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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2025-000834

State of South Carolina,

Respondent,

v.

George Ernest Morgan,

Appellant.

INITIAL BRIEF OF RESPONDENT

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APPELLANT’S STATEMENT OF THE ISSUE PRESENTED

Whether the court erred in refusing to relieve counsel, where there was an irreparable breakdown in the attorney-client relationship, since Appellant was constructively denied the assistance of counsel, or, in the alternative, since Appellant demonstrated satisfactory cause for removal of counsel?

RESPONDENT’S COUNTERSTATEMENT OF THE ISSUE PRESENTED

The circuit court did not abuse its discretion in denying Appellant’s request to relieve Counsel, where Counsel was retained rather than appointed, where Appellant expressly refused to proceed *pro se*, where the request was not made until after jury selection although the trial had been pending for more than six years, and where the tension between Counsel and Appellant stemmed from Appellant’s own conduct.

STANDARD OF REVIEW

“[A] motion to relieve counsel is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” *State v. Cottrell*, 421 S.C. 622, 634, 809 S.E.2d 423, 430 (2017).

ARGUMENT

The circuit court did not abuse its discretion in denying Appellant's request to relieve Counsel, where Counsel was retained rather than appointed, where Appellant expressly refused to proceed *pro se*, where the request was not made until after jury selection although the trial had been pending for more than six years, and where the tension between Counsel and Appellant stemmed from Appellant's own conduct.

Appellant was indicted in March of 2019 for attempted murder and possession of a weapon during the commission of a violent crime. His trial did not begin until April of 2025, more than six years later. After jury selection, Appellant's trial counsel, Ivan Toney ("Counsel"), addressed the court: "Well, I move to be relieved as counsel. My understanding is that [Appellant] told DMH this morning that he was going to fire me." Counsel explained that Appellant had made numerous threats and been abusive toward him and other attorneys. Counsel complained that he was distracted and did not feel safe sitting next to Appellant due to the death threats and other hostile comments Appellant was making. (Tr.p.33, line 25–p.35, line 22).

The trial court then asked Appellant if he was seeking to have Counsel relieved. Appellant responded, "I want to fire him," and complained that Counsel "never" came to see him. However, Appellant also related an incident in which Counsel *did* come to see him, but Appellant thought Counsel looked ill and convinced him to see a doctor. Appellant complained that he paid Counsel \$20,000 four years prior because Counsel "told me he would get my case dismissed at trial." Appellant denied threatening Counsel and claimed, "I've tried to do everything possible to work with this man, but no luck." (Tr.p.35, line 23–p.37, line 21).

The trial court pointed out the untimely nature of Appellant's request, stating, "Well, Mr. Morgan, you are [at trial] now" and "[t]he jury has been selected." (Tr.p.37, lines 22–25). The

trial court then warned Appellant that, if he granted the motion to relieve Counsel, “you’ll end up representing yourself in this case. Is that what you want?” (Tr.p.38, lines 2–7). Appellant responded, “What do you mean? I try my own case? How am I going to do that? I don’t have law books. I don’t have—” (Tr.p.38, lines 8–10). The trial court replied, “Well, that’s the inherent danger in trying to represent yourself.” (Tr.p.38, lines 11–12).

The trial court then proceeded to hear evidence concerning Appellant’s competency to stand trial. (Tr.pp.38–84). After finding Appellant competent, the trial court revisited the motion to relieve Counsel. The trial court noted the presence of “tension” between Appellant and Counsel, but also noted that it would be “very difficult for someone to attempt to represent themselves” on a charge as serious as attempted murder. (Tr.p.84, lines 10–16). The court ruled as follows:

Mr. Toney, I am going to deny the motion at this time. I'm going to leave you on the case. And, Mr. Morgan, I understand there's tension between you and Mr. Toney, but I'm—I'm—you need to listen to what I'm telling you now. We're going to start this trial tomorrow. And I would instruct you that at this point, Mr. Toney is going stay on the case as your lawyer. So any concerns that you have, you're to communicate those to him. The case will begin in the morning.

(Tr.p.84, line 17–p.85, line 1).

On appeal, Appellant contends the trial court erred in refusing to relieve Counsel, arguing that this amounted to a “constructive denial of counsel.” Appellant argues that some courts “have applied the constructive denial of counsel doctrine to cases where the defendant has an irreconcilable conflict with his counsel, and the trial court refuses to grant a motion for substitution of counsel.” (Br.App.p.7) (quoting *Daniels v. Woodford*, 428 F.3d 1181, 1197 (9th Cir. 2005)). According to Appellant, this was such a case: Counsel reported feeling distracted and unsafe due to Appellant’s threatening behavior, Appellant’s expert witness Dr. Donna Maddox testified that Appellant harbored paranoid ideations about Counsel, and there was evidence from a social worker

that Counsel expressed frustration and negative feelings toward Appellant during a phone call. Appellant claims this evidence proved the attorney-client relationship between Counsel and Appellant had broken down to the point that no lawyer “could have provided effective assistance”; consequently, Appellant argues “a presumption of prejudice is proper.” (Br.App.p.8) (citing *United States v. Cronin*, 466 U.S. 648, 659–60 (1984)).

There are several flaws with Appellant’s argument. The most obvious flaw is this: Counsel was *retained by Appellant*, not appointed by the court. This fact alone is sufficient to distinguish *Daniels v. Woodford* and similar cases relied on by Appellant in which indigent defendants were deemed prejudiced by being forced to proceed with appointed counsel against their will.

Although criminal defendants generally require court approval to replace their *appointed* counsel, “a defendant is not ordinarily dependent on the court’s permission to replace *retained* counsel.” *United States v. Mota-Santana*, 391 F.3d 42, 47 (1st Cir. 2004) (emphasis added). Rather, under most circumstances, “a defendant can fire his retained *or* appointed lawyer and retain a new attorney for any reason or no reason.” *United States v. Rivera-Corona*, 618 F.3d 976, 980 (9th Cir. 2010) (emphasis in original). “Because a defendant who moves to dismiss his retained counsel maintains the right to counsel of choice, a district court cannot require the defendant to show good cause.” *United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016).

Appellant himself acknowledged that he hired Counsel four years before trial began; nevertheless, in all that time, he did not fire Counsel despite his later claim that Counsel never came to see him and refused to do any work on his case. (Tr.p.35, line 23–p.37, line 21). Appellant could have exercised his right to discharge Counsel, without requiring permission from the court, at any time in the four years prior to trial; however, he inexplicably waited until after jury selection to present his complaints about Counsel to the trial court.

There are some factors that will properly limit the otherwise broad power of criminal defendants to dismiss retained counsel. The first is whether dismissal of counsel will leave the defendant without representation at trial. “A district court reviewing a motion to dismiss counsel must know how the defendant wishes to proceed so that the defendant will not be left without representation in violation of the Sixth Amendment.” *Jimenez-Antunez*, 820 F.3d 1267, 1272. A court should not grant a motion to dismiss retained counsel unless it is satisfied that the defendant will be represented by some other attorney or has made a knowing and voluntary waiver of the right to counsel. *Id.*

In this case, although Appellant requested that Counsel be relieved, he did not offer any explanation as to how he would be represented at trial without Counsel. Appellant did not indicate that he had hired another attorney to replace Counsel, nor did he claim to be indigent and request court-appointed counsel. The trial court asked if Appellant wanted to represent himself *pro se*, and Appellant indicated that he did not. (Tr.p.38, lines 2–10). The Sixth Amendment required the trial court, before granting a motion to relieve Counsel, to ensure that Appellant would still be represented in some fashion at trial. There was simply no evidence presented to the trial court to support such a determination. Under these circumstances, it likely would have been an abuse of discretion for the trial court to *grant* Appellant’s motion. *See State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007) (“An abuse of discretion occurs when the trial court’s ruling is based on . . . factual conclusions . . . without evidentiary support.”).

The second factor is the timeliness of the request; although a defendant may generally dismiss his retained lawyer for any reason, he may not do so in a way that would unreasonably delay his trial without a showing of good cause. “[A] court may still deny a motion to substitute retained counsel if it will interfere with the ‘fair, orderly, and effective administration of the

courts.” *Jimenez-Antunez*, 820 F.3d at 1272 (quoting *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir.1986)). “The freedom to have counsel of one's own choosing may not be used for purposes of delay. . . . Last minute requests are disfavored.” *United States v. Silva*, 611 F.2d 78, 79 (5th Cir. 1980). “We have recognized a trial court's wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). Before allowing a defendant to substitute retained counsel, judges must consider the risk of delay or disruption of the court's proceedings and be vigilant that requests for new counsel should not become a vehicle for achieving delay. *United States v. Brumer*, 528 F.3d 157, 160 (2d Cir. 2008).

Here, the request for relief of Counsel was not made until after the jury had already been selected. As discussed above, Appellant made no attempt to explain why he waited four years to dismiss his attorney. The court clearly considered the “last-minute” nature of the request in denying the motion: it noted that “[t]he jury has been selected,” “[w]e're going to start this trial tomorrow,” and “[t]he case will begin in the morning.” (Tr.p.37, lines 22–25; p.84, line 17–p.85, line 1). It complained that “this case is four years old. The indictments are. The case is older than that.” (Tr.p.86, lines 6–7). It was proper for the trial court to weigh the lengthy and unexplained delay in raising this issue, and the potential disruption of a proceeding that had already commenced, as reasons against granting the motion.

Appellant has wholly failed to address these factors, either before the trial court or in his brief to this Court. Appellant has never claimed that he was prepared to hire a different attorney to replace Counsel, or that he was eligible for appointed counsel. Appellant has never claimed that he knowingly and voluntarily waived his right to counsel; on the contrary, he clearly had no intention of representing himself at trial. Appellant has offered no explanation for why he failed

to fire Counsel on his own initiative during the four years prior to trial and waited until the last minute to bring the matter to the trial court's attention. A proper consideration of these factors supports the trial court's decision.

Of course, those factors ought to be weighed against the evidence of an "irreconcilable conflict" between Appellant and Counsel. Here, Appellant appears to argue that the trial court was required to find that such a conflict existed, based on the mere fact that both Appellant and Counsel agreed there were serious problems in the attorney-client relationship. However, the constitution does not guarantee "a right to counsel with whom the accused has a 'meaningful attorney-client relationship.'" *Morris v. Slappy*, 461 U.S. 1, 3–4 (1983). Appellant, moreover, ignores the fact that Appellant and Counsel largely *disagreed* regarding what the problems in their relationship were and who was responsible.

Appellant claimed Counsel totally failed to come see him in jail or to speak to him over the phone. Somewhat inconsistently, Appellant also described an incident in which Counsel *did* come see him at the jail, but Appellant told him to leave and see a doctor. Appellant denied ever threatening Counsel, and he claimed Counsel "never went over nothing about the trial," "never come to see me about who the witnesses are or anything." (Tr.pp.36–37; p.85, lines 9–12).

Counsel, on the other hand, was adamant that Appellant had repeatedly threatened him, to the point that he felt distracted and unsafe sitting next to Appellant at the defense table. Counsel explained that he had offered to come see Appellant more often: "I wrote to him. I've documented it. You want me to come, I will come." (Tr.p.34, lines 22–24). However, Appellant "ran me off last time" and made it clear that "[h]e doesn't want me." (Tr.p.34, lines 20–22).

There was substantial evidence in the record that any conflict between Appellant and Counsel was the result of Appellant's own hostile conduct toward Counsel. Appellant cannot

threaten and abuse his retained attorney and then, on the eve of trial, complain when his attorney reports feeling unsafe in his presence. Even if a genuine breakdown in attorney-client communication occurs, it cannot be said that a defendant did not have adequate assistance of counsel where communication was frustrated due to the defendant's own obstinacy. *United States v. Smith*, 640 F.3d 580, 591 (4th Cir. 2011). "A court can properly refuse a request for substitution of counsel when the defendant's own behavior creates the problem." *United States v. DeTemple*, 162 F.3d 279, 289 (4th Cir. 1998).

In addition, the trial court was not required to defer to Counsel's own opinion that the relationship had irreversibly broken down. *See Smith*, 640 F.3d at 597 (holding that, although counsel told the court he believed the attorney-client relationship "has obviously broken down to the point where we are not able to sit down and have a rational, reasonable discussion about this case," counsel's representation "is not determinative."). In this case, it is clear that the trial court was not convinced that the problems described by Counsel and Appellant amounted to an irreconcilable breakdown in attorney-client communication. In denying the motion to relieve Counsel, the trial court expressly instructed Appellant to communicate any concerns to Counsel during trial. (Tr.p.84, lines 24–25).

The trial court acted within its discretion in denying Appellant's motion to relieve Counsel on the eve of trial. This Court should affirm the decision of the trial court.

CONCLUSION

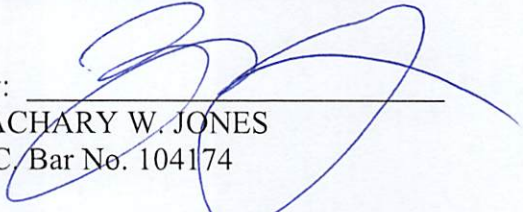
For the foregoing reasons, this Court should affirm the decision of the circuit court.

Respectfully submitted,

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