2016 IL App (2d) 141049-U
No. 2-14-1049
Order filed November 22, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LUIS M. MARTINES-CORONA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-CF-1169 Honorable George J. Bakalis, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying defendant's motion to substitute counsel, as substitute counsel was not ready, willing, and able to enter an unconditional appearance; rather, his appearance was conditioned on a continuance of the trial, which was about to begin.

¶ 2 Defendant, Luis M. Martines-Corona, appeals from his conviction of unlawful possession with the intent to deliver 900 grams or more of methamphetamine (720 ILCS 646/55(a)(1), (a)(2)(F) (West 2012)). The sole issue raised on appeal is whether the trial court abused its discretion when it denied defendant's motion for substitution of counsel. We find no abuse of discretion and thus we affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 13, 2012, defendant was charged with unlawful possession of 900 grams or more of methamphetamine (720 ILCS 646/60(b)(6) (West 2012)) and unlawful possession with the intent to deliver 900 grams or more of methamphetamine.

¶ 5 On June 25, 2012, attorney Josh Dieden filed an appearance of behalf of defendant. On July 24, 2012, attorney Rick Kayne filed an appearance on behalf of defendant. On August 7, 2013, Dieden appeared, seeking leave for himself and his firm, Richard A. Kayne & Associates, to withdraw as defendant's counsel. Dieden informed the court that "[defendant] and our firm have mutual differences that are irreconcilable." The court inquired of defendant, who confirmed that he wished to hire new counsel. The court asked defendant how much time he needed, and defendant responded, "Two weeks." The court granted counsel leave to withdraw, and it continued the matter for two weeks.

¶ 6 On August 30, 2013, attorney Joe Colsant, of Fawell & Associates, filed an appearance on behalf of defendant. The following colloquy occurred:

> "THE COURT: All right. I know you're coming in, but this case is—
>
> MR. COLSANT: I know it's old. I know. Mr. Fawell has talked to him about the age of the case and how it's probably going to have to get moved in short order.
>
> If we could have the first week in October?"

Thereafter, the matter was set for October 2, 2013.

¶ 7 On October 17, 2013, attorney Jeff Fawell appeared and requested leave to withdraw as defendant's counsel, citing defendant's failure to pay. The trial court asked defendant whether he had another attorney to represent him. When defendant stated that he did not, the trial court

asked defendant if he wanted the trial court to appoint the public defender. The following colloquy occurred:

> "[DEFENDANT]: For now to see if I could maybe do anything else. Maybe I could then come up with the money that I need.
>
> THE COURT: Well, you understand, sir, this case is now about 16 months old. We can't keep continuing it. And if I assign the public defender to you, then we're going to set it down for trial. And I can't keep continuing this case. Do you want me to appoint the public defender?
>
> [DEFENDANT]: Yes."

Thereafter, the court appointed the public defender to represent defendant.

¶ 8 On January 21, 2014, the parties were before the trial court for a status call. At that time, the case was set by agreement for trial on April 29, 2014. In addition, defendant presented a letter to the trial court wherein he raised concerns about the public defender's representation. The court continued the matter to February 25, 2014, to allow counsel time to address the concerns in the letter.

¶ 9 On February 25, 2014, the parties appeared, and the public defender addressed defendant's concerns that were presented in the letter. The court asked defendant if he wished to comment, but defendant did not respond on the substance of the letter. He questioned what was going to happen and if the case would be continued. The court explained the options to defendant, stating:

> "Your options are you can go to trial, you can negotiate a disposition or you can enter what's called an open or blind plea, and I'll decide what the penalty is going to be. Those are the options that you have."

When defendant stated that he "would have to discuss this with [his] family," the court responded:

> "Okay. But this case is getting quite old. We're going to give you one opportunity to do that, but then we're going to set it for trial if we don't have a disposition."

When the State reminded the court that the matter had previously been set for trial on April 29, 2013, the court continued the matter to that date, stating, "be prepared to go to trial if there's no disposition."

¶ 10 On April 25, 2014, attorney James D. Tunick filed a motion to substitute attorneys and to continue trial. He maintained that he had spoken with defendant's family on April 23, 2014, and with defendant on April 24, 2014, and that defendant would like Tunick to represent him in place of the public defender. Tunick further maintained that he would be unable to proceed to trial on April 29, 2014, and requested that he be given a status date to review discovery and determine whether any pretrial motions were appropriate.

¶ 11 Tunick's motion was heard on April 28, 2014, the day before trial. The State "strongly" objected. The court responded:

> "Okay. I've reviewed the file. This case is two years old. The State indicates he's been through six lawyers, there was two of them. Some of those are firms, not sole individual lawyers. But certainly it would be the fourth lawyer he's gone through. So [defendant] is—just either wants to delay this or is just never happy with whatever attorney is representing him. In my mind it's brought at the eleventh hour. This thing has been set for three months. He's had plenty of time, if that was his desire, to have come in earlier to do that. I'm not going to—if you're ready to try the case tomorrow, I

> will let you file your appearance. If you're not, then I'm not going to allow you to substitute in."

Tunick responded that he could not make that assurance as he had not yet seen the discovery. The court stated:

> "Okay. Then I would suggest you don't file your appearance. Okay. We're set for trial tomorrow."

¶ 12 Following a trial wherein defendant was represented by a public defender, the jury returned a verdict of guilty on both charges. The case was continued to June 4, 2014, for sentencing.

¶ 13 On May 28, 2014, defendant filed a motion for a new trial.

¶ 14 On June 2, 2014, Tunick filed a motion to substitute as counsel.

¶ 15 On June 4, 2014, the trial court discharged the public defender and continued the matter so that Tunick could file an amended motion for a new trial.

¶ 16 On July 16, 2014, Tunick filed a motion for a new trial, arguing that the trial court denied defendant his constitutional right to counsel of his choice when it denied his motion to substitute counsel and continue the case.

¶ 17 A hearing on the motion took place on August 13, 2014. Following arguments by counsel, the trial court denied the motion. The court noted that the matter had been pending for almost two years. The court recalled that defendant first appeared on June 25, 2012, that there were numerous continuances obtained by defendant, that defendant was represented by two different attorneys who each withdrew, that, on January 21, 2014, the matter was set for trial on April 29, and that from January through April defendant made no attempt to obtain new counsel. The court found a lack of diligence on the part of defendant. The court also found that it was in

the interests of justice that the case be moved to resolution. The court further noted that it did not tell Tunick that he could not appear; rather, the court told Tunick that he could appear if he were ready to go to trial.

¶ 18 Following the denial of defendant's motion for a new trial, the trial court sentenced defendant to 18 years in prison for unlawful possession with the intent to deliver 900 grams or more of methamphetamine. Defendant's subsequent motion for reconsideration of his sentence was denied. Defendant timely appealed.

¶ 19 II. ANALYSIS

¶ 20 Defendant contends that the trial court denied him his sixth amendment right to retain counsel of his choice. Specifically, he maintains that April 29, 2014, was the first trial date, there would have been no prejudice to the State, and he was not attempting to delay his trial. The State responds that the trial court did not abuse its discretion in denying defendant's motion where the proposed attorney was not ready, willing, and able to enter an unconditional appearance. We agree with the State.

¶ 21 A defendant has a constitutional right to the assistance of counsel (U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8), which includes the right to counsel of his choosing (*People v. Friedman*, 79 Ill. 2d 341, 349 (1980)). A defendant may not, however, wield this right "as a weapon" to "thwart the administration of justice or to otherwise embarrass the effective prosecution of crime." *People v. Friedman*, 79 Ill. 2d 341, 349 (1980). In ruling on a defendant's request for a continuance for substitution of counsel, the trial court must balance "the fundamental right of the defendant to counsel of his choice [citations], against the interests of the State, the courts and the witnesses in the efficient disposition of cases without unreasonable delay [citations]." *People v. Little*, 207 Ill. App. 3d 720, 723-24 (1990).

¶ 22 The trial court's decision on whether to grant or deny such a continuance is a matter left to the trial court's discretion, and we will not overturn it absent an abuse of that discretion. *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000); *People v. Curry*, 2013 IL App (4th) 120724, ¶ 49. "The factors to be considered in evaluating a trial court's exercise of its discretion include the diligence of the movant, the right of the defendant to a speedy, fair and impartial trial, and the interests of justice." *Segoviano*, 189 Ill. 2d at 245. Our supreme court has made clear that "a trial court will not be found to have abused its discretion in denying a motion for substitution of counsel in the absence of ready and willing substitute counsel." *Id.* Thus, if new counsel is specifically identified and stands ready, willing, and able to enter an unconditional appearance, the motion should be allowed. See *People v. Koss*, 52 Ill. App. 3d 605, 607-08 (1977). However, if any of those requirements is lacking, a denial of the motion is not an abuse of discretion. *Id.*

¶ 23 We find *Curry* to be instructive. In *Curry*, the defendant was arrested on January 28, 2012, and charged with driving under the influence. *Curry*, 2013 IL App (4th) 120724, ¶ 8. Less than a month later, attorney Mark Harmon entered an appearance on the defendant's behalf. *Id.* ¶ 9. On May 23, 2012, the case was set for trial on June 11. *Id.* ¶ 10. On June 1, 2012, Harmon learned that the defendant had hired attorney Richard Frazier to represent him. *Id.* ¶ 11. On June 11, 2012, Harmon filed a motion to continue the case in order to determine the nature of Frazier's relationship with the defendant. *Id.* At the hearing on the motion, Harmon advised the court that the defendant wanted Frazier to represent him, that the defendant had paid Frazier a retainer, and that Frazier had conditioned his representation on Harmon's obtaining a continuance. *Id.* ¶¶ 12-13. The State objected, noting that Frazier would not enter his appearance unless the case were continued. *Id.* ¶ 14. The court denied the motion as untimely.

It stated, " '[W]e don't do motions to continue on the morning of the jury trial.' " *Id.* ¶ 15. Frazier asked if the defendant could make a statement, and the court responded that it was " 'not going to accept any *pro se* statement by a defendant who is here represented by counsel.' " *Id.* ¶ 16.

¶ 24 The defendant appealed, arguing that he was denied his right to counsel of his choice. The Fourth District affirmed. The court stated:

> "[W]here a trial court conducts an inquiry into the circumstances of a defendant's motion, and those circumstances demonstrate substitute counsel does not stand 'ready, willing, and able to make an unconditional entry of appearance' on defendant's behalf, a court does not abuse its discretion by denying a defendant's motion for continuance to obtain substitute counsel." *Id.* ¶ 51.

¶ 25 Here, as in *Curry*, substitute counsel was not ready, willing, and able to enter an unconditional appearance. Instead, when Tunick filed his motion to substitute, on the eve of trial, he was not ready to proceed to trial. As in *Curry*, his representation of defendant was expressly conditioned on obtaining a continuance.

¶ 26 Further, in denying the motion for a new trial, the trial court addressed the relevant factors. The court specifically noted a lack of diligence on the part of defendant and his failure to take steps to obtain new counsel until the eve of trial. The court stated: "He's had plenty of time, if that was his desire, to have come in earlier to do that." The court found that defendant "just either wants to delay this or is just never happy with whatever attorney is representing him." The court also acknowledged defendant's right to a fair and speedy trial and the State's right, and the interest of justice, to have the matter resolved.

¶ 27 Defendant asserts that *Curry* is distinguishable, because there substitute counsel did not appear before the court to present the motion and because the defendant was not incarcerated and therefore arguably had more freedom to obtain counsel. These factors, although relied on by the reviewing court in *Curry*, do not warrant a different conclusion in the present case. Here, unlike in *Curry*, the matter had been pending for over two years. Although incarcerated, defendant demonstrated his ability to obtain private counsel at least twice prior to the public defender's appointment. Defendant had more than six months after the appointment of the public defender to secure private counsel if desired. During that time, defendant never expressed any intention to the trial court that he was planning on doing so. In addition, defendant had been advised several times by the court that it would not keep continuing the case.

¶ 28 Defendant's reliance on *Little* is unpersuasive, as it is readily distinguishable. In *Little*, the matter had been pending for only five months and the request for a continuance to substitute counsel was the defendant's first and only request for a continuance. *Little*, 207 Ill. App. 3d at 728. In addition, there was no indication that the substitute attorney was not ready, willing, and able to appear. Although he was not present at the hearing, the record indicated that it was because he had been given an incorrect court date. *Id.* at 727. Moreover, the trial court did not balance the relevant factors; instead, it summarily denied the motion on the erroneous ground that a defendant is not entitled to a continuance after he makes a demand for trial. *Id.*

¶ 29 Based on the foregoing, we find that the trial court did not abuse its discretion in denying defendant's motion for substitution of counsel.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Du Page County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for

this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 32 Affirmed.