IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERNEST RUSHING III,
Appellant.

No. 2 CA-CR 2019-0289
Filed January 28, 2021

Appeal from the Superior Court in Pinal County
No. S1100CR201900189
The Honorable Patrick K. Gard, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Eric K. Knobloch, Assistant Attorney General, Phoenix
Counsel for Appellee

Czop Law Firm PLLC, Higley
By Steven Czop
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Espinosa authored the decision of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

E S P I N O S A, Presiding Judge:

¶1 Ernest Rushing appeals from his conviction and sentence for possession of drug paraphernalia, arguing he was denied his Sixth Amendment right to counsel and his conviction must be reversed. For the following reasons, we affirm.

Factual and Procedural Background

¶2 After his arrest for possession of drug paraphernalia in December 2018 and subsequent indictment, Rushing was appointed counsel to represent him in April 2019. At a pretrial conference the following month, Rushing requested a different attorney, asserting counsel was unable to "properly represent" him because he had been represented by the same attorney in the past and "felt like [he] was improperly served." The trial court denied Rushing's request.[1]

¶3 At a July 2019 hearing to set his trial date, Rushing again requested new counsel, claiming counsel was "disrespectful" and disregarded Rushing's concerns and requests involving his case. Rushing further stated, however, that he did not "want to waive [any] time," and told the trial court, "you don't have to take him off my case. But either way it go[es], I want to go to trial."[2] The court asked counsel if he believed he

[1] Rushing does not challenge this ruling on appeal, conceding "nothing . . . demonstrated that Rushing and [counsel] had a breakdown in communication or an irreconcilable conflict" at that time.

[2] A more complete portion of the colloquy between Rushing and the trial court is as follows:

> THE DEFENDANT: . . . I told you the one time, I don't [want] to waive my rights. I don't want to waive my time. Do you see what I am saying?

could effectively represent Rushing, and he replied it would "[b]e very difficult, given the breakdown of communications." The court then inquired of two other attorneys in the courtroom whether they could represent Rushing, but both indicated their caseloads would not permit them to take the case to trial for several months.

¶4 The court asked Rushing, "do you think that you can work with [counsel]," explaining that "if you want a trial date, I can appoint a new attorney, but they are not here, we are not going to be picking a trial date and I am going to waive time so we can get [an attorney] here." Rushing reiterated that he did not wish to waive time. The court nevertheless sought further clarification, stating, "I can appoint one of those gentleman back there" or "[i]f you want to stay with [current counsel], we will get a trial, pick a trial date." Rushing stated he would not agree to waive time because his sister was in the hospital and he was "trying to get this over with quick" and he had "no choice." The court said, "No, you do have a choice," and referred to the two lawyers in the courtroom. Rushing then stated, "No, we are going to rock it out" with current counsel, and a trial date was set.

¶5 Following the trial, Rushing was convicted as noted above and sentenced to 3.75 years' imprisonment. We have jurisdiction over Rushing's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶6 The Sixth Amendment guarantees criminal defendants the right to representation by counsel. U.S. Const. amend. VI. To protect a defendant's right to counsel, the trial court has the duty to inquire into the basis of a defendant's request for substitution of counsel. *State v. Torres*, 208

> I don't want to waive no time. And we had history already and I just don't feel like he is properly representing me, I feel like he is more so violating my rights, you know.
> THE COURT: That is it?
> THE DEFENDANT: But regardless, you don't have to take him off my case. But either way it go[es], I want to go to trial.
> THE COURT: Okay. We can accommodate that.

Ariz. 340, ¶ 7 (2004). If, after inquiry, the court finds that the defendant has established "a total breakdown in communication" or an irreconcilable conflict with his attorney, then the defendant's request for new counsel must be granted. *Id.* ¶ 8; *see also State v. Moody*, 192 Ariz. 505, ¶ 11 (1998). Accordingly, "if a defendant is forced to go to trial" under such circumstances, "a resulting conviction must be reversed." *Torres*, 208 Ariz. 340, ¶ 6. While indigent criminal defendants have the right to competent counsel, however, *see State v. LaGrand*, 152 Ariz. 483, 486 (1987), they are not "entitled to counsel of choice, or to a meaningful relationship" with their attorneys, *Moody*, 192 Ariz. 505, ¶ 11. A trial court's denial of a request for new counsel is reviewed for an abuse of discretion. *See State v. Gomez*, 231 Ariz. 219, ¶ 18 (2012).

¶7 Rushing contends that once his lawyer "admitted to a complete breakdown in communications" at the July 2019 hearing, it was incumbent on the trial court to appoint new counsel and, by failing to consider the *LaGrand* factors,[3] the court committed "structural error." We disagree for several reasons.

¶8 First, although counsel stated there had been a "breakdown of communications," Rushing did not meet his burden of showing he had such minimal contact with his attorney that meaningful communication was not possible. Nor did he make any specific allegations of a communication breakdown beyond his general unhappiness with appointed counsel. *See State v. Hernandez*, 232 Ariz. 313, ¶¶ 14-15 (2013). At most, Rushing alleged loss of trust and disagreements with counsel regarding trial strategy, which is insufficient to require appointment of new counsel. *See State v. Cromwell*, 211 Ariz. 181, ¶ 30 (2005) ("To constitute a colorable claim, a defendant's allegations must go beyond personality

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[3]In *State v. LaGrand*, our supreme court identified several factors for the trial court to consider when determining whether to grant a defendant's request for new counsel:

> whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

152 Ariz. 483, 486-87 (1987).

conflicts or disagreements with counsel over trial strategy; a defendant must allege facts sufficient to support a belief that an irreconcilable conflict exists warranting the appointment of new counsel."); *State v. Peralta*, 221 Ariz. 359, ¶ 5 (App. 2009) ("The evidence must show more than mere animosity causing loss of trust or confidence."); *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 14 (App. 2007) (loss of trust or confidence not sufficient to appoint new counsel).

¶9 Second, and more importantly, the trial court was not obligated to consider the *LaGrand* factors because Rushing effectively withdrew his request for new counsel at the July hearing. Citing *Moody*, 192 Ariz. 505, Rushing contends, however, that he was forced to choose between his right to new counsel and his right to a speedy trial, resulting in a violation of the former.

¶10 In *Moody*, the record was "replete with examples of a deep and irreconcilable conflict" between the defendant and his counsel. 192 Ariz. 505, ¶ 13. Moody's attorney had called him crazy to his face and to the press, shouted at him, said he did not care about his case, and "allegedly had a party to celebrate" when Moody was found incompetent to stand trial. *Id.* ¶¶ 13, 16-17. Moody accused the attorney of conspiring with the prosecutor, court, and doctor to have Moody declared insane and threatened to file ethical complaints against him. *Id.* ¶¶ 16, 18. Two motions by the attorney to withdraw were denied, and the trial court refused to allow substitution of counsel. *Id.* ¶¶ 7-8, 21. Thus, Moody's choice between representation "by a lawyer with whom he had a completely fractured relationship" and self-representation rendered his waiver of counsel and decision to proceed pro se involuntary. *Id.* ¶ 23.

¶11 *Moody* is readily distinguishable from the situation here. As noted above, the record does not reflect such a fractured relationship between Rushing and counsel. And, significantly, the trial court was willing to appoint new counsel before Rushing abandoned his request upon learning a trial date would not be set at that hearing. Rushing has cited no authority to support his contention that a defendant is constitutionally prejudiced when he must make the choice between proceeding with current appointed counsel or setting a trial date at a particular hearing. *See id.* ¶ 22. Accordingly, we find no error in the court's acquiescence to Rushing's choice to proceed with appointed counsel.

¶12 Rushing also suggests the trial court prioritized the need for judicial economy over Rushing's "rights and interests," because "[a] brief continuance of [his] case with a new attorney appointed to represent him

could have avoided" his ultimate conviction and sentence, in particular because new counsel "may [have been] more successful at persuading [Rushing] to follow a different course of action" than testifying in his own defense. We reject that argument as not only speculative but contrary to the record: Rushing withdrew his request for new counsel when he understood a trial date would not be set that day and Rushing himself rejected a "brief continuance," and refused to waive any more time to have new counsel appointed. There is no basis to conclude the court prioritized judicial economy over Rushing's constitutional rights.[4]

¶13 Finally, to the extent Rushing argues his counsel was ineffective for failing to communicate with him about "important issues" like the "consequences" and "ramifications" of requesting a speedy trial and testifying in his own defense, we do not address those issues on appeal. *See Torres*, 208 Ariz. 340, ¶ 17 ("Ineffective assistance of counsel is a separate issue that can be raised only in a proceeding for post-conviction relief.").

Disposition

¶14 Rushing's conviction and sentence are affirmed.

[4]Rushing also claims the trial court could have appointed a new attorney without violating his speedy trial rights, but it does not necessarily follow that the court erred either by stating it would not set a trial date at that hearing if Rushing wished to proceed with new counsel or informing him it would waive time so that new counsel could be appointed. *Cf.* Ariz. R. Crim. P. 8.4(a)(1) (delays caused on behalf of defendant excluded from time computation).