

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0421-MR

DATE 9-15-05 E. J. A. G. W. H. P. C.

GREGORY WILLIAMS

APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN McDONALD, JUDGE
2001-CR-2322 & 2001-CR-2405

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a conditional guilty plea that convicted Williams of first-degree rape, first-degree sodomy, kidnapping, first-degree burglary, first-degree robbery, theft by unlawful taking over \$300, second-degree burglary, two counts of receiving stolen property under \$300 and operating a motor vehicle without an operator's license. He was sentenced to a total of twenty-five years in prison.

The questions presented are whether the trial judge abused his discretion in denying the motion by Williams for a continuance and whether Williams was entitled to substitution of counsel.

According to the briefs and record before this Court, the female victim was attacked at knifepoint by an intruder who bound, gagged and raped her anally as well as vaginally. Police investigation led them to Williams and he was later arrested after it

was discovered he was driving a stolen van containing stolen property. Williams confessed to stealing the automobile and raping the female victim. DNA evidence also confirmed that Williams was the assailant.

Williams entered a conditional guilty plea to those offenses pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), reserving the right to contest two issues: 1) the denial of his suppression motion; and, 2) the denial of his motion for a continuance. This appeal followed. It should be observed that only the second issue has been presented for our review.

I. Continuance

Williams argues that the trial judge abused his discretion and erred to his substantial prejudice when he refused to continue the trial despite what he calls a complete breakdown in communication and a conflict of interest between him and his attorney. We disagree.

RCr 9.05 allows a trial to be postponed upon a showing of sufficient cause. The decision of whether to grant a continuance lies within the sound discretion of the trial judge. Snodgrass v. Commonwealth, 814 S.W.2d 579 (Ky. 1991). That decision will not be disturbed on appeal absent an abuse of discretion. Williams v. Commonwealth, 644 S.W.2d 335 (Ky. 1982).

Snodgrass, supra, identified the following seven factors that a trial judge should consider in exercising his discretion with regard to continuances: 1) length of delay; 2) previous continuances; 3) inconvenience to litigants, witnesses, counsel and the court; 4) whether the delay is purposeful or is caused by the accused; 5) availability of other competent counsel; 6) complexity of the case; and, 7) whether denying the continuance will lead to identifiable prejudice. We will address each of these factors in turn.

A. Length of Delay

Twenty-eight months had already passed between the date of the indictment and the day of the scheduled trial. Williams concedes that obtaining new counsel would probably involve a sizeable delay. He did not specify a particular attorney he wished to employ, but rather expressed his lack of trust with his public defender and the entire Jefferson County Office of the Public Defender. Appointing outside counsel would have caused significant delay.

B. Previous Continuances

The defendant's trial was originally scheduled for October 8, 2002. That date was continued when Williams filed a motion in August 2002 for an in-patient psychiatric evaluation. He was not admitted for that examination until the last day of October. The evaluation was completed and a report was sent to defense counsel in the first part of December. In August 2003, Williams was again sent to KCPC for a second in-patient competency evaluation. Trial was ultimately set for February 12, 2004. Although there was only one prior continuance of a set trial date in this case, it was for a substantial period of time and is attributable to the defendant.

C. Inconvenience

The offenses charged in the indictment occurred between June and September 2001. Well over two years passed between those times and the final trial date. Courts may not ignore the concerns of victims in the administration of criminal justice. Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 1618, 75 L.E.2d 610 (1983). Otherwise, victims might be dissuaded from reporting crimes, especially when it requires public testimony about a humiliating and degrading experience. Id. Witnesses, prospective jurors, the Commonwealth and the trial judge were ready to proceed when the

defendant sought the continuance. Clearly, the inconvenience to these parties was considerable.

D. Whether the Delay is Purposeful or Caused by the Accused

Williams concedes that the delay was attributable to him. He refused to see defense counsel and/or come to court three times in the last month. When he did decide to talk to his attorney about three weeks before trial, he purposely raised old issues that had been resolved. Williams claimed that he was not seeking the continuance to be deliberate, but that his mood was not good and he was not stable. However, the doctor from KCPC stated that Williams was not psychotic or depressed on the morning of the scheduled trial. In fact, his thinking was “very, very logical and very sophisticated from the abstract point of view.”

E. Availability of other Competent Counsel

Williams expressed distrust and displeasure with the entire Jefferson County Office of the Public Defender, not just the attorney assigned to him. As a result, the availability of other competent counsel was limited. Moreover, the trial judge explained to Williams that any new counsel would be randomly assigned and there were no assurances of his level of competence. The judge also made clear that his current counsel was not incompetent or inexperienced and had the resources to defend him.

F. Complexity of Case

The crimes here were serious, but this by no means was a complex case. Williams gave a taped confession to police in which he admitted the crimes involving the female victim. DNA evidence also connected him to the assault. Additionally, Williams was arrested after driving up to police in a stolen van containing stolen property. He confessed to these crimes as well.

G. Identifiable Prejudice

Williams complains that he was faced with the choice of pleading guilty or going to trial with an attorney he did not trust or communicate with in preparation of his defense. His so-called Hobson's choice is without merit. Williams has failed to identify any specific witnesses he could not call or any specific evidence he could not present absent a continuance. Nor has he identified any defense that he could not raise without a continuance. Williams has not shown any actual prejudice.

II. Substitution of Counsel

Williams was not entitled to substitution of counsel. A defendant who is represented by a public defender does not have a constitutional right to any particular attorney, and he is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel.

Henderson v. Commonwealth, 636 S.W.2d 648 (Ky. 1982). Snodgrass requires the defendant to show: 1) a complete breakdown of communications between counsel and himself; 2) a conflict of interest; or, 3) that his legitimate interests are being prejudiced.

Williams orally requested a continuance on the day of trial because of an alleged breakdown in communication between himself and his counsel. The trial judge held an *ex parte* hearing on the matter. Williams indicated at the hearing that he filed a bar complaint against trial counsel and sent a letter to his supervisor. Although he was given ample opportunities, Williams refused to inform the trial judge of the nature of any complaints except the claim that counsel should have asked for a second competency evaluation sooner. Trial counsel maintained that he could and would defend Williams despite the lack of communication. He did not formally request to withdraw, but informed the trial judge that Williams wanted outside counsel.

Here, Williams has failed to demonstrate a complete breakdown of communications between himself and his appointed counsel as contemplated by Snodgrass. Trial counsel indicated some communication problems, but stated that the defendant has been more communicative in the last three weeks. Moreover, the trial judge gave the defendant several chances to speak with his attorney on the day of the scheduled trial and the record demonstrates they communicated extensively.

Filing a bar complaint against a public defender does not automatically entitle a defendant to new counsel. Shegog v. Commonwealth, 142 S.W.3d 101 (Ky. 2004). If that was permitted, trial delays due to counsel substitutions would be endless. Shegog, supra. In this case, the mere filing of the bar complaint was insufficient to create a conflict of interest between Williams and his public defender. Again, the only complaint Williams expressed to the trial judge concerned the failure of trial counsel to more promptly file a motion for a second psychological evaluation. Having already been found competent, there was nothing to gain by filing a second motion sooner.

Williams has failed to demonstrate in any way that he was prejudiced by the performance of his appointed counsel. Considering the charges and the sentence ultimately imposed, it is clear that different counsel could not have performed any better or achieved a different result.

The judgment of conviction is affirmed.

All concur.

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