Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **11th day of December, 2020** are as follows:

PER CURIAM:

2019-K-02004 *STATE OF LOUISIANA VS. TYRONE D. JOHNSON (Parish of Richland)*

REVERSED. SEE PER CURIAM.

Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

Johnson, C.J., dissents and will assign reasons.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2019-K-02004

STATE OF LOUISIANA

versus

TYRONE D. JOHNSON

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF RICHLAND

PER CURIAM:[*]

Defendant pleaded guilty as charged to distribution of methamphetamine, La.R.S. 14:967(A)(1), and in exchange received a sentence of 23 years imprisonment at hard labor and the State's promise not to file a habitual offender bill of information and seek a sentence of life imprisonment. The court of appeal vacated the plea and sentence because it found defendant was denied his right to counsel of choice when the district court refused on Friday to continue the Monday trial date to allow defendant additional time in which to hire a new attorney. *State v. Johnson*, 52,965 (La. App. 2 Cir. 9/25/19), 280 So.3d 1245. Under the circumstances herein, and for the reasons that follow, we find the court of appeal erred. Accordingly, we reinstate the guilty plea and sentence.

On June 1, 2015, the police captured defendant on video selling 3.6 grams of methamphetamine to an informant. Defendant was charged with distribution of methamphetamine. He retained counsel and was released on bond. About a week before trial, defense counsel filed a motion to withdraw based on disagreements with his client. The district court held a hearing on the motion on the Friday before the

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Monday trial date.

In addition to a dispute over unpaid fees, defense counsel and defendant disagreed about discovery. Counsel was satisfied with discovery. Defendant, however, wished to know the identity and criminal history of the informant. The State was willing to provide this information but indicated that it would withdraw its plea offer and cease plea negotiations once it disclosed the informant's identity and background, as was its policy. Counsel had advised defendant to wait to obtain this information while plea negotiations were ongoing but defendant refused.

Defense counsel and the State had also agreed that, if defendant rejected the plea offer, the State would reveal the identity of the informant before a *Prieur* hearing scheduled to occur immediately before trial.[1] The State alleged that defendant had sold drugs to the informant many times over several years, and the State intended to introduce this "other crimes" evidence at trial, pursuant to La.C.E. art. 404(B).

At the hearing on counsel's motion to withdraw, the district court informed defendant that he could fire present counsel and represent himself or obtain new counsel over the weekend, but the trial would proceed on Monday. The district court denied counsel's motion to withdraw, and the court declined to appoint a public defender because defendant was not indigent. Nonetheless, defendant insisted that he wanted a "better" attorney. When pressed by the court, however, defendant ultimately agreed to keep current counsel.

Jury selection began on Monday. During jury selection, the parties informed the district court that they had reached an agreement. Defendant agreed to plead guilty unconditionally and receive a sentence not to exceed 23 years imprisonment at hard

[1] *See generally State v. Prieur*, 277 So.2d 126 (La. 1973); *see also State v. Taylor*, 2016-1124 (La. 12/1/16), 217 So.3d 283.

labor, and in exchange the State agreed not to file a habitual offender bill of information and seek a sentence of life imprisonment. After conducting a colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the district court accepted defendant's guilty plea. Defendant did not reserve his right to seek review of the district court's denial of counsel's motion to withdraw.

While awaiting sentencing, defendant obtained new counsel, who then filed a motion to withdraw the plea. Defendant alleged that he only pleaded guilty to gain time to hire new counsel, and he argued that the court forced him to plead guilty to avoid a trial in which his former counsel would represent him. The district court denied the motion before sentencing defendant to 23 years imprisonment at hard labor.

In an out-of-time appeal granted pursuant to *State v. Counterman*, 475 So.2d 336 (La. 1985), the court of appeal found that the district court erred in not affording defendant additional time to hire a new attorney and in not granting defendant's motion to withdraw his guilty plea. The court of appeal determined that the district court deprived defendant of his right to counsel of choice, which the court of appeal deemed to be a structural error that required reversal. Therefore, the court of appeal vacated defendant's conviction and sentence. *State v. Johnson*, 52,965 (La. App. 2 Cir. 7/25/19), 280 So.3d 1245.

"The general rule is that a guilty plea waives all nonjurisdictional defects in the proceedings prior to the plea and precludes review thereof either by appeal or by post-conviction remedy." *State v. McKinney*, 406 So.2d 160, 161 (La. 1981), citing *State v. Torres*, 282 So.2d 451 (La. 1973) and *State v. Foster*, 263 La. 956, 269 So.2d 827 (1972). However, a defendant may plead guilty while expressly reserving the right to seek appellate review of an error the defendant believes "made useless any continued trial of their defense." *State v. Crosby*, 338 So.2d 584, 586–587 (La. 1976). Defendant

here pleaded guilty unconditionally and did not expressly reserve his right to seek appellate review of the denial of counsel's motion to withdraw. We do not believe defendant's subsequent motion to withdraw his plea can transform his unconditional guilty plea into a guilty plea expressly conditioned on his right to seek appellate review of a claimed error. Accordingly, appellate review should have been confined to the question of whether the plea was voluntarily and intelligently entered, or should have been permitted to be withdrawn as involuntarily and unknowingly made (in addition to any jurisdictional defects that appear on the face of the pleadings and proceedings). *See State v. Spain*, 329 So.2d 178 (La. 1976); *State v. Knighten*, 320 So.2d 184 (La. 1975); *see also Tollet v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973) ("[An unconditional] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea . . . .").

In seeking to withdraw his plea, defendant claimed in essence that he was forced to plead guilty because he hoped that by doing so he would gain time in which to obtain new representation. An unconditional guilty plea is a solemn admission of guilt that should not be entered lightly, and certainly never made as a delaying tactic in the belief that it can simply be withdrawn later. We also note that defendant apparently took no steps while he was free on bond before trial to try to replace his attorney. Regardless, defendant has not shown that the circumstances attendant to the plea placed undue pressure on him which resulted in an involuntary plea. *See generally Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469, 25 L.d.2d 747 (1970)

("The voluntariness of [a] plea can be determined only by considering all of the relevant circumstances surrounding it."). Instead, the district court simply ruled that the trial would proceed as scheduled on Monday, and the court would not permit defendant, by a last minute change of counsel when no potential replacement had been identified, to force a postponement of his trial. The district court did not abuse its discretion in so ruling.

Citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), the court of appeal found there was a structural error here that resulted from the denial of defendant's Sixth Amendment right to his retained counsel of choice. In *Gonzalez-Lopez*, however, the Government conceded that the trial court erroneously deprived defendant of his first counsel of choice when it repeatedly refused to admit defendant's chosen, out-of-state counsel pro hac vice after said counsel was found in contempt of court for violating a procedural rule related to cross-examination. The State has made no such concession here. Nor does it appear that the district court deprived defendant of his right to counsel of choice when it did not afford defendant additional time to find a replacement for his original counsel of choice.

The United States Supreme Court in *Gonzalez-Lopez* recognized that the right to counsel of choice is not without limitations:

> Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them. As the dissent too discusses, *post*, at 2567, the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. *See Wheat*, 486 U.S., at 159, 108 S.Ct. 1692; *Caplin & Drysdale*, 491 U.S., at 624, 626, 109 S.Ct. 2646. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. *See Wheat*, 486 U.S., at 159–160, 108 S.Ct. 1692. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id.*, at 163–164, 108 S.Ct. 1692, and against the demands of its calendar, *Morris v. Slappy*, 461 U.S. 1, 11–12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). The court has,

> moreover, an "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat, supra*, at 160, 108 S.Ct. 1692. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.

Gonzalez-Lopez, 548 U.S. at 151–152, 126 S.Ct. at 2565–2566. Likewise, this court has found that the right to counsel provided in La. Const. Art. I § 13 has similar limitations:

> An [accused's] right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice, if he can manage to do so, but that right is not absolute and cannot be manipulated so as to obstruct orderly procedure in courts and cannot be used to thwart the administration of justice. *State v. Jones*, 376 So.2d 125 (La. 1979); *State v. Leggett*, [363 So.2d 434 (La. 1977)]; *State v. Mackie*, [352 So.2d 1297 (La. 1977)].

State v. Reeves, 06-2419, pp. 37–38 (La. 5/5/09), 11 So.3d 1031, 1057.

Thus, a "[d]efendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings." *State v. Seiss*, 428 So.2d 444, 447 (La. 1983). Absent a justifiable basis, "[t]here is no constitutional right to make a new choice of counsel on the very date the trial is to begin, with the attendant necessity of a continuance and its disrupting implications." *State v. Leggett*, 363 So.2d 434, 436 (La. 1977); *see also State v. Anthony*, 347 So.2d 483, 489 (La. 1977) ("The law is well settled that a defendant in a criminal trial cannot, by a last minute change of counsel, force a postponement of his trial."). Moreover, the question of withdrawal of counsel largely rests with the discretion of the trial court and its ruling will not be disturbed in the absence of a clear showing of abuse of discretion. *See State v. Cousin*, 307 So. 2d 326, 328 (La. 1975).

Here, the record does not show that the district court abused its discretion when it denied counsel's request to withdraw on the Friday before trial was set to begin on

Monday. The district court did not deprive defendant of his right to counsel of choice when it did not permit defendant to force a postponement of his trial by seeking a last minute change of counsel. Thus, the court of appeal erred in finding that the district court's ruling placed undue pressure on defendant which resulted in an involuntary plea. Accordingly, we reverse the ruling of the court of appeal. We reinstate the district court's ruling, which denied defendant's motion to withdraw his guilty plea. We reinstate defendant's guilty plea and sentence.

REVERSED