

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 22, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-0597-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANDRES A. DELREAL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Andres Delreal appeals a judgment convicting him of first-degree intentional homicide and two counts of first-degree recklessly endangering safety, all by use of a dangerous weapon. He also appeals an order denying one of his postconviction motions. He claims the trial court erroneously

exercised its discretion when it denied his request for a substitution of counsel prior to trial and when it refused to modify his sentence after two prior convictions, which had been mentioned at sentencing, were reversed. We conclude the trial court properly exercised its discretion in each instance and affirm.

## BACKGROUND

¶2 The initial complaint against Delreal was filed on October 24, 1998.<sup>1</sup> At the preliminary hearing on November 3, 1998, appointed counsel informed the court that Delreal was attempting to obtain private representation and asked for an adjournment. The court indicated that it might be willing to grant extra time if a new attorney had been hired, but refused to adjourn the matter based on the mere possibility that Delreal would be able to obtain private counsel. The hearing proceeded and Delreal was bound over for trial, which was eventually set for January 19, 1999.

¶3 On January 4, 1999, Delreal wrote a letter to the trial court asking to have new counsel appointed based on his “lack of confidence” in his attorney’s preparation for trial. On January 8, 1999, defense counsel filed a motion to withdraw based on her client’s concerns, and on a breakdown in the attorney/client relationship. The court denied the motion, noting:

[T]here’s nothing that’s been said to the Court that these two<sup>2</sup> lawyers that are before the Court, who are good

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<sup>1</sup> The sole count in the initial complaint was first-degree intentional homicide. The complaint was amended on January 4, 1999, to add two charges of first-degree recklessly endangering safety and three penalty enhancers for use of a dangerous weapon.

<sup>2</sup> Attorney Melissa Fitzsimmons, who was counsel of record, was being assisted by Attorney Meighan Anger.

lawyers, who practiced in these courts before, have done these types of cases, and I have no doubt that they're prepared to — prepared to try the case because they've told me so, and knowing these lawyers there's no — there's no reason for this Court to question their — their veracity, so if they're telling me they're prepared, I know that they're prepared because of my past experiences with these two lawyers.

Defense counsel renewed her motion to withdraw at a pretrial hearing on January 14, 1999, noting that Delreal had refused to meet with her and her associate at the jail. The court denied the motion on the grounds that Delreal's refusal to cooperate was his own choice, and that his primary motivation for the substitution request appeared to be to delay the trial. The trial proceeded and Delreal was convicted on all counts.

¶4 At the sentencing hearing on February 25, 1999, the trial court considered, among other factors, Delreal's criminal history, which included criminal damage to property, disorderly conduct while armed, possession of a dangerous weapon by a child, two counts of second-degree recklessly endangering safety, and escape. The court sentenced Delreal to life in prison with parole eligibility in forty-five years for the homicide, and imposed and stayed nine-year prison terms, with twenty years probation, on each of the first-degree reckless endangerment counts.

¶5 The prior second-degree reckless endangerment convictions, which were based on Delreal's role as the driver in a drive-by shooting, were reversed shortly after the sentencing. Delreal filed a postconviction motion for sentence modification, which resulted in a stipulated 125 days of additional sentence credit and a reduction of the probation period on the reckless endangerment charges from twenty to eleven years. The trial court refused to modify the parole eligibility date

for the homicide, however, noting that counsel had affirmed the statement in the presentence report (PSI) that Delreal had been driving the car during the prior drive-by shooting, and that the court had relied on the pattern of Delreal's prior history with weapons, rather than on the number of convictions which he had accumulated.

## STANDARD OF REVIEW

¶6 The decision whether to permit substitution of counsel lies within the trial court's discretion. *State v. Lomax*, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988). A court properly exercises discretion when it considers the facts of record under the proper legal standard and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991).

¶7 Whether a set of facts constitute a new sentencing factor is a question of law that we review without deference to the trial court. *State v. Michels*, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). However, whether a new factor warrants a sentence modification is addressed to the trial court's discretion. *Id.* Because the trial court is in a better position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with its sentencing discretion and we presume that it acted reasonably. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984).

## ANALYSIS

### *Request for Substitute Counsel*

¶8 The Sixth Amendment right to counsel entitles a defendant to a competent attorney, but not necessarily one of the defendant's choosing. See *State v. Woods*, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988). WISCONSIN

ADMIN. CODE § PD 2.04(1) (1999) permits an indigent defendant to request one substitution of appointed counsel, provided that the change “will not delay the disposition of the case or otherwise be contrary to the interests of justice.” *See also Douglas County v. Edwards*, 137 Wis. 2d 65, 70, 403 N.W.2d 438 (1987) (recognizing the administrative right to one substitution of counsel). A defendant must make a showing of good cause in order to obtain substitute counsel. *C.N. v. Waukesha County Cmty. Human Servs. Dep’t*, 143 Wis. 2d 603, 615, 422 N.W.2d 450 (Ct. App. 1988), *overruled on other grounds by A.S. v. State*, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). On review of a denial of a substitution request, we will consider: (1) the adequacy of the trial court’s inquiry into the defendant’s complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between counsel and client was so great that it likely resulted in a total lack of communication preventing an adequate defense and fair presentation of the case. *State v. Lomax*, 146 Wis. 2d at 359.

¶9 Here, Delreal was given several opportunities to explain the nature of his dissatisfaction with counsel. He made repeated comments to the effect that he lacked confidence in counsel and that he could not communicate with her. He did not, however, point out any specific way in which he believed counsel was unprepared for trial. He gave no reason why he would talk to someone else after refusing to talk to her. Neither, for that matter, has Delreal given this court any further information as to why he wanted a new attorney, or why he waited over two months after the preliminary hearing, at which he first expressed an interest in retaining private counsel, without taking any action in that regard. A competency evaluation performed prior to trial indicated that Delreal had the ability to discuss his case with counsel if he chose to do so, notwithstanding his claims of severe depression.

¶10 The trial court did not clearly err in finding that any lack of communication between Delreal and his attorney was directly attributable to the defendant's deliberate refusal to participate in his defense. Given these circumstances and the trial court's ability to observe the defendant's demeanor, we also accept the trial court's finding that Delreal's primary motivation was to delay the trial date. In short, we conclude that the trial court did not erroneously exercise its discretion when it denied Delreal's request to allow a substitution of counsel two weeks before trial.

### *Sentence Modification*

¶11 A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, which operates to frustrate the purpose of the original sentence. *State v. Johnson*, 210 Wis. 2d 196, 203, 565 N.W.2d 191 (Ct. App. 1997). The trial court, of course, did not know at the time of sentencing that two of Delreal's prior reckless endangerment convictions would soon be reversed. Defense counsel did, however, point out that the case was on appeal, and the trial court made a point of confirming that, by Delreal's own account, he had served as the driver in the drive-by shooting which led to the convictions.<sup>3</sup> Therefore, the fact which was most relevant to the trial court's sentence—that Delreal had been involved in prior gang activity and other conduct involving weapons—had not changed. The trial court correctly observed that it was appropriate to consider Delreal's past behavior whether or not it resulted in a conviction. *See State v. Lechner*, 217 Wis. 2d 392,

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<sup>3</sup> Delreal now denies any involvement in the drive-by shooting. However, he was given an opportunity to point out any errors in the PSI at sentencing, and he did not challenge the statement that he was the driver.

422-23 ¶52, 576 N.W.2d 912 (1998). We therefore concur with the trial court's conclusion that the reversal of the convictions did not frustrate its intent in sentencing Delreal.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

