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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1267

Filed: 20 November 2018

Mecklenburg County, Nos. 16CRS201405-06, 16CRS201408-09

STATE OF NORTH CAROLINA

v.

VALENTINO CABRAL DAROSA, Defendant.

Appeal by Defendant from judgment entered 20 April 2017 by Judge Eric Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Josephine N. Teeth, for the State.*

*Lisa Miles for defendant-appellant.*

BERGER, Judge.

Valentino Darosa (“Defendant”) was convicted of possession of a firearm by a convicted felon, carrying a concealed weapon, making a false report to law enforcement, and resisting a public officer. Judgment was arrested on the false report to law enforcement conviction, and Defendant was sentenced to an active term of seventeen to thirty months in prison. Defendant timely appealed, alleging the trial

court erred in denying his pre-trial Motion to Continue and Substitute Counsel. We disagree.

Factual and Procedural Background

On January 10, 2016, police responded to Novant Hospital in Huntersville, North Carolina to investigate into a report of a patient at the hospital with a gunshot wound. The patient, later identified to be Defendant initially told police he had been shot in the leg by an unknown suspect while getting gas. As the investigation progressed, police determined the information provided by Defendant was not accurate.

On January 12, 2016, Defendant informed a detective assigned to the case that he had not been truthful. Defendant admitted to the detective that he had shot himself. On January 12, 2016, Defendant was charged with possession of a firearm by a convicted felon, carrying a concealed weapon, making a false report to law enforcement officer or agency, and resisting a public officer.

On February 3, 2016, attorney J. Bradley Smith (“Smith”) entered a limited appearance for Defendant in Mecklenburg County District Court. Defendant waived his probable cause hearing on March 9, 2016, and the record reflects that Smith represented him in filing that waiver.

The Mecklenburg County Grand Jury indicted Defendant for the same charges listed above. Smith subsequently filed a Motion for Extension of Time to File Pretrial

Motions on January 11, 2017. That same day, Smith signed a pretrial scheduling order setting Defendant's cases for trial on April 17, 2017.

On April 17, 2017, Attorney Laura M. Cobb ("Cobb") appeared in Mecklenburg County Superior Court with Defendant. Cobb and Smith were both practicing in the same firm, Arnold & Smith, PLLC, and she had previously informed the State there might be a "potential issue with representation." Cobb filed several motions that day and informed the trial court that she had been hired by the Defendant. Cobb advised the trial court that, about four months earlier, she had taken on a new role with her firm and Defendant's case was the "last straggler case. She also told the trial court that "kind of slipped my mind that . . . this case was kind of still out there and pending." Cobb further informed the trial court that she had a pending motion in another case that needed her attention.

Ms. Cobb explained to the trial court

Your Honor, this would be a motion for continuance to substitute counsel. *[Defendant] hired me*, I guess, back when he was in district [court]. I made a limited appearance. And then when he was indicted we did -- I did make a general appearance. Typically, Mr. Smith handles most of the felony matters or makes a general appearance. But [Defendant] and I have had a fairly longstanding relationship so this was one of the few cases where I made a general appearance in this matter in Superior Court. (Emphasis added).

Back in December, though, I took on a new role with the firm, where I've been essentially doing appellate work and civil litigation and essentially have been no longer

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doing criminal matters. And this was, kind of, one of my last -- really, the last straggler case. And until Ms. Northrup informed me, I guess, that it was on the trial calendar, it had kind of slipped my mind that [Defendant] -- that this case was kind of still out there and pending.

I spoke with [Defendant], I guess, starting when it was on the trial calendar. You know, kind of informing him of my new role within the firm. And we discussed how things were pending with my civil practice and discussed potentially Mr. Smith taking over his case since Mr. Smith is essentially the managing partner, obviously, handling primarily criminal defense matters. And I informed Ms. Northrup of my new role within the firm as well as some matters that essentially -- some other issues that have come up within my new practice that are conflicting with this trial, with this trial date which I can go into further if Your Honor needs.

...

So, Your Honor, in taking over this position, the position that I took on is essentially replacing -- it wasn't essentially just ramping up a new side of the practice. The associate who I replaced left to go to Horack Talley. So I essentially took on, basically, a full civil practice. And there is one case which is an extremely large federal civil case where, as of October of 2016, there was a federal scheduling order where there was a deadline for summary judgment motions that was last week, Your Honor. And then there's, obviously, a two-week deadline for responses to summary judgment motions, you know, should summary judgment motions have been filed. The defendants filed for summary judgment motion on Tuesday -- or filed for summary judgment on Tuesday. Wednesday I received it. I did inform Ms. Northrup that essentially I have two weeks to respond to summary judgment. The summary judgment motion, Your Honor -- it's about a 25-page motion with 93 exhibits with probably about 3,000 pages of documents to go through, plus case law in order to respond to that. And essentially I'm one week down and one week to go. It's due on the 24th, so.

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THE COURT: Uh-huh.

MS. COBB: And that deadline has essentially been set since October. So I did inform Ms. Northrup of that. And that essentially, you know, kind of was the initial basis for the motion to continue. And then in speaking with [Defendant], you know, he was obviously expressing concern so that's when we discussed Mr. Smith taking over.

The trial court then inquired:

THE COURT: All right. Thank you. And so you've been – you've made an appearance since day one on the case and you've shared the discovery with the gentleman?

MS. COBB: With [Defendant]?

THE COURT: Uh-huh.

MS. COBB: Yes, Your Honor.

THE COURT: You discussed with him what the law is of possession of a firearm by a felon, whether or not there were viable defenses to it, your thoughts on the strengths or weaknesses of the case?

MS. COBB: I have, Your Honor.

THE COURT: You shared with him the plea offers that have been extended by the government –

MS. COBB: I have, Your Honor.

THE COURT: -- with him during the administrative court procedures and certified that you all are ready to go for trial?

MS. COBB: Mr. Smith actually appeared at the pretrial readiness conference.

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The trial court Defendant's motion on the grounds that Cobb had done "the basic things that we expect of counsel." Additionally, the trial court stated that Defendant's trial had priority over a motion Cobb had later in the week in Mitchell County. Moreover, the trial court noted that the motion was made at the "last moment" and there was "no denial of [Defendant's] right to counsel under these circumstances."

Defendant had other opportunities to address the court directly during the trial and outside the hearing of the jury. Defendant did not express any misgivings about Cobb's representation. On appeal, Defendant contends his Sixth Amendment right to counsel was violated when the trial court denied the motion to continue and substitute counsel.

Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). Where a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005).

Analysis

Defendant argues that the trial court erred in denying the Defendant's right to counsel of his choice pursuant to his motion to continue and substitute counsel on the grounds that Smith had been retained by Defendant and had previously entered an unlimited appearance in superior court. Further, Defendant asserts that his retained counsel was compelled to represent him throughout the proceedings and, therefore, the trial court erroneously denied him counsel of his choice.

“An attorney enters a criminal proceeding when [she]: . . . (2) Appears in a criminal proceeding without limiting the extent of his representation[.]” N.C. Gen. Stat. § 15A-141 (2017). Once an attorney enters a criminal proceeding for a defendant without limitation, that attorney “undertakes to represent the defendant for whom the entry is made at all subsequent stages of the case until entry of final judgment.” N.C. Gen. Stat. § 15A-143 (2017).

Here, on April 17, 2017, Cobb filed a Motion for Complete Recordation, Motion to Sequester Witnesses, Motion to Continue and Substitute Counsel, and Stipulation – Prior Conviction. Each of these documents listed Cobb as counsel for Defendant. In addition, Cobb appeared in Mecklenburg County Superior Court that same day with Defendant. The record does not reflect that Cobb filed a notice of limited appearance in Superior Court. Thus, Cobb was Defendant's attorney of record for the cases on the April 17, 2017 trial calendar.

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Also, it appears from the record that Defendant hired the law firm of Arnold & Smith, PLLC to represent him, not any particular attorney. Three of the four documents filed on April 17, 2017 were filed on behalf of Arnold & Smith, PLLC by Cobb. Even though documents filed with the Court early in the case reflect Smith's signature, the transcript reflects that Cobb represented Defendant "since day one." Whatever the arrangement within the law firm, Cobb was Defendant's attorney of record, and her statements to the trial court confirm that she was acting as Defendant's attorney prior to filing documents with the trial court on April 17, 2017.

The Sixth Amendment to the United States Constitution and Sections 19 and 23 of the North Carolina Constitution guarantee a defendant's right to counsel in a criminal prosecution. *State v. Shores*, 102 N.C. App. 473, 474, 402 S.E.2d 162, 163 (1991). This right includes the right to retain an attorney of the defendant's choice. *State v. Yelton*, 87 N.C. App. 554, 559, 361 S.E.2d 753, 757 (1987). "However, this right is not absolute." *State v. Taylor*, 155 N.C. App. 251, 254, 574 S.E.2d 58, 62 (2002). "The right of the accused to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in the courts and deprive the courts of their inherent power to control the same." *State v. Montgomery*, 33 N.C. App. 693, 696-97, 236 S.E.2d 390, 392 (1977).

Here, Defendant had more than three months to prepare with his attorney, and that same attorney had been actively involved in the case "since day one." The



trial date had been set and both parties had ample time to prepare their respective cases. Moreover, Cobb admitted that she was prepared to go forward, that she had gone over the strengths and weaknesses of the case with Defendant, and that she had shared discovery with him.

We note that Cobb asserted in her motion that “Defendant has now undertaken to hire” Smith. Her motion does not state that Smith was Defendant’s attorney or that Smith had been his attorney. Moreover, Cobb does not allege in any filed document that she was appearing in a limited capacity. Even though Defendant may have consented to Smith representing him, if Cobb was allowed to withdraw, the documents filed by Cobb do not reflect that Smith had been hired by Defendant.

The record reflects that Defendant “exercised his right to select counsel of his choice [ ] before the case was called for trial,” *State v. McFadden*, 292 N.C. 609, 615, 234 S.E.2d 742, 746 (1977), and Cobb was that attorney. Defendant has failed to show the denial of the motion to substitute counsel violated his Sixth Amendment rights.

#### Conclusion

Defendant had more than adequate time to prepare with his attorney. Cobb was the attorney of record in Defendant’s case, and she acknowledged the same in open court and in court filings. Cobb had been actively involved in the case and had counseled him on important aspects of the case. By her own admission at the motion’s

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hearing, she was prepared to go forward. Defendant's constitutional rights were not violated, and he received a fair trial, free from error.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).