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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2019-CA-000027-MR

ROBERT GARREN, a/k/a
ROBERT EDWARD GARREN — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 17-CR-00595

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

COMBS, JUDGE: This is a criminal case in which the Appellant, Robert Garren, was tried and found guilty of possession of a handgun by a convicted felon. Before his trial began, the trial court called Garren to the bench and said that it had been told that he wanted to discharge his court-appointed counsel. The court did not inquire as to why he wanted substitute counsel, but it gave Garren a choice:

either to proceed to trial represented by the court-appointed attorney (whom Garren wanted to discharge) or to proceed *pro se*. The court emphasized that the trial **was going to be held that day** -- one way or the other. Garren discharged his attorney and, under protest, proceeded *pro se*. The jury found him guilty and recommended the maximum sentence of ten-year's imprisonment. The trial court sentenced Garren in accordance with the jury's recommendation. He now appeals.

Garren was a passenger in a vehicle in which drugs and firearms were found following a traffic stop. In December 2017, he was indicted for being a convicted felon in possession of a handgun and a drug trafficker. On July 31, 2018, immediately before *voir dire* began, the trial court called Garren to the bench. When the judge asked Garren if he no longer wanted to be represented by his court-appointed counsel, Garren responded "[n]o, sir, I've asked him to [inaudible] several motions for me and stuff." The court said it did not "want to get into" what Garren and counsel had discussed.

The judge announced, "We're going to trial today." Garren responded that he was "not ready for trial." The judge responded that he could not "help that." When Garren argued that he could not represent himself and that he needed "law books and stuff[,]" the court told Garren that he had been afforded ample time to prepare for trial. The court reiterated its displeasure with the timing of Garren's request. However, Garren advised the court that he did not want to represent

himself but that he had a conflict with his counsel, who would "not do anything" that Garren asked.

Garren requested time to hire his own lawyer, but the court was insistent that he had already been afforded sufficient preparation time, asking Garren if he intended to represent himself "because this matter is going to trial today." Garren replied that the did not intend to represent himself as he "don't [sic] know nothing." When the court asked if that statement meant that Garren wanted to continue being represented by his court-appointed counsel, Garren responded "[n]o, sir. I believe not." The court then declared that Garren would be representing himself and again that "we are going to trial today."

Garren advised the court that he had asked for another lawyer -- and that he did not want to represent himself. Garren's court-appointed counsel then remarked that he believed he had to withdraw. When Garren confirmed that he did not wish to be represented by his appointed attorney, the court duly noted counsel's withdrawal.

Shortly thereafter, Garren asked the court if he could speak with the Commonwealth. Without discussing the matter at all with Garren, the court asked an attorney who happened to be in the courtroom to stand in while Garren spoke to the Commonwealth. Shortly later, *voir dire* began -- with Garren proceeding *pro se*. The Commonwealth mentioned to the *venire* that Garren had chosen to

represent himself. At that point, Garren advised the court at a bench conference that he was on "mental medicine" and thus could not "do any of this." In response to the court's questions, Garren said he had taken Thorazine and Risperdal twice daily for five or six years due to paranoid schizophrenia, bipolar disorder, depression and hearing voices. The court remarked "so noted."

Garren then undertook *voir dire*, in which he repeatedly told the panel that he was being forced to represent himself and asked if they believed that was fair. The court sustained the Commonwealth's numerous objections, and after a bench conference at which Garren said he had "no idea" what he was doing and was "not nearly capable," the court told the jury to disregard Garren's comments about the Commonwealth's making him "do something." Garren then simply told the panel his name and sat down.

Next, the court handed the jury list to Garren and to the Commonwealth so that they could exercise their peremptory strikes. Garren then told the court that he could not read. Without discussing the matter with Garren, the court enlisted a young woman who was an intern with the Department of Public Advocacy to read the names to Garren.

The ensuing trial was very short. During the Commonwealth's closing argument, Garren interrupted and began a rambling objection. The court admonished Garren that he had already had an opportunity to give his closing

statement, and "[t]hat's it."[1] In full view of the jury, Garren again said he had been forced by the court to proceed without an attorney. When Garren kept talking, the judge ordered a bailiff to escort Garren from the courtroom—again in full view of the jury. The jury found Garren guilty and recommend ten-years' imprisonment, the maximum possible sentence. Garren then filed this appeal.

The Constitutions both of Kentucky and of the United States "provide a [criminal] defendant with the right to counsel," but '"[a]n indigent defendant is not entitled to the appointment of a particular attorney, and a defendant who has been appointed counsel is not entitled to have that counsel substituted unless adequate reasons are given.'" *Grady v. Commonwealth*, 325 S.W.3d 333, 341, 344 (Ky. 2010) (quoting *Deno v. Commonwealth*, 177 S.W.3d 753, 759 (Ky. 2005)). Thus, Garren bore the burden to show good cause necessitating appointment of new counsel. *Deno*, 177 S.W.3d at 759. "Good cause has been described as: (1) a 'complete breakdown of communications between counsel and defendant;' (2) a 'conflict of interest;' and (3) that the 'legitimate interests of the defendant are being prejudiced.'" *Id.* (quoting *Baker v. Commonwealth*, 574 S.W.2d 325, 327 (Ky. App. 1978)). A trial court is vested with discretion in determining whether a defendant has shown good cause sufficient to appoint substitute counsel. *Id.*

[1] Though Garren's objection may have lacked merit, no rule forbids objecting during an opposing party's closing statement.

The underlying facts highlight the conclusion that the trial court was intent on making sure that the trial was not delayed. However, the court did not ask Garren the critical question of why he desired substitute counsel. Absent Garren's eruptions and comments, the record contains nothing to show why Garren wanted substitute counsel. Thus, the hearing was facially insufficient to resolve its intended purpose; *i.e.*, to determine whether Garren was entitled to new counsel.

We have found no authority explicitly requiring a trial court to conduct a hearing on a motion to substitute appointed counsel. Indeed, more than forty years ago, we said in *Baker*, *supra*, that we "know of no precedent in this jurisdiction requiring the trial court to hold a formal hearing to inquire into a defendant's dissatisfaction with his appointed counsel and desire for a substitute." *Baker*, 574 S.W.2d at 327. *Baker* has not been overruled.

However, there is an implicit hearing requirement in *Deno*. In *Deno*, a defendant moved to substitute court-appointed counsel due to feeling that "he had been lied to, ignored, and was not going to receive a fair trial." *Deno*, 177 S.W.3d at 757. Deno argued that the hearing held on his motion was inadequate. Our Supreme Court disagreed, holding as follows:

> When Appellant presented his concerns regarding his representation, the trial judge allowed Appellant to fully describe in detail his objections with his attorney. The trial judge then allowed Appellant's attorney to respond to the allegations. The trial judge questioned both Appellant and his attorney regarding specific allegations

> of a breakdown in communication. Appellant asserted that his attorney had not kept him informed regarding the defense strategy, that his attorney had lied to him regarding the use of an expert, and that his attorney had ignored and rebuffed his ideas in regard to discrediting the victim. Appellant also stated that he felt his attorney was not invested in the case and Appellant believed he was not going to receive a fair trial. Appellant's attorney responded to the allegations Appellant made by detailing her contact with Appellant. She also described the decision not to use an expert witness and her reasons for her trial strategy. The trial judge's investigation into Appellant's allegations **was thorough**. The trial judge held that Appellant's attorney had sufficiently performed her job and there was not good cause for her substitution. **The trial judge followed the correct procedure for addressing Appellant's concerns with his representation.**

*Id.* at 759-60. (Emphases added).

Thus, *Deno* sets forth a three-step procedure to address motions for substitute counsel: 1) to allow the defendant to "fully describe in detail his objections with his attorney"; 2) if the stated objections are not frivolous, to permit the attorney to respond; and 3) to question the defendant and counsel regarding the specific allegations. *Id.* In short, a trial court must engage in a *bona fide* inquiry into of the allegations which is "thorough." *Id.*

A trial court is not required to follow a rote formula to resolve a motion for substitute counsel. If a defendant's stated written or oral reasons for seeking new appointed counsel are patently frivolous, a trial court may summarily deny the motion. *See, e.g.*, *Schell v. Commonwealth*, No. 2006-SC-000662-MR,

2008 WL 203036, at *3 (Ky. Jan. 24, 2008). The court has the flexibility to control the extent and scope of the hearing "so long as the trial court allows the defendant to state on the record the reasons why he seeks substitution of counsel." *Grady*, 325 S.W.3d at 346. *Deno* and *Grady* make it clear that a court must permit a defendant to state on the record why substitute counsel is necessary.

A trial court cannot properly exercise its discretion to determine whether a defendant has shown good cause for newly appointed counsel without first permitting the defendant **a meaningful opportunity to show good cause**. *See Padgett v. Commonwealth*, 312 S.W.3d 336, 343 (Ky. 2010) (emphasis added) (holding that a trial court has an "affirmative duty to inquire into the source and nature of a criminal defendant's expressed dissatisfaction with counsel"). The court here failed to afford Garren that opportunity pursuant to the reasoning set forth in *Deno*.

In his request to the court, Garren alleged that counsel failed to file motions, failed to obtain evidence for trial, and hung up the phone.[2] Perhaps those allegations, once fleshed out, would not have entitled him to relief. However, those allegations were summarily disregarded. We cannot know what a thorough

[2] Our Supreme Court has held that similar objections (counsel's refusing to accept phone calls or to respond to letters from a defendant, to provide the defendant copies of his psychiatric records, and general failure to respond to requests) "would have been serious enough—suggesting a complete breakdown of communication—to require new counsel if substantiated." *Goetz v. Commonwealth*, No. 2004-SC-001002-MR, 2007 WL 3225437, at *9 (Ky. Nov. 1, 2007).

investigation would have yielded because **no inquiry** -- much less a thorough one -- ever occurred.

It is understandable that a trial court would become frustrated when just before trial, it must address a motion to request substitute counsel. Defendants should make their request for substitute counsel known as soon as possible, and any intentional delay in raising the matter may weigh against the granting of substitute appointed counsel. *Cf. Hummel v. Commonwealth*, 306 S.W.3d 48, 54 (Ky. 2010) ("A request for self-representation may be denied if it is made as a tactic to delay proceedings."). However, not every defendant may become aware of problems with counsel until the latter stages of trial preparation. Therefore, regardless of when the request is made, a trial court **must conduct a thorough investigation** of a motion for substitute counsel. In most cases, that investigation would arguably require only a few minutes to conclude.

"The main obligation of a trial judge is to protect the integrity of the court proceedings over which he or she is the designated gate keeper." *Brown v. Commonwealth*, 226 S.W.3d 74, 86 (Ky. 2007) (Cunningham, J., concurring, joined by three other justices). *See also Indiana v. Edwards*, 554 U.S. 164, 176-77, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008) (holding that "the most basic of the Constitution's criminal law objectives" is to "provid[e] a fair trial"). In its endeavor to keep the trial from being postponed, the trial court in this case

improperly gave Garren's request short shrift. The court held no meaningful hearing, forced an attorney from the gallery to act as *de facto* temporary standby counsel, volunteered an intern from the audience to assist Garren in exercising his peremptory strikes, and ordered Garren to be removed from the courtroom after he openly protested that he had been forced to proceed *pro se*. The trial, therefore, bore few -- if any -- of the hallmarks of due process, integrity, and fairness -- which are the necessary underpinnings of all court proceedings.

We are compelled to remand this case with instructions that the trial court begin anew to address the issues before us on appeal. On remand, the court shall engage in a sufficiently thorough investigation of Garren's motion for substitute counsel. Upon proper resolution of that issue as set forth in this opinion, the trial court may conduct a new trial of Garren.

Our conclusion that the hearing on the motion to substitute counsel was fatally inadequate renders moot Garren's other claims.

Most significant is the issue of Garren's competency. Neither Garren's appointed counsel (before being discharged) nor Garren sought a competency hearing. Trial courts must ensure that a criminal defendant is competent to proceed *pro se* and may appoint standby counsel over a defendant's objection. *See, e.g.*, *Henderson v. Commonwealth*, 563 S.W.3d 651, 671 (Ky. 2018). Moreover, "[i]f there is substantial evidence that a defendant is

incompetent, and thus the constitutional right to a hearing attaches, the trial court must conduct a competency hearing. . . ." *Padgett*, 312 S.W.3d at 348. On remand, we note the obvious competency issue in this case and order that the trial court conduct any necessary competency proceedings.

The judgment of the Bell Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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