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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0512
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ANGEL DAVID OLIVAS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-157556-001 DT

The Honorable Sam J. Myers, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals Section/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry Reid, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Angel David Olivas (Olivas) appeals from his conviction
and sentence for misconduct involving weapons, a class four

felony. He argues that the trial court's failure to grant a continuance so that he could substitute private counsel violated his right to counsel. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Olivas was charged with one count of misconduct involving weapons, a class four felony. The charge was based on Olivas' status as a prohibited possessor. On November 19, 2008, a jury trial was set for March 3, 2009.

¶13 On February 24, 2009, Olivas' counsel filed a motion to continue due to a trial conflict; she had an unrelated trial scheduled to begin on March 4, 2009 and requested that one of the trials be continued. The trial court did not rule on the motion until March 3, the first scheduled day of trial. At that time, defense counsel advised she was ready for trial. Nonetheless, the trial court vacated the trial set for March 3 and reset the trial for March 4.

¶14 During a settlement conference on March 4, 2009, the day trial was set to begin, Olivas made an oral motion to continue the trial. Olivas requested a continuance because he was in the process of retaining private counsel. The trial court asked the State for its position on the motion, and the State replied it was ready to proceed with the trial. The court then noted that the trial date had already been affirmed and told Olivas that before a substitution could occur; the new attorney

would need to assure the court that he is ready for trial. Finding no good cause to continue the case, the trial court denied Olivas' motion to continue. Though the trial court said it was unable to continue the trial, it indicated it would allow Olivas to substitute his attorney as long as he did so by the next day.

¶15 Private counsel did not appear on behalf of Olivas at trial the next day. Olivas' original counsel remained his attorney throughout the trial. Olivas was convicted as charged. Two months later, prior to sentencing, a notice of substitution of counsel was filed and a private attorney represented Olivas at sentencing.¹

¶16 Olivas timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 and -4033.A.1 (2010).

DISCUSSION

¶17 Olivas' sole issue on appeal is whether the trial court deprived him of his right to counsel when it denied his oral motion to continue, which was made the day trial was scheduled to begin. A trial court's ruling on a request for a continuance will not be disturbed absent a clear abuse of discretion. *State*

¹ Although Olivas claimed to have retained T.G. to represent him at trial, T.G. never filed a notice of appearance. Instead, another attorney, J.S., represented Olivas at sentencing.

v. Hein, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983). An abuse of discretion occurs when the trial court "misapplies the law or exercises its discretion based on incorrect legal principles." *State v. Slover*, 220 Ariz. 239, 242, ¶ 4, 204 P.3d 1088, 1091 (App. 2009).

¶8 Olivas argues that his Sixth Amendment right to counsel was violated when the trial court denied his request for a continuance. Arizona Rule of Criminal Procedure 8.5.b states that a continuance "shall be granted only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Olivas contends the interests of justice include a reasonable delay to allow him to exercise his right to counsel. The Sixth Amendment of the United States Constitution guarantees that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Though the right to be represented by one's preferred attorney is supported by the Sixth Amendment, the ultimate goal is to guarantee an effective advocate for a criminal defendant rather than to ensure that the defendant be represented by the lawyer he prefers. *Wheat v. U.S.*, 486 U.S. 153, 159 (1988).

¶9 Whether the denial of a request for a continuance to substitute private counsel violates the constitutional rights of a defendant depends on the circumstances of the case. *State v.*

Aragon, 221 Ariz. 88, 90, ¶ 5, 210 P.3d 1259, 1261 (App. 2009).

The following factors are considered in determining whether a defendant's constitutional rights have been violated by the denial of a continuance:

[W]hether other continuances were granted; whether the defendant had other competent counsel prepared to try the case; the convenience or inconvenience to the litigants, counsel, witnesses, and the court; the length of the requested delay; the complexity of the case; and whether the requested delay was for legitimate reasons or was merely dilatory.

Hein, 138 Ariz. at 369, 674 P.2d at 1367.

¶10 A short continuance had already been granted in this case a day earlier, and Olivas was given additional time beyond the continuance in which to substitute counsel. Additionally, although the trial date was reset to start on March 4, 2009, the trial did not actually begin until March 5, and testimony did not begin until March 9. Olivas was given the opportunity to substitute counsel between the March 4 scheduled start date and the March 5 actual start date, with the understanding that the new attorney would only need to be prepared for jury selection on March 5 and would have until March 9 to prepare for testimony.

¶11 Olivas already had competent counsel prepared to try the case. Defense counsel had been assigned to the case since October 2008, and despite her request for a continuance due to a trial conflict, defense counsel indicated that she was ready for trial on March 3, 2009.

¶12 The State and the court were also ready to try the case. More than three months had passed since the trial date had been set. The State indicated twice that it was ready to proceed with trial: first on March 3 and again during the March 4 settlement conference. Also during the settlement conference, the trial court affirmed that a jury trial would begin with jury selection on March 5.

¶13 Olivas gave no indication of how long of a delay he was seeking. He said that he had hired a private attorney to represent him, but he made no representation as to how long his new attorney would need to prepare for trial. Nor was it even certain that he had indeed hired a private attorney. A notice of appearance was never filed on behalf of the attorney Olivas said he had hired.

¶14 Finally, though the request may have been legitimate, Olivas was clearly "dilatory" in waiting until the day trial was scheduled to begin to request a continuance for the purpose of retaining private counsel. Olivas had months to hire another attorney, and he had plenty of time before trial began to request a continuance.

¶15 Taking the *Hein* factors into consideration, it was well within the trial court's discretion to deny Olivas' motion to continue based on the circumstances in this case.

¶16 Even assuming the *Hein* factors weighed in favor of Olivas, the trial court was correct in denying the motion to continue based on Olivas' failure to file a written motion as required by Rule 8.5.a. "[W]e are obligated to affirm the [trial] court's ruling even if it reached the correct result for the wrong reason." *State v. Olquin*, 216 Ariz. 250, 253 n.5, ¶ 12, 165 P.3d 228, 231 n.5 (App. 2007). Rule 8.5.a states: "A continuance of a trial may be granted on the motion of a party. Any motion *must be in writing* and state with specificity the reason(s) justifying the continuance." (Emphasis added.) Because Olivas did not comply with Rule 8.5.a, the trial court properly denied the request.

CONCLUSION

¶17 For the reasons previously stated, we affirm Olivas' conviction and sentence.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

MARGARET H. DOWNIE, Judge