



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-16-00118-CR

GREGORY CHARLES PIERCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 6th District Court
Lamar County, Texas
Trial Court No. 26003

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Following his plea of guilty to family violence assault by occlusion,¹ the trial court assessed Gregory Charles Pierce's punishment at ten years' imprisonment, but suspended his sentence and placed him on community supervision for a period of ten years. In addition to the standard community supervision conditions, the trial court also ordered Pierce to pay a fine of \$500.00, restitution of \$300.00, court costs of \$283.00, and attorney fees of \$250.00. Only slightly more than a year later, the State filed a motion to revoke Pierce's community supervision. Following a hearing, the trial court granted the State's motion to revoke Pierce's community supervision and sentenced Pierce to six years in prison, allowing him credit for the time already served while awaiting trial. In the judgment revoking the community supervision, the trial court reiterated Pierce's obligation to pay the fine, the restitution, court costs, and attorney fees.²

Pierce appeals the trial court's subsequent revocation of his community supervision, maintaining that the trial court erred (1) when it denied his trial counsel's motion to withdraw, and (2) when it assessed attorney fees against him. For the reasons below, we affirm the trial court's judgment.

¹See TEX. PENAL CODE ANN. § 22.01(b)(3) (West Supp. 2016).

²This judgment simply said, "Court Costs & Attorney's Fees: \$533.00" without separating those charges into court costs of \$283.00 and attorney fees of \$250.00 for his (court-appointed) attorney as had been done in the previous order.

I. Background

Pursuant to a plea agreement, Pierce entered a guilty plea December 17, 2014, for the offense of assault family violence by occlusion.³ Under that agreement, Pierce was assessed a sentence of ten years in prison, but that sentence was suspended and he was placed on community supervision for a period of ten years.⁴ On January 14, 2016, the State filed its motion to revoke Pierce's community supervision, arguing that Pierce had, among other things, failed to perform 600 hours of community service requirements and failed to complete a BIPP, both of which were conditions set out in the judgment placing him on community supervision. Pursuant to Pierce's request, the trial court once again determined that Pierce was indigent and appointed Pierce an attorney to represent him.

Pierce's appointed attorney filed a motion April 15, 2016 for leave to withdraw. Counsel explained the reason for the filing of the motion, stating,

As grounds, Movant would show the Court that Movant previously filed a Motion for Determination of the Defendant's Competency to Stand Trial.^{5]} The court

³In its indictment against Pierce, the State alleged,

GREGORY CHARLES PIERCE on or about September 27, 2014 in the County of Lamar and State of Texas, then and there intentionally, knowingly, and recklessly cause bodily injury to Katrina Patterson, a person with whom the defendant had or had had a dating relationship, as described in Section 71.0021(b) of the Texas Family Code, by intentionally, knowingly, and recklessly impeding the normal breathing or circulation of the blood of the said Katrina Patterson by applying pressure to the throat or neck of the said Katrina Patterson.

⁴In its order suspending imposition of sentence and placing Pierce on community supervision, the trial court ordered, among other things, that Pierce: commit no criminal offenses; report in person to the community supervision department of Lamar County; remain within the supervising county; perform 600 hours of community service; have no contact with the victim; obtain employment; complete Batterer's Intervention Prevention Program (BIPP); abstain from drinking alcohol or using drugs; pay fines, restitution, and attorney fees in the amount of \$250.00; and pay court costs. Pierce's judgment of conviction also included court costs, attorney fees, and restitution.

⁵On April 15, 2016, the trial court ordered Pierce to submit to a mental-health examination, and it appointed Dr. David Bell to conduct the examination. On April 28, 2016, Bell provided the trial court with the results of his examination,

granted the Motion, and subsequently the defendant was evaluated by Dr. David Bell and found to be both competent to stand trial and sane. Movant received Dr. Bell's report on April 29, 2016 and met with the defendant the same day in the Lamar County Jail. The defendant was extremely belligerent and refused to discuss the report, Dr. Bell's findings, or Movant's recommendations regarding the State's Motion to Revoke Probation. The defendant requested Movant to withdraw from representing the defendant in this cause. According [sic], Movant believes that the attorney-client relationship between Movant and the defendant has broken down such that Movant cannot provide effective representation to the defendant Gregory Charles Pierce in the instant cause.

The trial court held a hearing May 17, 2016 on the above motion for leave to withdraw; during that hearing, the attorney once again relayed his concerns⁶ to the trial court. Pierce agreed with the contents of defense counsel's motion and stated, "Yeah, I want to get a new attorney." The State announced that it had no position on the issue. The trial court explained to Pierce that he had a right to have a timely hearing on the State's motion to revoke his community supervision, but that "[b]y making [his] request it [was] going to delay the proceedings even further." Pierce initially indicated that he had no objection to the delay and that he desired a new attorney to represent him. The court then stated,

You understand the Court looks with great disfavor upon motions like this because we need to have these hearings and we need to have them, we need to get on with it. Sometimes a new attorney is going to be telling you the same thing Mr. Coyle[—Pierce's appointed trial counsel—]is telling you.

finding that Pierce was competent to stand trial. In the report, Bell notes that he advised Pierce that anything he said would be used against him in court and that he did not have to answer any questions if he did not wish to do so. Bell stated that Pierce was initially difficult and appeared agitated and suspicious; however, he began to cooperate later. Contained in the report to the trial court was Bell's recitation of two of Pierce's comments to him. "He said that after he was placed on probation, he did not comply. His words were: 'I don't ever fool with probation.' [Pierce] realized he would go to jail for violations but he said, 'I don't care about jail.'"

⁶Pierce's appointed counsel stated, "Mr. Pierce was extremely belligerent with me and basically told me he didn't want me to represent him. That was my understanding. I said, fine, Mr. Pierce, I'll file a motion. That's what happened."

Pierce responded, “If I may ask if I can get a speedy trial also.”⁷ The trial court informed Pierce that if it granted the motion for leave to withdraw and appointed new counsel, the hearing on the State’s motion would be delayed at least thirty days. Pierce asked what he was required to do in order to get a speedy trial and the trial court explained that he would need to allow his then-current counsel to represent him at the hearing. Pierce responded, “So, speedy trial it is.” The trial court admonished Pierce that it would be necessary for him to work with his counsel and to let him assist with his case. Pierce agreed.

A hearing on the State’s motion to revoke community supervision was conducted May 31, 2016. Before the hearing on the State’s motion began, defense counsel orally renewed his motion for leave to withdraw. After speaking to Pierce, the trial court addressed defense counsel:

Furthermore, in regards to the motion to withdraw, respectfully, I am very, very much aware that the relationship issues can occur between their attorney [sic] but this matter has been heard once. Mr. Pierce was questioned about whether or not he wanted to proceed with you in regards to the speedy trial issues as well. With that understanding the Court set this matter for today and we are going to hear it. That motion will be denied as well.

The court then proceeded with the hearing on the State’s motion to revoke community supervision.

After hearing testimony, the trial court found there was sufficient evidence to find that Pierce had committed all but one of the State’s allegations and it revoked Pierce’s community supervision as stated previously.

⁷The Sixth Amendment to the United States Constitution guarantees the right to a speedy trial. This right protects the accused from anxiety and concern that accompanies a public accusation, seeks to avoid impairment to a defense, and assures freedom from oppressive pretrial incarceration. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

In his appeal, Pierce does not contest the trial court's finding of sufficient evidence to revoke his community supervision. Instead, Pierce contends that the trial court erred (1) in denying his trial counsel's motion for leave to withdraw and (2) when it assessed attorney fees against him.

II. Discussion

A. Failure to Grant Motion for Leave to Withdraw

Pierce contends that “[t]he Sixth Amendment right to the assistance of counsel includes a right to obtain that assistance from retained counsel of a defendant's own choosing.” However, the record in this case shows no indication that Pierce wanted to hire counsel; instead, he seemed to be asking the trial court to appoint a new and different attorney to assist him in lieu of the attorney previously appointed. The Sixth Amendment's guarantee of a person's right to counsel does not include the right to appointed counsel of defendant's choice. *Roberson v. State*, 741 S.W.2d 563, 564 (Tex. App.—Texarkana 1987, no pet.) (citing *United States v. Norris*, 780 F.2d 1207 (5th Cir. 1986)). There are certain circumstances when an accused may, upon adequate showing, be entitled to a change of counsel. *Garner v. State*, 864 S.W.2d 92, 98 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). The accused, however, must bring the issue to the trial court's attention and must successfully bear the burden of proving that he is entitled to a substitution of counsel. *Id.*

Reversible error relating to the denial of withdrawal exists only where an abuse of discretion is shown. *Tuffiash v. State*, 948 S.W.2d 873, 878 (Tex. App.—San Antonio 1997, pet. ref'd). The test for abuse of discretion is not whether the facts presented an appropriate case for the trial court's actions; instead, it is a question of whether the trial court acted without reference

to guiding rules and principles or acted arbitrarily or unreasonably. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). If the trial court's ruling is within the "zone of reasonable disagreement," there is no abuse of discretion and the trial court's ruling will be upheld. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997).

Initially, we observe that Pierce submitted an affidavit of indigence and requested appointment of counsel, a request that was granted. After a period of time, Pierce informed the trial court that he desired different counsel, but he did not proffer any reason for his dissatisfaction with his then current counsel. However, when the trial court informed Pierce that the appointment of different counsel would result in the delay of a final hearing by at least thirty days, Pierce indicated that he would rather proceed with his current counsel than have new counsel appointed. It appears that Pierce and his appointed counsel were experiencing a great deal of difficulty in working together for Pierce's benefit. However, the trial court is under no duty to search for counsel until it finds an attorney amenable to the accused. *Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. [Panel Op.] 1982). Moreover, a review of the record does not indicate that Pierce received inadequate representation during the revocation hearing and Pierce does not complain on appeal about the quality of his legal representation.⁸

Considering this set of facts and in the absence of any additional evidence demonstrating that the trial court acted arbitrarily or unreasonably, we overrule Pierce's first point of error.

⁸The original judgment of conviction contained a ten-year term of imprisonment in the event Pierce's community supervision was revoked. After hearing the evidence at the hearing on the State's motion, the trial court stated, "However, listening to your attorney's very eloquent argument the Court is going to sentence you to six years in the Texas Department of Corrections."

B. The Assessment of Attorney Fees

In this case, the trial court ordered the payment of attorney fees in the order placing Pierce on community supervision and repeated that same order in the judgment revoking his community supervision.⁹ Pierce contends that the trial court made a finding of indigency in an earlier proceeding and that there exists nothing in the record showing that the trial court modified its indigency finding.¹⁰ Pierce alleges that in order to award attorney fees against him, the absence of an affirmative finding that he was no longer indigent negated the ability of the trial court to assess attorney fees against him. Pierce asks this Court to modify the trial court's judgment by deleting the assessment of attorney fees. The State does not dispute Pierce's position on this issue. In *Wiley*, the State sought to revoke Wiley's community supervision, which was originally granted following his guilty plea to the offense of hindering apprehension. *See Wiley v. State*, 410 S.W.3d 313, 315 (Tex. Crim. App. 2013). The trial court revoked supervision, imposed a sentence, and reiterated the requirement in the judgment imposing community supervision that Wiley pay court-appointed attorney fees incurred during the initial proceeding. *Id.* Wiley appealed, maintaining that the evidence was insufficient to support the earlier order imposing attorney fees. The Waco Court of Appeals held that Wiley had procedurally defaulted his claim. *Id.* at 316. The Texas

⁹*See* TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West Supp. 2016) (“If the judge determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided to the defendant in accordance with Article 1.051(c) or (d), including any expenses and costs, the judge shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that the judge finds the defendant is able to pay.”).

¹⁰“A defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs.” TEX. CODE CRIM. PROC. ANN. art. 26.04(p) (West Supp. 2016).

Court of Criminal Appeals granted discretionary review and, in affirming the court of appeal's ruling,¹¹ it stated that Wiley "forfeited it because he failed to bring it as a claim in a direct appeal from the order originally imposing community supervision." *Id* at 318. The Court of Criminal Appeals went on to say in that case that

[t]he requirement that the appellant pay court costs did not exist solely as a function of the probationary contract between the appellant and the trial court. Because the obligation to pay attorney fees was already imposed by the judgment as a court cost, a reviewing court may treat it for purposes of appeals as it would treat any other judgment obligation for purposes of an evidentiary sufficiency claim; that is, a reviewing court may inquire whether the record rationally supports that obligation even in the absence of an objection in the trial court.

....

But this also necessarily means that the appellant could readily have raised this sufficiency claim in a direct appeal from the initial judgment imposing community supervision. Failing to do so, we hold, constituted a procedural default

....

Id. at 320.

The record in the case now before us shows that Pierce signed the "Order Suspending Imposition of Sentence and Placing Defendant on Community Supervision" which likewise recited his obligations for payment—including the obligation to pay \$250.00 in attorney fees. Therefore, he was aware of the existence of the attorney fees that were imposed during the original plea proceeding. If he were able to successfully appeal the imposition of attorney fees, it would have been this order that Pierce would have had to appeal. However, Pierce waived his right of direct appeal by the terms of the negotiated plea agreement with the State. Because he chose to waive

¹¹The Court of Criminal Appeals affirmed the appellate court's ruling; however, it did so for a reason different than that provided by the court of appeals. *Wiley*, 410 S.W.3d at 321.

his right of direct appeal, he has forfeited his claim and may not attempt to revive the claim in his appeal from the revocation of his community supervision. We overrule Pierce's second point of error.

III. Conclusion

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: December 27, 2016

Date Decided: February 8, 2017

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