NO. COA11-72

NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 06 CRS 244166
No. 08 CRS 46152

JOHN ARTHUR STROUD

Appeal by defendant from judgment entered 23 September 2009 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where the trial court's ruling implicates a violation of defendant's Sixth Amendment right to counsel and where the State fails to show this violation was harmless beyond a reasonable doubt, we must grant defendant a new trial.

Facts and Procedural History

On 18 September 2006, officers in the Charlotte-Mecklenburg Police Department arrested John Arthur Stroud ("Defendant") for possession of cocaine. Defendant was subsequently indicted on 14 July 2008 for being an habitual felon.

This case was called for trial for at least the fourth time on 21 September 2009. In a pre-trial motion, defendant moved to withdraw his court-appointed counsel. After hearing from both parties, the trial court found that there were "legal grounds to require counsel to withdraw or remove counsel of record." The trial court then gave defendant two choices: "[y]ou may either keep Mr. Sanders as your attorney and try this thing or you waive counsel and try it without one." Defendant elected to keep his counsel rather than represent himself.

Also pre-trial, the State moved to "proffer the lab analyst [Agent Jennifer Leiser] as an expert in forensic chemistry and her opinion that the fact that the evidence in this case was tested positively to be cocaine." Defense counsel confirmed that "he is not going to object" when the State introduces the lab report and tenders the Agent Leiser "as an expert witness" and only requested "the opportunity to cross-examine her at trial."

The jury returned a verdict of guilty of possession of cocaine on 23 September 2009, and defendant also pled guilty to being an habitual felon. The trial court sentenced defendant to

a minimum of 120 months and a maximum of 153 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) denying defendant's request for a new attorney, and (II) admitting a laboratory report of a non-testifying forensic analyst and the testimony of a substitute analyst.

I.

Defendant argues the trial court erred by denying defendant's request for new counsel after ruling that there existed legal grounds to dismiss current counsel. Defendant contends that this error by the trial court essentially denies him any relief or effective representation under the Sixth Amendment. We are constrained to agree.

This Court reviews an appeal alleging a violation of defendant's constitutional rights *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (2009). If an error is found, the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Id.*

When a defendant seeks to obtain substitute counsel, defendant must show "good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." *State v. Covington*, __ N.C. App. __, __, 696 S.E.2d 183, 185 (2010) (quoting *State v. Sweezy*, 291 N.C. 366, 372, 230 S.E.2d 524, 529 (1976)). In evaluating the effectiveness of counsel, "the obligation of the court [is] to inquire into defendant's reasons for wanting to discharge his attorneys and to determine whether those reasons [are] legally sufficient to require the discharge of counsel." *State v. Hutchins* 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981). A defendant does not "have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services." *Id.* (citations omitted). "Similarly, the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused; such a factor is but one consideration to be weighed in the balance." *Id.* (citations omitted). "In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense." *Id.* (citation omitted).

"[A] trial court is constitutionally required to appoint substitute counsel whenever representation by counsel originally

appointed would amount to denial of defendant's right to effective assistance of counsel, that is, when the initial appointment has not afforded defendant his constitutional right to counsel." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980) (citations omitted). Our Supreme Court has stated that "a motion to withdraw is ordinarily a matter left to the sound discretion of the trial judge . . . ." *State v. Thomas*, 310 N.C. 369, 375, 312 S.E.2d 458, 461 (1984) (citation omitted).

When a trial court exercises its own judgment in rendering a decision, the abuse of discretion standard is applied. *Appliance Sales & Service v. Command Electronics Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)). Further, "[b]ecause of the potential these challenges have for disrupting the efficient dispensing of justice, appellate courts ought to be reluctant to overturn the action of the trial judge" absent a showing of a Sixth Amendment violation by the court. *State v. Hutchins*, 303 N.C. 321, 337, 279 S.E.2d 788, 798

(1981); *see also State v. Covington*, __ N.C. App. __, __, 696 S.E.2d 183, 185 (2010).

Here, defendant requested new counsel and specifically complained to the trial court that:

> I called this man every day. I got the number in my phone. I called him every day. I never got no response whatsoever, and I'm here today to go to trial. I got a list of witnesses right here that would have been here. They were ready. They came down here two times before -- ran down here before, but he said he was going to subpoena them. I called him every day to see if he subpoenaed them. I haven't heard from him myself. He still has not talked to me about my case.

In reply, defense counsel informed the court that:

> Mr. Stroud and I did have quite a bit of phone tag back and forth. I did [have] a lengthy meeting with him on the 8th of June where we discussed this case in some detail. I did ask Mr. Stroud to provide a list -- if he had any witnesses that he wanted me to subpoena or wanted me to contact, I asked him to provide a list of witnesses and contact information at that time. I still have not received any witnesses or any way to contact those witnesses.
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> Your Honor, Mr. Stroud did call me probably at least five times last week, and I did return every one of those calls. Unfortunately, I recall – I now -- today when I called the wrong number; I had one digit wrong. His -- I thought I was calling the right number, but I want the Court to know I did call him back probably five or six times. Unfortunately, I had the wrong number.
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> But just so the Court will know, I have discussed the case with Mr. Stroud, and I'm

> prepared to go to trial if he wants to have me as his counsel. If he doesn't want me to have as his counsel, that's certainly his prerogative. I'm ready to go if needed, Your Honor.

Both defendant and counsel acknowledged that the case was over three years old. After review, the trial court concluded that there were "legal grounds to require counsel to withdraw or remove defense counsel." The trial court then gave defendant two choices: either keep existing defense counsel or waive counsel and try the case without an attorney.

We are confronted in this case with the trial judge's determination that there were "legal grounds to require counsel to withdraw or remove defense counsel"; yet, instead of appointing substitute counsel, the trial judge gave defendant the option of keeping the same defense counsel or waiving counsel and proceeding *pro se*. The record does not indicate any findings of fact or conclusions of law set forth by the trial court that would provide guidance to this Court in evaluating the trial court's actions. All we have is the trial court's declaration "that there were legal grounds to withdraw or remove defense counsel," a declaration which effectively granted defendant's motion to remove counsel. This ruling of the trial court that legal grounds exist to discharge counsel, absent further explication, appears to implicate a violation of

defendant's Sixth Amendment right to counsel.[1] As such, this is a constitutional error and such errors are presumed prejudicial unless the State shows that the error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (2009).

In rebuttal, the State argues that defendant forfeited his constitutional right to counsel by his behavior pursuant to *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000). We find this argument unpersuasive, since in *Montgomery* the defendant was actually verbally disruptive in the courtroom on two occasions, leading to trial delays, as well as physically disruptive when he assaulted his attorney. *Id.* at 525, 530 S.E.2d at 69; *see also United States v. McLeod*, 53 F.3d 322, 325 (11th Cir. 1995) (finding that defendant forfeited his right to counsel when he threatened his attorney with harm).

After careful review, we find nothing in the record to indicate that defendant's actions constitute forfeiture of counsel. *Montgomery*, 138 N.C. App at 524, 530 S.E.2d at 69 ("A forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to

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[1] Even assuming it could be determined that the trial court's ruling did not implicate defendant's constitutional right to counsel because the trial court did not specifically find that counsel's assistance was ineffective, the trial court nevertheless abused its discretion in not allowing substitute counsel after determining there were "legally sufficient grounds" to discharge original counsel.

justify a forfeiture of defendant's right to counsel. . ." (citation and quotations omitted)).

However, notwithstanding its forfeiture argument, the State fails to demonstrate that the error by the trial court was harmless beyond a reasonable doubt, thereby overcoming the presumption of prejudice. Consequently, we must grant defendant a new trial.

II.

Defendant also alleges the trial court erred by admitting a laboratory report of a non-testifying forensic analyst and the testimony of a substitute analyst. However, we decline to address this issue as we have granted defendant a new trial.

Reverse and remand for a new trial.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).