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2014 IL App (3d) 120617-U

Order filed May 6, 2014
Modified Upon Denial of Rehearing June 3, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-12-0617
v.)	Circuit No. 11-CF-24
)	
TYSHAWN BURCH,)	Honorable
)	Timothy M. Lucas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Lytton and Justice Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court did not abuse its discretion when it denied defendant's oral posttrial motion to substitute counsel; (2) defendant was awarded the correct amount of presentence custody credit.
- ¶ 2 Defendant, Tyshawn Burch, was charged with five counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)), three counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), and one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)). The court appointed counsel, but defendant later hired private counsel. Dissatisfied with private counsel's

performance, defendant chose to proceed *pro se*. His self-representation was short-lived, however, and the court appointed new counsel less than a month later. In the months leading up to his jury trial, defendant expressed frustration with appointed counsel's work on his case. Appointed counsel represented defendant at trial, where defendant was found guilty of five counts of home invasion and three counts of armed robbery. Defendant filed a *pro se* posttrial motion, in which he raised numerous claims, including that appointed counsel had provided ineffective assistance. At a hearing on that motion, defendant explained that his family had talked to an attorney about representing him posttrial, but the attorney had not yet been hired. Defendant requested a continuance to hire the attorney. The court denied defendant's request for a continuance and denied his posttrial motion. The court sentenced defendant to concurrent sentences of 30 years' imprisonment, with credit for time served in presentencing custody. Defendant appeals, arguing: (1) the trial court violated defendant's right to counsel of choice when it refused defendant's request to secure new posttrial counsel; and (2) the court erred in awarding defendant credit for time spent in presentence custody. We affirm.

¶ 3

FACTS

¶ 4

A grand jury indicted defendant on five counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2010)), three counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), and one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)). The trial court appointed the public defender to represent defendant. Two and a half weeks later, public defender Hugh Toner entered an appearance on defendant's behalf.

¶ 5

Approximately three months into Toner's representation, the court held a hearing on a motion to suppress filed by Toner. At the hearing, defendant stated his desire to fire Toner and have a different public defender appointed to his case. Defendant asserted that he was not satisfied with Toner's work on his case. Defendant thought that Toner should have been able to

get the home invasion charges dismissed. The court admonished defendant that Toner was working diligently and that the principle of accountability can create criminal liability in a variety of situations. Toner remained defendant's counsel.

¶ 6 Five months later, defendant moved to proceed *pro se*. The court admonished defendant in accordance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) and granted the motion. Less than a month later, defendant moved for appointment of counsel, asserting that he was incapable of representing himself. The court granted the motion and appointed public defender Thomas Sheets.

¶ 7 In the five months leading up to defendant's trial, defendant wrote three letters to the court complaining about Sheets's representation. Defendant complained that he was unable to get in touch with Sheets and that Sheets refused to file motions that defendant had requested. Finally, defendant filed a *pro se* motion to dismiss Sheets as counsel, again citing Sheets's failure to file requested motions and his lack of communication with defendant about his case. The record does not include the trial court's decision on that motion, but we assume it was denied because Sheets continued as counsel.

¶ 8 The cause proceeded to a jury trial on May 7, 2012. After the jury was selected, defendant made an oral motion to dismiss Sheets as his counsel. Defendant asserted that Sheets had failed to prepare a defense or visit with defendant to discuss his case prior to trial. The court explained that defendant had been through multiple lawyers in this case and that it was too late to substitute new counsel. Sheets represented defendant at trial, after which the jury returned verdicts of guilty on five counts of home invasion and three counts of armed robbery.

¶ 9 Defendant filed a *pro se* posttrial motion on May 29, 2012. The motion raised several claims, including that Sheets had provided defendant with ineffective assistance of counsel.

¶ 10 On July 6, 2012, the court held a hearing to address posttrial motions and conduct sentencing. Defendant stated that he wished to have private counsel represent him on his posttrial motion and during sentencing. The court asked whether defendant had hired new counsel. Defendant responded that his family had spoken to a lawyer named Gary Morris but had not yet hired him. Morris told defendant's family that he could not represent defendant because a posttrial motion would be due in defendant's case on June 8, and, apparently, by the time defendant's family approached the lawyer, there was not enough time left to prepare a motion before that date. It is unclear when defendant's family contacted Morris. Defendant explained that he would have approached Morris earlier, but he was awaiting a response to a complaint he filed against Sheets with the Attorney Registration and Disciplinary Commission.

¶ 11 Defendant further explained that if the court continued the case until July 9, Morris could appear on his behalf prepared to represent him. The court disagreed, finding that, as it was Friday, no new lawyer could become familiar with defendant's case by Monday. The court conducted a *Krankel* hearing on defendant's claims of ineffective assistance made in his *pro se* motion. Finding the claims meritless, it denied defendant's motion to continue the case in order to hire new counsel.

¶ 12 The cause proceeded to sentencing, with Sheets representing defendant. The trial court ordered that defendant serve a 30-year sentence on one count of home invasion and a concurrent 30-year sentence on one count of armed robbery. The court awarded defendant credit for time served in presentence custody from January 10, 2011, to July 6, 2012. Defendant appeals.

¶ 13

ANALYSIS

¶ 14

A. Right to Counsel

¶ 15 Defendant argues that the trial court should have granted his request for a continuance to secure private counsel and that the court's failure to do so violated his sixth amendment right to counsel of choice.

¶ 16 The right to counsel guaranteed by the United States and Illinois Constitutions encompasses the right to be represented by the counsel of one's choosing. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *People v. Baez*, 241 Ill. 2d 44 (2011). This right to counsel of choice "is absolute and limited only where abuse exists[,] such as attempts to thwart justice, delay, or embarrass the effective administration of justice[.]" *People v. Childress*, 276 Ill. App. 3d 402, 413 (1995).

¶ 17 The decision whether to grant a continuance for purposes of substitution of counsel is a matter left to the discretion of the trial court and will not be overturned absent an abuse of that discretion. *People v. Segoviano*, 189 Ill. 2d 228 (2000). In balancing a defendant's right to counsel of choice against the judicial interest in trying the case with due diligence, the court should look to the actual request to determine whether it is being used merely as a delay tactic. *People v. Tucker*, 382 Ill. App. 3d 916 (2008). Where a court conducts an inquiry into the circumstances of defendant's motion, and substitute counsel does not stand " 'ready, willing, and able to make an unconditional entry of appearance' on defendant's behalf," the court does not abuse its discretion by denying defendant's request. *People v. Curry*, 2013 IL App (4th) 120724, ¶ 51 (quoting *People v. Koss*, 52 Ill. App. 3d 605, 607-08 (1977)).

¶ 18 In the present case, the court conducted an inquiry into defendant's request. Defendant stated that he wanted new counsel because he felt Sheets had not represented him effectively at trial. The court inquired as to whether defendant had actually hired new counsel. Defendant had not. In fact, defendant said that Morris had refused to represent him because, at the time, the deadline for filing posttrial motions was nearing. Defendant did not assert that he or his family

had spoken to Morris again since that first conversation. He did not have a commitment from Morris to represent him. In addition, defendant had a history in this case of filing last-minute motions to appoint new counsel. In light of the foregoing facts, the trial court did not abuse its discretion in finding that defendant's request was intended to delay the administration of justice and that his motion for continuance should therefore be denied.

¶ 19 B. Sentencing Credit

¶ 20 Defendant was arrested on January 9, 2011, and sentenced on July 6, 2012. He was therefore entitled to 544 days' credit for time spent in presentence custody. 730 ILCS 5/5-4.5-100(b) (West 2010); *People v. Williams*, 239 Ill. 2d 503 (2011) (defendant is not entitled to presentence custody credit for day of sentencing). The court awarded defendant credit for time served from January 10, 2011, through July 6, 2012, equaling 544 days' credit. Defendant argues that we should correct the mittimus to reflect that defendant is entitled to credit for time served from January 9, 2011, through July 5, 2012. Under both scenarios, defendant will receive the 544 days he is due. There is no need to correct the mittimus.

¶ 21 CONCLUSION

¶ 22 The judgment and sentence of the circuit court of Peoria County are affirmed.

¶ 23 Affirmed.