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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-542

Filed 19 February 2025

Catawba County, Nos. 20 CRS 003466, 054797

STATE OF NORTH CAROLINA,

v.

JERRY RAY BOLES

Appeal by defendant from judgment entered 31 July 2023 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 29 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Megan Elizabeth Shook, for the State.

W. Michael Spivey, for defendant.

ARROWOOD, Judge.

Jerry Ray Boles (“defendant”) appeals from judgment entered 31 July 2023 upon his convictions of habitually impaired driving and misdemeanor possession of marijuana. On appeal, defendant argues the trial court committed a structural error when it denied defendant’s request to retain counsel using the standard for hearing an ineffective assistance of counsel argument rather than the standard for a counsel

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of choice argument. For the following reasons, we find no error.

I. Background

The evidence at trial tended to show the following:

On 6 October 2020, Officer Brittany Weaver (“Officer Weaver”) was working on road patrol for the Maiden Police Department. As she was patrolling West Main Street in Maiden, she observed a vehicle flash its lights several times at her and slow down near her vehicle. The passenger of the vehicle rolled down his window and told Officer Weaver that the vehicle directly in front of him, a green Ford Expedition, was swerving all over the road.

Officer Weaver proceeded to follow the Expedition for about four blocks. She observed the vehicle brake and speed up sporadically, swerve within its own lane, and cross the left lane line twice. After Officer Weaver initiated her police car lights, she observed the vehicle going completely over the double yellow line on the road before it came to a stop in the middle of the road.

As Officer Weaver approached the vehicle, she observed defendant in the driver’s seat. Defendant told Officer Weaver that he did not have a driver’s license and that he was not the registered owner of the vehicle. While speaking with defendant, Officer Weaver noticed he had glassy eyes, was sluggish, and slow to respond to her questions. At this point, she called Officer Thomas Evans (“Officer Evans”) for backup due to the possibility of an impaired driver. She also noticed a crushed beer can in the center console. Based on these observations, she decided to

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perform a field sobriety test. Defendant missed several heel-to-toe steps and needed to use his arms for balance during the test. Defendant also had to use his car several times to steady himself.

Officer Evans also collected a breath sample from defendant. The results showed that defendant blew 0.0. Officer Weaver then searched the vehicle and discovered a bag of marijuana in the center console. Based on the marijuana and the breath sample, Officer Weaver determined that the marijuana was the source of defendant's impairment. Officer Weaver then arrested defendant for driving while impaired and possession of marijuana.

After defendant was arrested, he submitted to a blood draw to determine if the impairment was caused by a substance other than alcohol. Officer Weaver called an additional Drug Recognition Expert named Allen Carlisle to test the blood for additional substances. While waiting for Mr. Carlisle to come do the testing, Officer Weaver read defendant his Miranda Rights, which he waived. The results of this blood test showed that defendant had tested positive for methamphetamines and marijuana. Defendant was ultimately charged with driving while intoxicated, driving while license revoked, and possession of marijuana.

Following defendant's arrest, on 25 January 2021, defendant was assigned Ralph Yount ("Mr. Yount") as his counsel. Mr. Yount filed an objection to an affidavit submitted by a chemical analyst related to introducing a North Carolina State Crime Laboratory Report in lieu of testimony for defendant's hearing. However, after filing

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this objection, Mr. Yount withdrew as defendant's counsel. No reason was given for Mr. Yount's withdrawal. On 26 July 2022, attorney Ben Moose ("Mr. Moose") was appointed to replace Mr. Yount as defendant's counsel.

As counsel for defendant, Mr. Moose filed a motion to suppress all evidence on the grounds that Officer Weaver had no probable cause to stop defendant and initiate the traffic stop. Mr. Moose also filed a motion to dismiss the charges based on the fact that there was no probable cause to obtain the evidence. The trial court denied these motions stating that Officer Weaver had reasonable suspicion based on her own observations of the way defendant was driving the vehicle.

Prior to trial, defendant pleaded guilty to driving with his license revoked. The next day, defendant moved to remove Mr. Moose as his counsel. Defendant stated that he believed Mr. Yount and Mr. Moose did not have his best interest at heart and that he wished to hire his own attorney instead of using a court-appointed one. He stated twice that he wished to hire his own attorney. The trial judge said that in order for defendant to hire his own attorney, he would have to have Mr. Moose file a motion to withdraw, otherwise, if defendant fired Mr. Moose immediately, he would have to represent himself pro se. Defendant declined to represent himself.

Mr. Moose subsequently filed a motion to withdraw as defendant's counsel. Mr. Moose stated that he asked defendant if defendant could cooperate with him throughout the rest of the trial. Defendant refused to answer him and only requested that the jury know defendant tried to fire Mr. Moose as his counsel. In ruling on this

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motion, the trial court specifically stated:

I'm not at all convinced at this point that there's any issue whatsoever as it relates to the effectiveness of counsel on behalf of Mr. Moose. Mr. Moose has filed numerous pretrial motions. We had a motion to suppress yesterday. What is really going on here is a delay in the case. I'm going to take a few minutes to think about this to see how best to proceed at this point.

. . . There is absolutely no evidence suggesting, intimating, forecasting, suggesting that there is any issue with regard to the effectiveness of Mr. Ben Moose's representation of this defendant. Mr. Moose has an exemplary reputation in this district. Everything in front of me has been first class. He is well-prepared to try this case. There is no suggestion of any ineffectiveness of counsel at this stage.

Indigent defendants have the right to counsel. They do not have the right to choose their lawyers. Indigent defendants are to take the attorney that is given to them or represent themselves. There is nothing relating to ineffectiveness of counsel whatsoever. Substitute counsel is not required just because defendant does not like his appointed counsel.

One option is I can discharge Mr. Moose and appoint him as a standby counsel. Let Mr. Boles represent himself. That's one option. The other option is to deny Mr. Moose's motion to withdraw. This case has been – August 1, 2022, that's the habitual impaired driving indictment. The indictment on the impaired revocation and possession of marijuana charge is August 1, 2022. Mr. Moose was appointed July 26, 2022. He is prepared to try this case. If you want to represent yourself, that's what you are going to do. I'm not going to continue this case. It's not going to be delayed. This case has been pending for over a year.

After a brief discussion with defendant, Mr. Moose proceeded to represent defendant throughout the trial. The trial judge never made a ruling on Mr. Moose's motion to

withdraw.

Following the trial, the jury found defendant guilty of possession of marijuana up to one-half ounces and guilty of driving while impaired. Defendant was sentenced to 21 to 35 months imprisonment. Following trial, defendant made a motion for appropriate relief, stating that he had asked Mr. Moose to enter a notice of appeal at the end of sentencing and that Mr. Moose failed to enter this notice of appeal. The trial court granted this motion and conducted a hearing on 31 July 2023 where defendant was able to enter oral notice of appeal.

II. Discussion

Defendant's sole argument on appeal is that the trial court committed a structural error by denying defendant's request to retain counsel using the standard for hearing an ineffective assistance of counsel argument rather than the standard for a counsel of choice argument. However, the State argues that defendant failed to preserve his issue for appeal because the trial court never issued a ruling on Mr. Moose's motion to withdraw. We begin by addressing whether defendant preserved this issue for appeal.

A. Preservation of Appeal

The State contends this appeal should be dismissed because defendant's issue was not preserved for appeal as the trial court did not make a final ruling on Mr. Moose's motion to withdraw as counsel for defendant. We disagree.

"In order to preserve an issue for appellate review, a party must have

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presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). The North Carolina Rules of Appellate Procedure also require that in order for an issue to be preserved for appeal, the moving party must “obtain a ruling upon the party’s request, objection, or motion.” *Id.*

Here, defendant presented two requests to the trial court: (1) a request to the court to allow him to hire his own counsel and (2) a motion for Mr. Moose to withdraw as defendant’s counsel. Defendant stated he made these requests because he believed he and Mr. Moose “were butting heads from the get go.” Defendant specifically wished to hire his own counsel instead of having a court-appointed attorney, which would require Mr. Moose to motion to withdraw as defendant’s counsel. In response to defendant’s request to allow him to hire his own counsel, the trial court effectively rejected his request by stating: “I’m not going to allow Mr. Moose with withdraw. He has to make a motion to withdraw. If you want to fire him, I’m just not going to allow you to discharge him, unless you want to represent yourself.” In giving defendant one of two choices, neither of which would allow defendant to hire his own counsel, the trial court effectively ruled on defendant’s request to hire his own counsel.

Furthermore, after the trial court rejected defendant’s request to hire new representation, Mr. Moose moved to withdraw. While the court did not make a formal ruling on Mr. Moose’s motion, the trial court merely noted that “[o]ne option is I can

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discharge Mr. Moose and appoint him as a standby counsel. Let Mr. Boles represent himself. That's one option. The other option is to deny Mr. Moose's motion to withdraw." After conferring with defendant, Mr. Moose and defendant both decided to proceed with Mr. Moose representing defendant, rendering Mr. Moose's motion to withdraw void. However, because defendant's issue on appeal is specifically related to his request to hire his own representation, and the trial court made a ruling on this request, this issue is preserved for appeal.

B. Counsel of Choice

On appeal, defendant argues that the court committed structural error when it considered defendant's request for new counsel using an ineffective assistance of counsel standard rather than a choice of counsel standard. We disagree.

1. Standard of Review

Generally, this Court reviews "a trial court's decision to either grant or deny a motion to withdraw for abuse of discretion." *State v. Melton*, 294 N.C. App. 91, 93 (2024). However, "when [a] motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion[.]" *State v. Little*, 56 N.C. App. 765, 767 (1982). Thus, "where, as here, the defendant's motion concerns his right to be defended in all criminal prosecutions by counsel whom he selects and retains, we must review the trial court's decision concerning that motion, de novo." *Melton*, 294 N.C. App. at 93–94 (internal quotations omitted).

2. Application of the proper standard on a motion to withdraw

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The Sixth Amendment provides that in criminal prosecutions, “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. [The United States Supreme Court has] previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (internal quotations omitted). However, this right is not absolute.

The Supreme Court of North Carolina has previously held that

[T]he state should keep to a necessary minimum its interference with the individual’s desire to defend himself in whatever manner he deems best, using any legitimate means within his resources and that desire can constitutionally be forced to yield only *when it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.*

State v. McFadden, 292 N.C. 609, 613–14 (1977) (emphasis added). In interpreting this holding in *McFadden*, this Court has ruled that in analyzing requests to withdraw court-appointed counsel in favor of private counsel, a court must “without weighing prejudice against the defendant, appl[y] a balancing test, noting defendant’s right to private counsel of his choice . . . against the need for speedy disposition of the criminal charges and the orderly administration of the judicial process.” *Melton*, 294 N.C. App. at 96–97 (internal quotations omitted). This Court has previously balanced defendant’s right to private counsel against the need for speedy disposition in *State v. Chavis*, 141 N.C. App. 553 (2000). In that case, the defendant, on the morning his

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case was called for trial, sought a third continuance to obtain alternate counsel. *Id.* at 556. Witnesses for the State were also present in the courtroom that day and were ready to testify. *Id.* at 562. The trial court denied this motion stating because defendant did not already have the private counsel he indicated he wanted to employ, he could not have his appointed counsel withdraw from representing him. *Id.*

Here, the trial court clearly did not commit structural error in denying defendant's request to withdraw his court-appointed counsel for him to hire private counsel. The trial court appropriately balanced defendant's right to his counsel of choice with issuing a speedy trial. The trial court noted several reasons why it was denying defendant's request in favor of continuing with the trial.

First, defendant made his motion after the jury had already been selected. Second, defendant requested new counsel after multiple continuances had already been issued and even admitted that his first attorney, Mr. Younts, "kept continuing the case" and that he had "wasted a lot of time." Third, like the defendant in *Chavis*, defendant here had not already hired the private counsel he wished to replace Mr. Moose with. Fourth, the trial court appropriately denied defendant's request to allow him time to hire new counsel because the State's witnesses were already present in the courtroom and ready to testify that day. Finally, although the trial court never specifically asked defendant if he had already hired a private attorney, defendant had already conceded that if Mr. Moose were to withdraw, he did not have a private attorney already lined up because he would have to "go hire" another one.

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Furthermore, although the trial court did respond to Mr. Moose's motion to withdraw by noting that it found no issues with Mr. Moose's effectiveness of counsel, it also noted that this request is being made to delay the case. The trial court specifically noted,

One option is I can discharge Mr. Moose and appoint him as a standby counsel. Let Mr. Boles represent himself. That's one option. The other option is to deny Mr. Moose's motion to withdraw. This case has been – August 1, 2022, that's the habitual impaired driving indictment. The indictment on the impaired revocation and possession of marijuana charge is August 1, 2022. Mr. Moose was appointed July 26, 2022. He is prepared to try this case. If you want to represent yourself, that's what you are going to do. I'm not going to continue this case. It's not going to be delayed. This case has been pending for over a year.

The defendant, in response to this reasoning by the trial court, even noted that it had "been 30 months" since this case had been pending. Thus, the trial court appropriately balanced defendant's right to counsel of choice with the need for a speedy trial in denying defendant's request to hire private counsel and requiring defendant to proceed with the trial with Mr. Moose as his court-appointed counsel. Accordingly, the trial court did not commit structural error by using an ineffective assistance of counsel standard rather than a counsel of choice standard.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges GORE and MURRY concur.

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Report per Rule 30(e).