# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDELL JONES III,

Defendant-Appellant.

UNPUBLISHED
December 21, 2021

No. 352111
Calhoun Circuit Court
LC No. 2018-003095-FC

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

LETICA, J. (*dissenting*).

I respectfully dissent. In my view, the trial court did not abuse its discretion when it denied defendant's day-of-trial motion to adjourn so that he could retain counsel.

## I. FACTUAL BACKGROUND

On the day set for jury trial,[1] after defendant rejected the prosecution's plea offer, he told the trial court that he had "lost all confidence and faith [in court-appointed counsel] due to the fact there was significant lack of communication . . . the last several months."[2] Defendant explained that yesterday "there was new evidence," "new statements or video evidence brought up[.]"

[1] On November 6, 2018, defendant's trial was scheduled for March 5, 2019. On February 13, 2019, another notice was sent, scheduling defendant's trial between March 5 and 29, 2019. Defendant's case was listed sixth. On February 20, 2019, counsel filed defendant's witness list, exhibit list, notice of self-defense, and requested jury instructions. On February 27, 2019, defendant's trial was scheduled for a date certain—October 8, 2019. On September 19, 2019, a criminal jury trial notice showed defendant's trial was listed first and was the only one designated "DATE CERTAIN" for October 8th. On September 30, 2019, defendant's case was adjourned from October 8 to October 22, 2019.

[2] Counsel was appointed to represent defendant on July 16, 2018, and filed her appearance, including a discovery demand, two days later.

Therefore, he felt "underprepared" and opined that counsel's caseload was "probably, maybe, too high."[3] Defendant also complained that counsel had not called him that weekend as they had arranged. Instead, because "some things came up," counsel told defendant to meet with her on the Monday before trial. Although counsel met with defendant, that made him "think that maybe she had not – couldn't – not wanting to – but couldn't put enough time and [sic] preparing for my case or at least briefing me enough well in advance as far as yesterday to prepare for the case." Defendant added that he "felt like even though she is a great person and she's always . . . treated [him] well," "there could have been a lot more done up to this point to prepare."

In response, counsel noted that she had been working with defendant "for quite some time." Her "records show[ed] that [she] provided [defendant] with a copy of his complaint, his police report, [and] supplemental reports on July 20th, 2018." Counsel "pretty much met with [defendant] at every single hearing." Defendant had called her "throughout the case" and she "return[ed] [his] calls." She received the CD on February 25, 2019,[4] and defendant "may be accurate in the fact that [she] didn't let him know about that CD." However, they had reviewed it in her office. The CD contained "some pictures and also videos from the officers as well as [defendant's] interview." It was not a video of the actual incident, but of the investigative process. Moreover, there was a video that "was basically just audio, " containing defendant's statements made while defendant was being transported to jail. Defendant was "aware that he had made those prior statements."

Defendant had a witness list and an exhibit list. Counsel had "multiple conversations" with defendant about those lists. "Multiple times," she "asked him if there were any witnesses, any individuals, that could refute any of the statements made in the police reports." Counsel just "learned that [defendant] actually never read or reviewed the police reports." Even so, counsel and defendant had "further conversations late last week." Defendant's girlfriend was identified as a potential witness and counsel added her to defendant's witness list along with defendant's father.[5] Defendant had also provided some phone records, which counsel would seek to admit.

The trial court informed defendant that he was entitled to an attorney to represent him, but not necessarily entitled to an attorney of his choice.[6] The court understood that defendant felt as

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[3] Defense counsel worked in the Calhoun Public Defender's Office.

[4] This was two days before defendant's trial was adjourned to a date certain in October.

[5] Both defendant's girlfriend and his father testified on the second day of trial.

[6] Although defendants have the right to counsel of their choice if they retain one, indigent defendants only have the right to *effective* appointed counsel. *People v Aceval*, 282 Mich App 379, 386-387; 764 NW2d 285 (2009). As such, counsel appointed for an indigent defendant need not be of the defendant's choosing, and a defendant may not obtain counsel of his choice by requesting substitute counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). " 'Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with

though "a lot of last-minute things [were] happening here." The court assured defendant that counsel had "been working diligently on [his] case," explaining that there were court dates and status conferences where defendant appeared, but did not go on the record. The court added that counsel had discovery and the opportunity to digest it. Counsel affirmed that she was "ready and prepared to go [to] trial."

The trial court ruled that defendant should have raised the issue "before the day of trial." The court had not heard any information that counsel was unprepared to proceed.

Defendant then told the court that there were "key things," "evidence . . . that [he] wanted to implement[] that [counsel]" did not. Counsel added that there were "some matters with regard to strategy," where they disagreed. The court explained that there was still time for discussion.

Defendant then returned to the trial court's earlier comment, noting that he did not "attempt to get another [c]ourt[-]appointed lawyer, but . . . attempted to hire a private one. . . ." Defendant named the attorney he had attempted to hire and admitted that the attorney was not available on the date scheduled for trial; even so, the attorney had indicated that he would be willing to take over if the trial court permitted it.

Court-appointed counsel interjected that she was prepared, but had no objection to defendant retaining an attorney, explaining that there was no prejudice to him because he was out on bond. The trial court explained that it was concerned about prejudice to the People's case.[7] The court then recessed to check on the status of the jury.

Forty minutes later, the court returned, indicating that it had "had an opportunity to talk with the attorney[]s . . . and . . . the jury clerk . . ." It then ruled:

> [W]e are going to proceed with this trial tomorrow morning at 8:30. At that time we will have the number of jurors that we need and this case has been scheduled for quite some time. It is a 2018 case. Had you wished to retain your own attorney you had time to do that. But at this point it would cause prejudice to the People and

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regard to a fundamental trial tactic.' " *Id*., quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (citations omitted). "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (quotation marks and citation omitted).

[7] At trial, Battle Creek Police Officer Ryan O'Connell had to be called out of order the next day because he was scheduled to report for military duty at 6 a.m. the following morning. Officer O'Connell had stopped defendant's vehicle, obtained consent to search it for the gun, took a recorded statement from defendant in his police car that was admitted during trial, and searched for the shell casing after the incident.

> it would also inconvenience the schedule of the [c]ourt to give you a last-minute adjournment to retain an attorney.
>
> That being said, if [the retained attorney] is available and prepared to go tomorrow morning, you are certainly welcome to bring [the retained attorney] here to proceed with the case. But I have every confidence that [court-appointed counsel] is ready to go.
>
> Furthermore, you have the remainder of the afternoon to speak with [court-appointed counsel] about any concerns that you have and any information that you may need to see, before we proceed with trial.

Counsel added that she would get the phone records to the prosecutor to see if she would stipulate to their entry. And the trial court noted that they had discussed the "issues of the video . . . and . . . a way of handling that . . .," which counsel could discuss with defendant.

The following morning, the trial court directly addressed defendant and inquired if he was "ready" "with [his court-appointed] attorney." Defendant replied: "Yes, Your Honor."

## II. STANDARDS OF REVIEW

We review a trial court's decisions on whether to permit the substitution of counsel and a continuance for an abuse of discretion. *People v McFall*, 309 Mich App 377, 382; 873 NW2d 112 (2015); *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 7373 (1999). A trial court abuses its discretion when its decision "falls outside the range of principled outcomes." *McFall*, 309 Mich App at 382. "We review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

## III. ANALYSIS

The constitutional right to counsel includes the right of a defendant, who does not require appointed counsel, to choose his own retained counsel. US Const, Am VI; Const 1963, art 1, § 13; *United States v Gonzales-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *Aceval*, 282 Mich App at 386. The right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 US at 146. "A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Id*. at 150. Consequently, an erroneous deprivation of a defendant's right to retained counsel of his choice is a structural error requiring reversal. *Id*. at 148-149.

As noted by the majority, the right to retained counsel of choice, however, is not absolute. *Id*. at 144. A trial court retains "wide latitude in balancing the right of counsel of choice against the needs of fairness . . . and against the demands of its calendar . . . ." *Id*. at 152 (citations omitted). Stated otherwise, a court must weigh the defendant's right to retained counsel of choice against " 'the public's interest in the prompt and efficient administration of justice.' " *Aceval*, 282 Mich App 386-387, quoting *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

The trial court in this case did precisely that and informed defendant that if the attorney he wished to retain was available and prepared for trial, he was welcome. Defendant did not do so, but appeared with court-appointed counsel, indicating that he was ready for trial with her.

This Court should not ignore the fact that readying defendant's case for trial required the trial court to clear its schedule and to summon jurors, no small task. It further required the parties to prepare witnesses, exhibits, and proposed jury instructions, and defendant to prepare a notice of self-defense. All of this occurred before defendant's last-minute request to adjourn.

Again, October 22, 2019 was not defendant's first trial date or even his first trial date certain. Recognizing the principle that justice delayed is justice denied, our Supreme Court has adopted guidelines to ensure the timely administration of justice. See Administrative Order No. 2013-12, 495 Mich cxx (2013). In relevant part, AO 2013-12 states: "70% of all felony cases should be adjudicated within 91 days from the date of entry of the order binding the defendant over to the circuit court; 85% within 154 days; and 98% within 301 days." In this case, defendant was bound over on October 17, 2018, and his second trial date certain was October 22, 2019—370 days later. And review of the trial transcript demonstrates that several witnesses expressed a lack of memory due to the passage of time between the date the crimes were committed and the date of trial. Moreover, as already mentioned, one of the investigating police officers had to report for military duty the day after trial actually commenced. Given these circumstances, the trial court properly prioritized the public's interest in the administration of justice and did not erroneously deprive defendant of his Sixth Amendment right to counsel of choice by denying his last-minute request to be represented by retained counsel in a case that had been pending for more than a year.

Likewise, a trial should not be adjourned except for good cause shown. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); MCR 2.503(B). " 'When reviewing a trial court's decision to deny . . . a defendant's motion for a continuance to obtain another attorney, we consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision.' " *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003), quoting *Echavarria*, 233 Mich App at 369.

In this case, defendant was asserting a constitutional right—his right to counsel of choice.[8] Defendant's reason for asserting this right was his contention that court-appointed counsel was ill-

[8] Defendant is incorrect when he asserts in his brief that the trial court "treated the claim as if it were a request for the appointment of substitute counsel by emphasizing the fact that [defendant] did not have the right to an attorney of his choice as an indigent defendant." The trial court did initially assert that defendant was "not necessarily entitled to the attorney of [his] choice," but that was before the trial court was made aware that defendant was seeking to be represented by retained counsel, and was not seeking to have the trial court appoint substitute counsel. After the trial court was made aware that defendant was seeking to be represented by retained counsel, the trial court ruled that defendant could be represented by the retained counsel of his choosing, but it denied

prepared and had not shared "new evidence" with him, namely, the photographs and videotapes contained on the CD. But the court determined that court-appointed counsel was prepared. And, there was no new evidence. The photographs admitted at trial showed the victims' motorcycle as well as the gun located in defendant's car. Defendant was aware of the gun in his glovebox as he told Officer O'Connell about it. Defendant was also aware that the victims were on a motorcycle because he eventually admitted being present and armed at the scene where the events occurred and a shell casing matching the bullets in his gun was found. As for the videos, defendant was certainly aware of the statements he had made to police, including initially denying any involvement before he apologized for lying and suggested an accidental discharge scenario after a self-defense struggle over his gun. Thus, defendant's allegations that he was uncomfortable and lacked confidence in court-appointed counsel because she did not show him the videos until the day before trial were specious. See *People v Mitchell*, 454 Mich 145 n 30; 560 NW2d 600 (1997) (Although "[g]rievances against attorneys . . . may be legitmate[,] "[t]hey are also prompted by a desire for . . . a new attorney, or an adjournment, and are routine incidents in Recorder's Court."). Cf. *Traylor*, 245 Mich App at 461-464 (The defendant's allegations that he lacked confidence in and was uncomfortable with his court-appointed attorney due to a grievance he had filed did not constitute good cause to appoint substitute counsel absent a specific claim suggesting a legitimate difference of opinion over a fundamental trial tactic). In the end, defendant presented no specific facts demonstrating that his relationship with court-appointed counsel led to an irreconcilable conflict or that their communication had irretrievably broken down. At best, they had some unspecified disagreement regarding evidentiary or strategic matters that they were able to further address.[9]

The majority also minimizes defendant's last-minute request, attributing it to a recent discovery of counsel's alleged failings. But this ignores defendant's own description of the "lack of communication . . . [spanning] the last several months," which counsel refuted.

Again, defendant was charged in July 2018, and his third trial date was October 22, 2019. Over the course of a year, the trial court "had status conferences where [defendant] appear[ed] but . . . [didn't] go on the record . . . ."[10] Regardless, defendant, who was free on bond throughout the proceedings, admitted that he only voiced concern with court-appointed counsel the day before the scheduled trial date. And, in my view, the trial court appropriately determined that "[h]ad [defendant] wished to retain [his] own attorney [he] had time to do that."

I also disagree with the majority's determination that "the trial court failed to consider, let alone balance, defendant's right to counsel of choice . . . ." The record shows that the trial court

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defendant's request for an adjournment of the trial. The trial court provided two reasons for denying defendant's request for an adjournment: (1) it would prejudice the People and (2) it would inconvenience the trial court's schedule. The trial court noted that this was a 2018 case and that defendant had had time to retain an attorney if he so wished.

[9] Apparently somewhat successfully as defendant was acquitted of the highest charge he faced.

[10] Those conferences were noticed and scheduled for December 18, 2018, and January 29, February 12, and February 26, 2019.

was exceedingly patient and allowed defendant to fully explain why his perceived issues with court-appointed counsel led him to attempt to retain counsel. The record further reflects that the trial court was aware that defendant's purported dissatisfaction occurred as the result of events occurring within days of trial, even as defendant claimed a lack of communication spanning months.

Moreover, this case is not *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972). There, the attorney the defendant sought to retain had actually come to the courtroom at one point, the defendant's mother had informed current counsel, who had filed a motion to withdraw, that the defendant no longer wanted him to represent the defendant, and current counsel had failed to contact and ensure the presence of the defendant's alibi witnesses. *Id*. at 568-570. The trial court denied the request for adjournment because the defendant, who was incarcerated, had sufficient time "to retain someone else" and opined that "this is a delaying tactic and nothing more." *Id*. at 569-570. The Supreme Court reversed because "the trial court abused its discretion in denying [the defense] counsel's motion to withdraw and in preventing [the] defendant from changing attorneys and granting a continuance in this case" because

> 1) [the] defendant was asserting a constitutional right—the right to counsel; 2) he had a legitimate reason for asserting this right—an irreconci[l]able [b]ona fide dispute with his attorney over whether to call his alibi witnesses; 3) he was not guilty of negligence [given that the dispute arose the day before trial]; and 4) the trial court was incorrect in stating that defendant had caused the trial to be adjourned several times . . . . [*Id*. at 576, 578.]

In this case, although defendant asserted the same right to counsel, there was no "irreconcilable bona fide dispute" regarding the defense to be employed. And, in contrast to *Williams*, counsel added the witnesses that defendant had just named to a witness list and called them at trial. Moreover, while it does not appear that defendant acted merely in order to delay trial, it is clear that court-appointed counsel was prepared and ready for trial.

Accordingly, defendant failed to demonstrate good cause and lack of negligence concerning court-appointed counsel's lack of communication. Given the record below, I cannot agree that the trial court abused its discretion when it denied defendant's day-of-trial oral motion to adjourn his third trial date.[11]

/s/ Anica Letica

[11] In light of the majority's resolution, I also decline to further address defendant's remaining claims.