NO. COA01-1240

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 99 CRS 17551

BRANDON OWEN BROWN

Appeal by defendant from judgment entered 30 November 2000 by Judge James E. Ragan in New Hanover County Superior Court. Heard in the Court of Appeals 12 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for the State.

Edwin L. West, III, PLLC, by Edwin L. West, III, for defendant.

BRYANT, Judge.

On 2 August 1999, defendant Brandon Owen Brown was indicted for first degree murder and discharging a firearm into an occupied vehicle. On 1 November 2000, upon motion of the defendant, the Honorable Ernest B. Fullwood denied defendant's request to substitute appointed counsel; thereafter, on 9 November 2000, defendant entered pleas of not guilty. Following a jury trial at the 27 November 2000 session of New Hanover County Superior Court with the Honorable James E. Ragan presiding, defendant was convicted of first degree murder and discharging a firearm into occupied property. Defendant was sentenced to life imprisonment

without parole for the murder conviction and 34-50 months for the conviction of discharging a firearm into an occupied vehicle. Defendant gave notice of appeal in open court on 30 November 2000.

Defendant presents three arguments on appeal.

I.

Defendant first argues that the trial court violated his fundamental right to make a trial record sufficient for appellate review when the trial court declined to allow the defendant to present an offer of proof in his motion for appointment of substitute counsel. We disagree.

The Sixth Amendment to the United States Constitution requires that in a serious criminal prosecution, the accused shall have the right to assistance of counsel. *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 530 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)). In instances when a defendant makes a request for the trial court to appoint substitute counsel, the Constitution requires only that the trial court, in denying the request, be satisfied that present counsel is capable of rendering competent assistance and that the nature of the conflict is not such as to render that assistance ineffective. *State v. Thacker*, 301 N.C. 348, 353, 271 S.E.2d 252, 256 (1980). When assessing whether counsel should be substituted, the trial court is not required to make detailed findings of fact. *Id.* at 353, 271 S.E.2d at 255-256. Moreover, a decision to substitute counsel rests solely in the sound discretion of the trial court. *State v.*

Robinson, 290 N.C. 56, 66, 224 S.E.2d 174, 180 (1976).

In the instant case, a hearing on defendant's motion was held 1 November 2000. Defendant's then court-appointed counsel, Helen Hinn, was present. The trial court questioned the defendant as to whether his reason for requesting substitute counsel was that Hinn was not vigorously representing him. The defendant responded in the affirmative, and went on to state that there were avenues that Hinn had not explored that defendant felt Hinn should have. Defendant also argued that Hinn had been rude to persons she had talked to on his behalf; and that Hinn did not believe him. The defendant indicated that he could not elaborate on his allegations "without going into it . . ." however, the trial court cautioned the defendant not to divulge the details of his privileged conversations with Hinn.

As to the allegations raised by the defendant, Hinn denied the sufficiency of the allegations. In particular, she testified that she had explored every avenue of his case that was appropriate to explore. Moreover, Hinn stated that she never tells a client whether she believes them or disbelieves them.

As the record reflects, the trial court made reasonable efforts to determine the basis for defendant's desire for substitute counsel, while being conscientious not to allow the defendant to divulge privileged conversations that would cause him to incriminate himself. In addition, the trial court stated,

> In my opinion, you've got one of the best lawyers that we have around here representing you. I don't believe they get any more conscientious than Ms. Hinn . . . . You're

> fortunate. . . . Now, Ms. Hinn has been in [a] lot of serious cases. I mean, murder cases, capital murder cases. So I know whereof I speak, and she's had a lot of cases in my court. If I felt that, for some reason, you were not being adequately represented, it wouldn't be a problem for me to substitute somebody else to represent you, but you can't do any better, in terms of representation of somebody who is going to take care of you.

The trial court did not err in cautioning the defendant not to offer as proof, details of privileged conversations with his counsel. In addition, submission of an offer of proof and detailed findings of fact were not necessary as the legal insufficiency of the grounds alleged were apparent from defendant's statements to the trial court. This assignment of error is overruled.

II.

Defendant next argues that the trial court failed to exercise its discretion on whether to appoint substitute counsel because the trial court failed to allow defendant to submit an offer of proof. In essence, defendant argues that for the court to exercise its discretion, it must have first allowed the defendant to submit an offer of proof. As noted above, a trial court is not required to make detailed findings when considering a defendant's motion for substitute counsel. *Thacker*, 301 N.C. at 353, 271 S.E.2d at 255-256. Moreover, as we previously stated, a decision to substitute counsel rests solely in the sound discretion of the trial court. *Robinson*, 290 N.C. at 66, 224 S.E.2d at 180.

A disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel. *Thacker*, 301 N.C. at 353, 271 S.E.2d at 255. Nor does a defendant have the right to

insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services. *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976).

The trial court, without allowing the defendant to divulge the essence of privileged conversations, gave the defendant ample opportunity to proffer substantive evidence justifying a substitution in counsel; however, defendant failed to provide any legally sufficient reason to do so. *See* defendant's allegations stated in section I. We find that the trial court did not abuse its discretion in denying defendant's motion for substitute counsel (even without considering defendant's offer of proof). Therefore, this assignment of error is overruled.

III.

Defendant's third argument alleges that use of a short-form (murder) indictment violated his constitutional rights to notice, jury trial, and due process. We disagree.

In *State v. Braxton*, our Supreme Court noted that "indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions." *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, (2001). *See, e.g.,* cases upholding use of short-form murder indictment, *State v. Anderson*, 355 N.C. 136, 558 S.E.2d 87 (2002); *State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001); *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272 (2001); *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001), *reh'g denied*, *cert. denied*, ___ U.S. ___,

151 L. Ed. 2d 1002 (2002); *State v. Call*, 353 N.C. 400, 545 S.E.2d 190 (2001), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 548 (2001); *State v. Locklear*, 145 N.C. App. 447, 551 S.E.2d 196 (2001); *State v. Lytch*, 142 N.C. App. 576, 544 S.E.2d 570, *review on additional issues denied,* 354 N.C. 224, 554 S.E.2d 653 (2001), *aff'd,* 355 N.C. 270, 559 S.E.2d 547 (2002). The *Braxton* Court further held that the elements of premeditation and deliberation for first degree murder need not be separately alleged in the short-form indictment. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 438.

Defendant contends that the indictment did not allege the elements of premeditation and deliberation, therefore, the short-form indictment should be construed only as an indictment for second-degree murder. Defendant's argument fails in light of our Supreme Court's ruling in *Braxton*. This assignment of error is overruled.

NO ERROR.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).