



NUMBER 13-15-00093-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

WALTER JAY WIKOFF,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

**On appeal from the 36th District Court
of San Patricio County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Benavides, and Perkes
Memorandum Opinion by Justice Benavides**

By two issues, appellant Walter Jay Wikoff appealed his conviction for possession of methamphetamine. See TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (b) (West, Westlaw through 2015 R.S.). Wikoff argues on appeal: (1) that the trial court erred by denying appointed counsel's oral motion of withdrawal; and (2) that the trial court's denial of appointed counsel's oral motion for continuance violated his Sixth Amendment right to

counsel. We affirm.

I. BACKGROUND

Portland police officers proceeded to Wikoff's residence on or about February 4, 2014 to serve an outstanding warrant against him for unrelated theft charges. Once placed under arrest, officers transported Wikoff to the police station. During the booking process, officers found two small plastic baggies containing methamphetamine weighing less than a gram in Wikoff's pocket.

Subsequently, a grand jury indicted Wikoff for possession of methamphetamine in an amount of less than one gram. *Id.* On Wikoff's trial date, and prior to voir dire, appointed counsel made two oral motions: (1) a motion for continuance and (2) a motion for withdrawal of counsel. The trial judge denied both motions. After the jury found Wikoff guilty as charged, the trial court assessed punishment at two years confinement in a state jail facility, probated for a period of three years, and a \$500.00 fine. This appeal followed.

II. MOTION TO WITHDRAW

By his first issue, Wikoff asserts that the trial court abused its discretion in denying his trial counsel's motion to withdraw because a conflict of interest existed between himself and appointed counsel.¹

A. Standard of Review and Applicable Law

In reviewing a trial court's decision for a withdrawal request, we consider whether

¹ Wikoff's brief argued that the alleged conflict of interest created an ineffective assistance of counsel issue; however, we need not address this contention because we conclude that no conflict existed. Accordingly, we address this issue under the appropriate standard of review

the trial court abused its discretion. See *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000) (en banc). The trial court has discretion to determine whether to allow counsel to withdraw from a case. *Id.* Personality conflicts and disagreements concerning trial strategy are typically not valid grounds for withdrawal. *Id.*; see *Carrol v. State*, 176 S.W.3d 249, 256–58 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) (explaining that general allegations of a breakdown in communications and a lack of cooperation in pursuing certain defenses do not rise to an adequate showing to require a substitution of counsel); *Boston v. State*, 965 S.W.2d 546, 552 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (concluding that vague claims of a defendant's dissatisfaction with his appointed counsel are not sufficient to require the trial court to grant counsel's request to withdraw).

Instead, an abuse of discretion may be shown when “[a]n ‘actual conflict of interest’ exists[, for example,] if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest.” *Acosta v. State*, 233 S.W.3d 349, 355 (Tex. Crim. App. 2007) (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997) (en banc)); see *Frazier v. State*, 15 S.W.3d 263, 265-66 (Tex. App.—Waco 2000, no pet.) (determining that the trial court is within its discretion to deny a motion to withdraw when counsel fails to offer any specific facts to support assertions of a conflict of interest or irreconcilable differences with the defendant).

B. Discussion

Wikoff argues that the trial court abused its discretion by denying his appointed counsel's withdrawal motion because, he contends, his counsel's inadequate

representation creates a conflict of interest. A conflict of interest exists if counsel is required to make a choice between advancing his or her client's interest or advancing other interests to the detriment of his client's interest. *Acosta*, 233 S.W.3d at 355. However, Wikoff's allegations are vague claims of dissatisfaction with his appointed trial counsel that lack any specific facts to support assertions of a conflict of interest.

In *Boston*, the court appointed attorney for the defendant moved for withdrawal stating a conflict existed. *Boston*, 965 S.W.2d at 551–52. The defendant complained about the amount of time spent between himself and the court appointed attorney being inadequate. *Id* at 551. Additionally, the defendant stated he did not feel his court appointed attorney had represented him to the best of the attorney's ability. *Id*. The trial court noted that the court-appointed attorney had been assigned to represent the defendant fourteen days prior to the withdrawal motion, but that the attorney was “one of the best lawyers in the state.” *Id* at 551–52. The trial court denied the motion for withdrawal after concluding that vague claims of a defendant's dissatisfaction with his appointed counsel are not sufficient to require the trial court to grant counsel's request to withdraw. *Id* at 552.

In this case, the following exchange during the motion for withdrawal hearing shows similar vague claims of dissatisfaction:

Counsel: Your Honor, at this time I have to move to withdraw from representation of Mr. Wikoff. He feels that my representation of him has been inadequate and I would ask that because of that that there is a conflict of interest. I ask the Court to allow me to withdraw.

Court: I don't feel that's a conflict. Mr. Wikoff, what's your problem with your lawyer, he's not getting you the deal you want done?

Wikoff: I don't feel like anything has been done that could have been up to this point.

Court: What – what – what would need to be done, explain to me what's missing.

Wikoff: I'd like more time –

Court: In the legal –

Wikoff: – more time spent with me instead of the 15 minutes when we initially met. The only other times I've had to talk to him is when we've been up here at the courthouse.

Like the defendant in *Boston*, Wikoff alleged a general dissatisfaction with the amount of time spent between himself and appointed counsel. In this case, Wikoff had met more times with his appointed counsel than the defendant in *Boston*. Wikoff's appointed counsel had represented him for six months prior to the withdrawal request; whereas in *Boston*, the attorney had only been the defendant's attorney for fourteen days. Further, the trial court in *Boston* noted that defendant's attorney had met with the defendant once and had read the file. Similarly, here the trial court determined that there had been numerous court settings when Wikoff was able to meet with appointed counsel. Additionally, the record indicates that Wikoff did not pursue additional appointments after having met with appointed counsel once because he believed "everything was fine."

Wikoff also told the trial court that he wished to hire other counsel. Again, when the trial court questioned Wikoff, he could not articulate why he wanted new counsel, other than to say he felt appointed counsel had not met with him enough. The record reflects that Wikoff was provided ample opportunity to inform the trial court of the nature of the conflict but failed to provide any specific facts. The general and vague allegations made in this case do not demonstrate a conflict of interest. Thus, the trial court did not

abuse its discretion in denying the motion for withdrawal. We overrule Wikoff's first issue.

III. MOTION FOR CONTINUANCE

By his second issue, Wikoff asserts that the trial court erred by depriving him of his Sixth Amendment right to counsel because the trial court denied trial counsel's oral request for a continuance.

A. Preservation of Error

A motion for continuance that is not in writing and not sworn preserves nothing for review. TEX. CODE CRIM. PROC. ANN arts. 29.03, 29.08 (West, Westlaw through 2015 R.S.); *Dewberry v. State*, 4 S.W.3d 735, 755 (Tex. Crim. App. 1999).

B. Discussion

In this case, the following exchange occurred between appointed counsel and the trial judge, which is the basis for Wikoff's continuance challenge:

Counsel: Your Honor, Mr. Wikoff has indicated to me this morning he would like to hire an attorney to represent him on this matter.

Court: It's set for trial today, announcement was last week. I'm sorry, Mr. Wikoff, that could have been done last week but today we're set for trial. We can't delay the case. State has announced ready. Are you ready?

Counsel: We're ready.

Wikoff's motion was not a written, sworn motion for continuance, rather it was made orally shortly before voir dire. Additionally, appointed counsel's statement, "Your Honor, [Wikoff] has indicated to me this morning he would like to hire an attorney to represent him on this matter," does not meet the requirements for a continuance motion. See *Pierce v. State*, 113 S.W.3d 431, 435 (Tex. App.—Texarkana 2003, pet. ref'd).

Thus, Wikoff has not preserved the issue for appellate review. We overrule his second and final issue.

IV. CONCLUSION

We affirm the trial court's judgment.

GINA M. BENAVIDES,
Justice

Do not publish.
TEX. R. APP. P. 47.2 (b).

Delivered and filed the
23rd day of June, 2016.