IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1157

Filed: 17 September 2019

Mecklenburg County, Nos. 17 CRS 204615, 024833

STATE OF NORTH CAROLINA

v.

STEVIE GOODWIN, JR., Defendant.

Appeal by Defendant from judgment entered 4 May 2018 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for defendant-appellant.

MURPHY, Judge.

Where an indigent defendant requests a change of counsel from a court-appointed attorney to a private attorney during a pre-trial hearing, a trial court commits structural error when it makes its decision based solely on the effective assistance of the appointed attorney. Here, the trial court committed a structural error when it denied Defendant's request for new counsel using the standard for hearing an ineffective assistance of counsel argument rather than the standard for a counsel of choice argument. We reverse the trial court's denial of the right to hire new counsel and remand for a new trial.

BACKGROUND

On 5 February 2017 at approximately 1:00 A.M., Officer Taylor Lee Hager ("Officer Hager") and his partner stopped a vehicle when they observed it had an expired registration tag. The vehicle contained Defendant in the front passenger seat, the driver, and another passenger in the back seat. An officer recognized the back-seat passenger as an individual with several outstanding felony warrants and subsequently arrested him.

After the arrest, Officer Hager noticed an open beer bottle in the vehicle and asked Defendant to step out. When Defendant exited the vehicle, Officer Hager "smell[ed] an odor of marijuana coming from his person." Officer Hager performed a pat down on Defendant to ensure he was not armed. During this pat down, Officer Hager felt a small metal container used as a keychain in Defendant's pocket. Relying on his prior experience in law enforcement, Officer Hager suspected that the keychain hid controlled substances. Officer Hager opened the container and found inside what was later identified as Oxycodone and methamphetamine. Cocaine was also found in the glove compartment of the vehicle.

Defendant was charged with possession of cocaine and possession of methamphetamine. For the entirety of his trial, Denzil Forrester ("Forrester") was Defendant's court-appointed counsel. Forrester filed a motion to suppress evidence of the drugs found on Defendant during Officer Hager's pat down. However,

Forrester omitted the required affidavit for the motion to be treated as a motion to suppress, thus making it a motion *in limine*, which the trial court denied.

After his motion *in limine* was denied—and immediately prior to jury selection—Defendant requested new counsel, explaining to the trial court that he believed Forrester was not competent to represent him because they could not agree on which witnesses to call and could not properly communicate. Defendant also said he wanted to hire a private attorney and could acquire the money to pay for one. In response, Forrester moved to withdraw from his representation of Defendant. The trial court denied Defendant's request as well as Forrester's, stating, "The Court deems there not to be an absolute impasse in regards to this case so far."

Forrester continued as Defendant's counsel, and, at the trial's conclusion, the jury found Defendant guilty of possession of methamphetamine and not guilty of possession of cocaine. Defendant was sentenced to an active sentence of 37-57 months imprisonment. He timely appeals.

ANALYSIS

Defendant presents two arguments on appeal: (1) that the trial court committed plain error when it admitted evidence obtained during the search subsequent to the pat down and (2) that the trial court committed a structural error when it denied his request for new, chosen counsel. We first address the choice of

counsel issue, and conclude the trial court committed structural error by applying the incorrect standard in resolving Defendant's request to hire private counsel.

Defendant contends that the trial court committed a structural error when it used the ineffective assistance of counsel standard established in *State v. Ali*, 329 N.C. 394, 402, 407 S.E.2d 183, 188 (1991), to deny his request for chosen counsel. Defendant asserts the standard from *State v. McFadden*, 292 N.C. 609, 613-14, 234 S.E.2d 742, 746 (1977), was instead appropriate. The State argues Defendant tried to replace Forrester on ineffective-assistance-of-counsel grounds and, therefore, the trial court used the correct standard. After a thorough review, we agree with Defendant.

A structural error is one that "should not be deemed harmless beyond a reasonable doubt" because "it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420, 431-32 (2017) (citing *Arizona v. Fulminate*, 499 U.S. 279, 309-10, 113 L. Ed. 2d 302, 331 (1991)) (alteration in original). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* "Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to

'automatic reversal' regardless of the error's actual 'effect on the outcome.'" *Id.* at 1910, 198 L. Ed. 2d. at 434.

The Supreme Court of the United States has repeatedly held that "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 165 L. Ed. 2d 409, 420 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 124 L. Ed. 2d 182, 191 (1993)). Therefore, if we determine that the trial court erred in any manner that deprived Defendant of his right to choice of counsel, we must order a new trial.

The most frequently cited of our Supreme Court's cases regarding a defendant's constitutional right to chosen counsel is *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). In *McFadden*, the defendant argued the trial court infringed on his right to be represented by the counsel of his choice when it denied a continuance for his case and thereby forced an attorney unfamiliar with the case to become his primary counsel on short notice. *Id.* at 612, 234 S.E.2d at 744-45. Holding this to be a violation of the defendant's constitutional rights, our Supreme Court reasoned:

> [T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant or in a disruption

> of the orderly processes of justice unreasonable under the circumstances of the particular case.

Id. at 613-14, 234 S.E.2d at 746 (quoting *People v. Crovedi*, 417 P.2d 868, 874, 65 Cal. 2d 199, 208, 53 Cal. Rptr. 284, 290 (1966)) (alteration in original).

Under our reading of *McFadden*, when a trial court is faced with a Defendant's request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice. The most common example of a situation where a defendant's request is properly denied is where he seeks to weaponize his right to chosen counsel "for the purpose of obstructing and delaying his trial." *Id.* at 616, 234 S.E.2d at 747; *see also State v. Chavis*, 141 N.C. App. 553, 562, 540 S.E.2d 404, 411 (2000). In *Chavis*, for example, the trial court denied an indigent defendant's request for a private attorney, which he made on the morning of his trial. *Id.* We upheld the trial court's ruling, citing the timing of the request as the primary reason for our decision. *Id.*

A somewhat related standard is that described in *State v. Ali*, where our Supreme Court held that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to . . . tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali,* 329 N.C. at 404, 407 S.E.2d at 189. Because the defendant in *Ali* had not reached an absolute impasse with his attorney regarding the direction of his

trial, our Supreme Court held that he was "not denied effective assistance of counsel." *Id.* at 404, 407 S.E.2d at 189-90. That decision remains binding, but is inapplicable where, as here, the defendant is seeking the counsel of his choice rather than arguing that he has received ineffective assistance. *See Gonzalez-Lopez*, 548 U.S. at 146-48, 165 L. Ed. 2d at 418-19 (explaining the difference between the right to be assisted by the counsel of one's choice and the right to receive effective assistance of counsel).

Reviewing the transcript from Defendant's trial, the trial court mistakenly relied upon the absolute impasse standard in ruling on his request for new counsel, stating, "The Court deems there not to be an absolute impasse in regards to this case so far." Again, this standard was incorrect because Defendant's request was an assertion of his right to be represented by the counsel of his choice; not an argument regarding the effectiveness of Forrester's representation. Defendant wanted to hire a new, private attorney to replace Forrester and asked the trial court for permission to do so. Although Defendant expressed doubts about Forrester's competency to the trial court, that alone is insufficient to transform his request into an argument regarding effective assistance of counsel, as the trial court concluded; instead, it supports Defendant's assertion that he was entitled to hire counsel of his choice, which was not Forrester.

It is within the trial court's discretion to decide whether allowing a defendant's request for continuance to hire the counsel of his choice would result in "significant

prejudice . . . or in a disruption of the orderly processes of justice [that is] unreasonable under the circumstances of the particular case." *McFadden*, 292 N.C. at 613-14, 234 S.E.2d at 746. The trial court did not make such a determination in this case. It made no findings of fact indicating that the timing or content of Defendant's request may have been improper or insufficient. Instead, by misapprehending the law and employing the incorrect standard in resolving Defendant's request, the trial court failed to properly exercise discretion. Affirming the trial court's denial of Defendant's request would implicitly endorse the use of an incorrect standard for the right to counsel of choice and a structural error that violated Defendant's Sixth Amendment rights. We must vacate the judgment and remand for a new trial.

Because we hold the trial court committed a structural error when it applied the incorrect standard in analyzing Defendant's request for new counsel, we need not reach Defendant's other argument on appeal, which may not recur in his new trial.[1] *See, e.g., State v. Long*, 196 N.C. App. 22, 41, 674 S.E.2d 696, 707 (2009) ("As we are granting defendant's request for a new trial, and the other issues he has may not be repeated in a new trial, we will not address his other [arguments on appeal].").

CONCLUSION

[1] Additionally, even if we are presented with Defendant's remaining argument in a subsequent appeal, it is likely we would not be reviewing it solely for plain error as we would in the instant appeal.

The record reflects Defendant asserted his right to hire chosen counsel and the trial court treated that request as an ineffective assistance of counsel claim, evaluating Defendant's request accordingly. We vacate the entry of judgment of conviction against Defendant and remand the case for a new trial.

VACATED AND REMANDED.

Judges DIETZ and COLLINS concur.