[Cite as *State v. O'Neal*, 2015-Ohio-1096.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2014-08-104
Plaintiff-Appellee,	:	
		O P I N I O N
	:	3/23/2015
- vs -		
	:	
BRADLEY O'NEAL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 13CR29688

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Paris K. Ellis, 300 North Main Street, Suite 600, Middletown, Ohio 45042, for defendant-appellant

M. POWELL, J.

{¶ 1} Defendant-appellant, Bradley O'Neal, appeals from his conviction in the Warren County Court of Common Pleas for trafficking in marijuana, possession of marijuana, possession of criminal tools, and engaging in a pattern of corrupt activity. For the reasons discussed below, we affirm.

I. FACTS

{¶ 2} O'Neal was indicted on December 9, 2013, and charged with one count of trafficking in marijuana in violation of R.C. 2925.03(A)(1), a second-degree felony; one count of possession of marijuana in violation of R.C. 2925.11(A), a second-degree felony; one count of possession criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony; and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a first-degree felony. O'Neal retained Jon Paul Rion and Kevin Lennen to represent him in the matter. Initially, O'Neal was released on bond; however, bond was later revoked, and he was held in the Warren County Jail pending trial.

{¶ 3} On March 5, 2014, O'Neal received a telephone call from his girlfriend, Sierra Owens. Owens informed O'Neal that the police, including Detective Dan Schweitzer with the Warren County Drug Task Force, had made contact with her while she was picking up money related to O'Neal's drug operation. According to Owens, Schweitzer advised that she could be charged with several criminal offenses based on her involvement with O'Neal's drug activities. During the call, it was discussed whether O'Neal could do anything to help her out. O'Neal then offered to call Schweitzer on Owen's behalf.

{¶ 4} O'Neal called Schweitzer from the Warren County Jail on March 5, 2014. Schweitzer did not answer, but returned the call and spoke with O'Neal for approximately 15 minutes. At the outset of the call, it was established that O'Neal had representation but was attempting to reach Schweitzer outside the presence of his attorneys. During the conversation, O'Neal indicated he wanted to talk to Schweitzer in order to help Owens escape prosecution.

{¶ 5} On March 6, 2014, O'Neal met with Schweitzer; Sergeant Brandon Lacy, Warren County Drug Task Force; and Tyler Hayes, an intern for the Warren County Sheriff's Office. The interview took place in an interview room at the Warren County Sheriff's Office. At the beginning of the interview, Schweitzer read O'Neal his *Miranda* rights. O'Neal

indicated that he understood his rights and wanted to talk to them without his attorneys. Lacy told O'Neal that he could use his cell phone at any time to call his attorneys. Before questioning began, O'Neal once again emphasized that he was talking to them "to guarantee that nothing happens to [Owens]."

{¶ 6} The interview lasted approximately three hours. The majority of the interview involved questions related to a ledger kept by O'Neal which consisted of names, drugs, and prices paid by those purportedly involved in his drug operation. At the outset of the interview, Schweitzer made it clear that in order to help Owens, Schweitzer not only wanted information related to the drug operation, but he also wanted information on O'Neal's attorney. Schweitzer stated: "I mean, you know what I want. I want * * * Jon Paul Rion."

{¶ 7} During the course of the interview, Schweitzer repeatedly brought up Rion and indicated that he had been investigating Rion since 2008 for possible criminal charges related to money laundering. Many of the questions about Rion were related to how O'Neal was paying Rion for his representation on the pending charges. Schweitzer mentioned Rion on at least five separate occasions during the interview. Schweitzer also made several disparaging remarks about Rion, accusing Rion of being "crooked," not "caring" about O'Neal, and failing to attend hearings on O'Neal's behalf. Schweitzer also implied O'Neal would have been better off not hiring an attorney. Schweitzer told O'Neal of another individual he had arrested for selling drugs, who cooperated, did not hire an attorney, trusted Schweitzer, and as a result, "walked" free.

{¶ 8} Each time Rion was mentioned, O'Neal stated that he did not want to answer any questions about his attorneys. Specifically, when Schweitzer first questioned O'Neal about paying Rion for his representation, O'Neal stated the following: "Honestly I don't want to * * * answer any questions about my lawyer because I can't risk being represented, you know * * * But, I mean, in all honesty, I don't even know how I would be able to help you with

a case like that." Although O'Neal stated he did not want to discuss Rion, both Schweitzer and Lacy continued to press O'Neal about Rion. On at least three occasions, O'Neal specifically reiterated that he did not want to answer questions regarding his attorney. O'Neal again explained that he was there to help Owens and possibly his own case. By the conclusion of the interview, O'Neal had refused Schweitzer's overtures and did not provide any information regarding Rion. However, O'Neal did provide incriminating information related to the pending charges against him. O'Neal was then permitted to call Owens and advise her that she would not be charged.

{¶ 9} The following day, on March 7, 2014, Schweitzer informed a Warren County Assistant Prosecutor of the interview with O'Neal. The prosecutor's office, in turn, advised O'Neal's attorneys of the interview.

{¶ 10} On April 1, 2014, O'Neal filed a motion to dismiss the indictment based on the March 6, 2014 interview, claiming that the interview violated his Sixth Amendment rights. Subsequently, on April 11, 2014, Rion and Lennen withdrew from the case, and new counsel was substituted.

{¶ 11} A hearing on the motion to dismiss was held on June 17, 2014. At the hearing, Hayes and Schweitzer testified regarding the March 6, 2014 interview. In addition, an audio recording of the telephone call on March 5, 2014 and a video of the March 6, 2014 interview, as well as a transcript of the interview, were all admitted as evidence. After considering the evidence and closing arguments submitted by the parties, the trial court denied the motion to dismiss. Although the trial court denied the motion to dismiss, the trial court found that the officers violated O'Neal's Sixth Amendment rights during the March 6, 2014 interview, and therefore ordered any evidence gained from the interview to be suppressed.

{¶ 12} On July 16, 2014, O'Neal entered a no contest plea to the indictment, and as a result was found guilty on all counts in the indictment. The trial court subsequently

sentenced O'Neal to an eight-year mandatory prison term. O'Neal filed a timely notice of appeal raising the following single assignment of error:

{¶ 13} THE WARREN COUNTY COURT OF COMMON PLEAS ABUSED ITS DISCRETION WHEN IT REFUSED TO DISMISS THE INDICTMENT.

II. ANALYSIS

{¶ 14} In O'Neal's sole assignment of error, he asserts the trial court erred in denying his motion to dismiss the indictment because the state violated his Sixth Amendment right to counsel by intentionally invading and destroying the attorney-client relationship with his first attorney, Jon Paul Rion. O'Neal asserts that the intentional actions by Schweitzer and Lacy in intruding into the attorney-client relationship during the interview prejudiced him as it destroyed the attorney-client relationship and "caused Mr. Rion to withdraw as counsel." O'Neal also asserts that the interview violated his Sixth Amendment rights by depriving him of his counsel of choice. O'Neal argues the only appropriate remedy for the violation of his Sixth Amendment rights was for the trial court to dismiss the indictment.

{¶ 15} This court reviews a trial court's decision to dismiss an indictment de novo, without deference to the decision reached by the lower court. *State v. Gaines*, 193 Ohio App.3d 260, 2011-Ohio-1475, ¶ 14 (12th Dist.). However, as the decision on O'Neal's motion to dismiss required the trial court to make certain factual findings, this court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *See State v. Wyatt*, 12th Dist. Preble No. CA2013-06-005, 2014-Ohio-3009, ¶ 15.

A. Sixth Amendment Right to Counsel

{¶ 16} The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." The Sixth Amendment's right to counsel is made applicable to the states through the due process clause of the Fourteenth Amendment of the United States

Constitution. *See State v. Napier*, 12th Dist. Preble No. CA84-01-002, 1984 WL 3324, *1 (May 14, 1984). The Sixth Amendment provides a statement of the rights necessary to a full defense, which includes the right to the assistance of counsel. *State v. Geldrich*, 12th Dist. Butler No. CA2006-10-267, 2008-Ohio-2622, ¶ 25. "This right, fundamental to our system of justice is meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665 (1981), citing *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792 (1963). The state may not intentionally interfere with the accused's right to counsel. *See Morrison* at 364; *United States v. Cole*, 807 F.2d 262 (1st Cir.1986); *State v. Lewellen*, 6th Dist. Huron No. H-86-16, 1987 WL 6185 (Feb. 6, 1987). The state has an obligation to respect the accused's choice to seek the assistance of counsel and must not act "in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 168-171, 106 S.Ct. 477 (1985).

{¶ 17} In addition, an element of the Sixth Amendment right to counsel is the right to be represented by counsel of one's choosing where court-appointed counsel is not required. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557 (2006), citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692 (1988). In this appeal, O'Neal claims that the state violated his right to counsel, not only by invading and interfering with the attorney-client relationship, but also by denying him the right to counsel of his own choosing. As we discuss below, in determining whether dismissal is the appropriate remedy for a violation of these two separate elements of the right to counsel, the analysis differs in that the invasion and interference with the attorney-client relationship requires a showing of prejudice, while a violation of the right to counsel of one's choosing does not.

B. Interference with the Attorney-Client Relationship

{¶ 18} We first address O'Neal's claim that the state unconstitutionally interfered with and invaded the attorney-client relationship.

{¶ 19} "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison* at 364; *State v. Gamble*, 3d Dist. Union No. 14-81-9, 1982 WL 6871 (Sept. 17, 1982). Among these competing interests is society's interest in the administration of criminal justice. *Morrison* at 364; *Gamble* at *2. As a result of these competing interests, the Supreme Court in *Morrison* held that in granting remedies for Sixth Amendment violations, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Morrison* at 365. Accordingly, in order to justify dismissal of an indictment based upon an interference with the attorney-client relationship, a defendant must show that the constitutional violation has had or threatens some adverse effect upon the effectiveness of counsel's assistance or has produced some other prejudice to the defense. *Id.* "[T]he remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted." *Id.*

{¶ 20} In *Morrison*, federal drug agents, with knowledge that the defendant was represented by counsel extensively interfered with defendant's right to counsel. During several conversations, agents made disparaging remarks about defendant's counsel and suggested that appointed counsel would have been better. Defendant refused to cooperate or provide any information related to her case and immediately notified her attorney of the agents' actions. *Morrison* at 362-363. The Court of Appeals held that dismissal with prejudice was the appropriate remedy. *Id.* at 363. However, the Supreme Court reversed, finding defendant "has demonstrated no prejudice of any kind." *Id.* at 366.

{¶ 21} In the instant case, the state asserts that his court should not even reach the issue of whether the trial court erred in denying the motion to dismiss because no Sixth

Amendment right violation occurred to be remedied. However, because we find that dismissal of the indictment was not required under the circumstances in this case, we shall assume for purposes of this opinion, that O'Neal's Sixth Amendment right to counsel was violated due to the officers' disparagement of O'Neal's counsel during the March 6, 2014 interview and, thus, interfered with the attorney-client relationship.

{¶ 22} As an initial matter, we note that there is no evidence in the record regarding why Rion withdrew from representing O'Neal in this case. Rion did not testify at the hearing on the motion to dismiss nor was there ever an affidavit filed stating the reasons for Rion's withdrawal. The motion to dismiss, filed by Rion ten days before Rion withdrew as counsel, obviously does not address this issue as Rion was actively representing O'Neal at the time. There is simply no evidence to indicate that the statements made during the interview were the reason Rion withdrew. Rather, the record only indicates that Rion withdrew as counsel upon request of the defendant. Specifically, the entry states, "Upon the request of defendant, Bradley O'Neal, Paris K. Ellis * * * hereby enters his appearance as counsel for defendant. Jon Paul Rion and Kevin Lennen hereby withdraws [sic] as counsel for defendant."

{¶ 23} Furthermore, although O'Neal has maintained that the conversation with Lacy and Schweitzer destroyed the attorney-client relationship, there is no evidence to suggest that as a result of the statements made during the interview, O'Neal had lost confidence in Rion. The record illustrates that the officers impugned the reputation and integrity of Rion during the course of the three-hour interview; however, O'Neal never provided any information related to Rion or acted in a way that indicated he no longer had confidence in Rion's representation. Illustrative of this fact is the exchange which took place with the trial court on April 1, 2014, the day the motion to dismiss was filed.

THE COURT: Based on some conversations we had in this case

> there was an indication that there would be a Motion to Dismiss in the case. * * * I want to address Mr. O'Neal. Sir, I want to check with you on something; it's come to my attention that there could possibly be an issue that affected whether or not you kept [sic] Mr. Rion as your attorney. Now, the first thing I want to know is[,] is it your desire to continue with Mr. Rion's representation?
>
> MR. O'NEAL: Yes, Your Honor.
>
> THE COURT: All right. Would you like the opportunity to consult with another counsel to get a second opinion on that matter?
>
> MR. O'NEAL: No, Your Honor.
>
> THE COURT: Are you certain of that?
>
> MR. O'NEAL: Yes, Your Honor.
>
> THE COURT: So you've talked with Mr. Rion and you want him to continue to be your attorney?
>
> MR. O'NEAL: Correct, Your Honor.

Accordingly, the record demonstrates that even after the interview, O'Neal was satisfied with Rion's representation and wished to proceed with him as counsel. Although we may speculate that the March 6, 2014 interview had some bearing on the change in representation in this case, as there is no evidence in the record on this specific issue, we decline to do so. The burden was on O'Neal to demonstrate that he suffered prejudice as a result of the officers' actions in disparaging his attorney which required dismissal of the indictment. On the record before us, we find that O'Neal failed to demonstrate that the interview destroyed the attorney-client relationship or that the interview caused Rion to withdraw.

{¶ 24} Moreover, in arguing that the appropriate remedy in this case was dismissal of the indictment, O'Neal relies on the decisions in *Com. v. Manning*, 373 Mass. 438 (1977) and *Boulas v. Superior* Court, 231 Cal.Rptr. 869 (1986). However, as these cases are factually distinguishable, we do not find the cases to be persuasive or require dismissal of the

indictment.

{¶ 25} In *Manning*, the Supreme Court of Massachusetts found that the willful interference by two federal officers of the defendant's right to counsel was of such an aggravated nature that dismissal of the indictment was the appropriate remedy. *Manning* at 439. There, federal agents working closely with the prosecutor contacted the defendant outside the presence of his attorney. *Id.* at 440. The contact occurred after the defendant was indicted and the agents were aware he was represented by counsel. During the conversation, the agents attempted to persuade the defendant to abandon his defense and become an informant. The agents made several disparaging remarks about defendant's counsel and indicated that counsel's tactics would not insure that defendant would stay out of jail. *Id.* Defendant promptly informed his attorney of the conversation and counsel subsequently filed a motion to dismiss the complaint and indictment. In finding the trial court erred in denying the motion, the Supreme Court of Massachusetts noted that the agent's motive was to induce the defendant to abandon his defense and therefore "the indictment itself is so inextricably interwoven with the misconduct which preceded it that the only appropriate remedy here is to dismiss the indictment."[1] *Id.* at 443-444.

{¶ 26} In *Boulas*, it was also decided that the only appropriate sanction for the intentional interference with the attorney-client relationship by law enforcement personnel and the prosecutor was dismissal of the charges. *Boulas* at 875-876. There, the police, with the participation of the prosecutor, told defendant that in order to secure a plea bargain, defendant was required to fire his current attorney and retain an attorney that was acceptable to the police and the prosecutor. *Id.* at 870-871. Defendant complied with the instructions and fired his attorney. After defendant suggested approximately five other attorneys, the

1. Notably, this decision occurred prior to the Supreme Court's decision in *Morrison*.

police directed him to an "acceptable" attorney to hire. *Id.* at 871. However, this attorney declined the representation. Thereafter, defendant was left without counsel but continued to work with the authorities who assured him that leniency would be forthcoming. *Id.* Eventually, the prosecutor decided he was no longer interested in entering a plea deal with defendant. *Id.* Defendant later hired new counsel who learned of the conduct of the police and prosecutor, and thereafter filed a motion to dismiss the charges. In concluding that dismissal of the charges was appropriate, the court found that the evidence established defendant "was seriously prejudiced as a result of the improper governmental intrusion into his Sixth Amendment * * * rights. He lost his attorney of choice. Evidence of such interference in the attorney-client relationship, of its motivation, of its intended effect, and of its pointed intrusiveness, is manifest from the record before us." *Id.* at 876.

{¶ 27} Here, unlike in *Boulas* or *Manning*, the prosecutor was not involved with the interview and, in fact, did not learn of the contact between O'Neal and the officers until after the interview concluded. Once the prosecutor learned of the interview, the prosecutor immediately notified defense counsel. Moreover, it was O'Neal and not law enforcement who initiated the contact and the purpose of the interview, as stated by O'Neal, was to help Owens escape prosecution by O'Neal providing information regarding his drug operation. There is no indication that the purpose of the interview was to persuade O'Neal to abandon his defense or that the officers even attempted to persuade O'Neal to abandon his defense. Furthermore, although disparaging remarks were made regarding O'Neal's attorney, there is no indication in the record that such comments were made to pressure O'Neal into firing Rion. Rather, it appears that the officers' motivation in questioning O'Neal about Rion was to serve a legitimate law enforcement purpose (i.e., to obtain information in an unrelated pending criminal investigation). Finally, as detailed above, there is no evidence in the record that Rion withdrew from this case or that O'Neal fired Rion as a result of the comments made

by the officers during the interview. Again, this court cannot speculate that prejudice occurred as a result of the interview. Rather, prejudice must be evident in the record before us.

C. Deprivation of Counsel of Choice

{¶ 28} We now turn to O'Neal's argument that the trial court erred in denying his motion to dismiss as the March 6, 2014 interview deprived him of his counsel of choice. O'Neal contends that the officers' behavior had a lasting and adverse effect as it caused Rion to withdraw. Accordingly, O'Neal asserts that as the interview deprived him of his counsel of choice, he was not required to demonstrate actual prejudice.

{¶ 29} Under the Sixth Amendment, a defendant who does not require appointed counsel has the right to choose who will represent him. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S.Ct. 2557 (2006), citing *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692 (1988). Where the right to be assisted by counsel of one's choice is wrongfully denied, it is unnecessary to conduct an ineffectiveness or prejudice analysis to establish a Sixth Amendment violation. *Gonzalez-Lopez* at 148. Rather, where the right to counsel of one's own choosing is violated, such a violation results in a structural error requiring reversal of the defendant's conviction. *Id.* at 142, 150.

{¶ 30} After a review of the record, we find that the evidence does not demonstrate that O'Neal's right to counsel of choice was violated. As described above, there is no evidence in the record that Rion withdrew as a result of the March 6th interview. Furthermore, O'Neal never provided any evidence that Rion, rather than his current counsel, was his counsel of choice. On this record, we do not find that the state wrongfully denied O'Neal of his counsel of choice.

III. CONCLUSION

{¶ 31} In summary, we find the trial court did not err in denying O'Neal's motion to

dismiss the indictment as O'Neal failed to establish that he was deprived of his counsel of choice. In addition, we find that O'Neal failed to demonstrate that the interference with the attorney-client relationship during the March 6, 2014 interview prejudiced him to the extent necessary to require the dismissal of the indictment. In arriving at this conclusion, we do not condone the conduct of the state's agents. This opinion should also not be read as an endorsement of the tactics used by law enforcement. While the police certainly have an interest in investigating new or additional crimes that the defendant has knowledge of or has participated in, these investigations are constrained by the defendant's Sixth Amendment right to counsel.

{¶ 32} O'Neal's sole assignment of error is, therefore, overruled.

{¶ 33} Judgment affirmed.

PIPER, P.J., and HENDRICKSON, J., concur.