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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. ALEXANDER ORTEGA LOPEZ, Appellant.	)	2 CA-CR 2008-0371 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063078

Honorable Gus Aragón, Judge

AFFIRMED WITH DIRECTIONS

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann — Tucson
Attorneys for Appellee

Alejandro O. Lopez — Florence
In Propria Persona

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Alejandro Lopez was convicted of attempted theft by control, theft of means of transportation, and two counts of third-degree

burglary.[1] The trial court found he had two historical prior felony convictions and sentenced him to presumptive, concurrent prison terms, the longest of which is 11.25 years.[2]

¶2 In pro se appellate briefs that are not entirely clear, Lopez appears to challenge the trial court's allowing him to appear at trial in jail garb and declining to appoint new advisory counsel on the first day of trial, after granting Lopez's motion to dismiss his fourth appointed advisory counsel. He also suggests he was denied a fair trial because the judge was biased and prejudiced against him. We find these claims without merit and affirm.

¶3 The following facts and procedural history are relevant to Lopez's claims. At arraignment, the trial court appointed private counsel to represent Lopez. Five weeks later, Lopez filed a pro se motion to dismiss appointed counsel, in which he claimed counsel's performance was deficient. At a hearing on that motion, Lopez told the court he wished to represent himself. He waived his right to counsel and agreed to have his previously appointed counsel act as an advisor (First Advisory Counsel).

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[1]Trial court documents identify Lopez as "Alexander" rather than Alejandro.

[2]Although the trial court's sentencing minute entry characterizes these offenses as "non-repetitive," it is clear from the sentencing transcript that Lopez was sentenced as a repetitive offender under former A.R.S. § 13-604(C) and (D), *see* 2005 Ariz. Sess. Laws, ch. 188, § 5, after the court found he had "at least two prior felony convictions for enhancement purposes." By this memorandum decision, we direct the trial court to correct the minute entry to reflect Lopez's convictions were for repetitive offenses. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) ("Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record.").

¶4 Five months later, in March 2007, Lopez's First Advisory Counsel moved to withdraw on the ground that her relationship with Lopez was irretrievably broken after she had, over his strong objections, requested that he undergo a competency examination pursuant to Rule 11, Ariz. R. Crim. P. The trial court allowed her to withdraw, appointed new counsel for Lopez (Second Advisory Counsel), and rescheduled Lopez's jury trial for August 14, 2007.

¶5 In June 2007, Lopez filed a motion to dismiss Second Advisory Counsel, alleging that counsel's failure to provide him with copies of his pro se motions and the court's rulings "revealed combative, disruptive, and conflict oriented attributes causing disagreements and genuine conflict of interest in this matter," and that counsel had "knowingly, willingly[,] openly and insultingly evad[ed] responsibility to keep [Lopez] reasonably informed." Second Advisory Counsel then filed a motion to withdraw. The court granted counsel's motion and, on June 27, appointed new counsel (Third Advisory Counsel).

¶6 A month later, however, Third Advisory Counsel orally moved to withdraw, stating, "I think [Lopez] thinks that advisory counsel is his private secretary." According to counsel, Lopez had directed him to file a request for change of judge and a petition for special action alleging trial court misconduct, both of which were groundless.[3] The trial court directed Third Advisory Counsel to file the motions Lopez

[3]In Lopez's motion requesting a change of judge pursuant to Rule 10.1(a), Ariz. R. Crim. P., he appears to have alleged the trial judge had exhibited bias against him by directing that he file all his pro se motions through advisory counsel. The presiding judge denied the motion.

had prepared, permitted counsel to withdraw, and again appointed new counsel for Lopez (Fourth Advisory Counsel). The court vacated Lopez's August trial date and rescheduled his trial for December 11, 2007.

¶7 On November 23, 2007, Lopez moved to dismiss Fourth Advisory Counsel, asserting counsel had failed to meet his professional obligations and requesting a "less repulsive legal advisor." At a status conference on December 10, the trial court addressed outstanding pretrial issues, including Lopez's request to interview witnesses, and vacated the pending trial date. In denying Lopez's motion to dismiss Fourth Advisory Counsel, the court noted Lopez's history of seeking successive changes of advisory counsel. The court explained a defendant does not have a right to appointed advisory counsel, much less one of his own choosing, and stated, "Every time a new advisory lawyer comes in, [he or she has] to start over . . . ." The court told Lopez it was "not going to replace any more advisory lawyers" and, if he "prefer[red] to proceed without [advisory counsel], then that could be arranged as well."

¶8 In June 2008, three weeks before his trial was scheduled to begin, Lopez filed another motion to dismiss Fourth Advisory Counsel. The day before trial, the court addressed some outstanding pretrial motions and procedural matters and had the following exchange with Lopez:

> THE COURT: Mr. Lopez, if you end up representing yourself on your own completely tomorrow, obviously you have a right to be present at your own trial, sir, and you can appear in any way that you want. You can appear in street clothes or you can appear in jailhouse clothes. What are your plans on that, sir, so that we can all try to make arrangements and anticipate the appropriate way to go?

> LOPEZ: I'm completely incapable of acquiring clothing for the trial, so I don't know how to appear other than in jail garb at this time.

The following day, before jury selection began, the court denied Lopez's request for different counsel. After the court again apprised him of the hazards of self-representation, Lopez elected to proceed to trial without advisory counsel. The court also asked Lopez again about his choice of attire, stating, "Mr. Lopez, you're here in your jail uniform. Is that how you wish to proceed, sir?" Lopez responded, "At this point I have no choice, I guess."

¶9 After he was convicted and sentenced and had filed his notice of appeal, Lopez filed another motion for change of judge. In it, he appeared to challenge the trial court's rulings before, during, and after trial.

Appearance in Jail Clothing

¶10 Lopez's first argument on appeal appears to be that the trial court abused its discretion by compelling him to appear at trial wearing jail attire. Relying on *Estelle v. Williams*, 425 U.S. 501 (1976), he maintains the court's action was "inherently prejudicial" and violated his right to a fair trial by "impairing the presumption of innocence."

¶11 In *Williams*, a jail officer had denied a defendant's request for his civilian clothes, to be worn at trial, but the defendant never objected to appearing before the jury in jail attire. *Id.* at 502. The Supreme Court reversed a decision by the Fifth Circuit Court of Appeals, which had held the defendant's failure to object to jail attire could not

be construed as a waiver of his objection "'if trial in [jail] garb is customary in the jurisdiction.'" *Id.* at 510, 512-13, *quoting Williams v. Estelle*, 500 F.2d 206, 208 (5th Cir. 1974). According to the Supreme Court,

> [A]lthough the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

Id. at 512-13.

¶12 Thus, it is not a defendant's appearing in jail garb that violates due process, but his being compelled to do so, over his objection. *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 10, 953 P.2d 536, 539 (1998) (where "record indicate[d] . . . defendant did not want to appear before the jury" in jail attire, court erred in denying request to delay jury selection until civilian clothes arrived); *see also Williams*, 425 U.S. at 508 (noting criminal defendants "frequently . . . prefer[] to stand trial before [their] peers in [jail] garments").

¶13 We agree with the state that Lopez has failed to show he was compelled to appear in jail attire when he did not object to doing so. Nor did he expressly ask to appear in his own clothing or explain why he was "incapable of acquiring" it. *See Garcia-Contreras*, 191 Ariz. 144, ¶ 14, 953 P.2d at 539-40 (defendant responsible for having civilian clothing available for trial). *But cf. Felts v. Estelle*, 875 F.2d 785, 785-86 (9th Cir. 1989) (when police had lost all of defendant's clothing, including clothing he had worn when arrested, court erroneously compelled him, over express objection, to

attend trial in jail garb). Under these circumstances, we see no error, much less fundamental error, in allowing Lopez to appear in his jail apparel. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object forfeits right to appellate relief for all but fundamental, prejudicial error). Lopez has thus failed to sustain his burden on this claim. *See id.* ¶ 19 (defendant has burden of persuasion in fundamental error review).

Refusal to Appoint Fifth Advisory Counsel

¶14 Lopez's second claim appears to be that the trial court abused its discretion in refusing to appoint new advisory counsel on the first day of trial, allegedly violating the Sixth Amendment to the United States Constitution. But, as our supreme court has explained, appointment of advisory counsel for a defendant who has exercised his constitutional right to represent himself is discretionary under Rule 6.1(c), Ariz. R. Crim. P. *State v. Gonzales*, 181 Ariz. 502, 510, 892 P.2d 838, 846 (1995); *see also Locks v. Sumner*, 703 F.2d 403, 407-08 (9th Cir. 1983) (no constitutional right to advisory counsel; whether to appoint rests in trial court's discretion). And, in the event the court does appoint advisory counsel, "[a] defendant does not have the right to the appointment of [advisory] counsel of his choosing." *State v. Fayle*, 134 Ariz. 565, 577, 658 P.2d 218, 230 (App. 1982).

¶15 The trial court did not abuse its discretion in declining to appoint a fifth attorney to advise Lopez after he elected to proceed without the services of the fourth appointed advisory counsel. *Cf. State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998) (among factors relevant to motion to change appointed counsel are "'whether new

counsel would be confronted with the same conflict; the timing of the motion; . . . [and] the proclivity of the defendant to change counsel'") *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987).

Bias and Prejudice

¶16 Lopez's third claim on appeal appears to be that he was denied a fair trial because the trial judge was prejudiced against him. Essentially, Lopez argues the judge exhibited bias by failing "to address or correctly apply rules of law as [Lopez] presented" them during trial. Absent fundamental error, a defendant forfeits appellate review of a claim of judicial bias if he fails to file a timely motion for change of judge for cause. *See State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996). Lopez's post-sentencing motion for change of judge was not only untimely but by then moot. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (unpreserved claim "'curable at trial'" reviewed for fundamental error only; *quoting State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989)).

¶17 As evidence of the judge's bias against him, Lopez points to the court's legal rulings denying his pretrial motions and his motion for acquittal pursuant to Rule 20, Ariz. R. Crim. P., and overruling his objections to jury instructions. But disagreements over such rulings are insufficient to warrant recusal, and Lopez has not challenged these rulings on appeal. *See Curry*, 187 Ariz. at 631, 931 P.2d at 1141 ("[W]e fail to understand how adverse rulings to which a party assigns no error can nevertheless amount to bias on the part of the judge."). Moreover, the portions of the record cited by Lopez do not reveal judicial bias or prejudice that would have resulted in an unfair trial.

Indeed, they suggest a trial judge who should be commended for his patience and impartiality.

Conclusion

¶18 For the foregoing reasons, we affirm Lopez's convictions and sentences and direct the trial court to correct the sentencing minute entry consistent with this memorandum decision. *See* n.2, *supra*.

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

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge