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NO. COA05-1535

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v.

Wake County
No. 03 CRS 50204

ELMER CONNELL TAYLOR

Appeal by defendant from judgment entered 5 November 2004 by Judge Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 24 July 2006.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Brian Michael Aus for defendant-appellant.

MARTIN, Chief Judge.

Elmer Connell Taylor ("defendant") appeals a judgment entered after a jury verdict convicting him of second degree sexual offense. We hold that defendant received a fair trial, free from prejudicial error.

Defendant was charged with second degree rape, second degree sexual offense, and first degree burglary. About a month prior to trial, defendant filed a written motion with the superior court entitled "Motion for the Replacement of Appointed Counsel," in which defendant alleged that he had "lost all confidence in the

ability of his appointed counsel[.]” Defendant further alleged that “irreversible and irreconcilliable [sic] differences as well as conflicting interests have contaminated the attorney/client relationship and the sanctity of the defendant[’s] defense, making it impossible and unreliable for that attorney to represent this defendant in the professional, ethical, and supportive manner to which this defendant is entitled.”

Defendant appeared for trial on 2 November 2005. Defendant informed the trial court that he wanted to replace his court appointed attorney, Samuel Bridges. Defendant indicated that his prior motion to replace counsel had been denied, but after “a little research” he had prepared a new written “Motion for the Replacement of Appointed Counsel.” The trial court told defendant, “Mr. Bridges is very competent. He’s a good lawyer. He’s been before me plenty of times.” The trial court then invited defendant to present his motion.

Defendant informed the trial court that he had “lost all confidence in the ability of his appointed counsel” and that “irreversible and irreconcilable differences, as well as conflicting interests have contaminated the attorney/client relationship[.]” Defendant handed the trial court his written motion, in which defendant listed issues regarding DNA analysis performed on the victim and defendant. Upon reviewing defendant’s written motion, the trial court told defendant “most of your concerns can be addressed by your attorney during cross examination of the CCBI or the SBI.” The trial court told defendant that “Mr.

Bridges is a fine attorney, is very competent" and denied defendant's motion for substitute counsel.

At the beginning of the second and third day of trial, defendant again requested that his appointed attorney be replaced. Defendant complained that his attorney did not make an opening statement; that his attorney had written his closing argument without hearing all the evidence; and that his attorney had refused to ask questions suggested by defendant. Defendant asked that his concerns "go on the record" and the trial court assured defendant that the record would reflect defendant's concerns.

The State's evidence tended to show that on the night of 12 June 2003, the victim was asleep in her bedroom when she felt a man's hands around her throat. The man told the victim to take off her pants and panties, which she did. The man inserted his penis into the victim's vagina and rectum. The victim collapsed on the floor and told the man to leave. After the victim heard the man leave through the front door, she put on her pants, called 911 and went to the front door. The victim observed the man walking toward the railroad tracks.

When police officers arrived at her home minutes later, the victim informed the officers that she had been raped by a man she described as a medium built African-American male with a stubbly beard, wearing a short-sleeved button-up shirt over a T-shirt. The victim indicated that she last saw the man walking in the direction of the Boylan Street Bridge. Officer J.C. Banks went to the train track bridge on Boylan Street and observed defendant, who matched

the victim's description, walking away from the area of the victim's residence. Officer Banks stopped defendant, who had the victim's purse stuffed inside the sleeping bag he was carrying. The victim had not realized her purse was missing until the police informed her they had found her purse in defendant's possession. Lab analysis determined that the DNA of the semen found in the victim's rectum matched defendant's DNA.

A jury found defendant guilty of second degree sexual offense, but could not reach a verdict on the charges of first degree burglary and second degree rape, and the trial court declared a mistrial as to those charges. The trial court sentenced defendant to 151 months to 191 months imprisonment. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred by failing to appoint substitute counsel when his court-appointed counsel provided ineffective assistance. Defendant argues substitute counsel was required because the "attorney/client relationship had completely broken down." We disagree with defendant's contention.

The Sixth Amendment guarantees that an accused shall have the right to have effective assistance of counsel for his defense. *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981), cert. denied, 464 U.S. 1065, 79 L. Ed. 2d 207 (1984). This constitutional right, however, does not include the right to "insist that competent counsel . . . be removed and replaced with [other counsel merely] because the defendant has become dissatisfied with his services." *State v. Robinson*, 290 N.C. 56,

66, 224 S.E.2d 174, 179 (1976). As our Supreme Court stated in *State v. Gary*, 348 N.C. 510, 501 S.E.2d 57 (1998),

[a] disagreement between the defendant and his court-appointed counsel over trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. In order to be granted substitute counsel, the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict.

Id. at 516, 501 S.E.2d at 62 (citations and quotations omitted). When it "appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent that defendant, denial of defendant's request to appoint substitute counsel is entirely proper." *State v. Thacker*, 301 N.C. 348, 352, 271 S.E.2d 252, 255 (1980). The standard of review of denial of a defendant's request to substitute counsel is abuse of discretion. *State v. Sweezy*, 291 N.C. 366, 371-72, 230 S.E.2d 524, 529 (1976).

Here, the decisions regarding opening and closing arguments, questioning of witnesses, and how to challenge DNA evidence, were trial tactics properly decided by defendant's counsel. The fact that defendant did not agree with his counsel's decisions does not provide a basis for replacement of counsel. Although defendant contends that distrust and hostility existed between him and his attorney which ultimately led to a breakdown of communications, defendant failed to show that the nature of the conflict between defendant and counsel rendered counsel incompetent or ineffective

to represent him. Indeed, the effectiveness of counsel was such that the jury could not reach a verdict on the rape and burglary charges in the face of strong evidence, requiring the court to declare a mistrial as to those charges. Defendant has not shown good cause that his request should have been granted, and we conclude that the trial court did not abuse its discretion in refusing to substitute defendant's appointed counsel.

No error.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).