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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DANIEL LEE KENNEDY, Appellant.	)	2 CA-CR 2012-0126 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103271001

Honorable Jose H. Robles, Judge Pro Tempore

VACATED AND REMANDED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Daniel Kennedy was convicted of one count of aggravated driving under the influence of an intoxicant (DUI) with a blood-alcohol

concentration (BAC) of .08 or more while his driver's license was suspended. On appeal, he argues the trial court erred by denying his motion to continue in order to substitute his counsel, thereby denying him the right to counsel of his choosing. For the following reasons, we vacate Kennedy's conviction and sentence and remand for a new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the conviction. *See State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). In September 2010, Tucson Police Officer William Honomichl stopped Kennedy's car after observing it driving in the bus lane. After approaching Kennedy, Honomichl observed signs that Kennedy was under the influence of alcohol. Kennedy admitted that he had been drinking and that his license was suspended. He failed a field sobriety test, and two breathalyzer tests produced results of .150 and .153 BAC.

¶3 Kennedy was charged with and convicted of one count of aggravated DUI with a BAC of .08 or more while his driver's license was suspended. He was sentenced to a mitigated prison term of six years. Kennedy appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Discussion

¶4 Kennedy argues the trial court violated his right to counsel of his choosing by denying his motion for continuance to substitute new counsel. We review claims of the denial of the right to counsel of choice for structural error. *State v. Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d 1259, 1262 (App. 2009) (erroneous denial of right to counsel of choice structural error); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (same). We

review a court's interpretation of a constitutional right de novo. *Robinson v. Hotham*, 211 Ariz. 165, ¶ 9, 118 P.3d 1129, 1132 (App. 2005).

¶5 Six days before the start of his trial, Kennedy moved for a continuance in order to substitute his counsel. In that motion, he stated he had concerns with "his current attorney's defense strategies and trial presentation." At the hearing on the motion, Kennedy also explained to the trial court he was uncomfortable with the firm he originally had hired after being transferred between attorneys several times, he did not have the funds to retain new counsel until recently, and he had already paid a substantial consulting fee to the new attorney.

¶6 The trial court ruled that "[t]here has been extensive litigation in this case, and, considering the age of the case and the activity in the case, the motion will be denied." The court also noted its concerns that substitute counsel would not be ready by the scheduled trial date, as required by Rule 6.3(c), Ariz. R. Crim. P., but the court did not articulate this concern as a basis for its final ruling.

¶7 A criminal defendant has the right to counsel of his choosing under the Sixth Amendment of the United States Constitution and article 2, § 24 of the Arizona Constitution. *Hotham*, 211 Ariz. 165, ¶ 16, 118 P.3d at 1133; *see also Gonzalez-Lopez*, 548 U.S. at 144. The right to counsel of choice stems from the "root meaning" of the constitutional right to a fair trial and is not subject to the same limitation as the distinct, but related, right to effective assistance of counsel. *Gonzalez-Lopez*, 548 U.S. at 147-48. "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation

he received." *Id.* at 148. Therefore, defendants need not show that counsel was ineffective or that they were prejudiced to prevail on a claim that they were deprived of the counsel of their choice. *Id.* at 150-51.

¶8 The right to counsel of choice, however, is "not absolute, but is subject to the requirements of sound judicial administration." *State v. Hein*, 138 Ariz. 360, 369, 674 P.2d 1358, 1367 (1983); *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) (right circumscribed in many respects and no guarantee that defendant will have top choice of attorney in all circumstances). A trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." *Gonzalez-Lopez*, 548 U.S. at 152 (citation omitted). Despite the court's broad discretion, an "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), *quoting Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

¶9 "Whether an accused's constitutional rights are violated by the denial of a request for a continuance depends on the circumstances present in the particular case." *Hein*, 138 Ariz. at 369, 674 P.2d at 1367. When reviewing a court's ruling on a motion to continue trial, we consider

> whether 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.

Id.

¶10 In *Aragon*, we applied these factors to a defendant who had been charged with an aggravated DUI and moved to continue the trial to substitute counsel six days before trial was set to begin. 221 Ariz. 88, ¶¶ 1-2, 210 P.3d at 1260. The defendant told the court he had a "communication issue" with his appointed counsel and had only just received the funds to retain private counsel. *Id.* ¶ 3. He had not previously sought or been granted any continuances, the case was not particularly complex, there was no victim anxious for a resolution, and all the witnesses were law enforcement officers accustomed to accommodating court appearances. *Id.* ¶ 6. The trial court had denied the motion, citing the short time until trial and that appointed counsel was competent to try the case. *Id.* ¶ 3. Although the court had also cited concerns over Rule 6.3(c), which requires substitute counsel to be prepared to try the case by the scheduled trial date, and Rule 8, Ariz. R. Crim. P., which protects a defendant's right to a speedy trial, we noted that the primary purpose of those rules is to protect the defendant and we should not "elevat[e a] technical requirement above [Aragon']s right to counsel of his choice." *Id.* ¶¶ 7-8, *quoting State v. Coghill*, 216 Ariz. 578, ¶ 44, 169 P.3d 942, 953 (App. 2007) (alteration in *Aragon*). We concluded that by focusing solely on its own scheduling concerns, the trial court had violated the defendant's constitutional right to counsel of his choice. *Id.* ¶ 9.

¶11 Similarly, applying the *Hein* factors to Kennedy's case favors vacating his conviction and sentence. *See Aragon*, 221 Ariz. 88, ¶ 6, 210 P.3d at 90-91. Kennedy's proffered reasons for the basis and timing of his request included concerns about trial strategy, an inability to hire new counsel until recently, and a recent and substantial

financial stake in new counsel. These are facially legitimate reasons and do not appear "merely dilatory."[1] *See id.* ¶¶ 3, 6; *Hein*, 138 Ariz. at 369, 674 P.2d at 1367. Additionally, Kennedy had not requested any prior continuances. The state concedes this was a "'run-of-the-mill' DUI case," there was no victim anxious for resolution, and "the witnesses were only four local law enforcement agents, and thus the inconvenience to witnesses was minimal." Although Kennedy did not specify the length of the delay he was requesting, the court did not discuss or inquire into that factor. As we noted in *Aragon*, "persuasive authority suggests that, '[w]hen a motion for a continuance . . . implicates a defendant's Sixth Amendment right to counsel,' the onus is on the court to create a record of its reasons for the denial." *Aragon*, 221 Ariz. 88, n.3, 210 P.3d at 1261 n.3, *quoting United States v. Garrett*, 179 F.3d 1143, 1147 (9th Cir. 1999). Finally, although Kennedy's current counsel was competent and prepared to try the case, that factor alone cannot justify the denial of a request for a continuance. *See Gonzalez-Lopez*, 548 U.S. at 148; *Aragon*, 221 Ariz. 88, ¶ 6, 210 P.3d at 1261-62.

¶12 The trial court did not consider any of the above facts in its ruling, and denied Kennedy's motion based solely on its own scheduling concerns. Although the court noted concerns regarding Rule 6.3(c), it did not articulate this concern as a basis for its final ruling, nor would that reason alone justify the denial. *Aragon*, 221 Ariz. 88, ¶ 8, 210 P.3d at 1262. Thus, it does not appear the court weighed Kennedy's facially legitimate request to exercise his right to counsel of his choosing against its concerns

[1]Although the state argues that "on this record, it appears [Kennedy's] motion was dilatory," it is unable to point to either a finding by the trial court or evidence other than the length of the case on the court's docket that would support such a claim.

with efficient judicial administration. The logic of *Aragon* requires us to vacate Kennedy's conviction and sentence. *Id.* ¶ 9.

¶13 The state argues, however, that Kennedy's case is distinguishable from *Aragon* for three reasons. First, it argues "the trial court's ruling was based on legitimate concerns while the *Aragon* trial court's ruling was not." The state, however, only points out the scheduling concerns the trial court cited. As we held in *Aragon*, scheduling concerns alone are not a sufficient basis for the denial of a request for counsel of the defendant's choosing. *Id.* ¶ 9.

¶14 The state next contends that, unlike the sought-after attorney in *Aragon*, the attorney Kennedy wished to hire never had appeared before the court prior to trial and refused to sign a substitution request unless the court granted the motion for continuance. *Aragon*, 221 Ariz. 88, ¶ 3, 210 P.3d at 1260. But there is no indication in *Aragon* that counsel's appearance before the court affected the outcome of the case. The fact is only mentioned in the factual and procedural history of the case. *Id.* ¶ 3.

¶15 Lastly, the state argues that in *Aragon* the trial court's ruling was based solely on Rule 6.3(c), whereas here, the trial court considered Rule 6.3(c) "in conjunction with" its scheduling concerns. But, as discussed above, the trial court in *Aragon* had considered both Rule 6.3 and Rule 8 in conjunction with its scheduling concerns. *Id.* ¶¶ 7-9. As we held in that case, a trial court should not hold the technical requirements of Rule 6.3(c) against the defendant when the motion for continuance is brought by the defendant himself. *Id.* ¶ 8. We therefore find the state's attempt to distinguish *Aragon* unpersuasive.

¶16 The trial court erred by focusing solely on its own schedule and not giving due regard to Kennedy's request to exercise his right to counsel of his choosing. *See Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d at 1262. The court's ruling thus constituted "an 'unreasoning and arbitrary' adherence to its schedule." *Id.*; *Morris*, 461 U.S. at 11-12. Because the "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error,'" we must vacate Kennedy's conviction and sentence. *See Gonzalez-Lopez*, 548 U.S. at 150, 152, *quoting Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993); *Aragon*, 221 Ariz. 88, ¶ 9, 210 P.3d at 1262.

Conclusion

¶17 For the foregoing reasons, we vacate Kennedy's conviction and sentence and remand for a new trial.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge