

NOTICE

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2015 IL App (4th) 130461-U

NO. 4-13-0461

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 15, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MATTHEW E. CONLEY,)	No. 12CF1915
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in denying defendant's motion to continue the trial without conducting a sufficient inquiry into the circumstances surrounding defendant's request for substitute counsel.

¶ 2 Following a March 2013 trial, a jury found defendant, Matthew E. Conley, guilty of unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and theft of property having a value exceeding \$500 (720 ILCS 5/16-1(a)(4)(A) (West 2010)). In April 2013, the trial court sentenced defendant to concurrent terms of 10 years' imprisonment for unlawful possession of weapons by a felon and 5 years' imprisonment for theft of property having a value exceeding \$500.

¶ 3 Defendant appeals, asserting (1) the trial court violated his constitutional right to counsel of his choice; (2) the circuit clerk improperly imposed fines and fees; and (3) he is entitled to monetary credit for pretrial detention. We reverse and remand.

¶ 4

I. BACKGROUND

¶ 5 On November 21, 2012, the State charged defendant by information with unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2010)) (count I); theft of property having a value exceeding \$500 (720 ILCS 5/16-1(a)(4)(A) (West 2010)) (count II); and aggravated assault (720 ILCS 5/12-2(c)(1) (West 2010)) (count III). On February 5, 2013, the State charged defendant by information with attempt (armed robbery) (720 ILCS 5/8-4(a) (West 2010); 720 ILCS 5/18-2 (West 2010)) (count IV). All charges stemmed from defendant's alleged actions on November 20, 2012. Defendant remained in custody throughout the proceedings in the trial court.

¶ 6 On February 26, 2013, defendant's first jury trial commenced, with the State proceeding only on counts I and II, having dismissed counts III and IV. On March 1, 2013, the trial court declared a mistrial after the jurors were unable to reach a verdict. The court set the matter for a second jury trial to begin March 11, 2013.

¶ 7 On March 11, 2013, attorney Daniel C. Jackson filed a motion for substitution of counsel, asking the trial court to vacate the appointment of defendant's public defender and allow his entry. Also on March 11, 2013, defendant's public defender—who represented him during his first trial—filed a motion to continue the trial, noting that defendant sought additional time to have Jackson appear on his behalf and represent him in the matter. According to the motion to continue the trial, Jackson was unable to appear in court at 1:30 p.m. that day due to his required presence at a hearing in an unrelated case in another county.

¶ 8 At the hearing on the motion to continue the trial, the trial court addressed the prosecutor as follows:

"[N]ow that Mr. Jackson has stuck his foot in the middle of this case and mucked it up, what are your suggestions? I'll tell you what mine are. I'll continue this to tomorrow morning. Mr. Jackson will be sitting right there and we will pick a jury."

The prosecutor objected to the motion to continue, noting that "it has been ten days since the mistrial and, of course, this is filed today." The court then addressed the public defender as follows:

"[W]hat I am going to do is reschedule this to tomorrow morning at 9:00. I'll have the jurors here. Either Mr. Jackson will be representing [defendant] or you will, so I suggest you be here also."

¶ 9 Following the hearing, the public defender filed a second motion to continue the trial, noting that Jackson planned to be present in court at 9 a.m. the next day, but that defendant sought a longer continuance so Jackson could "have additional time to familiarize himself with the case and to prepare the case for trial." The second motion also noted that "[d]efendant had not previously requested any continuances, which demonstrates that he is not using his request for a continuance as a delay tactic."

¶ 10 On March 12, 2013, both defendant's public defender and Jackson appeared in court. The following colloquy occurred:

"THE COURT: *** Mr. Jackson, are you prepared to enter your appearance and go to trial this morning?"

MR. JACKSON: No, your Honor. That would—that would not be possible. I only discovered—was asked to enter on

this case a couple days ago; actually, yesterday morning at 8:30 was the time that I was advised that I would be retained and could be retained. I haven't seen any discovery yet, I haven't interviewed any witnesses. I've had one brief conversation with [defendant] at the jail on Sunday night. That's the extent of my knowledge about the case. I couldn't ethically represent—attempt to represent him today.

THE COURT: Has [defendant] or members of his family paid you your fee?

MR. JACKSON: His mother has given me a credit card number and represented to me that I could use that to take a portion [of] my fee from it. I have not done so yet, pending the Court's decision.

THE COURT: [Public Defender], anything you want to say as to the motion to continue?

[PUBLIC DEFENDER]: Just briefly, your Honor. I would note that prior to yesterday my client had not requested any continuance in this matter. My client has met with Mr. Jackson. He's requesting that Mr. Jackson be permitted to enter on this case. We are moving to continue this case for a short period of time so Mr. Jackson may enter and fully prepare this case for trial.

I would note also, we have already tried this case one time. It has been less than two weeks since the first trial in this case

ended. I don't think this is any means of my client trying to thwart or delay the proceedings in this matter. He just legitimately wants to have a different attorney this time. And I think it's his constitutional right to have the attorney of his choice represent him at trial."

¶ 11

The trial court found as follows:

"It's within the trial [c]ourt's discretion to determine whether [defendant's] right to selection of counsel unduly interferes with the orderly process of judicial administration. And if new counsel is not specifically identified, but in this case is, or does not stand ready, willing and able to make an appearance, and Mr. Jackson is prepared to make an appearance but not prepared to try the case.

I totally disagree with [the public defender]. This is an attempt on the part of the Defendant to delay his trial. There was a trial in this case. It resulted in a mistrial, the jury was unable to reach a verdict. Quite frankly, Mr. Jackson is abetting—aiding and abetting the Defendant in this delay. Last Monday Mr. Jackson entered his appearance on two cases that were set for trial, which resulted in a continuance. And then again yesterday, he does the exact same thing. Quite frankly—I'll let it go at that.

This is an attempt to delay the trial. There's nothing in this record that would indicate that [the public defender] has done anything but admirably defend the Defendant. She's, up to this

date, has even filed another motion to suppress statements, which I have granted.

The motion for a continuance is denied. We will select the jury this morning."

¶ 12 Following a five-minute recess, a jury was selected and defendant's second trial commenced, with defendant being represented by the public defender. After the evidence was presented—the details of which are not important to the issues on appeal—a jury convicted defendant of unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and theft of property having a value exceeding \$500 (720 ILCS 5/16-1(a)(4)(A) (West 2010)).

¶ 13 On April 4, 2013, the public defender filed a "motion for acquittal or, in the alternative, motion for a new trial." The motion alleged, in relevant part, that the court erred in denying defendant's motion to continue the trial. At a hearing on April 15, 2013, the trial court denied defendant's motion and proceeded with sentencing. The trial court sentenced defendant to concurrent terms of 10 years' imprisonment for unlawful possession of weapons by a felon and 5 years' imprisonment for theft of property having a value exceeding \$500. Defendant was given 147 days of credit for pretrial detention.

¶ 14 At the time of sentencing, the court did not assess any fines or fees, although the sentencing judgment states that defendant "is ordered to pay costs of prosecution herein." Nonetheless, the record contains two computer-generated documents dated August 1, 2013, that reflect specific fines and fees imposed against defendant on each conviction, apparently by the circuit clerk.

¶ 15 On April 25, 2013, the public defender filed a motion to reconsider the sentence, which the trial court denied.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant asserts (1) the trial court violated his constitutional right to counsel of his choice; (2) the circuit clerk improperly imposed fines and fees; and (3) he is entitled to monetary credit for pretrial detention.

¶ 19 Defendant first contends that the trial court abused its discretion by denying his motion for a continuance to obtain substitute counsel in violation of his sixth-amendment right to counsel of his choice. According to defendant, there is no evidence to suggest he sought a continuance to obtain new counsel in an effort to delay the administration of justice. Thus, he asserts the trial court's denial of his request on that basis constitutes reversible error and entitles him to a new trial.

¶ 20 A defendant has a constitutional right to obtain counsel of his choosing. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *People v. Bingham*, 364 Ill. App. 3d 642, 645, 847 N.E.2d 903, 906 (2006). "However, this right is not absolute, and a defendant may not use this right to 'thwart the administration of justice, or to otherwise embarrass the effective prosecution of crime.' " *Id.* (quoting *People v. Solomon*, 24 Ill. 2d 586, 590, 182 N.E.2d 736, 739 (1962)). When presented with a motion to continue for the purpose of substituting counsel, a trial court must balance a defendant's right to choose counsel of his choice with the efficient and effective administration of justice. *Id.* at 645, 847 N.E.2d at 907. " This balancing, of necessity, requires a review of the diligence shown by the defendant [citation] and an inquiry into the actual request to see if the request is being used merely as a delaying tactic.' " *Id.* (quoting *People v. Washington*, 195 Ill. App. 3d 520, 525, 552 N.E.2d 1067, 1070 (1990)). In

ruling on a motion to continue for the purpose of substituting counsel, a trial court should consider the following factors:

"[W]hether defendant articulates an acceptable reason for desiring new counsel; whether the defendant has continuously been in custody; whether he has informed the trial court of his efforts to obtain counsel; whether he has cooperated with current counsel; and the length of time defendant has been represented by current counsel." *People v. Tucker*, 382 Ill. App. 3d 916, 920, 889 N.E.2d 733, 737 (2008).

¶ 21 We review a trial court's denial of a motion to continue for the purpose of substituting counsel for an abuse of discretion. *Id.* "A determination of whether there has been such an abuse depends on a consideration of all the facts of a particular case." *Washington*, 195 Ill. App. 3d at 525, 552 N.E.2d at 1070. A court does not abuse its discretion "where new counsel is unidentified or does not stand ready, willing, and able to make an unconditional entry of appearance on defendant's behalf." *People v. Childress*, 276 Ill. App. 3d 402, 411, 657 N.E.2d 1180, 1186 (1995).

¶ 22 In *Tucker*—the case cited by the trial court in denying defendant's motion to continue—the First District was tasked with determining whether the trial court abused its discretion in denying the defendant's motion for a continuance after a brief inquiry regarding the circumstances of his request. *Tucker*, 382 Ill. App. 3d at 918, 889 N.E.2d at 735. In that case, the defendant's privately retained counsel filed a motion to continue on the date the defendant's trial was to begin, informing the court that the defendant had hired another attorney. *Id.* The

trial court responded, " 'Oh, well, what can I tell you? It may be a basis for some further review. No, you're going to trial today, sir.' " *Id.*

¶ 23 On appeal, the appellate court noted a number of prior decisions where reviewing courts "have held a trial court erroneously denied the defendant's motion for a continuance to substitute counsel [filed on the day trial was to commence] by failing to conduct an adequate inquiry into the request." *Id.* at 921-22, 889 N.E.2d at 737-38 (discussing *People v. Little*, 207 Ill. App. 3d 720, 566 N.E.2d 365 (1990) (conviction reversed where the trial court failed to inquire into the truth of the defendant's assertions that his private counsel, who had been retained by his family due to the defendant's incarceration, was given the wrong trial date); *Washington*, 195 Ill. App. 3d at 526, 552 N.E.2d at 1070 (reversing the defendant's conviction, holding "[i]f the trial court suspected that defendant's representation that a private attorney had been hired was being used as a delaying tactic, it very easily could have confirmed or dispelled its suspicion by inquiring further into the employment of the attorney"); *People v. Green*, 42 Ill. 2d 555, 557, 248 N.E.2d 116, 117 (1969) (reversing the defendant's conviction where the trial court, "without any inquiry into the truth of the circumstances described by the defendant [regarding the attorney retained for the defendant by a church], summarily denied his request for a continuance and insisted that he go to trial that day")). The court in *Tucker* reversed defendant's conviction, finding that the trial court failed to inquire into the reasons the defendant sought new counsel. *Tucker*, 382 Ill. App. 3d at 924, 889 N.E.2d at 740.

¶ 24 Likewise, in *Bingham*—a case also discussed by the *Tucker* court—the defendant's public defender filed a motion to continue on the date defendant's trial was to begin, asserting that the defendant was represented by out-of-town counsel in other cases and hoped to be represented by the same counsel in the subject case. *Bingham*, 364 Ill. App. 3d at 644, 847

N.E.2d at 906. The trial court denied the motion and following a trial—at which the defendant was represented by the public defender—the defendant was found guilty of the charged offenses. *Id.* On appeal, the defendant asserted the trial court abused its discretion in denying the motion to continue because it failed "to conduct an inquiry into the circumstances surrounding the request." *Id.* This court agreed. We held that "[t]he trial court should have conducted an inquiry into the circumstances and the purposes of the motion before making its ruling. By denying defendant's motion without conducting such an inquiry, the trial court abused its discretion and violated defendant's sixth-amendment right to counsel of choice." *Id.* at 645, 847 N.E.2d at 907. As further support, we noted that the defendant's case progressed quickly, over a matter of three months; no prior continuances had been filed in the case; and no indication existed in the record of any prior attempt on defendant's part to delay the proceedings. *Id.*

¶ 25 In this case, despite the trial court's citation to *Tucker*, which in turn relied on *Bingham*, *Little*, *Washington*, and *Green*—all cases which resulted in the reversal of the defendant's convictions due to the respective trial courts' failures to inquire into the circumstances surrounding the motions to continue—the trial court failed to inquire into the circumstances surrounding defendant's request for substitute counsel before denying the motion to continue for that purpose. Based on the record before us, it appears the trial court's denial of defendant's motion for a continuance was fundamentally based on its frustration with attorney Jackson. At the hearing on the first motion to continue the trial, the court asked the prosecutor what he suggested "now that Mr. Jackson has stuck his foot in the middle of this case and mucked it up?" The court then noted it would continue the case until the following morning, at which time "Mr. Jackson will be sitting right there and we will pick a jury."

¶ 26 The next morning, at the hearing on defendant's second motion to continue, the court noted that "Mr. Jackson is *** not prepared to try the case." The court disagreed with the public defender's assessment that defendant was not "trying to thwart or delay the proceedings" but "legitimately wants to have a different attorney this time." Instead, the court concluded—without any inquiry into defendant's request—that he was attempting to delay his trial and that Jackson was "aiding and abetting [defendant] in this delay." The court's finding appears to be attributed to its observation that attorney Jackson had entered his appearance in two other cases set for trial the previous week, resulting in their respective continuances. This was not a sufficient reason, without further inquiry into the circumstances involving defendant's request, for denying his motion to continue for the purpose of substituting counsel. As stated in *Washington*, "[i]f the trial court suspected that defendant's representation that a private attorney had been hired was being used as a delaying tactic, it very easily could have confirmed or dispelled its suspicion by inquiring further into the employment of the attorney." *Washington*, 195 Ill. App. 3d at 526, 552 N.E.2d at 1070. The trial court did not do so here.

¶ 27 We also note that only 10 days elapsed between defendant's mistrial and the commencement of his second jury trial. During that time, defendant remained in custody and was operating under the limitations of his confinement—limitations which would have minimized his opportunities to seek out and retain new counsel. The morning after defendant spoke to attorney Jackson, defendant's mother provided Jackson with her credit card number to cover a portion of his fee. Jackson immediately filed a motion to vacate the public defender's appointment and enter his appearance in the matter. Further, the record contains no evidence of any prior continuances attributable to defendant, nor does the record contain any indication that defendant attempted to delay the proceedings in any way.

¶ 28 The State, citing *People v. Curry*, 2013 IL App (4th) 120724, 990 N.E.2d 1269, asserts that the trial court's denial of defendant's motion to continue was appropriate where attorney Jackson's representation of defendant was conditioned on the motion to continue being granted. We disagree.

¶ 29 In *Curry*, the defendant's proposed new counsel did not file any motions in the case or appear in court, relying instead on the defendant's counsel to file a motion to continue. *Id.* ¶12, 990 N.E.2d 1269. At the hearing on the motion, the defendant's counsel informed the trial court that the proposed new counsel " 'put conditions on his employment, and the condition were [*sic*] we had to come over here and basically beg the Court for a continuance" because the proposed new attorney had a scheduling conflict and would only be able to represent the defendant if the case was continued. *Id.* The prosecutor objected to the motion, noting the proposed new counsel told her "he was not going to enter his appearance unless the case was continued because he had a scheduling conflict during the scheduled trial week," and in her opinion, the "defendant was 'playing some kind of games' to try to get his case continued." *Id.* ¶ 14, 990 N.E.2d 1269. The court denied the motion as untimely. *Id.* ¶ 15, 990 N.E.2d 1269.

¶ 30 On appeal, this court affirmed the trial court's denial of defendant's motion to continue. We noted that unlike the court in *Bingham*—which failed "to conduct an inquiry into the circumstances and purposes of the defendant's motion," the court in *Curry* "correctly inquired of counsel to determine the factual basis surrounding the request for a continuance." *Id.* ¶ 51, 990 N.E.2d 1269. In addition, we noted that defendant's proposed new counsel did not appear in court and specifically conditioned his representation of defendant on the case being continued. *Id.* ¶ 54, 990 N.E.2d 1269. Last, we noted that defendant had posted bond and remained out of custody during the approximately four months leading up to his trial. *Id.* ¶ 56, 990 N.E.2d 1269.

¶ 31 Unlike the defendant in *Curry*, defendant in this case was in custody during the pendency of the proceedings and only 10 days elapsed between the time his first trial ended in a mistrial and his request for new counsel was made. Further, unlike the proposed new counsel in *Curry*—who did not appear in court or file any motions in the case—attorney Jackson immediately filed a motion to substitute counsel upon being contacted and he did appear in court the following day. Although Jackson was not prepared to go to trial due to his limited knowledge of the case, he was prepared to enter his appearance, as evidenced by his motion for substitution, and he sought only a "short continuance" to familiarize himself with the case. Further, unlike the trial court in *Curry*, the trial court's inquiry into defendant's request in this case, particularly the circumstances and purposes of the request, was inadequate.

¶ 32 Based on the specific circumstances presented here, we find the trial court abused its discretion in denying defendant's motion for a continuance and denied defendant his sixth-amendment right to counsel of his choice. Accordingly, we reverse defendant's conviction. See *Bingham*, 364 Ill. App. 3d at 650, 847 N.E.2d at 911 (holding that "the violation of a defendant's sixth-amendment right to counsel of choice requires automatic reversal of the conviction").

¶ 33 Because we reverse defendant's conviction, we need not address the remaining issues on appeal.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 36 Reversed and remanded.