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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2220**

State of Minnesota,
Respondent,

vs.

Panh Rick Thavong,
Appellant.

**Filed August 26, 2013
Affirmed
Peterson, Judge**

Olmsted County District Court
File No. 55-CR-11-8043

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James Peter Spencer, Senior Assistant
Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer Lynn Lauermann,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and
Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction of aiding and abetting felony theft, appellant argues that the district court abused its discretion when it failed to consider appellant's requests for a continuance to secure private counsel and failed to inquire how appellant wished to proceed at appellant's sentencing hearing. We affirm.

FACTS

Appellant Panh Rick Thavong pleaded guilty to one count of aiding and abetting felony theft in this case, which was assigned district court file number 55-CR-11-8043. He admitted stealing merchandise valued at between \$1,000 and \$5,000 from a store. In a second case, which was assigned district court file number 55-CR-12-2565, appellant pleaded guilty to one count of felony receipt of stolen property, and another charge was dismissed. Under a plea agreement, the parties recommended sentencing appellant to concurrent 21-month, executed sentences for the two offenses. Two other felony cases were dismissed in their entirety, and appellant was released pending sentencing.

Appellant did not appear for sentencing on August 30, 2012. He was in the courtroom earlier that morning but left before his case was called, and a warrant for his arrest was issued. Appellant's counsel told the district court that he had talked to appellant the night before, and appellant wanted a one-week continuance "to hire private counsel to get a second opinion about the plea agreement." Counsel told appellant that he would orally request a continuance at the sentencing hearing. The court stated that, as a result of appellant's decision to leave before his case was called, the court would not

consider the continuance request and would proceed with sentencing when appellant was apprehended.

Appellant appeared for sentencing on September 13, 2012. Appellant requested a continuance because, in the other case in which he had pleaded guilty, district court file number 55-CR-12-2565, he thought he was pleading guilty to an offense for which he would have received 179 days of jail credit, but he pleaded guilty to an offense for which he received only 74 days of jail credit. Defense counsel also stated that appellant wanted a continuance to consult with private counsel. Defense counsel stated that a private attorney had appeared for appellant's sentencing on August 30 after the sentencing hearing ended, but defense counsel had not received a certificate of representation from private counsel. The district court continued the sentencing in district court file number 55-CR-12-2565 but proceeded to sentencing in this case. The district court sentenced appellant to an executed term of 28 months, the high end of the presumptive range plus a three-month custody-status enhancement.

This appeal followed.

D E C I S I O N

A district court has discretion to deny an indigent defendant's request for a continuance to obtain private counsel when the motion is made at or near the time of trial; the defendant is represented by competent, prepared, court-appointed counsel; and no private lawyer is available and willing to represent the defendant. *See State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (holding that district court did not abuse its discretion by denying request for continuance made on the day of trial, because defendants' court-

appointed attorneys were experienced, competent, and prepared for trial, and defendants articulated no valid reason for firing them and could not provide the court with name of attorney willing to represent them); *State v. Vance*, 254 N.W.2d 353, 359 (Minn. 1977) (holding that district court did not err in denying continuance sought a few days before trial when defendant had “a competent and able public defender who had thoroughly investigated the facts and was prepared for trial” and defendant could not be certain of securing private representation). A defendant has an obligation to make a timely request for a continuance, and the district court may deny a last-minute request for substitute counsel that inevitably delays the proceeding. *State v. Clark*, 698 N.W.2d 173, 178 (Minn. App. 2005), *aff’d* 722 N.W.2d 460 (Minn. 2006). In deciding whether the district court acted within its discretion in denying a continuance, this court considers “whether the defendant was so prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial.” *Vance*, 254 N.W.2d at 359.

Before the August 30 sentencing hearing, appellant told defense counsel that he wanted a one-week continuance to retain private counsel. But appellant did not appear at the sentencing hearing. It was appellant’s failure to appear that caused the district court to not consider his request for a continuance. At the September 13 hearing, appellant told the district court that an error had occurred in the other case in which appellant had pleaded guilty, and the court granted a continuance in that case. In this case, appellant was represented by competent counsel during plea negotiations and at the sentencing, did not claim any error or prejudice with respect to the plea or sentence, and did not identify a private attorney who was available and willing to represent appellant. The district court

did not abuse its discretion in denying appellant's request for a continuance or in not inquiring further about appellant's wish to obtain private counsel.

Affirmed.