

No. 1-11-1992

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 10 C4 40621 |
| |) | |
| AUBREY BASS, |) | Honorable |
| |) | Carol A. Kipperman, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE STERBA delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not violate defendant's sixth amendment right to counsel of his choice when the trial court granted counsel's request to withdraw from defendant's case. Defendant's conviction of the lesser-included offense of possession of a controlled substance must be vacated. The mittimus should be corrected to state that defendant was only convicted of possession of a controlled substance with intent to deliver. Defendant correctly received a three-year term of mandatory supervised release because he was sentenced as a Class X offender.

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¶ 2 A jury convicted defendant Aubrey Bass of possession of a controlled substance (1.3 grams of a substance containing cocaine) with intent to deliver and possession of a controlled substance. He was sentenced as a Class X offender to 12 years in prison, with a 3-year term of mandatory supervised release. On appeal, defendant contends that the trial court violated his sixth amendment right to counsel of his choice when it permitted his privately-retained counsel to withdraw from his case without giving a reason. Defendant also contends that his conviction of the lesser-included offense of possession of a controlled substance must be vacated under the one-act one-crime rule. In addition, defendant contends that the mittimus must be corrected to state that he was only convicted of possession of a controlled substance with intent to deliver. Finally, defendant contends that he should have received only a two-year period of mandatory supervised release because, although he was sentenced as a Class X felon, he was only convicted of a Class 1 felony.

¶ 3 Defendant does not challenge the sufficiency of the evidence to convict him. At trial the State introduced evidence establishing the following. Two Maywood police officers testified that on May 15, 2010, they approached defendant in the courtyard of an apartment complex on the 1700 block of St. Charles Avenue in Maywood. As the officers approached, defendant threw to the ground a plastic bag containing nine individually-wrapped "rocks" of what they suspected was cocaine. Defendant was arrested. After being advised of his *Miranda* rights, he told the officers the name of the person from whom he usually bought cocaine. He would purchase a quarter ounce for \$200 and sell it for \$350, thus making \$150 for himself. The substances recovered by the police were subsequently tested by the Illinois State Police Forensic Science Center and were found to weigh 1.3 grams and to contain cocaine.

¶ 4 The jury convicted defendant of possession of a controlled substance with intent to deliver, and possession of a controlled substance. He was subsequently sentenced as a Class X

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offender to 12 years in prison and a 3-year term of mandatory supervised release. He then brought this appeal.

¶ 5 We first consider defendant's contention that he was deprived of his sixth amendment right to counsel of his choice when the court permitted defendant's private counsel to withdraw from representation of defendant without explaining why he wished to withdraw. When defendant's preliminary hearing was held, on June 9, 2010, he was represented by private counsel, John Wesley. Wesley continued to represent defendant for his arraignment and for several continuances until a hearing on August 18, 2010, when Wesley informed the court that he wished to withdraw as defendant's counsel. Wesley told the court that he had not yet received any discovery from the prosecution, but he did not cite a reason for wishing to withdraw. The court asked defendant if he had any objection and defendant initially said "I have no choice." The court told defendant that his lawyer had a right to withdraw and that this was a very early stage of the case. When the court asked defendant why he did not want counsel to withdraw, defendant said "I feel like he should stay on the case." The court then stated that "[a]bsent any other articulable argument that could be made by the defendant," it was granting Wesley leave to withdraw. The court asked defendant if he could afford another lawyer and defendant said he could not, because he had no funds. The court initially appointed the Cook County Public Defender to represent defendant, but defendant communicated to the court, through an assistant Public Defender, that he wanted a week to obtain his own attorney. The court stated that it would not appoint the Cook County Public Defender at that time, and the cause was continued until August 25, 2010. On that date, defendant told the court that he had been unable to obtain counsel and he was not working. The court then appointed Assistant Cook County Public Defender Heather Brauckman to represent defendant.

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¶ 6 On the next court date, September 30, 2010, Brauckman informed the court that defendant did not wish her to represent him, and instead wanted the appointment of a bar association attorney. The court asked defendant why he did not want Brauckman to represent him and defendant stated that he had asked her to do something for him and she would not do it. The court asked what defendant had asked Brauckman to do, and defendant said he wanted her to "file a motion for insufficient counsel for my lawyer withdrawing off my case." Brauckman then explained that defendant wanted a motion asserting that private counsel was ineffective at the preliminary hearing, apparently with the intent of obtaining a new preliminary hearing. Brauckman stated that she had reviewed the transcript of the preliminary hearing and found no basis for a motion to be filed. Defendant then stated that Wesley never came to talk to him, although he had been paid, and that Brauckman had also never come to talk to him. The court replied that Brauckman had reviewed the transcript of the preliminary hearing, and that neither another public defender nor a bar association attorney would be appointed for defendant. The cause was continued from time to time until trial commenced on January 4, 2011. Defendant did not voice any additional dissatisfaction with his public defender, not did he request representation by any other attorney.

¶ 7 Defendant now contends that he was entitled to representation by the private counsel he had selected, John Wesley, and that the trial court erred in allowing Wesley to withdraw without first giving a reason for his withdrawal. The standard of review for contentions that a defendant was deprived of his choice of counsel is abuse of discretion. *People v. Holmes*, 141 Ill. 2d 204, 228 (1990); *People v. Wolff*, 19 Ill. 2d 318, 322 (1960). Accordingly, we must determine whether the trial court's decision to allow private counsel to withdraw was so arbitrary, fanciful, or unreasonable that no reasonable person would make the same decision. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009).

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¶ 8 Because defendant did not raise this argument in his motion for a new trial, ordinarily he would be deemed to have forfeited the issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant contends that the issue should be reviewed under the second prong of the plain error doctrine, as it challenged the integrity of the judicial process. *People v. Howard*, 376 Ill. App. 3d 322, 337-38 (2007) (alleged pretrial defect in erroneously denying a defendant the counsel of his choice affects a substantial right). We agree with the reasoning of *Howard* and we will review defendant's contention to determine whether it was plain error to permit defendant's counsel to withdraw from representing him without giving a reason.

¶ 9 In support of his contention of error, defendant relies upon *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). In *Gonzalez-Lopez*, the government admitted that the trial court had erred in preventing the defendant's privately retained counsel from representing him. *Id.* at 144. Under these circumstances, the court ruled that the sixth amendment right to counsel of one's choice required reversal of the defendant's conviction, and was not subject to harmless error review. *Id.* at 148. But the *Gonzalez-Lopez* court also acknowledged that the right to counsel of choice was limited in some circumstances. *Id.* at 151-52. For example, a defendant is not entitled to representation by an attorney who has a conflict of interest. *Id.*; *Wheat*, 486 U.S. at 159; *Howard*, 376 Ill. App. 3d at 335. Nor is a defendant entitled to representation by an attorney who chooses not to represent him. *Wheat*, 486 U.S. at 159; *People v. Baez*, 241 Ill. 2d 44, 105 (2011). A defendant also cannot insist on representation by an attorney who is not ready, willing or able to represent him. See *People v. Young*, 207 Ill. App. 3d 130, 134 (1990). Most important for our review, a defendant is not entitled to his choice of counsel when he is indigent and counsel must be appointed for him. *Gonzalez-Lopez*, 548 U.S. at 151. Although defendant was initially represented by private counsel, when he was given the opportunity to obtain new private counsel, he informed the court that he could not afford private counsel. Under these

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circumstances we find no error in the trial court granting defendant's initial counsel of choice the right to withdraw.

¶ 10 Defendant also cites to *People v. Ottomanelli*, 153 Ill. App. 3d 565, 571 (1987), for the proposition that Wesley was required to demonstrate the "legitimacy" of his request to withdraw. But in *Ottomanelli*, defense counsel sought leave to withdraw when the case was called for trial. *Id.* Here, defense counsel sought leave to withdraw early in the proceedings, and there is no evidence of any substantial trial delay. The proceedings were in their early pretrial stages when Wesley was allowed to withdraw, and trial commenced only four months after the Public Defender was appointed to represent defendant. In addition to defendant's sixth amendment right to counsel, the court making this decision must also be vigilant in protecting the court's institutional interest in administering a fair trial. *Wheat*, 486 U.S. at 160. This may include the ramifications of forcing trial counsel to represent a defendant when trial counsel does not wish to do so. Because of these competing considerations the trial court is accorded broad discretion to determine whether to allow counsel to withdraw. *Id.* at 162.

¶ 11 Defendant notes that Wesley did not file a written motion to withdraw, as required by Illinois Supreme Court Rule 13(c)(3) (eff. January 4, 2013). But although defendant asserts that this violation of the rule rendered the motion "invalid," he cites no authority in support of this claim. The rule itself sets out that the request to withdraw may be denied if would delay the trial or otherwise be inequitable. Ill. S. Ct. R. 13(c)(3) (eff. January 4, 2013). We have found no trial delay here, and we have also not found that the decision to grant this motion was inequitable. *Howard*, 376 Ill. App. 3d at 343. Defendant does not claim that he was prejudiced by Wesley's failure to file a written motion to withdraw. Accordingly, we find that the failure to file this motion to withdraw in writing did not prejudice defendant and does not form a basis for finding that the trial court abused its discretion in granting the motion. Furthermore, although our task

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would have been an easier one had counsel given his reasons for why he wished to withdraw, we do not find that the trial court abused its broad discretion in permitting counsel to withdraw.

¶ 12 Defendant contends, and the prosecution concedes, that defendant's conviction for possession of a controlled substance must be vacated under the one-act one-crime rule. Defendant's conviction for possession of a controlled substance with intent to deliver and his conviction for possession of a controlled substance were both based upon the same act, possession of 1.3 grams of a substance containing cocaine. Because both offenses were based on the same conduct, we must vacate the lesser included offense of simple possession of a controlled substance. *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 13 The State also concedes that, as defendant contends, the mittimus should be corrected. Although defendant was convicted of possession of a controlled substance with intent to deliver, the mittimus states that he was convicted of the manufacture or delivery of a controlled substance. Accordingly, the mittimus should be amended to reflect the correct offense of which defendant was convicted, possession of a controlled substance with intent to deliver. *People v. Blakney*, 375 Ill. App. 3d 554, 560 (2007).

¶ 14 Finally, defendant contends that the trial court erred in imposing a three-year term of mandatory supervised release (MSR), the amount required for a Class X conviction, where he was convicted of a Class 1 felony but sentenced as a Class X offender because of prior convictions. We find that defendant was properly sentenced, as we concur with those cases which have determined that a defendant who is Class X by background is subject to the same MSR period as one who has been convicted of a Class X offense. *People v. Brisco*, 2012 IL App (1st) 101612, ¶¶ 59-62; *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 47-49; *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (2011); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Anderson* 272 Ill. App. 3d 537, 541-42 (1995).

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¶ 15 For the reasons set out in this order, we affirm defendant's conviction of possession of a controlled substance with intent to deliver but we vacate his conviction of possession of a controlled substance. We also order that the mittimus be corrected by the clerk of the Circuit Court to reflect defendant's conviction for possession of a controlled substance with intent to deliver, rather than the manufacture or delivery of a controlled substance. Finally, we affirm defendant's sentence of 12 years in prison with a 3-year term of mandatory supervised release.

¶ 16 Affirmed in part and vacated in part; mittimus corrected.