IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Gene Garza, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060403-CA F I L E D (January 10, 2008) 2008 UT App 7

Third District, Salt Lake Department, 051903311
The Honorable Judith S.H. Atherton

Attorneys: Ronald S. Fujino, Salt Lake City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake City, for Appellee

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Before Judges Thorne, Davis, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under existing law.

Contrary to Defendant's contention, harmless error analysis is appropriate on his first claim.[1] See State v. Lovell, 1999 UT

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1. Defendant states that harmless error analysis is not appropriate because the alleged error was structural. The authority he cites for this proposition, however, is misplaced. The cases cited stand for the proposition that harmless error analysis is not appropriate when a trial court denies a defendant's request to proceed pro se. See McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); United States v. Peppers, 302 F.3d 120, 127 (3d Cir.), cert. denied, 537 U.S. 1062 (2002). As Defendant did not ask to proceed pro se, these cases do not apply. Moreover, "[s]tructural error is reserved for a 'very limited class of cases' in which a constitutional error so

(continued...)

40, ¶¶ 27, 35, 984 P.2d 382 (declining to reverse when trial court failed to inquire into why the defendant was dissatisfied with his court-appointed attorney because the error was harmless), cert. denied, 528 U.S. 1083 (2000). In considering whether a failure to inquire into the reasons why a defendant wanted substitute counsel is prejudicial, we first address whether any of the mandatory grounds for substitution were present, and if none were, we then address whether the outcome would have been different if the court had appointed substitute counsel. See id. ¶¶ 29-35. In this case, Defendant filed a pro se motion seeking discharge of his court-appointed counsel based on four grounds. His motion did not elaborate on these four grounds. On appeal Defendant has not provided any record support for the first three grounds.[2] Rather, he only addressed and provided record cites relating to the last ground, i.e., that there was a complete breakdown in communication between Defendant and his court-appointed trial counsel. Such a breakdown is a mandatory ground for substitution. See State v. Pursifell, 746 P.2d 270, 274 (Utah Ct. App. 1987). Accordingly, we must determine whether or not this ground existed.

Defendant, who did not follow through with an effort to engage private counsel, never again mentioned his request to have his court-appointed counsel discharged, even though he attended additional hearings before the trial court and had the

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1. (...continued)
undermines the fairness of the proceedings that prejudice must be presumed." State v. Arguelles, 2003 UT 1, ¶ 94 n.23, 63 P.3d 731 (quoting Johnson v. United States, 520 U.S. 461, 468-69 (1997)), cert. dismissed on motion of the parties, 540 U.S. 1098 (2004). As Defendant was not completely deprived of his right to counsel, see Johnson, 520 U.S. at 468-69 (identifying six errors that are considered structural, including "a total deprivation of the right to counsel") (citations omitted), and as it is well established that a failure to inquire into the reasons why a defendant wanted substitute counsel may be harmless, see State v. Lovell, 1999 UT 40, ¶¶ 27, 35, 984 P.2d 382, cert. denied, 528 U.S. 1083 (2000); State v. Vessey, 967 P.2d 960, 962-63 (Utah Ct. App. 1998), any error here is not structural.

2. Because Defendant failed to adequately brief any of his first three grounds for substitution, we do not consider them. See State v. Lee, 2006 UT 5, ¶ 22, 128 P.3d 1179 ("[W]e may refuse, sua sponte, to consider inadequately briefed issues.").

opportunity to do so at those times.[3] Furthermore, at the pretrial conference, Defendant's trial counsel made no reference to any cooperation problems. Instead, counsel's responses indicated that the defense was ready to proceed to trial. Based on these circumstances, it appears that counsel and Defendant had resolved their differences by the time of trial and that a complete breakdown in communication did not exist. See Lovell, 1999 UT 40, ¶¶ 31-32. Moreover, the trial court's remarks at the hearing on Defendant's pro se motion made it clear that it fully expected to hear back from Defendant on the issue, and Defendant cannot now complain given his failure to raise the issue again. See State v. Pinder, 2005 UT 15, ¶¶ 45-46, 114 P.3d 551.

Because no mandatory ground for substitution has been shown, we turn to consider whether the outcome would have been different had substitute counsel been appointed or retained. We agree with the State that Defendant's court-appointed trial counsel vigorously represented him. With respect to certain charges, Defendant's trial counsel filed motions to dismiss, to quash bindover, and to sever; counsel moved to dismiss at the close of the State's case; counsel called several defense witnesses to testify; and counsel ably argued self-defense. At the same time, the evidence that Defendant committed the crimes was strong. Thus, we conclude that even if the trial court should have investigated why Defendant was dissatisfied with his court-appointed counsel, any failure in this regard did not prejudice Defendant and was, accordingly, harmless. See Lovell, 1999 UT 40, ¶¶ 33, 35.

Turning to Defendant's second claim on appeal, we conclude that the trial court did consider all statutorily mandated factors. At the sentencing hearing, the trial court indicated that it had "reviewed the presentence report," and the report discussed "the history, character, and rehabilitative needs of the defendant." Utah Code Ann. § 76-3-401(2) (2003). Thus, especially in light of its remarks at the sentencing hearing, the trial court clearly satisfied its duty with respect to reviewing the statutory factors, even if it did not determine that Defendant's history, character, and rehabilitative needs qualified as mitigating factors. See State v. Helms, 2002 UT 12, ¶ 13, 40 P.3d 626; State v. Thorkelson, 2004 UT App 9, ¶ 13, 84 P.3d 854. Accordingly, this argument is without merit.

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3. Defendant has not contended that he later raised the issue again before the trial court, and our review of the record reveals that he did not.

Also without merit is Defendant's argument that the trial court failed to consider all the mitigating circumstances his counsel raised. The trial court specifically indicated that it had reviewed Defendant's sentencing memorandum. The other six mitigating circumstances he relies on were raised at the sentencing hearing, immediately before the court imposed sentence. The record shows that the trial court considered Defendant's arguments with regard to mitigating factors even if it did not specifically address each argument. See State v. Moreno, 2005 UT App 200, ¶ 18, 113 P.3d 992.

Finally, we disagree that the trial court abused its discretion when it considered Defendant's age in the manner it did, given his criminal history, poor judgment, the violence of the crime, and the danger in which he put other innocent citizens. See State v. Montoya, 929 P.2d 356, 359 (Utah Ct. App. 1996).

Affirmed.

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Gregory K. Orme, Judge

WE CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

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James Z. Davis, Judge