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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-83

Filed: 2 June 2020

Wake County, No. 16 CRS 209195

STATE OF NORTH CAROLINA

v.

ANDRE MONTEZ GAGUM

Appeal by defendant from judgment entered 21 March 2018 by Judge David T. Lambeth, Jr. in Wake County Superior Court. Heard in the Court of Appeals 27 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamika L. Henderson, for the State.

Daniel J. Dolan for defendant.

PER CURIAM.

Defendant Andre Montez Gagum appeals his conviction for habitual impaired driving. Gagum argues that the trial court erred in denying his motion to continue his trial to allow him to obtain private counsel. For the reasons discussed below, we find no error in the trial court's judgment.

Background

On 7 May 2016, Gagum was arrested and charged with speeding and driving while subject to an impairing substance. On 16 May 2017, Gagum was indicted for driving while impaired and for habitual impaired driving.

When Gagum's case was called for trial on 20 March 2018, his appointed counsel made an oral motion to continue, stating that Gagum wanted to obtain private counsel. Counsel informed the trial court that Gagum had been in jail awaiting trial for eight months, had only been out for eight weeks, and was not yet in a financial position to hire an attorney.

The trial court heard from the parties as follows:

[THE PROSECUTOR]: Your Honor, the State would be opposed to that at this time. This original date of offense on this charge was May 7 of 2016. The indictment was returned, I believe, in May of 2017. . . .

The State is ready to proceed. We're approaching at this point in time, two years of age on this DWI charge. It sat around in District Court for a while, where there were plea offers extended there that were rejected. . . .

Had he wanted other counsel, I believe that he could have But there's been plenty of opportunity prior to the date of trial to want to get a new attorney. And [Gagum] has been – we've conversed about this case, about my plea offers, et cetera, and so I just think at this point in time the removal of [appointed counsel] is no more than a delay tactic.

. . .

[DEFENDANT]: How are you, Judge? I would like to say that I feel like this trial would be unfair. I was incarcerated

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for eight months, and this – this DUI has been going on for a year and maybe some change, and it just graduated to a habitual when I didn't take the plea.

As far as me never being in trial before, I had no idea that I had trial. I don't drink anymore. I'm on a[n] alcohol monitor so, you know, even they didn't have any idea when my next court date was. I had to go find out for myself on NC court calendar. And besides that, my attorney informed me yesterday that we would be going to trial.

I would just ask for a continuance because I'm working now, and just because I was locked up – when I was locked up eight months, the world didn't stop for me. So there's bills that I'm still paying and counsel that I am saving up for because this is a serious charge.

THE COURT: Have you talked to any lawyers about trying to hire them?

THE DEFENDANT: Yes, sir. I'm currently talking to Timothy Peterkin.

THE COURT: Are you in a position to be able to hire him?

THE DEFENDANT: Yes. I am actually only about \$350 short, maybe a little more.

[THE PROSECUTOR]: Your Honor, if I could address that? That's P-E-T-E-R-K-I-N.

THE DEFENDANT: Right. He was my attorney before.

[THE PROSECUTOR]: Out of Durham County?

THE DEFENDANT: Right.

[THE PROSECUTOR]: That you were convicted of obtaining property by false pretenses and forging a check from him?

THE DEFENDANT: I did take that plea for certain

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reasons, but Timothy Peterkin was my counsel before.

THE COURT: But you're saying he's pled guilty to an offense where that attorney was a victim?

[THE PROSECUTOR]: Yes, Your Honor.

THE COURT: Well, then I'm not sure he'd be able to ethically represent you.

After noting that Gagum had been charged “almost two full years ago” and appointed counsel “two months shy of two years ago,” the trial court denied Gagum’s motion to continue and proceeded to trial.

At trial, Gagum admitted that he had three prior driving while impaired convictions. On 21 March 2018, the jury found Gagum guilty of driving while impaired. The court arrested judgment on the driving while impaired conviction and sentenced Gagum to 23 to 37 months in prison for habitual impaired driving. Gagum appealed.

Analysis

Gagum’s sole argument on appeal is that the trial court deprived him of his constitutional right to retain counsel of his choice by denying his motion to continue. We disagree.

“A trial court’s ruling on whether to grant or deny a motion for a continuance is ordinarily reviewed under an abuse of discretion standard.” *State v. Blackwell*, 228 N.C. App. 439, 446, 747 S.E.2d 137, 143 (2013). However, “[w]here the motion raises

a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *State v. Hewson*, 182 N.C. App. 196, 210, 642 S.E.2d 459, 469 (2007).

"The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). This right includes an indigent defendant's right to court-appointed counsel, a defendant's right to obtain private counsel of his choosing, and a defendant's right to represent himself. *Id.* However, the North Carolina Supreme Court has recognized that "the right to be defended by chosen counsel is not absolute." *State v. McFadden*, 292 N.C. 609, 612, 234 S.E.2d 742, 745 (1977). "A judge's denial of a defendant's motion for a continuance to retain private counsel does not violate that defendant's constitutional right to the assistance of counsel if that right is balanced with the need for speedy disposition of the criminal charges and the orderly administration of the judicial process." *State v. Gant*, 153 N.C. App. 136, 142, 568 S.E.2d 909, 913 (2002).

In *State v. McFadden*, the defendant hired private counsel to represent him. 292 N.C. at 610, 234 S.E.2d at 743. When the case was called for trial, one of the retained counsel's junior associates appeared in court and asked for a continuance as the retained counsel was engaged in a trial in the United States District Court for the Middle District of North Carolina. *Id.* The junior associate explained that the

retained counsel had handled the defendant's case from its inception and was the only person prepared to try the case. *Id.* The junior associate stated he knew nothing about the case. *Id.* The trial court denied the motion to continue and directed the junior associate to represent the defendant. *Id.* at 610, 234 S.E.2d at 744. The North Carolina Supreme Court, in holding that the trial court erred by denying the defendant's motion to continue, stated that because the defendant timely exercised his right to select counsel of his choice long before the case was called for trial, and the defendant had not contributed in any way to his counsel's absence, nothing in the record indicated that the defendant "exercised his right to select counsel of his choice in a manner calculated to disrupt or obstruct the orderly progress of the court." *Id.* at 615, 234 S.E.2d at 747.

In *State v. Little*, the trial court denied the defendant's motion to continue in order to obtain counsel of his choice. 56 N.C. App. 765, 766, 290 S.E.2d 393, 394 (1982). The record demonstrated that the defendant's trial court date had been set two months earlier. Although the defendant had been appointed counsel, the defendant's mother had been in contact with the private attorney two or three weeks before she was retained on the day of the trial. *Id.* at 768, 290 S.E.2d at 395. Thus, this Court held that

[the] defendant was dilatory in securing the privately retained counsel. Under these circumstances, when balancing [the] defendant's right to have counsel of his choice with the need for speedy disposition of criminal

charges and the orderly administration of the judicial process, it is clear that [the] defendant's constitutional rights have not been denied.

Id. at 768–69, 290 S.E.2d at 395–96.

Similarly, this Court found no error in the trial court's denial of the defendant's motion to continue in *State v. Chavis*, 141 N.C. App. 553, 540 S.E.2d 404 (2000). The defendant made a motion to continue on the morning his trial was to begin because he wanted to retain his own counsel. *Id.* at 562, 540 S.E.2d at 411. The defendant's desired counsel was not in the courtroom when the motion was made, and there was no indication the defendant had made any financial arrangements to retain the attorney. *Id.* Moreover, the State's witnesses were present for trial, the matter had already been continued twice, and the defendant did not allege any conflict with his appointed attorney. *Id.*

Here, in contrast to *McFadden*, Gagum failed to exercise his right to obtain private counsel before his case was called for trial. The Sixth Amendment requires that "a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). But a defendant's "right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice" and must be "timely exercised" before his case is called for trial. *McFadden*, 292 N.C. at 615, 234 S.E.2d at 746. Analogous to the circumstances found in *Little* and *Chavis*, Gagum waited until the day his case was

called for trial to express his desire to hire private counsel, despite the fact that he had been charged and appointed counsel nearly two years before the time of the trial. Thus, even assuming that Gagum had, in fact, only been released from jail eight weeks prior to the commencement of his trial, Gagum had ample opportunity to retain private counsel. As in *Chavis*, there is no indication Gagum had made financial arrangements with his desired counsel; he stated he was “talking” to the attorney, but was still \$350 short of being able to retain him. Finally, the State stated it was prepared to proceed to trial and asserted that Gagum’s motion was “no more than a delay tactic.”

Gagum filed a memorandum of additional authority that *State v. Goodwin*, __ N.C. App. __, 833 S.E.2d 379 (2019), supports his claims, but we find this case inapplicable. While this Court did award the defendant a new trial where he was denied the opportunity to retain counsel, this determination was based on the conclusion that the trial court failed to apply the standard set out in *McFadden*. *Id.* at __, 833 S.E.2d at 382. Moreover, this Court pointed to the differences between the defendants in *Goodwin* and *Chavis*. *Id.* The defendant in *Goodwin* made his request during a pretrial motion, not on the day trial was to begin. *Id.* This Court reaffirmed that “the timing of the request [was] the primary reason” for the decision in *Chavis*. *Id.*

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In light of the foregoing, allowing Gagum's motion to continue would have significantly delayed disposition of the criminal charges and disrupted the administration of the judicial process. Accordingly, we hold that the trial court did not deprive Gagum of his constitutional right to counsel of his choice when it denied Gagum's motion to continue.

Conclusion

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Panel consisting of Judges DILLON, DIETZ, and MURPHY.

Report per Rule 30(e).