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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-274

Filed: 19 November 2019

Guilford County, Nos. 18 CRS 71786, 24265

STATE OF NORTH CAROLINA

v.

KEVIN RAYNARD WILSON

Appeal by defendant from judgment entered 13 September 2018 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 3 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State.*

*Paul F. Herzog for defendant.*

DIETZ, Judge.

Defendant Kevin Wilson appeals his convictions for failing to register as a sex offender and attaining habitual felon status. Wilson argues that the trial court erred by denying his motion to continue, made on the day of trial, to permit him to hire a new attorney.

The trial court properly denied that motion. Wilson told the trial court that his family “had been in contact” with a new attorney but acknowledged that he had not yet hired new counsel. The State was prepared to go to trial, as was Wilson’s court-appointed counsel. And Wilson’s case already had been delayed once after he failed to appear.

Under controlling precedent from this Court, on this record, the trial court properly denied the motion after determining that “the basis for the continuance, that is, the only articulated reason is that he wants to hire another attorney, is nothing more than a delay tactic.” We therefore reject Wilson’s argument and find no error in the trial court’s judgment.

### **Facts and Procedural History**

In March 2017, Defendant Kevin Wilson was released from prison. At that point, he was required to register as sex offender. Sometime in October 2017, Wilson moved but did not inform the Sheriff’s Office of his change of address. Law enforcement arrested Wilson for failure to register as a sex offender.

In May 2018, Wilson failed to appear for a scheduled court date. The court issued an order for arrest but recalled the order the next day and rescheduled the proceeding for the following month. Wilson later submitted an affidavit of indigency and applied for court-appointed counsel. He received court-appointed counsel who

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appeared on his behalf. At these early court appearances, Wilson did not express any desire to hire his own counsel or any concerns about his court-appointed counsel.

Wilson's trial began on 12 September 2018. After addressing some pre-trial motions from the State, the trial court asked Wilson if he had any pre-trial motions. Wilson's counsel then explained that "my client has passed me a note that he basically wants a continuance, that his family is trying to hire a lawyer." The trial court then addressed Wilson directly, asking him "who is your attorney you've hired?" Wilson responded that he intended to hire a private lawyer but had not done so yet:

MR. WILSON: My family have been in contact with Sean Olson.

THE COURT: Where is he?

MR. WILSON: Well –

THE COURT: He -- so he hadn't been hired yet?

MR. WILSON: Not yet, sir.

The trial court then explained that it was the day of trial, that Wilson's court-appointed counsel arrived on time and was prepared to defend him at the trial, and that, although Wilson's case was "very serious, it is not a complex case, nor is it going to last very long." The trial court then denied the motion to continue, explaining that it "finds that the basis for the continuance, that is, the only articulated reason is that he wants to hire another attorney, is nothing more than a delay tactic."

The jury convicted Wilson of failing to register as a sex offender. Wilson then pleaded guilty to attaining habitual felon status. The trial court sentenced him to 84 to 113 months in prison. Wilson appealed.

### **Analysis**

Wilson argues that the trial court erred by denying his motion to continue the trial so that he could retain counsel of his choosing. As explained below, the trial court properly denied the motion.

“Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court’s ruling is not subject to review.” *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). But “[w]hen a motion to continue raises a constitutional issue, the trial court’s ruling is fully reviewable upon appeal.” *Id.* Wilson’s argument implicates his Sixth Amendment rights and we therefore review this constitutional question *de novo*. *Id.*

The Sixth Amendment right to counsel includes “the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Thus, “a defendant should be afforded a fair opportunity to secure counsel of his own choice.” *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

But our Supreme Court has held that “the right to be defended by chosen counsel is not absolute.” *State v. McFadden*, 292 N.C. 609, 612, 234 S.E.2d 742, 745

(1977). A defendant is not permitted to use a request to change counsel “in a disruption of the orderly processes of justice.” *Id.* at 614, 234 S.E.2d at 746. Thus, a defendant who is “inexcusably dilatory in securing legal representation” cannot use a request to retain new counsel as a means to delay a trial. *Id.* at 613, 234 S.E.2d at 745.

As this Court explained in a similar case involving a request to continue made on the day of trial, the right to counsel of the defendant’s choosing must be “balanced against the need for speedy disposition of the criminal charges and the orderly administration of the judicial process.” *State v. Chavis*, 141 N.C. App. 553, 562, 540 S.E.2d 404, 411 (2000). Indeed, our appellate courts repeatedly have affirmed trial court decisions to deny a motion to continue, to obtain new counsel, made on the day the trial is set to begin. *See, e.g., State v. Poole*, 305 N.C. 308, 319, 289 S.E.2d 335, 342 (1982); *Chavis*, 141 N.C. App. at 562, 540 S.E.2d at 411; *cf. State v. Goodwin*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2019).

We find *Chavis* particularly instructive. There, “Defendant’s motion was made on the morning the trial was set to begin on the basis Defendant wanted to employ private counsel.” *Chavis*, 141 N.C. App. at 562, 540 S.E.2d at 411. This Court explained that new counsel “was not in the courtroom at the time the motion was made and there was no evidence Defendant had made financial arrangements with this or any other private attorney.” *Id.* We also noted that the State was prepared to

go to trial and that “Defendant did not point to any conflict he had with his appointed attorney.” *Id.* Lastly, we observed that “this case had been rescheduled twice due to various conflicts.” *Id.* Based on these facts, we held that “the trial court did not err in denying Defendant’s motion to continue.” *Id.*

This case involves facts indistinguishable from *Chavis*. The day his trial was set to begin, Wilson informed the court that he wanted a continuance because his “family had been in contact” with a new attorney. Wilson acknowledged that neither he, nor his family, actually had retained that attorney to represent him. The State was prepared to go to trial. Wilson’s court-appointed counsel was present and likewise prepared to proceed to trial. Finally, Wilson’s case already had been delayed once because he failed to appear at a court hearing.

Based on these facts, the trial court denied the motion for a continuance, explaining that it “finds that the basis for the continuance, that is, the only articulated reason is that he wants to hire another attorney, is nothing more than a delay tactic.” Under *Chavis*, the trial court’s decision to deny the motion to continue on this record was proper. We therefore reject Wilson’s argument and find no error in the trial court’s judgment.

### **Conclusion**

We find no error in the trial court’s judgment.

NO ERROR.

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Judges INMAN and BROOK concur.

Report per Rule 30(e).