IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY F. BRYSON, Appellant.	No. 39980-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Rodney F. Bryson guilty of one count of possession of methamphetamine. On appeal, Bryson argues that the trial court violated his Sixth and Fourteenth Amendment rights when it denied defense counsel's motion to appoint new counsel and for a continuance to call an expert witness. Because the trial court did not abuse its discretion when it denied either motion, we affirm.

FACTS

On July 15, 2009, Bryson was arrested in Hoquiam, Washington, on two outstanding warrants. During a search of his person incident to his arrest, the police officer discovered a small baggie which contained residue of some white, crystalline substance. The Washington State Patrol Crime Laboratory (WSPCL) tested the 0.06 grams of substance and found both methamphetamine and a cutting agent, dimethyl sulfone MSM. The State charged Bryson with

one count of possession of methamphetamine contrary to RCW 69.50.4013(1). On August 24, the State amended the information, replacing the "knowingly possess methamphetamine" language with "Bryson . . . did possess a controlled substance, *to wit*: methamphetamine." Clerk's Papers (CP) at 1, 6.

On October 19, 2009, Bryson's trial counsel, John L. Farra, informed the trial court that he had met with Bryson the previous Saturday to discuss trial options and that Farra was unclear as to how his client wanted to proceed because Bryson had obtained a copy of the WSPCL lab criteria or protocol and wished to have an expert examine whether those criteria were met when the residue was tested. Because of speedy trial concerns, Farra was also unclear as to whether Bryson wished to move for a continuance to obtain the additional expert examination. And Bryson, apparently dissatisfied with Farra's representation, indicated he would report Farra to the Washington State Bar Association (WSBA).

The next day on October 20, Farra made a motion declaration for continuance and substitution of counsel, reiterating that (1) an independent test of the residue as authorized by Grays Harbor Superior Court was positive for methamphetamine, (2) Bryson had obtained the WSPCL protocol for testing and requested further expert advice with regard to whether the analyst at WSPCL violated protocol, and (3) a new attorney should immediately be appointed because he and Bryson were "not communicating" and Bryson stated he would file a complaint with the WSBA against Farra. CP at 20. A discussion regarding the appointment of a new attorney occurred at the hearing on the motion:

> Mr. Farra: . . . As I indicated yesterday I thought there would be a—become an impasse in regard to my relationship with Mr. Bryson. I still feel that after a short conversation with him. . . .
>
> As far as getting another attorney, he—we're not talking at all as far as

> communicating. If we have a trial tomorrow it's both—he can speak for himself, but we're just not obviously on the same page as far as communicating. And I won't go into deeper than that as far as what I set forth in my affidavit.
>
> I think that is the problem, I think—and basically it's both of our positions, both my client and mine, that he probably should have another lawyer that now he can direct what he thinks is deficient in regard to the [WSPCL] reports that we received. So I'm moving to continue the trial and also to have another attorney appointed.
>
> The Court: Is [Bryson] offering a waiver of his right to a speedy trial?
>
> . . . .
>
> [Bryson:] No, I'm not sitting in this jail another 60 days.
>
> The Court: Trial is tomorrow then.
>
> Mr. Farra: Just for the record, we're not talking. So I do think he should have another lawyer but—
>
> The Court: Well, you'll just have to do the best you can. That's up to Mr. Bryson. I can't force you to talk. Trial is tomorrow. He wants a trial, speedy trial rights, he's entitled to it.

Report of Proceedings (RP) at 25-27.

The following morning during the pretrial conference, Farra stated that Bryson was "confused" the day before but was now willing to waive his right to speedy trial based on his desire to call an expert to refute proper adherence to the WSPCL protocol. RP at 29. The State argued against continuance because Farra did not argue that he was unprepared for trial and any hardship was self-created by waiting until the eve of trial to request a continuance for additional expert evidence. The trial court denied Bryson's motion, indicating that Bryson had been given a chance to waive his speedy trial rights the day before, jurors had been inconvenienced in order to proceed with trial, and the trial court did not find good cause for the continuance.

That same day, a jury found Bryson guilty of one count of possession of methamphetamine as charged. The trial court later sentenced Bryson to 12 months plus one day incarceration and 12 months community custody. Bryson timely appeals.

DISCUSSION

This appeal requires that we address two issues: first, whether the trial court properly denied defense counsel's motion to appoint new counsel based on a breakdown in his communications with Bryson and, second, whether it erred in denying Bryson's motion for continuance made on the day of trial. Holding that the trial court properly denied Bryson's motion for a continuance and his request for appointment of new defense counsel, we affirm.

Appointment of New Counsel

Bryson asserts that the trial court violated his Sixth Amendment right to counsel and Fourteenth Amendment right to due process when it denied defense counsel Farra's motion to appoint new counsel based on a breakdown in his communications with Bryson. We disagree.

We review a denial of a motion to appoint new counsel for abuse of discretion. *State v. Rosborough*, 62 Wn. App., 341, 346, 814 P.2d 679 (citing *State v. Stark*, 48 Wn. App. 245, 252, 738 P.2d 684, *review denied*, 109 Wn.2d 1003 (1987)), *review denied*, 118 Wn.2d 1003 (1991). The right to counsel of choice, unlike the right to counsel in general, is not absolute. *State v. Stenson*, 132 Wn.2d 668, 733, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). "A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Stenson*, 132 Wn.2d at 734. Importantly, an attorney-client conflict may justify granting a substitution motion only when the defendant and counsel "are so at odds as to prevent presentation of an adequate defense." *Stenson*, 132 Wn.2d at 734.

Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the

trial court. *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). Factors the trial court must consider in deciding a motion to withdraw and substitute appointed counsel include "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." *Stenson*, 132 Wn.2d at 734.

Here, the trial court considered all three required factors and did not abuse its discretion when it denied the motion for appointment of substitute counsel. First, Farra informed the trial court that Bryson had independently obtained copies of the WSPCL protocol and the analysis report of the residue found in the baggie. It appears Bryson had either expected Farra to arrange for an expert to review the protocol to show the WSPCL analyst failed to follow proper procedures rendering the report inadmissible, or Bryson had expected the residue analysis report sooner. Having failed to fulfill either of Bryson's expectations, Bryson indicated he would report Farra to the WSBA.

Second, the trial court evaluated Farra stating, "I don't see a problem. You're a very—you're one of the most experience trial counsel, Mr. Farra. You know what you're doing." RP at 23. Third, the trial court asked Bryson the day before trial whether he was willing to waive his speedy trial rights, indicating the trial court's willingness to grant a continuance if Bryson agreed, but Bryson refused to delay his trial. The following day, just a few minutes before trial was to start, Bryson changed his mind and moved for a continuance and appointment of an additional independent expert to evaluate the crime lab procedures. The trial court denied the motion, noting that Bryson's expert had already conducted independent testing of the sample and found it to contain methamphetamine, that jurors had been inconvenienced, and because it did

not find good cause for a continuance.[1] That Bryson changed his mind overnight does not amount to an abuse of the trial court's discretion in denying the motion to appoint an additional expert and continue the trial date.

As to his request for substitution of counsel, Bryson's reliance on *Holloway v. Arkansas*, 435 U.S. 475, 485-86, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978), for the proposition that courts must give complete deference to the opinions of current counsel in determining whether to appoint new counsel is misguided. In *Holloway*, one lawyer represented three defendants at the same trial, each of whom desired to testify at trial. 435 U.S. at 478. Defense counsel in that case advised the trial court that effective representation was impossible because of diverging interests of each co-defendant, but the court refused to consider appointment of separate counsel. *Holloway*, 435 U.S. at 477-80. Here, neither Bryson nor Farra indicated any impossibility in continuing with trial—only that Bryson would like more time to arrange for additional expert evidence. The trial court properly considered the apparent conflict between Bryson and Farra, evaluated Farra's performance and trial experience, and its decision to proceed with trial was not an abuse of discretion.

Last, Bryson cites to numerous federal circuit cases to support his argument that his constitutional rights were violated when the trial court failed to engage in more extensive inquiry with respect to the "breakdown in communication." But to the extent Bryson and Farra may have

[1] CrR 3.3(f)(2) provides that

> [o]n motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

disagreed on trial strategy, there is no evidence to suggest that the communication breakdown was so complete as to amount to good cause to appoint new counsel or that the representation Bryson received was in any way inadequate. *See In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 729-30, 16 P.3d 1 (2001); *cf. Holloway*, 435 U.S. at 477-80 (defense counsel's inability to cross-examine any of the three co-defendants because of conflicts of interest amounted to deficient representation).

On October 19, 2009, Farra told the trial court he visited with Bryson just two days prior to discuss five different trial strategy options. Then Farra discussed with Bryson the waiver of his speedy trial rights in favor of a continuance after the October 20 hearing. Thus, while Bryson and his attorney may have disagreed, the record shows they were in frequent communication. Moreover, the record shows Farra competently represented Bryson at trial by conducting thorough cross-examination of the State's witnesses and direct examination of Bryson, clarifying the State's use of prior convictions for impeachment purposes, and issuing a subpoena for inventory evidence from the sheriff's department as part of an "unwitting" possession defense strategy.

Motion For Continuance

Bryson next contends that the trial court denied his Sixth Amendment rights to compulsory process and to present a defense when it refused to continue the case so he could call his expert witness. Again, we disagree.

We review a denial of a motion to continue for abuse of discretion. *State v. Downey*, 27 Wn. App. 857, 861, 620 P.2d 539 (1980). Washington courts have consistently held "'that failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the

circumstances of a particular case.'" *State v. Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169 (2004) (quoting *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975)). A denial of a request for a continuance may violate a defendant's right to compulsory process if the denial prevents the defendant from presenting a witness material to his defense. *Downing*, 151 Wn.2d at 274-75 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)). "'[T]here are no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result.'" *Downing*, 151 Wn.2d at 275 n.7 (quoting *Eller*, 84 Wn.2d at 96). Thus, whether the denial of a continuance rises to the level of a constitutional violation requires a case-by-case inquiry. *Downing*, 151 Wn.2d at 275.

The existence of due diligence alone does not determine whether a constitutional right has been violated by the denial of a continuance. *Downing*, 151 Wn.2d at 275. Here, the record shows Bryson requested a continuance on the day of trial in order to present expert testimony to show either that the WSPCL analyst failed to adhere to the protocol in examining the residue or that the protocol itself was improper. Even assuming Bryson could have successfully admitted such testimony rendering the WSPCL report inadmissible, the record also shows that the testimony of Bryson's own independent expert would have been that the test he conducted was also positive for methamphetamine. The record does not otherwise support an argument that such expert protocol testimony, which was speculative and, at best, merely cumulative, was material to Bryson's defense. *See Downey*, 27 Wn. App. at 861; *see also Eller*, 84 Wn.2d at 96-98. Accordingly, the trial court did not abuse its discretion when it denied Bryson's motion to continue to obtain the additional expert testimony.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.