SECOND DIVISION
January 17, 2012

No. 1-10-0515

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. 07 CR 3132
	)	
MACIO STEWART,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant was not denied counsel of his choice during posttrial proceedings because there was no new counsel ready, willing, and able to take the case and a continuance for the purpose of hiring a different attorney would have delayed the administration of justice. This court affirmed the decision of the circuit court of Cook County.

¶ 2 Following a jury trial, defendant Macio Stewart was found guilty of first-degree murder and sentenced to 70 years' imprisonment. Defendant contends he was denied his constitutional right to counsel of his choice when the trial court denied his request to continue the case so he

could hire a different attorney for posttrial proceedings. Defendant also requests that the mittimus be corrected to reflect only one count of murder. We affirm and correct the mittimus.

¶ 3 Defendant was arrested and then charged with the murder of Ronnie Campbell. Trial evidence showed that defendant entered a vehicle with his two childhood friends, Howard White and Campbell, as well as defendant's girlfriend. Defendant sat in the back passenger seat and Campbell in the front. As White was driving away from the currency exchange, from the back seat defendant shot Campbell at close range in the head. In October 2009, the jury found defendant guilty of murder and, further, that he personally discharged the gun that caused Campbell's death.

¶ 4 On November 30, 2009, the parties appeared for a status hearing. Defendant was not present. Defense counsel Anderson J. Ward filed a motion for a new trial, but noted it was "preliminary" because he had not received all the transcripts and also because defendant's family had communicated a desire to hire different counsel for posttrial proceedings. Defense counsel, accordingly, requested a continuance.

¶ 5 The court recessed. When the case was recalled, defense counsel informed the court that he had communicated the case status to defendant, who was in lockup, and defendant understood the case would be recalled on December 7.

¶ 6 On December 7, 2009, the parties appeared before the court. Defense counsel stated that he had obtained all the trial transcripts and was ready to proceed. He requested a short date to complete filing his motion. Counsel, however, then stated that defendant had just informed him that his family would have another attorney represent defendant posttrial. The court observed: "Mr. Stewart [defendant], I don't see anybody else here. I don't see your family or another attorney." Defendant explained that he had been on "lockdown" and that his family essentially had been unable to communicate with him. Defendant said that attorney Dean Morask had

visited him in jail, and Morask relayed he would take the case provided finances were addressed first. The court repeated that defendant did not yet have a new attorney, no family had appeared in court for defendant, and Ward was still defendant's attorney. The court nevertheless continued the case for several weeks.

¶ 7 Defendant subsequently filed a *pro se* motion alleging his trial counsel was constitutionally ineffective. He requested that a bar association attorney represent him in subsequent proceedings.

¶ 8 On December 22, 2009, the court acknowledged defendant's *pro se* motion. The court stated it was prepared to hold a *Krankel* hearing on the motion before proceeding in defendant's case further. The court asked defendant if he had hired a new attorney to represent him on his motion. Defendant stated that he had attempted to reach Morask, but Morask was asking for a substantial sum of money, which defendant was still in the process of gathering. Defendant stated he was not sure how the court would view another continuance request and that is why he had filed his motion alleging ineffective assistance. He acknowledged that he did not yet have another attorney.

¶ 9 The court then conducted an extensive *Krankel* hearing. The court addressed defendant's ineffective assistance of counsel claims and ultimately determined that they were meritless. The court, as a result, denied defendant's request for a bar association attorney.

¶ 10 The court then turned to defendant's motion for a new trial. Defense counsel stated that he had just been informed by defendant that defendant had indeed hired Morask and would pay him the following day. Counsel stated that this information was confirmed by a relative present in the courtroom. Counsel added that he had not been informed of the new attorney and as a result had prepared the motion for a new trial.

¶ 11 The court responded that the case had been continued two times since defendant's conviction; no other attorney had contacted the court or filed an appearance; and no new attorney was present that day. The court commented that defense counsel had his appearance on file. In reference to Morask, the court stated: "I don't know why he would come in tomorrow if your sentencing hearing is set for today. What do you have to say about that?"

¶ 12 Defendant repeated that prior to the grant of the continuance, he was on lockdown and unable to contact his family. At this point, the court halted proceedings and requested that both the State and defense counsel contact Morask.

¶ 13 When the case was recalled, the court stated that Morask was unreachable and repeated that although defendant had been given a month, "[n]o attorney, including Mr. Morask, indicates he plans on filing an appearance for you." The court then concluded: "***[T]he hope that a family member is going to have the money to pay him [Morask] is all speculative, and I am not going to delay this any longer." The court, accordingly, denied defendant's request for an additional continuance. The court nevertheless stated that defendant would have 30 days to file a posttrial motion after sentencing and if defendant wished to hire Morask to perform the task, he was free to do so.

¶ 14 Returning to the subject of alternate counsel, the court then asked defendant who would pay for the attorney. Defendant responded his mother and uncle. Defendant's uncle Roosevelt Hawkins, who was present in the courtroom, stated in response to the court's inquiry that he had paid only defense counsel Ward. However, Hawkins stated that "[t]o the best of his knowledge" they intended to hire a different attorney and pay him for his services. The following interchange occurred:

> "MR. HAWKINS: They just contacted me that they did have another attorney.

THE COURT: Who is *they*?

MR. HAWKINS: His mother.

THE COURT: All right. No other attorney has filed an appearance here. This is all speculative.

MR. HAWKINS: Yes, I know.

THE COURT: You have not hired another attorney?

MR. HAWKINS: As of now, no.

THE COURT: Mr. Stewart's mother is not here today?

MR. HAWKINS: No.

THE COURT: What did she tell you has happened?

MR. HAWKINS: She said that she is planning on getting another lawyer that he suggested that she should get. And the lawyer that's been confirmed that he will take the case is Mr. Morask.

THE COURT: Who has not come in today and has not filed an appearance even though today is his sentencing date.

MR. HAWKINS: Nobody haven't actually spoke with him by phone or personally.

THE COURT: No. She is saying she is planning on hiring him.

MR. HAWKINS: Yes."

¶ 15 The court stated that Morask had not been hired, a new attorney was speculative, and again denied defendant's request. The cause proceeded on defendant's posttrial motions, which the court denied. Following a hearing, the court sentenced defendant to 40 years for murder and 30 years for personally discharging the firearm that resulted in the victim's death. While admonishing defendant of his appeal rights, the court again stated that defendant could have a

different attorney file a motion to reconsider the sentence if he so desired. Defense counsel Ward subsequently filed a motion to reconsider the sentence, which was denied. Defendant appealed.

¶ 16 Defendant contends he was denied his constitutional right to counsel of his choice when the court denied his requested continuance to secure new counsel.

¶ 17 The sixth amendment of the United States Constitution provides that a defendant in a criminal prosecution has the right to counsel for his defense. U.S. Const., amend. VI. At the root of this constitutional guarantee is the right to counsel of one's choice. *People v. Tucker*, 382 Ill. App. 3d 916, 919 (2008). The right does not depend on whether defendant received a fair trial or was prejudiced by the representation he received. *Id*. Deprivation of the right is a "structural error" not subject to harmless error review. *Id*. at 919-20.

¶ 18 Although fundamental, the right to counsel of choice is not absolute, but is limited in certain respects. *People v. Howard*, 376 Ill. App. 3d 322, 335 (2007). For example, a criminal defendant has no right to select an attorney he cannot afford or an attorney who declines to represent him. *Id*. A defendant who abuses the sixth amendment in an attempt to delay trial and the effective administration of justice may forfeit his right to counsel of choice. *Id*. Whether that is the case is a matter within the discretion of the trial court. *Tucker*, 382 Ill. App. 3d at 920. A determination of the issue turns on the particular facts of each case. *Id*.

¶ 19 Defendant argues that nothing in the record suggests he abused his right to counsel of choice in an attempt to delay posttrial proceedings where he asked merely for a "one-day continuance."

¶ 20 In balancing the judicial interest of trying the case with due diligence and the defendant's constitutional right to counsel of choice, a court must inquire into the actual request to determine whether it is being used merely as a delay tactic. *Tucker*, 382 Ill. App. 3d at 920. Factors to be

considered 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. *Id*. The court does not abuse its discretion in denying a motion if new counsel is not specifically identified or does not stand ready, willing, and able to make an appearance on defendant's behalf. *Id*.

¶ 21 Defendant argues the above-stated factors militate in his favor. For example, he argues his ineffective assistance of counsel claim against his attorney Ward supported his request for a new attorney; he was under incarcerated lockdown and thus unable to adequately communicate with his family regarding hiring a new attorney; and he identified attorney Morask as ready, willing, and able to take the case with payment by the family the following day.

¶ 22 The State responds that there was no new counsel ready, willing, and able to take the case and suggests defendant's effort to secure a continuance for the purpose of hiring a different attorney resulted in delay. We agree.

¶ 23 Here, defendant had a little over three weeks, from November 30 to December 22, 2009, and two court continuances, to secure different counsel, yet he failed to do so. At the November 30 hearing, the court granted a continuance after defense counsel Ward stated he needed an additional transcript and that defendant's family wished to hire different counsel for posttrial proceedings. The case was passed, and when recalled, defense counsel Ward stated on the record that defendant had been informed of the case status and the December 7 hearing. At the December 7 hearing, although defendant was able to identify his new attorney as Morask, Morask did not appear on his behalf. The court continued the case yet again after defendant essentially stated he was gathering money to pay Morask and had been unable to communicate with his family while on lockdown.

¶ 24 At the December 22 hearing, again no new attorney appeared on defendant's behalf. Defendant stated he had attempted to reach Morask, who was asking for a substantial sum of money, which defendant was still in the process of gathering. When defendant repeated that he had been on lockdown and was thus unable to communicate with his family, the court ordered the parties to contact Morask, who was unreachable. The court then inquired of defendant's uncle, present at the hearing, whether he or defendant's mother in fact had secured a different attorney. Hawkins acknowledged that he had not yet hired another attorney, or spoken to Morask. He acknowledged that defendant's mother, who was not present at the hearing, was merely planning to hire another attorney. Defense counsel Ward stated he did not have prior knowledge of a new attorney and as a result had prepared the motion for a new trial.

¶ 25 Under these circumstances, and given the court's considerable inquiry into the matter, we conclude it was not an abuse of the court's discretion to deny defendant's request to hire new counsel. See *People v. Antoine*, 335 Ill. App. 3d 562, 580-82 (2002); *People v. Burrell*, 228 Ill. App. 3d 133, 143 (1992). We agree with the court that at that point, the prospect of hiring new counsel for posttrial proceedings was merely speculative and a delay in the administration of justice. See *People v. Solomon*, 24 Ill. 2d 586, 591 (1962).

¶ 26 In reaching this conclusion, we reject defendant's reliance on *Tucker* and similar cases, as misplaced. *Tucker* addressed the specific issue of whether the trial court had adequately addressed defendant's request for a different attorney on the day his case was to proceed to a jury trial. *Tucker*, 382 Ill. App. 3d at 923. This court held the inquiry was insufficient where the trial court did not ask defendant why he wanted another attorney, what he meant when he said he had "hired" the new attorney, or whether he could afford that attorney. *Id.* *Tucker* added that the trial court also did not ask defendant's family, then present, about the arrangements to hire a new attorney or attempt to actually contact the attorney to determine whether he was ready, willing,

and able to represent the defendant. *Id*. The trial court, in addition, made no factual findings that defendant's request was a delay tactic and not in good faith. *Id*. at 924.

¶ 27 As set forth above, this is not such a case. At the final hearing, the court addressed defendant's ineffective assistance of counsel claims in an extensive *Krankel* hearing. Defendant has not raised any arguments on appeal with respect to that claim or the hearing or specified whether the arguments had any merit. Our review of the record has revealed no basis for concluding defendant needed a different attorney for posttrial proceedings. See *People v. Mims*, 111 Ill. App. 3d 814, 818 (1982) (defendant failed to articulate acceptable reason for new counsel). Unlike in *Tucker*, here the court inquired of defendant and his family whether they had retained alternate counsel. The court also gave the parties an opportunity to contact counsel. As stated, even after two court continuances and extensive inquiry into the matter, it was unclear whether defendant and his family had the resources to secure Morask as counsel or had even truly contacted him. The court determined this was unacceptable, and we cannot say we disagree. Defendant's contention that he was denied his right to counsel of his choice fails.

¶ 28 Defendant next contends the mittimus should be corrected to reflect only one count of intentional first-degree murder. The mittimus currently lists convictions for both Count 5, intentional or knowing murder, and Count 6, acts creating a strong probability of death or great bodily harm. The State concedes, and we agree, that there can be but one conviction for murder where only one person was murdered. See *People v. Cardona*, 158 Ill. 2d 403, 411 (1994); *People v. Walker*, 2011 IL App. (1st) 072889, ¶ 39. When multiple convictions have been entered on the same act, only the conviction for the most serious charge should remain on the mittimus. *Id.* This court may correct the mittimus without remanding the case to the trial court. *Walker*, 2011 IL App. (1st) 072889, ¶ 39. Accordingly, we order the clerk of the circuit court to

correct the mittimus to reflect a conviction for only count 5, intentional murder, which is the most serious charge.

¶ 29 We affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed; mittimus corrected.