

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSHAUN DEMARIO BURTON,

Defendant-Appellant.

UNPUBLISHED

August 2, 2012

No. 305052

Ingham Circuit Court

LC No. 10-000402-FH

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his January 31, 2011, conviction by jury of possession with intent to distribute less than five kilograms of marijuana, contrary to MCL 333.7401(2)(D)(iii). The trial court sentenced defendant to 24 to 72 months in prison. Defendant now appeals the trial judge's denial of his motion for a continuance. We vacate defendant's conviction and remand this case to the trial court for an analysis of the request for a continuance under the four-part test of *People v Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972).

The pertinent facts of this case are fairly simple. Defendant was given appointed counsel. That counsel represented him throughout the pre-trial proceedings, including a competency evaluation and hearing. At a November hearing at which defendant was not in attendance, a trial was scheduled for early January. Then, in December, trial was rescheduled without a hearing to commence on January 31, 2011. On the day of trial, defendant requested an adjournment to obtain new counsel and to subpoena witnesses. Appointed counsel admitted that defendant did not get the notice of the trial date until the Friday before the commencement of the Monday trial. Counsel noted that at the last hearing at which defendant was present, there had been discussion about retained counsel. The attorney that defendant wished to retain, however, was appointed to a district judgeship in December. Several other attorneys had contacted the appointed lawyer in the interim regarding the status of the case. The trial court denied the adjournment stating only "we are going ahead because you had plenty of time to get witnesses ready and plenty of time to have found other counsel if he wanted."

Defendant's first ground for appeal concerns the trial judge's denial of a requested continuance so that defendant could retain counsel of his choosing. This Court reviews a denial of a request for an adjournment or a continuance for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009); *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831

(2003). This Court likewise reviews for an abuse of discretion a lower court's decision affecting a criminal defendant's right to counsel of choice and its denial of a motion to adjourn the trial proceedings to allow defendant to obtain new counsel. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). “An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes.” *People v Weddell*, 485 Mich 942, 944; 774 NW2d 509 (2009). When denial of continuance implicates constitutional rights, the issue is reviewed de novo. See *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

“The Sixth Amendment guarantees an accused the right to retain counsel of choice.” *People v Fett*, 257 Mich App 76, 80; 666 NW2d 676 (2003), vacated on other grounds 469 Mich 913 (2003). This right is not absolute and requires a balancing of a defendant’s right to counsel with the efficient administration of the court. *Akins*, 259 Mich App at 557. This balancing test was developed further by our Supreme Court in *Williams*, in which the Court stated, “[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” *Williams*, 386 Mich at 575, quoting *Unfar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 LEd2d 921(1964). In determining whether the denial of a request for a continuance constituted error, the Court in *Williams* considered whether the defendant: 1) was asserting a constitutional right; 2) had a legitimate reason for asserting that right; 3) had been negligent in his assertion; and 4) had requested and received prior adjournments. *Williams*, 386 Mich at 578. Somewhat ironically, those four factors became the test in Michigan for determining whether the denial of a continuance was in error.

The four *Williams* factors became five in 1976, when the *Wilson* Court considered a similar case, stating:

In reversing the trial court, we enumerated four factors we considered important in finding that the trial court had abused its discretion in that case in not granting defendant a continuance . . . To these four points we add the traditional requirement that defendant on appeal must demonstrate prejudice resulting from the trial court's abuse of discretion. MCLA 769.26; MSA. 28.1096. [*People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976).]

The footnote in *Wilson* makes plain that the fifth factor of prejudice was added because of MCL 769.26, and its perceived application.

Later, in *People v Lukity*, 460 Mich 484, 495 n 3; 596 NW2d 607 (1999), the Court noted that MCLA 769.26 “does not apply to preserved, constitutional error.” Therefore, in this case where there is a preserved constitutional claim of error, defendant need not demonstrate that there error resulted in prejudice. That conclusion is consistent with the ruling of the United States Supreme Court in *US v Gonzalez-Lopez*, 548 US 140, 146; 126 S Ct 2557; 165 LEd2d 409 (2006), where it was held that error denying choice of counsel is structural and that no showing of prejudice is needed to warrant reversal of a criminal conviction once this error is found. In *Gonzalez-Lopez*, the prosecution argued that in order for a defendant’s right to counsel to be violated, she must show that the desired counsel would have taken a different tactic that likely would have affected the result of the trial. *Id.* 548 US at 144-145. Disagreeing, the Court held,

Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. *Gonzalez-Lopez*, 548 US at 148.

In this case, the trial court failed to articulate its analysis of the adjournment request beyond citing the need for judicial efficiency and stating that defendant had failed to obtain counsel when he had sufficient time to do so. “[T]he desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance.” *Williams*, 386 Mich at 577. To determine if this request was otherwise proper, we must remand to the trial court, which must apply the four-part *Williams* analysis.

Defendant also argues that the failure to grant the adjournment to obtain witness was erroneous. We agree.

MCR 2.503(C) addresses this circumstance, *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987), and provides:

(C) Absence of Witness or Evidence.

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

* * *

Additionally, MCL 768.2 provides:

768.2. Criminal cases; precedence, adjournment, continuance

Sec. 2. . . . No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record: Provided, That no court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done.

A defendant who requests a continuance for the purpose of acquiring witnesses, must show “good cause” under MCL 768.2 and that the witness would be “material and that diligent efforts have been made to produce the witness” under MCR 2.503(C). Michigan courts have

determined that factors helpful in determining good cause include, “whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Because the right to call witnesses is also constitutional, *Lukity* precludes the requirement that the defendant demonstrate prejudice. Given the nature of the record in this case, the issue of whether the court should have granted an adjournment to subpoena witnesses must also be determined upon remand.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Donald S. Owens