IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ROBERT CHARLES KEENAN, Appellant.	))))))))))	No. 65647-3-I UNPUBLISHED OPINION FILED: November 14, 2011

Ellington, J. — Robert Keenan was convicted of possession of cocaine and driving while license suspended in the second degree. He contends he was denied his Sixth Amendment right to retain counsel of his choice when the court refused his request for an opportunity to hire private counsel two court days before trial. We disagree. Finding no merit Keenan's pro se claims, we affirm.

BACKGROUND

The State charged Keenan with possession of cocaine, driving while license suspended, and an ignition interlock violation that was later dismissed. Keenan was arraigned on December 15, 2009 and remained out of custody pending trial. The case scheduling conference was continued twice.[1] The omnibus hearing was also continued

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[1] The State represents that these continuances were requested by Keenan. The record does not indicate either way, but we note that Keenan has not corrected the assertion by reply brief or in his statement of additional grounds for review.

by joint request so that Keenan could consider a plea offer from the State. Keenan ultimately rejected the offer, and trial was set for May 11, 2010.

At the omnibus hearing on May 7, 2010, Keenan indicated to the court that he intended to hire private counsel. The court replied that it was "too late" and "[t]he trial is Tuesday."[2] Keenan argued that he and his attorney could no longer work together:

> [M]e and my attorney have gotten into a few disagreements. I don't feel like it could be, our relationship could be repaired, Your Honor. I feel it's been damaged beyond repair. I sincerely feel that way. I don't feel at all comfortable with going to trial (inaudible) significant amount (inaudible).[3]

The court asked Keenan to elaborate on his disagreements with counsel. Keenan responded:

> We haven't . . . well, I think it started because I, I missed a meeting, you know, maybe two meetings. Then, then we had a (inaudible) and we talked about the case. You know, I don't feel that we can get along (inaudible). I feel, you know, I don't feel comfortable with a lady.[4]

After this inquiry, the court declined to discharge defense counsel. The court observed that the case had been pending for "a long time for this kind of case" and found that "it's too late at this point to hire a private attorney."[5] Keenan explained he had wanted "our side to get the drugs tested and stuff," but counsel had not done so.[6] The court reiterated that the matter had been pending for "five months, six months after the date of arraignment. It's time to get this resolved."[7] Keenan argued the delays

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[2] Report of Proceedings (RP) (May 7, 2010) at 3.

[3] Id.

[4] Id.

[5] Id. at 3-4.

[6] Id. at 4.

[7] Id. at 6.

were at the attorney's request, not his. The court did not accept this explanation and confirmed the trial date.

Keenan's counsel thereafter moved to suppress evidence that the police found on Keenan's person, arguing the traffic stop leading to his arrest was unlawful. After a hearing on the matter, the court denied the motion.

The following day, Keenan waived his right to a jury and stipulated that the case should be tried to the bench on the contents of the police reports, laboratory reports, and similar materials. After reviewing the materials, the court found Keenan guilty of possession of cocaine and driving while license suspended in the second degree.

DISCUSSION

The Sixth Amendment guarantees the accused the right to counsel.[8] A component of this right is "'the right to a reasonable opportunity to select and be represented by chosen counsel.'"[9] The right to retain counsel of choice is not unlimited, however.[10] A defendant may not unduly delay the proceedings by making an untimely request to retain new counsel.[11]

When the defendant's request would necessitate a continuance, the court "must weigh the defendant's right to choose his counsel against the public's interest in the prompt and efficient administration of justice."[12] This balancing is within the broad

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[8] U.S. Const. amend. VI.

[9] State v. Price, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (quoting State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994)).

[10] State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010).

[11] Id. (citing Roth, 75 Wn. App. at 824).

[12] Id. (citing Roth, 75 Wn. App. at 824-25).

discretion of the trial court.[13] "'[O]nly an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the defendant's right.'"[14]

Keenan relies on State v. Price to argue the court abused its discretion by denying a continuance to retain counsel of choice.[15] There, Division Two of this court identified certain factors for reviewing courts to consider:

> (1) whether the court had granted previous continuances at the defendant's request; (2) whether he defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.[16]

Based on these factors, we conclude the court did not abuse its discretion.

Keenan's motion came only two court days before trial and after several continuances, some of which appear to have been requested by Keenan.[17] Besides a nebulous assertion that he and counsel had had "a few disagreements," Keenan's only basis for dissatisfaction was counsel's failure to have the drug evidence independently tested and the fact that he did not "feel comfortable with a lady."[18] This falls well short

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[13] Id.

[14] Roth, 75 Wn. App. at 824 (quoting Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983)) (internal quotation marks omitted).

[15] 126 Wn. App. 617, 109 P.3d 27 (2005).

[16] Id. at 632 (citing Roth, 75 Wn. App. at 825).

[17] See RP (May 7, 2010) at 6 (court rejects Keenan's claim that he has not requested continuances); Br. of Resp't at 2-3 (representing that two continuances were by Keenan's request and one by joint request).

[18] RP (May 7, 2010) at 3.

of establishing an irreconcilable conflict or complete breakdown in communication that would justify substitution of counsel.[19] The court indicated counsel could have the evidence tested "[i]f there's some reason to have it tested."[20] Keenan identified no reason.

Keenan's counsel stated she was ready for trial. Keenan points out that the case was relatively uncomplicated and suggests new counsel would require only a brief continuance to prepare. That may be. But even with ample opportunity to seek out private counsel during his several months out of custody, Keenan evidently had made no such efforts. Given that competent counsel was available and prepared for trial, the court could reasonably conclude further delay was unwarranted.

Finally, Keenan made no showing of likely prejudice, and suggests none on appeal. He contends the denial of the right to counsel of choice is a "structural defect," which requires no showing of prejudice.[21] "However, while not a necessity, the inability of the defendant to establish likely prejudice at the motion for continuance weighs heavily in the trial court's balance of the competing considerations."[22]

Given the imminent trial date, Keenan's inability to articulate any legitimate basis for dissatisfaction with counsel, the availability of competent counsel who was prepared

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[19] See State v. Schaller, 143 Wn. App. 258, 267-68, 177 P.3d 1139 (2007) (to warrant substitution of counsel, defendant must show good cause, "such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication").

[20] RP (May 7, 2010) at 5.

[21] Br. of Appellant at 4 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (erroneous deprivation of a criminal defendant's choice of counsel violates Sixth Amendment right regardless of prejudice)).

[22] Roth, 75 Wn. App. at 826 (emphasis omitted).

for trial, and the absence of any apparent prejudice, we cannot say the court abused its discretion or violated Keenan's constitutional right to counsel of choice by denying a continuance.

Statement of Additional Grounds

Pro se, Keenan contends his counsel was constitutionally ineffective because she neglected to use questions Keenan prepared for cross-examination of an officer at the suppression hearing.[23]

To prevail on a claim of ineffective assistance of counsel, the defendant must show his attorney's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the result.[24] We engage in a strong presumption of effective representation and require a defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[25] To show prejudice, a defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different.[26]

Keenan argues that the questions he wished counsel to ask would have established the officer was incorrect about the direction Keenan was traveling when he

[23] He also argues his counsel failed to provide him an opportunity to review discovery, including to view the video of his arrest. The appellate record does not permit review of this claim, but since Keenan identifies no resulting prejudice in any event, counsel's alleged failure to provide discovery cannot establish ineffective assistance of counsel.

[24] State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[25] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

[26] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

was stopped. We fail to see the significance of this discrepancy. Officer Sarah Mulloy

testified she stopped Keenan for avoiding an intersection by cutting through a parking lot and then entering traffic without stopping. Keenan does not dispute this fact. There is no reasonable probability that the outcome of the suppression hearing, or the trial, would have been different if counsel had asked the questions Keenan suggested.

Keenan also argues the court abused its discretion and violated his rights by refusing to allow the defense to test the evidence. The argument is without merit. The court indicated there is no constitutional right to an independent test of drug evidence; it did not say Keenan could not have it tested.

Affirmed.

Ellington, J.

WE CONCUR:

Grosse, J.

Cox, J.