

**FILED: August 06, 2014**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

MARK LEWIS RINGLER,  
Defendant-Appellant.

Lane County Circuit Court  
201104280

A149050

Suzanne B. Chanti, Judge.

Argued and submitted on January 30, 2014.

Laura A. Frikert, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Rebecca M. Johansen, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and De Muniz, Senior Judge.

EGAN, J.

Affirmed.

1 EGAN, J.

2 Defendant appeals a judgment of conviction for one count of unlawful  
3 delivery of methamphetamine. ORS 475.890. He assigns error to the trial court's denial  
4 of his motion for a continuance.<sup>1</sup> We conclude that the trial court did not abuse its  
5 discretion in denying defendant's motion. Therefore, we affirm.

6 We review the trial court's denial of a motion for a continuance for abuse of  
7 discretion. "Discretion refers to the authority of a trial court to choose among several  
8 legally correct outcomes. If the trial court's decision was within the range of legally  
9 correct discretionary choices and produced a permissible, legally correct outcome, then  
10 the trial court did not abuse its discretion." *State v. Hug*, 186 Or App 569, 572, 64 P3d  
11 1173, *rev den*, 335 Or 510 (2003) (internal citations and quotation marks omitted).  
12 Further, "[i]f the trial court did not abuse its discretion, we may not substitute our  
13 judgment for that of the trial court even if we might have resolved the issue differently."  
14 *State v. Licari*, 261 Or App 805, 808, 322 P3d 568 (2014).

15 Defendant was indicted on one count of unlawful delivery of  
16 methamphetamine, ORS 475.890, in March 2011. Defendant was arraigned on April 21,  
17 2011, and the trial court appointed counsel for defendant that day. His trial was initially  
18 scheduled for June 14, 2011.

19 On May 26, 2011, the state filed a notice of sentencing enhancement

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<sup>1</sup> We have considered defendant's remaining assignments of error, relating to the trial court's denial of his motion to suppress, and we reject those assignments without discussion.

1 facts. That same day, defendant's initial attorney moved to withdraw as counsel. The  
2 court engaged in the following colloquy with defendant, his attorney--Kaiser--and the  
3 prosecutor:

4 "THE COURT: What's the problem between you and Mr. Kaiser?

5 "THE DEFENDANT: He doesn't believe in me on this case. He  
6 doesn't think that I'm innocent like I know I am. And as far as all these  
7 other mitigating factors that he's putting in here. So, you know, I want my  
8 trial. I want to go to trial. And he's adamantly against that. That I should  
9 plead guilty and take the max that [the prosecutor is] offering.

10 "\* \* \* \* \*

11 "MR. KAISER: What I [told defendant was] offered [in the plea  
12 agreement] was plead to the gridblock, which as I understand it from the  
13 criminal history provided by the State is a 9C, which is 56 to 60 [months].  
14 Or to plead to an 8C, admit the aggravating factors allowing for a range of  
15 29 to 68 months.

16 "THE COURT: Is that wrong?

17 "[PROSECUTOR]: No, that's accurate.

18 "THE COURT: All right. So those are the offers he's made. Mr.  
19 Kaiser had to tell you those offers. So I'm confused what the problem is.

20 "THE DEFENDANT: The problem is I didn't--the aggravating  
21 factor isn't true.

22 "THE COURT: Well, fine. You can have a trial. Mr. Kaiser is just  
23 telling you what the options are. He's not telling you he won't try the case.

24 "THE DEFENDANT: We differ on our whole plan--whole idea  
25 about this. He's totally different than what I'm thinking as far as how to go  
26 about this.

27 "THE COURT: He's just giving you advice which he's entitled to.  
28 That's what lawyers are for, to advise you. Sometimes he might tell you  
29 you should take a deal, but you don't have to take the deal. That doesn't  
30 mean he isn't going to fight for you. You're not entitled to a lawyer who

1 believes you. You are entitled to a lawyer who is going to tell you all your  
2 options. If you want to go to trial, go to trial and fight it.

3 "THE DEFENDANT: He doesn't believe in this case.

4 "THE COURT: It doesn't matter what he believes in. It matters  
5 what he does. Mr. Kaiser, do you have any problem trying the case?

6 "MR. KAISER: I've got a problem trying the case, Judge. I will say  
7 that we have a contentious relationship.

8 "THE COURT: I don't think that's going to change if I change  
9 lawyers. Do you think [a new attorney] isn't going to have a contentious  
10 relationship with [defendant]?

11 "MR. KAISER: I don't know the answer to that, Judge.

12 "THE COURT: I do. The motion is denied."

13 Approximately one week after the trial court denied defendant's motion,  
14 and less than two weeks before the scheduled trial date, defendant waived his 60-day trial  
15 right and his attorney requested a continuance for approximately one month to afford  
16 defendant time to retain private counsel and to allow the new attorney additional time to  
17 prepare for trial, investigate witnesses, and submit motions challenging the sufficiency of  
18 the search warrant. In the midst of multiple off-record discussions, defendant noted that  
19 he wanted to file his tax returns, that he was expecting money in the form of a refund, but  
20 that the return had not been filed at the time of the hearing. In support of the motion for a  
21 continuance, defendant's attorney argued primarily that the trial date had not previously  
22 been postponed and that more time was necessary to prepare for trial and investigate.  
23 During the remainder of the hearing, neither defendant nor his attorney provided further  
24 information about when defendant could expect to have the money to retain a private

1 attorney or whether he had selected a particular attorney. The court denied the motion,  
2 noting:

3 "I understand that he gets the counsel of his choice. I don't have any  
4 problem with that. However, I hear \* \* \* it a lot and I see it rarely. I mean,  
5 it happens, but I don't know who he's going to hire. I don't know when he  
6 might have the money to do it. And if we postpone cases because  
7 somebody wants to hire a lawyer when they get some money at a date in  
8 the future, I mean, we just can't run our lives that way."

9 On the day of trial, defense counsel renewed defendant's motion and asked for time to  
10 locate an additional witness. The trial court again denied the motion. Defendant was  
11 convicted after a jury trial and sentenced to 80 months in prison. This timely appeal  
12 followed.

13 In defendant's first assignment of error, he contends that the court abused  
14 its discretion when it denied his motion for a continuance to retain counsel of his choice.  
15 The state responds that, because defendant failed to demonstrate any ability to retain and  
16 pay for counsel and also failed to demonstrate any reason that the time allotted was  
17 insufficient to investigate the case, or how any additional investigation would have  
18 helped him at trial, the trial court acted within its discretion by denying defendant's  
19 motion for a continuance.

20 "Whether a denial of a continuance is improper depends on the particular  
21 circumstances of the case and the reasons presented to the court at the time the request is  
22 denied." *Licari*, 261 Or App at 808 (citing *State v. Hickey*, 79 Or App 200, 203, 717 P2d  
23 1287 (1986)). Although a defendant's right to counsel "carries with it a right to counsel  
24 of one's choice," that right is tempered by the need for "orderly processes of justice."

1 *State v. Zaha*, 44 Or App 103, 106, 605 P2d 306 (1980); *see also State v. Ferraro*, 264 Or  
2 App 271, \_\_\_, \_\_\_ P3d \_\_\_ (July 14, 2014) (slip op at 11) (summarizing principle).  
3 Thus, "[w]hen assessing a request for continuance to obtain new counsel, a trial court  
4 must balance a defendant's right to choice of counsel against the need of the public and of  
5 all defendants for expedition in the court system." *Hug*, 186 Or App at 572-73.  
6 Generally, a trial court does not abuse its discretion in denying a motion for continuance  
7 "unless a defendant makes a specific showing of good cause." *State v. Fredinburg*, 257  
8 Or App 473, 479, 308 P3d 208, *rev den*, 354 Or 490 (2013) (quoting *State v. Martinez*,  
9 224 Or App 588, 592, 198 P3d 957 (2008), *rev den*, 346 Or 364 (2009)). "To exercise its  
10 discretion properly, the trial court must inquire into the nature and evaluate the merits of  
11 defendant's complaints." *State v. Keerins*, 145 Or App 491, 494, 932 P2d 65 (1996)  
12 (internal quotation marks omitted).

13           Here, defendant made multiple motions--requesting the appointment of a  
14 new attorney and later requesting continuances--ahead of trial. In the first instance, he  
15 requested the court appoint another attorney to him. After allowing defendant to state his  
16 complaints--in which defendant explained that he wanted a new attorney because Kaiser  
17 did not believe in his innocence, had advised him to take the plea deal, and that he and  
18 Kaiser had differing trial strategies--the trial court denied the motion finding that  
19 defendant's concerns did not warrant appointing new counsel.

20           A court "may substitute one appointed counsel for another at any stage of  
21 the proceedings when the interests of justice require such substitution" but a defendant

1 has "no right to have another court-appointed lawyer in the absence of a legitimate  
2 complaint concerning the one already appointed for him." *State v. Langley*, 314 Or 247,  
3 257, 839 P2d 692 (1992), *adh'd to on recons*, 318 Or 28, 861 P2d 1012 (1993). At the  
4 time of defendant's first request, he did not need the court's permission to retain a private  
5 attorney, and, at that point, had sufficient time to retain a new lawyer with his own funds  
6 prior to trial. *See id.*

7           Here, the trial court made inquiries into defendant's complaints. The trial  
8 court's denial of the motion for continuance and statements to defendant and defense  
9 counsel indicate that it determined that defendant's complaints about his attorney did not  
10 justify appointment of new counsel. In the absence of "good cause," *i.e.*, a legitimate  
11 complaint about his attorney, the trial court's decision to deny defendant's motion for a  
12 continuance and substitution of attorney was within the range of legally permissible  
13 choices. Therefore, in that instance, the trial court did not abuse its discretion.

14           Defendant made two more motions requesting continuances, less than two  
15 weeks before trial and on the day of trial. In both instances, Kaiser represented to the  
16 court that defendant wanted to retain private counsel and that he needed additional time  
17 to prepare for trial and locate witnesses. Defendant indicated that he expected money  
18 from his anticipated tax refund, but also represented to the court that he had not yet filed  
19 the returns. Defendant also did not indicate any specific information about the amount of  
20 money that he expected to receive, and neither defendant nor his attorney provided  
21 information, in the face of the court's statements and inquiries, relating to when defendant

1 could expect to receive the money. At its core, the court could regard defendant's  
2 assertions to the court, that he would receive an unspecified amount of money at some  
3 unknown point in the future, as nothing more than speculation.

4           Although defendant was entitled to the counsel of his choice, that right is  
5 not unlimited. *Zaha*, 44 Or App at 106. The trial court determined that defendant had  
6 not presented sufficient information to establish "good cause," and therefore, defendant's  
7 right to counsel of his choice was outweighed by the need for expeditious judicial  
8 administration. *Id.* at 106; *Hug*, 186 Or App at 572-73; *see also Martinez*, 224 Or App at  
9 592-93 (concluding that the trial court's denial of the defendant's motion for continuance  
10 was not an abuse of discretion where the defendant "did not demonstrate that he lacked  
11 any opportunity to retain private counsel prior to the day of trial or that he had good  
12 cause for his failure to make a timely request for a continuance" (emphasis omitted)).

13           To the extent that defendant's arguments pertaining to his second and third  
14 motions for continuance were based on the need to locate witnesses and prepare for trial,  
15 we are not persuaded that the trial court abused its discretion. Defendant was required to  
16 offer more than an "abstract statement" regarding his need for the witnesses. "[I]f a  
17 defendant seeks a continuance to procure witnesses, he must show that the witnesses can  
18 be produced and if produced, they will testify to facts material to the defendant's case."  
19 *State v. Reese*, 25 Or App 231, 234-35, 548 P2d 998 (1976). Defendant did not do so  
20 here. *Cf. Ferraro*, 264 Or App at \_\_\_\_ (cautioning that in some instances, motion for  
21 continuance to investigate what witnesses will be necessary for defense will be



1 sufficient).

2                   Defendant's second request for a continuance, approximately two weeks  
3 before trial, was based on the need to locate witnesses and otherwise prepare for trial. He  
4 proffered no information about the witnesses' whereabouts, expectations for locating the  
5 witnesses, or how the witnesses' testimony was material to defendant's case as required  
6 by *Reese*. Defendant again reiterated his request on the day of trial, basing that request  
7 on his intention to obtain new counsel and the need for additional time to prepare for  
8 trial, thus indicating that no progress had been made in locating the witnesses or  
9 obtaining funds to retain private counsel. Based on the showings made by defendant in  
10 both instances, the trial court's decision was within the range of legally correct  
11 discretionary choices and produced a permissible, legally correct outcome. The trial  
12 court did not abuse its discretion. *Hug*, 186 Or App at 572.

13                   Affirmed.