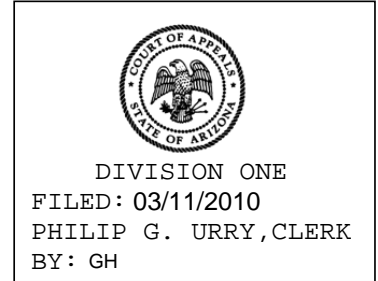


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 09-0238  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
CHESTER CHARLES GALLOWAY, II, ) Arizona Supreme Court)  
)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2008-139975-001 DT

The Honorable Steven P. Lynch, Judge Pro Tempore

**REMANDED**

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Terry Goddard, Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
and Katia Mehu, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
by Spencer D. Heffel, Deputy Public Defender  
Attorneys for Appellant

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P O R T L E Y, Judge

¶1 Defendant Chester Charles Galloway, II, challenges his misdemeanor conviction on one count of possession or use of marijuana. Specifically, he argues that the trial court erred when it denied his motions for new counsel. For the following reasons, we remand for a hearing consistent with *State v. Torres*, 208 Ariz. 340, 93 P.3d 1056 (2004).

#### FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant entered the Glendale apartment of victim C.I.<sup>1</sup> without permission on the morning of February 22, 2008, between 2:00 a.m. and 4:00 a.m. He removed his jacket and eventually went to the second floor of the apartment, at which time C.I. gathered her children and went to her neighbor's apartment to call the police.

¶3 When officers arrived, they found Defendant asleep in one of the second-floor bedrooms. The officers also found and searched a brown leather jacket later identified as belonging to Defendant. The search revealed a partially burned marijuana cigarette in one of the jacket's interior pockets.

¶4 Defendant was charged with one count of criminal trespass and one count of possession or use of marijuana, both

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<sup>1</sup> We use the initials of the victim throughout this decision to protect her privacy. See *State v. Maldonado*, 206 Ariz. 339, 341 n.1, 78 P.3d 1060, 1062 n.1 (App. 2003).

class six felonies. An attorney at the Maricopa County Legal Defender's Office was appointed to represent Defendant.

¶15 Defendant made an oral pro per motion for new counsel during a status conference on March 2, 2009, the day before trial was set to begin. The court denied his request.

¶16 On the State's motion, both counts were subsequently designated as misdemeanors and the matter was tried before the court. Defendant was acquitted of criminal trespass, but convicted of possession or use of marijuana.

¶17 Prior to sentencing, Defendant again moved for a change of counsel in both this matter and in a collateral criminal matter in which he was represented by the same attorney. Counsel joined the motion and stated that, during the course of representation, a conflict over strategy developed and, over time, "caused a complete breakdown in communication and an irreconcilable conflict" between he and Defendant. He explained that the conflict "originally arose in January [2009]," "ha[d] worsened since that time," and "[s]ince February 27, 2009[,] [he] and defendant ha[d] spoken on multiple occasions . . . [without] meaningful discussion." The court granted the motion for new counsel in the collateral criminal matter, but denied the motion in this case.

¶18 Five days later, the court suspended sentencing, placed Defendant on probation for a one-year term, and ordered a

five-month jail term as a condition of his probation. Defendant appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A) (Supp. 2008).

#### **DISCUSSION**

¶9 First, Defendant argues that the trial court abused its discretion "when it refused to grant Appellant new counsel for sentencing [in this case] after finding grounds to remove counsel in [the collateral criminal matter]." Defendant misconstrues the record.

¶10 During oral argument on his second motion for new counsel, the court found that Defendant and his lawyer were not "getting along" and ordered new counsel appointed in the collateral criminal matter. However, the court stated that "it just [didn't] make sense to have a new attorney" in this matter because the case was already set for sentencing and it involved only a single misdemeanor. The court then asked Defendant if he would "still like a new attorney to help [him] on sentencing." In response, Defendant indicated that he wanted to present a different defense at his trial, to which the court informed him that he had a right to appeal. The court then stated that it was willing to do something that would have the effect of delaying sentencing, but Defendant interrupted before the court was able to finish, and stated that he did not want to delay

sentencing. The court therefore denied the motion in this matter.

¶11 By electing to proceed with sentencing as scheduled, Defendant declined the court's offer and, in effect, withdrew his motion in respect to this case. Consequently, Defendant's characterization that the court "refused" to provide substitute counsel for sentencing in this matter is inaccurate.

¶12 The State argues that, to the extent the court's denial of the motion was error, the invited error doctrine precludes our review because Defendant expressly elected to proceed to sentencing with his lawyer. We agree. We have repeatedly held that "we will not find reversible error when the party complaining of it invited the error." *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001). Because Defendant elected to proceed with the scheduled sentencing and did not respond to the court's offer to substitute counsel, the court did not err when it denied his motion.

¶13 Defendant next challenges the trial court's failure to inquire into his initial motion for new counsel and the subsequent denial of the motion. He argues that the trial court abused its discretion when it did not sufficiently inquire into whether "a total breakdown in communication, or an irreconcilable conflict with his attorney" existed based on his allegations. We review a trial court's decision on whether to

conduct an inquiry on a request to substitute counsel for an abuse of discretion. *Torres*, 208 Ariz. at 343, ¶ 9, 93 P.3d at 1059.

¶14 The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to be represented by counsel. U.S. Const. amend. VI; see also Ariz. Const. art. 2, § 24. "A defendant is not, however, entitled to counsel of choice, or to a meaningful relationship with his or her attorney." *State v. Moody*, 192 Ariz. 505, 507, ¶ 11, 968 P.2d 578, 580 (1998). The right to counsel is violated whenever a defendant is "forced to go to trial with counsel" when there has been a "complete breakdown in communication" or an "irreconcilable conflict." *Torres*, 208 Ariz. at 342, ¶ 6, 93 P.3d at 1058.

¶15 To protect a defendant's Sixth Amendment right, a trial judge has a "duty to inquire as to the basis of a defendant's request for substitution of counsel" and must make such an inquiry on the record. *Id.* at 343, ¶ 7, 93 P.3d at 1059. "The nature of the inquiry will depend upon the nature of the defendant's request," and "generalized complaints about differences in strategy may not require a formal hearing or an evidentiary proceeding." *Id.* at ¶ 8. Although an evidentiary hearing is required if a defendant makes "sufficiently specific, factually based allegations in support of his request for new

counsel," a trial court is not exempt from conducting an inquiry when presented with less specific allegations. *Id.* at ¶¶ 7-8 (quoting *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002)).

¶16 In *Torres*, the defendant "claimed that he could no longer speak with his lawyer about the case, he did not trust him, he felt threatened and intimidated by him, there was no confidentiality between them, and his counsel was no longer behaving in a professional manner." *Id.* at 342, ¶ 2, 93 P.3d at 1058. The court denied the motion based on the assumption that it lacked authority to appoint new counsel. *Id.* Our supreme court held that the trial court abused its discretion by not conducting an inquiry into Torres' request. *Id.* at 343, ¶ 9, 93 P.3d at 1059.

¶17 Here, as the basis for his motion, Defendant stated that: (1) "[his lawyer] sent [him] correspondence through the mail and failed to put [his] address on it;" (2) he didn't want his lawyer representing him; (3) he and his lawyer "had a fight in the [jail] visitor's room;"<sup>2</sup> (4) he felt that his lawyer was "trying to sell [him] out every chance he g[ot];" and (5) his lawyer "stated he would love to get rid of [him]" as a client.

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<sup>2</sup> In a later filing, counsel explained the "fight" that took place on February 27, 2009, in the jail visitor's room. During a meeting with Defendant, counsel stated that Defendant "became very agitated," "refused to discuss the case," and asked a Sheriff's officer to have him leave.

After Defendant's motion, the court denied his request, suggesting that Defendant was "being mean" to his lawyer, and indicated that his lawyer "is a very hard worker" and "does very good for his clients." A short time later, Defendant argued that his lawyer had failed to interview a police officer until close to trial, and again asserted that his lawyer stated that he wanted to be rid of him. Without any further inquiry, the court stated that Defendant's lawyer did not want to be his attorney "because [he] [was] mean to him," and confirmed that trial would begin the next day. Defendant contends that, based on his motion and allegations, the court abused its discretion by not making further inquiry. We agree.

¶18 Certain of Defendant's allegations, i.e., strategy disputes and his personal wishes not to have his lawyer represent him, are not sufficient bases for requesting substitute counsel, and would not require further inquiry. However, we find that Defendant's allegations of discord between he and his lawyer prior to trial necessitated further inquiry to determine whether substitution of counsel was warranted.<sup>3</sup> Rather

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<sup>3</sup> Counsel's subsequent statements further support the necessity of additional inquiry into the state of the relationship before Defendant's trial. In his joinder to Defendant's second motion for new counsel, counsel concluded that the "breakdown in communication . . . [was] complete" and that his "ability to present a defense in [this matter] was directly and materially affected by the breakdown in communication and the defendant's refusal to assist in his own defense."



than conduct this inquiry, the court speculated that Defendant was "being mean" to his lawyer and denied his request without any meaningful questioning of him or counsel.

¶19 Based on his allegations, it is unclear whether, in fact, an irreconcilable difference or complete breakdown in communications existed at the time of the first motion. The mere possibility of a fractured relationship with counsel does not require reversal. *Torres*, 208 Ariz. at 344, ¶ 12, 93 P.3d at 1060. We therefore remand for a hearing consistent with *Torres*.<sup>4</sup> See *id.* at ¶ 13 ("[T]he appropriate remedy for a trial court's error in this situation is to remand for a hearing on the defendant's allegations.").

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<sup>4</sup> At the hearing, Defendant bears the burden of demonstrating that, at the time of trial, there was an irreconcilable conflict with his counsel or a total breakdown in communications. See *Torres*, 208 Ariz. at 343, ¶ 8, 93 P.3d at 1059. *Torres* also outlines the process the court should follow should Defendant meet, see *id.*, or not meet his burden, *id.* at 344, ¶ 13, 93 P.3d at 1060.

**CONCLUSION**

¶20 Based on the foregoing, we remand the matter for a hearing consistent with this decision.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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LAWRENCE F. WINTHROP, Judge

/s/

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MARGARET H. DOWNIE, Judge