

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2003-KA-1346**
VERSUS * **COURT OF APPEAL**
EDWARD REAUX * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

*

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 419-039, SECTION "A"
Honorable Charles L. Elloie, Judge

JUDGE MAX N. TOBIAS, JR.

(COURT COMPOSED OF JUDGE JAMES F. MCKAY, III, JUDGE MAX N. TOBIAS, JR., AND JUDGE EDWIN A. LOMBARD)

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CONVICTIONS AND SENTENCES AFFIRMED.

The defendant, Edward Reaux (“Reaux”) appeals his convictions on the charges of distribution of cocaine and possession of cocaine with the intent to distribute. The matter was submitted on briefs without oral argument in this Court. For the following reasons, we affirm.

On 16 January 2001, the state filed a bill of information in which it charged Reaux with one count of distribution of cocaine and one count of possession of cocaine with the intent to distribute, both violations of La. R.S. 40:967(A). In the same bill of information, the state charged Samantha Reaux (“Samantha”) with one count of possession with the intent to distribute cocaine and Sonia Brown (“Brown”) with one count of simple possession of cocaine, a violation of La. R.S. 40:967(C). On 19 January 2001, only Brown appeared for arraignment. Counsel was appointed to represent her, and she entered a plea of guilty as charged.

Reaux and Samantha appeared for arraignment on 22 January 2001 and entered pleas of not guilty through an attorney who was appointed for purposes of the arraignment only. The matter was reset for determination of counsel. Samantha subsequently appeared with retained counsel while

Reaux appeared with the same counsel who had been appointed at arraignment. A motion hearing was held on 18 April 2001; the court denied the motion to suppress evidence. On 1 May 2001, another motion to determine counsel was held as to Reaux only. After the court was informed that Reaux did not have the funds to hire counsel, the court appointed Kevin Kelly of the Orleans Indigent Defender Program (“OIDP”) to represent him and set the matter for trial.

Trial was subsequently reset on multiple occasions for various reasons; at these settings Juana Marine of the OIDP appeared as Reaux’s counsel. On 27 November 2001, Reaux appeared with newly retained counsel, Frank Larre, who requested a continuance of the trial. The court denied the continuance, and Mr. Larre refused to sign the record. Another attorney from OIDP, Joe Meyer, then appeared, and trial commenced. The twelve-person jury rendered verdicts of guilty as charged on both counts.

On 14 February 2002, Reaux appeared for sentencing. His attorney, who was a different retained counsel from the one who had requested the continuance, filed a motion for new trial. The court denied the motion, and Reaux waived delays. The court initially sentenced him to ten years on each count, then vacated those sentences, and sentenced him on each count to the minimum term of five years at hard labor without the benefit of probation,

parole, or suspension of sentence, to run concurrently with any and all sentences. The state filed a multiple bill of information. After a multitude of settings, the state withdrew the multiple bill on 8 May 2003.

Although at sentencing an oral motion for an appeal was made, on 16 April 2003 counsel filed a notice of intent to seek supervisory writs from this court. That writ, number 2002-K-0747, was denied because the notice of intent was untimely. Thereafter, on 23 July 2003, a new attorney filed a written motion for an appeal, which was granted.

FACTS.

On 10 November 2000, police officers prepared to execute a search warrant for 1525 Carondelet Street. Detective Montalbano had obtained the warrant a few days earlier. To be sure that activity was still occurring, surveillance was set up. Detective Montalbano observed a black female, later identified as Brown, approach the residence. When she knocked on the door, Reaux came out, took money from her, and gave her a small object in return. Brown left the area, and Detective Montalbano instructed the take-down team to stop her out of the area. She was stopped and arrested for possession of cocaine. Other detectives then proceeded into the residence to execute the warrant.

Detective Kyle Hendrichs was one of the first officers into the residence. He testified that he advised Reaux of his rights and Reaux admitted that he had cocaine in his pocket. Reaux also directed the officers to a shoebox behind the sofa. That box contained a large quantity of small pieces of crack cocaine, a scale, and razor blades. Detective David Waite corroborated the testimony of Detective Hendrichs. Detective Montalbano testified that he entered the residence after the drugs had been seized. Reaux told him that all of the drugs were his and that his wife had nothing to do with them.

The detectives testified that documents seized from the residence included utility bills, all of which were in the name of Samantha Butler, the maiden name of Reaux's wife. An identification card in Reaux's name, as well as a few miscellaneous documents with Reaux's name on them but no address, was also seized.

The parties stipulated that the criminalist, if called to testify, would state that all of evidence he tested in connection with this case tested positive for cocaine.

Reaux testified on his own behalf at trial. He stated that he had moved out of the Carondelet Street residence in August at the request of his wife after she caught him talking on the phone to a woman. On the day of

his arrest, Reaux stated that he had come to the house to help his wife; the children were sick, and she needed diapers for them. As he arrived, he met a neighbor, Brown, on the sidewalk outside, and they spoke for a few minutes. Reaux then went inside. Shortly thereafter he heard the sound of loud noises coming up the steps. Five or six plainclothes police officers entered the house and stated that they had a warrant. Reaux was asked about a person named "Mike" who drove a yellow motorbike. Reaux said he did not know anyone like that. His wife then volunteered that Mike was a friend of Reaux's twenty-two year old son, Louie Edward, who had continued to reside at the apartment. Reaux denied telling the police about any drugs, and he stated that no drugs were found until after the police dog went through the apartment. Reaux also testified that one of the detectives told him to convince the sergeant that all the drugs belonged to him and then his wife would not be arrested.

Reaux admitted prior convictions for possession with the intent to distribute cocaine and possession of pentazocine.

In rebuttal, Officer Montalbano testified that the search warrant application recounted that a confidential informant had indicated that a person named Mike on a yellow motorbike made drug deliveries to 1525 Carondelet Street. The detective never saw Mike himself. Defense counsel

elicited that the warrant application reflected that the confidential informant made a controlled buy at the residence from Mike.

ERRORS PATENT.

A review of the record for errors patent reveals none.

DISCUSSION.

Reaux assigns four specific errors in his brief, but argues them together. First, he alleges that the trial court assigned attorneys from the same office to represent him and his codefendants, resulting in a conflict of interest. Furthermore, Reaux avers that the trial court failed to advise him of the dangers of joint representation. He then argues that the trial court on the morning of trial erroneously substituted an attorney from OIDP, who had not previously been involved in the case, after wrongfully denying the motion for a continuance filed by an attorney who Reaux had retained. (All of these issues were argued at a motion for new trial hearing held on 14 February 2002.)

Reaux is correct that his codefendant, Brown, was represented by the same attorney, Ms. Marine, who handled some of the proceedings in his case. Ms. Marine was appointed at Brown's arraignment on 19 January 2001 for only Brown was present on that date. Brown entered a guilty plea

and was given to a suspended sentence. She did not testify against Reaux at trial; the record is devoid of any indication that she entered into an agreement to testify against him. At the arraignment of Reaux and his remaining codefendant and wife, Samantha, the same attorney was appointed for arraignment purposes only. Thereafter, retained counsel represented Samantha.

At the motion for new trial hearing, counsel for Reaux argued that the appointment of the attorneys from the OIDP to represent Brown and his client violated his right to separate counsel under La. C.Cr.P. art. 517. That statute provides as follows:

A. Whenever two or more defendants have been jointly charged in a single indictment or have moved to consolidate their indictments for a joint trial, and are represented by the same retained or appointed counsel or by retained or appointed counsel who are associated in the practice of law, the court shall inquire with respect to such joint representation and shall advise each defendant on the record of his right to separate representation.

B. Unless it appears that there is good cause to believe that no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

In *State v. Miller*, 2000-0218 (La. App. 4 Cir. 7/25/01), 792 So.2d 104, a jury convicted two defendants represented by the same counsel of distribution of marijuana. One defendant appealed his conviction arguing that the trial court erred by failing to advise him and his codefendant of the

dangers of multiple representations, arguing a violation of La. C.Cr.P. art. 517. He further argued that the trial court's failure to advise him violated his Sixth Amendment right to counsel. This court disagreed and held that a trial court's failure to inquire into joint representation does not require automatic reversal of a conviction. The court held that a defendant must still prove an actual conflict by counsel. In reaching its decision, the court reviewed F.R.Cr.P. art. 44(c) and federal jurisprudence interpreting it; we recognized that the rule does not give a defendant any new constitutional right. Because the defendant had failed to prove an actual conflict by counsel, this court held that the trial court's failure to inquire into the joint representation constituted harmless error. Moreover, we found that the defendant had waived any objection to a violation of La. C.Cr.P. art. 517 by failing to object prior to trial or filing a motion for separate counsel.

In the instant case, the record is devoid of any indication that Reaux objected, until after trial, to being represented by the same OIDP attorney who represented his codefendant Brown. Brown did not testify at Reaux's trial. Furthermore, at the motion for new trial hearing, no showing was made that Reaux was otherwise prejudiced, i.e., that he had intended to call Brown as a witness on his own behalf but was unable to do so because of a conflict. Thus, Reaux's arguments regarding his first three assignments of error are

without merit.

In his fourth assignment of error, Reaux alleges that the trial court erred when it denied the request for a continuance made by his newly retained counsel, Mr. Larre, on the morning of trial. He argues that the error was compounded when the court required that Reaux proceed to trial with Mr. Meyer, an ODP attorney who had not been involved in the case previously, after Mr. Larre refused to sign the record.

The issue of a defendant attempting to substitute counsel on the day of trial was discussed in *State v. Marshall*, 2002-1453 (La. App. 4 Cir. 3/19/03), 843 So.2d 469, writ denied 2003-1087 (La. 10/17/03), 855 So.2d 760 and 2003-1101 (La. 10/17/03), 855 So.2d 760:

As a general proposition a person accused in a criminal trial has the right to counsel of his choice. *State v. Jones*, 97-2593 (La.3/4/98), 707 So.2d 975, 977, (quoting *State v. Harper*, 381 So.2d 468, 470-71 (La.1980)); La. Const. art. I, § 13. However, this right is not absolute, and it must be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system. *State v. Trepagnier*, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So.2d 181, 188, (quoting *State v. Leggett*, 363 So.2d 434, 436 (La.1978)). Thus, the Louisiana Supreme Court has repeatedly upheld the trial court's denial of motions made on the day of trial based upon the defendant's dissatisfaction with appointed counsel. See *State v. Seiss*, 428 So.2d 444, 447 (La.1983) and cases cited therein.

Although the defendants herein couch this assignment of error in terms of violation of sixth amendment rights, the thrust of their complaint is that the trial court abused its discretion by denying their motions for continuance.

As a general matter, the decision to grant or deny a

motion for continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb a trial court's determination absent a clear abuse of discretion. La.C.Cr.P. art. 712; *State v. Strickland*, 94-0025, p. 23 (La.11/1/96), 683 So.2d 218, 229. Whether a refusal is justified depends on the circumstances of the case. In general, a reviewing court will decline to reverse a conviction based on the denial of a motion for continuance absent a showing of specific prejudice. *State v. Simpson*, 403 So.2d 1214, 1216 (La.1981).

Marshall, pp. 6-7, 843 So.2d at 474-75.

The transcript of the hearing on the motion to continue the trial in this case reflects that Mr. Larre appeared and informed the court that he was hired to represent Reaux “on Friday” (which would have been 23 November 2001, the day after Thanksgiving). He notified the district attorney’s office on Monday, 26 November 2001, the day before trial was scheduled of the fact that he had been hired to represent Reaux. Mr. Larre informed the court that he had spoken with the OIDP attorney and that she was supposed to turn over her file to him “today,” i.e., 27 November 2001. He indicated that, as of that time, he had not yet seen a police report or anything. The court interrupted, stating:

She didn’t give you my message? She didn’t give you my message? She should have given you my message. Because that’s the oldest trick in the book. You know I know that play. That’s like to [sic] old Statute of Liberty play. That’s how old it is. Any when they come in here on the date of trial and they want to change lawyers, that’s fine. But I told Ms. Marine [O.I.D.P. attorney] to give you the message that we [are] going to trial anyway with Reaux and Reaux. That’s why I specifically asked them yesterday whether they’d be ready on

Reaux and Reaux. And we are going to trial on Reaux and Reaux. I told her that. I told her to give you the message. That happens too often Frank. They come in here on the day of trial and they want to change lawyers. And who says something where they start talking in terms of the amount of time it take[s] to move cases? Does anyone come to my defense? No. So I don't have any sympathy for it.

Mr. Larre then attempted to inform the court that a transcript was needed, but the court again interrupted, stating:

Should have been done a long time ago. This has been set. Several times. Several, several, several times. Several, several times. No don't come to me on the day of it and say this is going to happen. We [are] going to trial on this today, . . .
..

After this colloquy, Mr. Larre informed the court that he would not sign the record. The court indicated that this posed no problem because the court had already informed Ms. Marine that trial would proceed as scheduled. The court then directed the minute clerk to call "Ms. Marine or somebody from OIDP" and advise them "they'd better be ready to go." The motion to continue transcript then concludes.

The record on appeal supports the trial court's statements that the matter had been continued multiple times. Motions were heard on 18 April 2001; at that time Dwight Doskey represented Reaux. Trial was set for 29 May 2001. On 1 May 2001, however, a motion to determine counsel was held, and the court appointed Kevin Kelly of the OIDP. Trial was continued

on 29 May 2001 until 16 July 2001; Mr. Kelly was still counsel. Another continuance was granted on 16 July 2001. At the next trial setting, 30 July 2001, Ms. Marine appeared as counsel. The trial was reset for 10 September 2001. Trial was subsequently continued again until 9 October 2001 and then 23 October 2001, before proceeding on 27 November 2001. Thus, as the trial court stated, the case had been pending for some time and had been ready for trial since the motion hearing in April 2001.

We do not find that the trial court erred in refusing to continue the trial at the request of counsel who was retained four days before a trial, which had been scheduled multiple times for over six months.

The secondary issue raised by Reaux, and also argued at the motion for new trial hearing, was that the trial court erred by substituting Mr. Meyer of OI DP for Ms. Marine when Mr. Meyer had not previously had any participation in the case.

In *State v. Knight*, 611 So.2d 1381 (La. 1993), the defendant had been represented by the attorney from the indigent defender's office who handled most of the cases for that particular section of criminal court. On the day of trial, the attorney was on vacation; another attorney from the indigent defender's office was in court to cover the vacationing attorney's docket for that day. The trial court refused to grant a continuance even though the

second attorney knew nothing about the defendant's case. The trial court denied the motion of defense counsel for an instanter subpoena for one of the arresting officers. Defense counsel presented no defense but cross-examined the state's witnesses. The Supreme Court reversed the defendant's conviction because the trial court constructively denied counsel to the defendant. The court stated:

Although formal appointment of counsel does not satisfy the constitutional guarantee, a short period of time is sometimes sufficient for trial preparation. *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940). Prejudice to a defendant may be presumed when counsel fails to subject the state's case to a meaningful adversary test. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Three days, including a Saturday and Sunday, have been held inadequate for Louisiana trial preparation. *State v. Winston*, 327 So. 2d 380 (La. 1976). A general appointment of the Public Defender's Office does not justify designating an unprepared attorney from that office on the morning of trial. *State v. Simpson*, 403 So.2d 1214 (La. 1981).

Knight, 611 So.2d at 1383.

The court further stated that there was no significant difference between what happened to Knight and the complete absence of counsel, and that the complete absence of counsel was a structural trial defect not subject to a harmless error analysis.

In *State v. Addison*, 94-2745 (La. 6/23/95), 657 So.2d 974, the defendant had been represented by various attorneys from the public

defender's office; and, on the morning of trial, the attorney who had represented the defendant only at a bail reduction hearing appeared and moved for a continuance. The trial court denied the continuance and noted that different public defenders had been substituting in and out of the case. The court of appeal refused to consider the denial of the continuance on the grounds that the attorney failed to state specific grounds for the continuance. The Supreme Court granted certiorari to consider the issue of whether the trial judge vented her frustration with the public defender's office by forcing the defendant to trial despite the last minute substitution of an attorney who was not familiar with the case. In a *per curiam* decision, the court found that the record did not establish ineffective assistance and prejudice; but, the court further found that a showing by the defendant at a subsequent hearing that his new attorney was totally unprepared might entitle him to a new trial. The court concluded that it was appropriate to affirm the conviction conditionally and to remand for a hearing, in the nature of a hearing on a motion for new trial, to determine whether the defendant received effective assistance of counsel, and if not, to determine whether he suffered prejudice from such failure.

In the instant case, the transcript of the trial (which is separate from the motion to continue transcript although they occurred on the same day)

commences with voir dire. Defense counsel was Mr. Meyer of OIDP; the presence of Eric Hessler of OIDP is also reflected on the cover sheet. Nothing in the trial transcript indicates that Mr. Meyer informed the court that he was unprepared to proceed; no explanation is given of why he was appearing as defense counsel. He fully participated in the trial, cross-examined the witnesses (including eliciting details found in the search warrant application to support the defense's theory that someone else was selling drugs from the residence), and conducted a full direct examination of his client. Nothing in the trial transcript indicates that Mr. Meyer was not prepared to represent Reaux.

We further note that at the motion for new trial hearing, Reaux's retained counsel (who had been retained after trial) did not call any witnesses or present any evidence that would indicate a lack of adequate representation at trial. The trial court, in rejecting the assertion that a constructive denial of counsel had occurred, noted that Mr. Meyer was a supervisor who was familiar with all of the cases, and that was why he was able to handle the trial. The court further stated that Mr. Meyer had given Reaux "beautiful representation," and defense counsel indicated that he did not dispute that fact. Defense counsel argued, instead, that under *Knight* prejudice need not be shown; however, in *Knight* the indigent defender had

informed the court that he was not prepared to go to trial and had appeared only to file the motion to continue for the other appointed counsel.

Additionally, his request for an instanter subpoena had been denied, and he put on no defense. In contrast, in the case at bar, Mr. Meyer did not indicate that he was unprepared for trial, and he did present a defense for Reaux.

Reaux's arguments that the trial court committed reversible error by denying the motion for a continuance and the appointment of counsel have no merit.

CONCLUSION.

For the foregoing reasons, Reaux's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.