COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1332-CR **Cir. Ct. No. 2007CF6091**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC PAUL HENRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARTIN J. DONALD, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 CURLEY, P.J. Eric Paul Henry appeals the judgment, entered following a jury trial, convicting him of first-degree intentional homicide, as a

party to the crime, contrary to WIS. STAT. §§ 940.01(1)(a) and 939.05 (2007-08).[1] Henry argues that the trial court erroneously exercised its discretion when it denied his pretrial request for new counsel so as to deprive him of his constitutional right to counsel. Because the trial court properly concluded that a substitution of counsel was not appropriate under the circumstances, we affirm the trial court's exercise of discretion.

I. BACKGROUND.

¶2 Henry was charged with first-degree intentional homicide, as a party to the crime, in connection with the death of Anne Gordon. Gordon was found dead in her condominium, and the results of her autopsy revealed that she died as a result of asphyxia due to the obstruction of her airways by duct-tape covering her face. The allegations set forth in the complaint reveal that Henry considered Gordon to be his grandmother.

¶3 In addition, the complaint set forth statements Henry made to police admitting his involvement in Gordon's death, but claiming that he was coerced by a man who was identified as Ronald Woods. Testimony from the preliminary hearing reflects that Woods was questioned by police and had a convincing alibi. As such, Woods was not charged in connection with Gordon's death.

¶4 Following the preliminary hearing, Henry's privately retained attorney moved to withdraw because Henry could not pay him. Attorney Richard Johnson was appointed through the State Public Defender's office and agreed to

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

the previously scheduled April 21, 2008 jury trial date. Shortly thereafter, Attorney Johnson filed a motion to suppress Henry's statements to the police.

¶5 At the outset of the motion hearing, Attorney Johnson advised the court that Henry wished to have a new attorney appointed. Henry, however, agreed to have Attorney Johnson handle the ***Miranda-Goodchild*** hearing, and at the conclusion of the hearing, advised the court that he wanted Attorney Johnson to remain as his attorney.[2]

¶6 Then, on April 11, 2008, ten days before the scheduled jury trial, Henry filed a motion to dismiss Attorney Johnson as his attorney. Five days later, Attorney Johnson's co-counsel filed a motion to withdraw as counsel. The motions were not addressed until the day of trial.

¶7 At that time, the trial court inquired as to the reason for Henry's dissatisfaction with his attorneys, to which Henry replied:

> What happened is that the last time that I saw Mr. Johnson, he just told me, said I'm going on vacation. And I said, what about my defense for my trial? He said, well, we're working on that. And I took that and said, well, something is wrong here. So I got on my knees and I prayed and I asked what was the best thing for me to do, and the best thing for me to do was to get rid of my lawyer so I have somebody that's going to fight.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). If the defendant moves to suppress his or her statements because of law enforcement's failure to timely warn of the risks and consequences of self-incrimination (***Miranda***), or the voluntariness of the statements (***Goodchild***), the trial court conducts an evidentiary (***Miranda-Goodchild***) hearing to determine the validity of the accused's statements and whether suppression is warranted.

> And I went back over the times that me and him talked. All he kept saying is these words, well, we're working on it; we're working on it. I asked, what about my pre-trial? He said, I don't think you're going to get one. What about the witnesses that I'm asking to be called for my defense? He said, oh, we don't need any witnesses because you already gave the police a statement.
>
> … There's things that he did that were unethical on my behalf. I gave him factual information that was never investigated by him, [his co-counsel] or his investigator, and there were things that were given to him in February when I first received him as my lawyer.
>
> And at the actual time we did the motion hearing, I thought he did a great job. But when he came and told me he was going on vacation, and he said, we don't have a defense right now; we're working on it, that led me to believe that he's really not trying to fight for my life, Your Honor.

According to Henry, he saw Attorney Johnson only once following the ***Miranda-Goodchild*** hearing.

¶8 When the trial court inquired further as to the basis for Henry's complaint against Attorney Johnson, Henry responded:

> Factual information as far as receipts that I had that showed where I was at at the time. He said his investigator was looking [into] it. He still said, we still haven't found it yet. We haven't had a chance to get that yet. Witnesses that I asked to be called who I had to go ask and ask to testify for me.
>
> THE COURT: What witnesses?
>
> MR. HENRY: For instance, Ronald Woods. The only thing he kept saying is, we're going to try to break his alibi. He just kept saying, we're going to try.

When Henry made this statement, the State advised the court that Woods would be testifying at the trial.

¶9 When the trial court inquired, Attorney Johnson informed the court that he told Henry he had a vacation planned the first time he met with him. Henry said that this was a lie and that he only first learned of Attorney Johnson's vacation on April 3rd or 4th.

¶10 At this point, the trial court again inquired as to the basis for Henry's complaint against Attorney Johnson and was told that Henry did not think that Attorney Johnson had performed the necessary due diligence because he had not investigated a receipt related to a phone bill Henry had paid for his mother; had not pursued his allegation that he had not been read his ***Miranda*** rights by the police, which the court noted had already been addressed at the prior motion hearing; and had not followed-up on witnesses to be called on his behalf. As for Henry's reference to receipts for paying a phone bill, Henry conceded that he was not pursuing an alibi defense. When pressed as to the names of the witnesses, Henry referenced Woods, Erica Morrow, and Susan Morrow. According to Henry, Woods's alibi was that he was with Erica Morrow in Whitewater, Wisconsin, and Susan Morrow would testify that this was not the case. In addition, Henry referenced Candice Hamilton, another person Woods relied on as part of his alibi.

¶11 When questioned regarding whether he had investigated any of the witnesses referenced by Henry, Attorney Johnson stated:

> I've talked to [Henry's] mother. Susan Morrow—I know the name Erica Morrow, and I would have to ask my investigator if he was able to contact her. Susan Morrow, her mother, that's the first I've heard of that name.

¶12 In giving Henry one last opportunity to advise the trial court as to why he wanted to dismiss Attorney Johnson as his attorney, Henry stated:

> Your Honor, to be honest with you, besides the fact that I just—I know he's not doing his job, I think Mr. Johnson really doesn't care by his work ethics [sic] and everything else. He's always putting things off on [his co-counsel] doing the work and his investigator doing the work. It's never, well, this is what I'm doing.
>
> I understand I don't have the money to pay for an attorney, but I do pay taxes, and I feel like I help pay his salary. And I think that Mr. Johnson is only here saying whether he's guilty or not. He really doesn't care.

¶13 Attorney Johnson informed the trial court that having just learned about Susan Morrow, he was not ready to proceed to trial. He further advised the court that the case had not previously been adjourned and that although an adjournment would be burdensome to the victim's family, who came from New York to attend the trial, "the real burden is on [Henry]." Attorney Johnson sought "one adjournment [to] allow [Henry] to have an attorney who he feels comfortable with and he's not calling a liar, and let that attorney go out and find Susan Morrow and make sure they're ready and give him one good kick at the cat."

¶14 In ruling on Henry's motion, the trial court noted that Henry had not told Attorney Johnson about Susan Morrow until that day. Notwithstanding, the court offered to issue a body attachment so that she and Erica Morrow could appear as witnesses in Henry's case. The court further explained:

> [I]t was only after [Attorney Johnson] came to you to indicate that he was going on vacation that you became somewhat disillusioned with his work ethics [sic], the mere fact that he was going on vacation. I don't necessarily find that as a legitimate reason to grant the motion, particularly, in fact, that today is the day of trial.
>
> When I take into account that Mr. Johnson is the second attorney on the case; he's worked this case; he's prepared the case with respect, as he understood the theory, you're now, in essence, implying that there is a potential

> alibi on your part,[3] but again, that's information that you had that you could have communicated to him long before today's date or long before the date he indicated that he was going to go on vacation.
>
> In terms of balancing between the State's interest and your interest to a fair trial, you have two attorneys who have worked the case; who are competent, and up until you made the motion, they were prepared to proceed. So I feel that they are still in the position to proceed with the case.
>
> When I look at the fact that I have family members of the victim who came from out of town specifically for today's trial date, the inconvenience and hardship that that creates; when I take into account, in addition, that there are other witnesses who are now available that you're seeking, namely, Mr. Woods, who is available to be cross-examined and questioned with respect to his alibi … therefore, this Court at this time finds that there is no good cause to grant the motion. That it is nothing more than an attempt to delay the trial, and therefore, the Court will deny the motion to dismiss Mr. Johnson in this matter.

(Footnoted added.) In addition, the court did not find "that the communication has broken down to the point where it would result in a situation where the defendant would, in essence, have an inadequate defense or frustrate a fair presentation of the case." At this juncture, the State advised the court that it had located Susan Morrow and that both she and Erica Morrow would be subpoenaed to be in court the following day, for the start of trial.

¶15 At the end of the first day of trial, the State informed the trial court that Erica Morrow and Susan Morrow had been present and were interviewed by a detective, who wrote a report about what they would say. The report was provided to Attorney Johnson who then released the women. The next day, Attorney Johnson explained that based upon the statement Erica Morrow had provided, he

[3] This appears to have been a misstatement by the trial court, as Henry had previously stated that he was not pursuing an alibi defense.

would not call her as a witness, a decision Henry disagreed with. Henry sought to proceed *pro se*, and after engaging in a colloquy with him, the court denied Henry's request.

¶16 The jury found Henry guilty of first-degree intentional homicide, as a party to the crime. He was sentenced to life in prison without the possibility of extended supervision. Henry now appeals.

II. ANALYSIS.

¶17 "Decisions related to the substitution of counsel are within the sound discretion of the [trial] court." ***State v. McMorris***, 2007 WI App 231, ¶18, 306 Wis. 2d 79, 742 N.W.2d 322. "[T]he exercise of discretion is not the equivalent of unfettered decision-making." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). To be upheld, a discretionary act "must demonstrably be made and based upon facts appearing in the record and in reliance on the appropriate and applicable law." ***Id.*** In general, we look for reasons to sustain the trial court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). We will uphold a discretionary decision if we can independently conclude that the facts of record, applied to the proper legal standards, support the trial court's decision. ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993).

¶18 In ***State v. Lomax***, 146 Wis. 2d 356, 432 N.W.2d 89 (1988), our supreme court described the factors to be considered when reviewing a discretionary denial of a motion to change counsel:

> In evaluating whether a trial court's denial of a motion for substitution of counsel is an abuse of discretion, a reviewing court must consider a number of factors including: (1) the adequacy of the court's inquiry into the

> defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Id. at 359.

¶19 Henry asserts that application of the ***Lomax*** factors to this case compels the conclusion that the trial court's denial of his request for new counsel was in error. As an initial matter, Henry concedes that the trial court's inquiry into his complaint was sufficient. Accordingly, we turn to the second ***Lomax*** factor, "the timeliness of the motion." *See* ***id.*** at 359.

¶20 Henry asserts that his motion for new counsel was timely for the following reasons: the motion was filed ten days before trial (and within four or five days of the meeting where he claims he first learned of Attorney Johnson's vacation plans); he wrote a letter to counsel informing them of his desire to obtain new counsel; both the State and his counsel were aware of his request; and it was not his fault that the trial court did not review the motion until the morning of trial.

¶21 Although the date of the request to substitute counsel in relation to the date of trial is a relevant factor, *see* ***id.*** at 361-62, it is not the sole consideration in determining the timeliness of the motion. A court should also take into account the following: (1) the length of the delay sought; (2) whether competent counsel is available to try the case in "lead" counsel's absence; (3) whether prior continuances were requested and received by the defendant; (4) the inconvenience to the parties, witnesses, and the court; (5) whether the delay seems to be for legitimate reasons as opposed to some dilatory purpose; and (6) other relevant factors. *See* ***Phifer v. State***, 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974); *see also* ***Lomax***, 146 Wis. 2d at 360.

¶22 The trial court did not make specific findings as to the timeliness of Henry's motion. The court observed, however, that it was only after Attorney Johnson informed Henry that he would be on vacation the week and a half before Henry's trial that Henry became "disillusioned with [Attorney Johnson's] work ethics" and sought a substitution of counsel. The court rejected this as a legitimate reason for delaying the trial. We agree. Attorney Johnson stated that he had advised Henry of his vacation plans when he first met with Henry, he had prepared for Henry's trial both prior to and immediately following his vacation, he considered the case "pretty much ready to go" the day before trial, and co-counsel was available during his absence. There is no indication in the record that Attorney Johnson's vacation affected his representation of Henry in any respect and Henry does not claim otherwise. Moreover, we agree with the State that:

> even if the trial court had heard the motion the day it was filed, referral to the Public Defender to appoint new counsel ten days before trial would have required a continuance. It would not have been reasonable to expect new counsel to get prepared for a first-degree intentional homicide trial in only ten days.

¶23 The timeliness of a motion to substitute counsel "must be balanced with the third [***Lomax*** factor], whether the alleged conflict between the defendant and attorney is so great that it likely resulted in a total lack of communication that prevented adequate defense." ***Lomax***, 146 Wis. 2d at 362. Although ***Lomax*** used the phrase "total lack of communication," we have since recognized that the conflict need only result in a "substantial breakdown in communications." *See* ***State v. Jones***, 2007 WI App 248, ¶19, 306 Wis. 2d 340, 742 N.W.2d 341. We explained in ***Jones*** that "[t]he trial court must … make sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible." ***Id.***, ¶13.

¶24 Henry argues that a "substantial breakdown in communications" is evidenced by the following facts: when Attorney Johnson would visit him at the jail prior to trial, "[Attorney Johnson] would have nothing new to say about the case and would respond to Henry's inquires only by saying '[w]e're working on it'"; Attorney Johnson failed to investigate the names of witnesses Henry provided, which he claimed were relevant to the alibi of Woods, the man he claimed coerced him to participate in Gordon's death; and following the ***Miranda-Goodchild*** hearing, Attorney Johnson visited him at jail on only one occasion, which was to inform Henry that he was going to be on vacation immediately before Henry's trial.

¶25 Although Henry may have been frustrated that Attorney Johnson did not visit him in jail more frequently and was unable to develop a defense or constantly provide new information regarding the case, we conclude that the record does not support a conclusion that the communication between Henry and Attorney Johnson had broken down to the extent that it prevented an adequate defense. *See* ***State v. McDowell***, 2004 WI 70, ¶75, 272 Wis. 2d 488, 681 N.W.2d 500; ***Lomax***, 146 Wis. 2d at 362. As the State observes, Henry has not demonstrated a lack of communication between him and his attorney, he has merely demonstrated his dissatisfaction with what his attorney told him. Furthermore, although Henry complains that Attorney Johnson failed to investigate two potential witnesses, the record reflects that Attorney Johnson was unaware of one of those witnesses until the day of trial and the other witness refused to speak with defense investigators prior to trial. We agree with the trial court that Henry's unhappiness with the way things developed in his case does not support the conclusion that there was a "substantial breakdown in communications." *See* ***Jones***, 306 Wis. 2d 340, ¶19.

¶26 In sum, we have considered the timeliness of Henry's motion for substitute counsel and whether there was a "substantial breakdown in communications" between Henry and Attorney Johnson, and we conclude that the facts of record support the trial court's discretionary decision to deny Henry's motion. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.