendant's . . . trial counsel during a critical stage in the proceedings,³ over the objection of defendant, violates the

³ Our Supreme Court has previously held that sentencing is a critical stage in the proceedings, at
(continued...)

defendant's Sixth Amendment right to counsel. Under such circumstances, a harmless-error analysis does not apply. . .

Finally, as we noted in *Johnson*, [*supra* at 669-670,] the fact that substitute counsel may have performed adequately at sentencing is of no consequence. The trial court improperly removed . . . counsel over the objection of . . . defendant before sentencing. . . . Thus, reversal is required where the trial court improperly interfered with defendant's Sixth Amendment right to counsel (Internal citations omitted).

III. Conclusion

In summary, based on *Echavarria*, *Durfee*, and *Johnson*, and the cases cited therein, we conclude that the trial court abused its discretion when it chose to proceed with sentencing without providing defendant a reasonable opportunity to retain counsel of his own choosing. Cf. *People v Williams*, 386 Mich 565, 573-574; 194 NW2d 337 (1972). Accordingly, we reverse defendant's sentences and remand for resentencing.⁴

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

(...continued)

which the defendant has a Sixth Amendment right to be represented by counsel. See *People v Miles*, 454 Mich 90, 98; 559 NW2d 299 (1997), citing *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

⁴ Because we conclude that remand is necessary based on the trial court's decision to go forward with the sentencing in the absence of defendant's retained counsel, we need not determine whether the trial court also abused its discretion when it failed to adjourn the sentencing hearing in order to allow defendant to obtain a neuropsychological examination; nonetheless, since we are remanding this case for resentencing, we presume that defendant's counsel will be able to schedule such an examination prior to sentencing.

In addition, because defendant's retained counsel apparently left for vacation without the permission of the trial court (even though there was at least two pending matters before the court) and without ensuring that his client was adequately represented by counsel agreed upon by the client, Rules 1.1, 1.3, 3.2, and 3.5 of the Michigan Rules of Professional Conduct may be implicated. We note that, on remand, any attorney having knowledge of the facts who believes that defendant's former retained counsel significantly violated the MRPC, has the responsibility to report such conduct to the Attorney Grievance Commission, MRPC 8.3, assuming such report has not already occurred.