

NO. 12-10-00356-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*DOROTHY DEE GIRARD,
APPELLANT*

§

APPEAL FROM THE 294TH

V.

§

JUDICIAL DISTRICT COURT

*THE STATE OF TEXAS,
APPELLEE*

§

VAN ZANDT COUNTY, TEXAS

MEMORANDUM OPINION

Dorothy Dee Girard appeals her conviction for indecency with a child. In two issues, Appellant argues that the trial court erred in overruling her motion for new trial without a hearing and abused its discretion in denying her motion to terminate court appointed counsel. We affirm.

BACKGROUND

In March 2009, Appellant pleaded guilty to the offense of indecency with a child. The trial court deferred adjudication of her guilt and placed her on community supervision for a period of ten years. In May 2010, the State filed a motion to adjudicate her guilt alleging a number of violations of the conditions of her community supervision. The trial court held an adjudication hearing on July 21, 2010.

At the beginning of the adjudication hearing, Appellant asked the court to allow her attorney to withdraw and for time to engage new counsel. The trial court denied her request. Appellant pleaded true to the majority of the allegations in the State's motion. Following the hearing, the trial court found that Appellant had violated the terms of her community supervision and found her guilty as charged in the indictment. The trial court held a sentencing hearing on October 5, 2010. At the conclusion of the hearing, the trial court assessed a sentence of

imprisonment for twenty years. Appellant filed a motion to withdraw her plea and a motion for new trial on October 26, 2010. On October 28, the trial court set a hearing on Appellant's motion for December 15, 2010.

On November 1, 2010, Appellant filed an amended motion for new trial. The State filed an objection to the hearing on December 13, 2010. In its motion, the State pointed out that neither of Appellant's motions were verified or accompanied by a supporting affidavit. The same day, the trial court signed an order stating that the hearing had been set "inadvertently" by the court's coordinator. The court found that the first motion contained allegations that could be determined from the record and that the second motion was not supported by an affidavit. The court determined that a hearing was not required and denied both of Appellant's motions. This appeal followed.

APPELLANT'S REQUEST FOR NEW COUNSEL

In her second issue, Appellant argues that the trial court erred in overruling her request to "terminate" her court appointed counsel and to hire her own counsel.

Standard of Review and Applicable Law

The Sixth Amendment to the United States Constitution "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though she is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409 (2006). This right, however, "is circumscribed in several important respects." *Id.* For example, in *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697, 100 L. Ed. 2d 140 (1988), the Court listed several limitations to the right to counsel, including that a defendant could not have as her counsel a person not licensed to appear in court, an attorney she cannot afford or who declines to represent the defendant, or an attorney, in certain instances, who has a conflict of interest.

There is also the matter of timing. A trial court has wide latitude in balancing the right to counsel of choice against the needs of fairness and the demands of its calendar. *See Gonzalez-Lopez*, 548 U.S. at 151-52, 126 S. Ct. at 2565-66. Trial judges necessarily require a great deal of latitude in scheduling trials, and "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *See Morris*

v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964)).

Accordingly, we review a trial court's ruling whether to grant a motion to dismiss appointed counsel for an abuse of discretion. See *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000).

Analysis

At the beginning of the hearing on the State's motion to adjudicate, Appellant asked the trial court to allow her attorney to withdraw.¹ She explained to the court that she was "going to try to hire [her] own attorney" and that she had been unable to do so because "the attorneys" would not speak with her since she was represented by counsel. The trial court asked Appellant why she wanted counsel to withdraw. Appellant responded that her appointed counsel had not, to her view, adequately responded to her letters and telephone calls and that she believed that counsel should call additional witnesses.

Appellant's counsel told the court that he had met with Appellant more than once and had subpoenaed a witness "who in my estimation can testify - - can give testimony we need in this case." The court noted that it had previously given Appellant a different attorney and denied her request.

Appellant's request in this case was something less than a request for new counsel. She did not ask the court to appoint new counsel for her. Instead, she sought additional time to hire her own counsel. Without a record to support the argument, Appellant argues that new counsel was necessary to call witnesses whose testimony would pertain "directly to the [contested] issue of [her] residence." Because of the procedural posture of this case, we cannot know who such witnesses were or what their testimony would have been. The trial court was called upon to decide if Appellant's dissatisfaction with her second appointed counsel arose from a genuine and reasonable problem with counsel's representation or was something less than that or was an attempt simply to delay the proceedings. It is doubtful that the trial court would have required Appellant to maintain her court appointed counsel if she had arrived at the hearing with newly hired counsel.

¹ At the hearing on July 21, 2010, Appellant asserted that she had filed a written motion to "terminate" counsel. The trial court did not have that motion in its file. There is such a motion in the clerk's record. It has a file mark indicating that it was filed on August 10, 2010. Appellant had at least two pending cases, and it is not clear if this motion is one that she intended to file in this case in advance of the July hearing. In the written motion, she requests new appointed counsel.

Generally, vague expressions of dissatisfaction are insufficient to carry the defendant's burden to show that counsel must be replaced. *See Maes v. State*, 275 S.W.3d 68, 71-72 (Tex. App.–San Antonio 2008, no pet.). In addition, “personality conflicts and disagreements concerning trial strategy are typically not valid grounds” for the replacement of appointed counsel. *See King*, 29 S.W.3d at 566; *see also Carroll*, 176 S.W.3d at 256-58 (general allegations of communication breakdown and lack of cooperation did not require substitution of counsel). Finally, the decision as to whether to grant a continuance is committed to the discretion of the trial court. *See, e.g., Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007).

The trial court determined that Appellant's request for new counsel did not justify a delay in the proceedings after giving Appellant a full opportunity to express her concerns. The trial court was able to evaluate those concerns in light of counsel's statements on the issues of his preparedness and his attentiveness to Appellant's requests to communicate with him. In light of the circumstances, we hold that the trial court did not abuse its discretion in proceeding with the hearing. We overrule Appellant's second issue.

MOTION FOR NEW TRIAL

In her first issue, Appellant argues that the trial court erred in not holding a hearing on her amended motion for new trial. Specifically, she argues that the trial court should have held a hearing despite her failure to include an affidavit in support of the amended motion because the trial court had scheduled a hearing on the first motion and that motion also lacked a supporting affidavit.

Applicable Law

A defendant in a criminal case may file a motion for new trial no later than thirty days after the date the trial court imposes or suspends a sentence in open court. *See TEX. R. APP. P. 21.4(a)*. Within those thirty days, a defendant may file an amended motion for new trial if the trial court has not overruled the pending motion for new trial. *See TEX. R. APP. P. 21.4(b)*. The trial court must rule on a motion for new trial within seventy-five days after sentence is imposed or it will be “deemed denied.” *See TEX. R. APP. P. 21.8(a), (c)*.

A trial court is not required to hold a hearing in open court on a motion for new trial. *See Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). However, a defendant is entitled to an evidentiary hearing on a motion for new trial if the motion is accompanied by an affidavit or

affidavits and raises matters that could entitle the defendant to relief and that cannot be determined from the record. See *Lucero v. State*, 246 S.W.3d 86, 94 (Tex. Crim. App. 2008). We review the trial court's decision not to hold a hearing for an abuse of discretion. See *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006). A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record supports the trial court's ruling. *Id.*

Analysis

In her first motion for new trial Appellant stated, without elaboration, that the “verdict in this case is contrary to the law and the evidence.” She also requested that the court exercise its discretion and allow her to withdraw her plea of guilty and to grant a new trial “in the interests of justice.” It is this motion that the trial court set for hearing. After the trial court set the matter for hearing, Appellant filed an amended motion for new trial. In the amended motion, Appellant repeated her argument that the verdict was contrary to the law and the evidence and further alleged that her defense attorney provided inadequate assistance of counsel. The poor performance of counsel, she asserted, rendered both her original plea of guilty and her plea of true to allegations that she violated the terms of her community supervision involuntary and unknowingly made.

The allegations of ineffective assistance of counsel made in this case required additional evidence to consider. Therefore, Appellant's amended motion for new trial was deficient because it did not contain a supporting affidavit, and the trial court did not err in not holding a hearing. See *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009) (defendant not entitled to a hearing on motion for new trial unless she establishes the existence of reasonable grounds showing entitlement to relief); *King v. State*, 29 S.W.3d 556, 569 (Tex. Crim. App. 2000) (defendant not entitled to hearing unless motion is supported by affidavit specifically showing the truth of the grounds of attack).

Appellant concedes that the allegations of ineffective assistance of counsel required additional evidence. And she concedes that she did not file the required affidavits with her motion. She argues that the trial court was obligated, nevertheless, to hold a hearing because the trial court had “set out her judicial requirement that no supporting affidavit was required” and that this became a kind of a “judge's rule” that Appellant relied upon to her detriment.

Appellant's first motion for new trial did not require additional evidence. Accordingly, the first motion did not require a supporting affidavit. As it turns out, the hearing was set by an inexperienced staff member, and the trial court did not intend to set a hearing on Appellant's

motion. Appellant could not be expected to have guessed this. However, it was also not reasonable for Appellant to have concluded that the trial court had dispensed with the affidavit requirement for extra-record allegations because the first motion contained no extra-record allegations and did not require an affidavit. All Appellant had to do to avoid having been placed in this position was to comply with the requirement that a motion for new trial that contains extra-record allegations be accompanied by a supporting affidavit. Because she failed to do so, the trial court did not err in overruling her motion without a hearing. We overrule Appellant's first issue.

DISPOSITION

Having overruled Appellant's first and second issues, we *affirm* the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 30, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)