

No. 1-13-0637

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. 12 CR 11666
)	
DONTE FORD,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the judgment where the trial court did not abuse its discretion in denying defendant a continuance so that his retained counsel of choice could represent him, and vacate the \$200 DNA fee.

¶ 2 Following a bench trial, defendant Donte Ford was convicted of delivery of a controlled substance and sentenced, as a Class X offender, to seven years' imprisonment. On appeal, defendant contends that the trial court abused its discretion in denying his request for a continuance so that his retained counsel of choice could represent him. He also contends that the

\$200 DNA fee imposed against him should be vacated. We affirm the conviction and vacate the DNA fee.

¶ 3 On May 28, 2012, defendant was arrested after police observed him engage in two narcotics transactions, one involving codefendant Hugh Lindsey, who is not a party to this appeal, in front of a residence on West Arthington Street in Chicago.

¶ 4 Defendant and codefendant appeared in court for arraignment on July 10, 2012. The public defender's office was appointed to represent them, and the matter was continued for a bond hearing on August 1. On that date, the matter was continued to September 10 for discovery. On September 10, codefendant pled guilty, and defendant's case was continued to October 3 for a bench trial. At the October 3 hearing, defense counsel indicated that she was ready to proceed to trial, but the State answered not ready. The parties agreed to continue the matter to November 15 for a bench trial.

¶ 5 On November 15, the State indicated that it was ready for trial. Defendant's assistant public defender (APD), Kelly Moore, also answered ready, but told the court that defendant would not speak to her. During the proceedings, a private attorney identified as Mr. Wilk asked to file an appearance on behalf of another private attorney, Mr. Weiner, who was not present. Wilk stated that he was unaware the case had been set for trial, had not met with defendant or read the police reports, and was not ready for trial. Defendant expressed his desire to dismiss the public defender and hire a private attorney. The trial court responded:

"I'm sorry. Sir, you can hire any lawyer that you want to hire as long as that lawyer is ready to go to trial today ***. This is the second time that this matter was set for trial. It was first set for trial on October 3.

* * *

And now it's set for trial today. The State has brought in their witnesses, and they've answered ready. Now, if you have a lawyer that is ready to go to trial today, then I'll allow you to go and get another lawyer.

Your Public Defender has been on this case from the beginning has all of the reports and is ready to go [to] trial. Mr. Wilk is not ready to go to trial. That's what he says. He knows nothing about the case, and he would not be able to represent you. Now, whether or not you cooperate with your Public Defender or not, I don't know, but I am not going to exercise my discretion and continue this matter for trial. This is a case that's been on my call since July. The discovery has been completed and its been set twice for trial. We're going to go to trial today.

Mr. Wilk, if you are not going to file your appearance on this matter, you're excused."

¶ 6 Defendant elected to have a bench trial, but told the court that he did not think that the cause was going to trial on that day and believed Mr. Weiner was going to file an appearance and continue the matter. Defendant also indicated that he wanted to talk to his mother who was in court and apparently attempting to obtain his attention. The court responded that defendant, who was 30 years old, was a "grown man," and if he wanted to communicate with his mother he could do so through APD Moore. The trial then proceeded with APD Moore representing defendant.

¶ 7 At trial, the evidence showed that police were conducting a narcotics investigation on the 2800 block of West Arthington Street on May 28, 2012. During the surveillance, police observed two men separately approach defendant on the sidewalk and give him money. Defendant went 5 to 10 feet into the front yard on West Arthington Street, where he lived, and retrieved a small green item from the ground and gave it to the men, the second of whom was identified as

codefendant. After observing the transactions, police arrested codefendant, who had heroin in his possession, and defendant, who had \$25 on his person. Tiesha Ford, defendant's wife, testified that on the date defendant was arrested, Tiesha, defendant, and their five children were home. The family was outside and Tiesha never observed anyone approach defendant. Following closing arguments, the trial court found defendant guilty of delivery of a controlled substance.

¶ 8 On the next court date, APD Moore was allowed to withdraw and a private attorney, Marvin Marshall, appeared for defendant. Marshall filed a posttrial motion alleging, in pertinent part, that defendant's right to private counsel of his choice had been violated when the court denied him a continuance to retain private counsel prior to trial even though the case had only appeared on the court's call four times. Marshall argued that the court made no inquiry of the private attorney as to how long of a continuance was being sought. When the State responded that no appearance was ever filed by a private attorney, Marshall argued that an appearance was not filed because the trial court refused to grant a continuance, and that the State's witnesses who were present for trial were police officers who would not have been inconvenienced by a continuance. The judge interjected that:

"Well, except for the taxpayers of the City of Chicago who has [sic] to pay them for appearing in court and not doing any work, and would have to pay other officers to cover their job because they were sitting in court, and then to have those officers come back again where we have to pay them a second time, and then we have to pay other police officers to cover their duties, so maybe there was some inconvenience to the taxpayers ***."

Posttrial counsel responded that inconvenience to the taxpayer does not outweigh the constitutional right of an individual to choose counsel. The court agreed and explained that it was just pointing out that some inconvenience existed. The court added that the reason Wilk did not

file an appearance was because he was not ready for trial, not because the court refused to grant him a continuance. The court ultimately denied defendant's motion, and then sentenced defendant to seven years' imprisonment.

¶ 9 On appeal, defendant contends that the trial court violated his constitutional right to counsel by failing to conduct any inquiry into the circumstances and purposes underlying his desire to hire private counsel and by denying his request for a continuance in order for his retained counsel of choice to represent him at trial.

¶ 10 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, 147-48 (2006); *People v. Baez*, 241 Ill. 2d 44, 104-05 (2011). However, it is well established that the right to counsel of choice "is not absolute." *E.g.*, *People v. Rivera*, 2013 IL 112467, ¶ 37; *People v. Holmes*, 141 Ill. 2d 204, 217 (1990); *People v. Nevarez*, 2012 IL App (1st) 093414, ¶ 53 (stating that choice of counsel may be limited in important respects, including the disqualification of counsel where a conflict of interest exists).

¶ 11 The decision of 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, 245 (2000). The appropriate factors to consider include the movant's diligence, the defendant's right to a speedy, impartial and fair trial, and the interests of justice. *Segoviano*, 189 Ill. 2d at 245. 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, 920 (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)).

¶ 12 In the present case, the court conducted an inquiry into defendant's request. On November 15, prior to the start of trial, APD Moore told the court that defendant would not speak to her but was ready for trial. During the proceedings, Wilk asked to file an appearance in defendant's case on behalf of another attorney identified as Weiner, who was not present. Wilk stated that he was not aware the case had been set for trial, had not met with defendant or read the police reports, and was not ready for trial. Defendant expressed his desire to dismiss the APD and hire a private attorney. Defendant noted that he thought the case would be continued and not go to trial. The court stated that defendant could hire any lawyer he wanted, as long as that lawyer was currently ready to go to trial. The court highlighted that the case at bar had been on its call since July, discovery had been completed, it was the second time the matter was set for trial, the State's witnesses were present, and APD Moore, who the court noted was "on this case from the beginning," answered ready for trial. The court continued that Wilk was not ready to go to trial, and refused to continue the matter in order for Wilk and/or Weiner to prepare for trial where APD Moore could proceed. Wilk, who was present to file an appearance for Weiner, never filed an appearance and the matter went to trial with Moore representing defendant. In light of the foregoing facts, the trial court did not abuse its discretion in finding that defendant's request to continue the matter in order to substitute a private attorney, who admitted that he was not ready for trial, for the public defender was intended to delay the administration of justice. See *People v. Terry*, 177 Ill. App. 3d 185, 190-91 (1988) (affirming the trial court's denial of a motion to continue when the defendant "was represented by counsel for almost four months and at no time prior to the day of trial complained about his representation, or indicated a desire to obtain other counsel").

¶ 13 Nevertheless, defendant contends that the trial court erred because the fact that private counsel was not prepared to proceed to trial was not a basis for denying a continuance, the court improperly relied upon consideration of the expense to the taxpayers, it was difficult for defendant to hire an attorney because he was incarcerated, the court failed to inquire about defendant's efforts to hire private counsel, and the trial court failed to consider the fact that defendant was not cooperating with counsel.

¶ 14 Defendant relies on this court's decision in *People v. Brisco*, 2012 IL App (1st) 101612, for his argument that private counsel not being ready to proceed to trial was not a valid reason to deny his request for a continuance. In *Brisco*, this court vacated the defendant's sentence and remanded for new posttrial proceedings where the trial court erred in denying his motion to substitute counsel for posttrial proceedings. In finding that the trial court erred, this court held, in pertinent part, that "merely because defendant's chosen counsel requires a continuance to become prepared, it does not follow that counsel is not willing and able to make an entry into the case." *Brisco*, 2012 IL App (1st) 101612, ¶ 45. However, *Brisco* involved a defendant who sought a new attorney for posttrial motions, and did not concern a case, like the one at bar, where defendant wanted a new attorney to file an appearance on the day of trial, the attorneys for the State and public defender were ready to proceed, and all witnesses were present in court.

¶ 15 Defendant next maintains that the trial court's consideration of the "inconvenience of the taxpayer," regarding the possibility of the police officers being required to return to court to testify if the matter was continued, was improper as it was not listed as a factor to consider in *Tucker*, 382 Ill. App. 3d at 916, *People v. Childress*, 276 Ill. App. 3d 402 (1995), or *People v. Burrell*, 228 Ill. App. 3d 133 (1992). Those cases found that factors to be considered by the trial court in balancing the judicial interest of trying a case diligently with the defendant's right to counsel of choice include: "whether 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." *Tucker*, 382 Ill. App. 3d at 920 (citing *Childress*, 276 Ill. App. 3d at 411); *Burrell*, 228 Ill. App. 3d at 142. As pointed out by the State, however, defendant's argument is misleading. The trial court did not state, prior to denying the continuance, that it was doing so because of the inconvenience to taxpayers. Instead, the court made the remark in response to defense counsel's argument during a posttrial hearing for a new trial that had the matter been continued for defendant to obtain private counsel, the testifying police officers would not have been inconvenienced in the same manner as a lay witness. Moreover, as the court stated on November 15, defendant could substitute counsel as long as counsel was prepared to proceed to trial.

¶ 16 Defendant also asserts that the court failed to consider that he was continuously in custody, making it harder for him to investigate and hire an attorney. However, defendant's incarceration would not prevent him from putting the court on notice before the day of trial that he sought new counsel or was dissatisfied with the public defender. Defendant also overlooks the fact that potential substitute counsel, Wilk, was present at the November 15 court date, so defendant, or someone on behalf of defendant, obviously had the time to contact a private attorney while he was in prison. The fact that Wilk was not prepared for trial does not change that fact. In addition, defendant's argument that the court failed to inquire into his efforts to obtain private counsel was belied by the record. After hearing from Wilk that he was present in court to file an appearance for another attorney but was not otherwise prepared for trial, the court turned to defendant who stated, "I didn't know who [Wilk] was right then and there."

¶ 17 Defendant next suggests that the fact that he was not cooperating with his APD should have weighed in favor of granting a continuance in order to allow him to hire substitute counsel

and allow the new attorney time to prepare for trial. However, we agree with the State that defendant was not cooperating with his attorney as a delay tactic in order to prevent trial from going forward. Defendant's efforts and statements were clearly designed to obtain a continuance rather than obtain new counsel. In particular, just before the trial began, defendant stated, "I didn't think that it was going to go [to trial] today" and "I just knew that we were going to get a continuance." Defendant made these statements despite the fact that he was present at the October 3 hearing when a trial date was set for November 15. In so finding, we note that *Tucker*, 382 Ill. App. 3d at 922, relied on by defendant, is distinguishable from the case at bar where there was no evidence to show that the defendant in *Tucker* was attempting to delay court proceedings.

¶ 18 Defendant finally contends, and the State concedes, that the \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2012)), should be vacated. We agree that the \$200 DNA analysis fee cannot be imposed because defendant was assessed the fee upon a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). We thus vacate that fee.

¶ 19 For the foregoing reasons, we vacate the \$200 DNA fee and affirm defendant's conviction in all other respects.

¶ 20 Affirmed as modified.