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NO. COA02-131

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v.

CLEMMIE LEE COVINGTON

Richmond County
Nos. 00 CRS 3363-4
00 CRS 7864

Appeal by defendant from judgment entered 17 May 2001 by Judge Preston Cornelius in Richmond County Superior Court. Heard in the Court of Appeals 29 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey B. Parsons, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

BIGGS, Judge.

Defendant appeals from judgments entered upon his convictions of possession of drug paraphernalia and felony possession of cocaine while having attained the status of habitual felon.

Defendant was arrested upon warrants dated 10 April 2000 charging him with possession with intent to sell and deliver cocaine and possession of drug paraphernalia. He appeared in district court on 18 May 2000, was determined to be indigent, and John D. Sullivan was appointed to represent him. On 24 July 2000, defendant was indicted for possession with intent to manufacture,

sell and deliver cocaine, possession of drug paraphernalia, and being a habitual felon. Sullivan subsequently withdrew because of a conflict of interest and on 21 February 2001, the trial court appointed Benny Sharpe (Sharpe) to represent defendant.

Defendant's case was set for trial at the 14 May 2001 criminal session. On 9 May 2001, Henry T. Drake filed a notice of representation as defendant's counsel and a motion to continue. In his motion, Drake informed the trial court that he had been granted secured leave starting 12 May 2001 and asked that defendant's case be continued until after the 13 June 2001 session of court. At a pre-trial hearing held on 15 May 2001, Sharpe informed the court that defendant had hired Henry Drake to try his case and moved to continue defendant's case so that defendant might "have counsel of his choice." The assistant district attorney informed the court that Sharpe had been appointed to represent defendant on the 22nd of February, that a second hearing was held in April with Sharpe, and that he had spoken with Sharpe "a couple of times," but defendant "still didn't want to plead." Sharpe informed the court that "in the beginning [defendant] was trying to hire Mr. Drake. And he had not paid him early on. I didn't think he had paid him, until I was notified about a week ago."

After hearing further arguments and reviewing the case file, the trial court found: (1) the offenses occurred in April of 2000; (2) a bond forfeiture was entered because defendant failed to appear; (3) defendant hired Mr. Drake when the matter went on the trial calendar for the week of 14 May 2001; and (4) Mr. Drake has

indicated to the court that he will not be available for court until 13 June 2001. Based upon the findings, the trial court concluded:

defendant is manipulating the court system by playing games with the Court. He has had ample time to hire his own attorney. He made false statements with regard to his indigency status. He's had two court appointed lawyers.

Mr. Sharpe was appointed in February, and has been representing him up until this week when the court trial calendar came out. And he at that point sought Mr. Drake's services, who will not be available until after June the 12th.

The Court finds that this interferes with the lawful administrative process of the court. Mr. Sharpe is fully competent and capable of representing this defendant. The defendant has expressed no reservations about Mr. Sharpe's services. He's just simply using the tactic of hiring an attorney at the last moment after going on the trial calendar, who is not available for a month, to delay the trial of this matter.

The trial court denied the motion to continue and advised Benny Sharpe "you'll represent him, and we'll proceed." The following day, defendant appeared for trial with Sharpe as his attorney. At defendant's trial, Sharpe moved to suppress physical evidence seized by police, made opening and closing statements, cross-examined witnesses, and made objections.

A jury found defendant not guilty of possession with intent to sell and deliver cocaine but guilty of possession of cocaine and possession of drug paraphernalia. Defendant then pled guilty to being a habitual felon. Upon the court's inquiry as to the voluntariness of defendant's plea to being a habitual felon, defendant indicated that he was satisfied with defense counsel

Sharpe's legal services. The trial court sentenced defendant to 120 days imprisonment for the possession of drug paraphernalia conviction and 116 to 149 months imprisonment for the possession of cocaine and habitual felon convictions. Defendant appeals.

Defendant contends the trial court erred by denying his motion to continue. He argues that the trial court's actions violated his constitutionally guaranteed right to counsel. We disagree.

The right to counsel, which is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, includes the right of an indigent defendant to appointed counsel. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977); *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963); see also N.C.G.S. § 7A-450 (2001). A defendant who retains private counsel has a Sixth Amendment right to counsel of his choosing. *McFadden*, 292 N.C. 609, 234 S.E.2d 742. Furthermore, a defendant must be granted a reasonable time in which to obtain counsel of his own choosing, and must be granted a continuance to obtain counsel of his choosing where, through no fault of his own, he is without counsel. *Id.* at 615-16, 234 S.E.2d at 746-47.

The right to choose one's counsel, however, is not absolute. *McFadden*, 292 N.C. at 612, 234 S.E.2d at 745. Where a defendant is appointed counsel, he may not demand counsel of his choice. *State v. Anderson*, 350 N.C. 152, 513 S.E.2d 296, cert. denied, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). More importantly, "an accused may lose his constitutional right to be represented by counsel of his

choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747.

Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review. When a motion to continue raises a constitutional issue, the trial court's ruling is fully reviewable upon appeal. Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error. *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001).

In *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390 (1977) the defendant employed local counsel of his choice before trial, who had fully prepared the case for trial. When defendant's case was called for trial, however, defendant appeared and requested to discharge local counsel and employ another attorney. The trial court explained to defendant that he could elect to proceed to trial with his present counsel or to proceed to trial without counsel. This Court reasoned that the defendant's "attempt to change counsel when the case was called for trial, which would have resulted in the disruption and obstruction of orderly procedure in the court, must be charged to the defendant," *id.* at 697, 236 S.E.2d at 392, and held the trial court properly denied defendant's motion to continue to obtain other counsel.

Here, defendant was afforded ample opportunity during the thirteen months after he was indicted to obtain counsel. Further, defendant was twice appointed counsel as an indigent. The record does not reveal why defendant waited until the week before the date of his trial to employ counsel. Defendant does not show why or how his case could have been better prepared had the continuance been granted, nor does defendant show that he was prejudiced by the denial of his motion to continue. Sharpe had been appointed to represent defendant more than three months before defendant's trial and had every reason to be familiar with the case. Sharpe effectively argued defendant's motion to suppress and the record indicates that the case was well tried. We note that after defendant pled guilty to attaining the status of habitual felon, defendant stated that he was satisfied with Sharpe's legal services. We fail to perceive that the trial court erred or deprived defendant of his constitutional right to be represented by competent counsel at his trial.

No error.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).