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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0145**

State of Minnesota,
Respondent,

vs.

Clifford Lee Welsh,
Appellant.

**Filed June 24, 2008
Affirmed
Peterson, Judge**

Becker County District Court
File No. K8-05-1568

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Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a conviction for possessing methamphetamine, appellant argues that the district court denied his right to counsel of his choice when it denied his motion for a mistrial after appellant informed the court during trial that he had fired his defense attorney months earlier. We affirm.

FACTS

Appellant Clifford Lee Welsh was charged with possession of methamphetamine and retained Richard Varriano to represent him. On April 24, 2006, appellant appeared with Varriano for a hearing on several open cases. Varriano was noted as counsel of record for all of the cases. A contested omnibus hearing was held the same day on appellant's motion to suppress evidence in this case, and trial was scheduled for June 27. On May 26, 2006, Varriano filed a substitution of counsel form to withdraw from all of appellant's pending cases, except this one.

Appellant's trial was rescheduled to begin on June 29, and on June 27, 2006, appellant made an appearance to waive his right to a speedy trial. Appellant was represented at the appearance by Varriano, who indicated that appellant was withdrawing his speedy-trial demand because Varriano had a conflict with the June 29 trial date. The district court confirmed appellant's request.

A jury trial began on August 29, 2006. Appellant interrupted several times while preliminary matters were being put on the record. The district court advised appellant to "speak through your attorney, Mr. Varriano." Appellant replied: "I speak for myself. I

don't need Mr. Varriano or anyone else to speak for me." The district court asked Varriano to confer with appellant before the potential jurors were brought into the courtroom to "[s]hare whatever information he has not seen, [and] prepare him for trial to conduct himself in accordance with the rules of decorum." When court reconvened, the jury was selected and sworn without any interruptions by appellant. Appellant personally made an objection during the prosecutor's opening statement. The district court overruled the objection and told appellant to "please consult with your attorney."

After the jury was excused for lunch, the district court said to appellant: "[A]s I instructed you earlier, you have retained counsel and your attorney will speak for you during this trial." Appellant replied, "The one I retained is not present." Appellant told the district court that he had fired Varriano before the omnibus hearing and that Varriano was not handling the case according to appellant's wishes. The district court indicated that this was the first it had heard about the issue. Varriano explained:

[I]t was my intention to withdraw, and [appellant] did hire a different lawyer. When I prepared the substitution of counsel [form], I failed to put this case down because there [were] so many cases. So I was left as attorney of record on this case. That's the way it stands now.

Appellant explained that he did not want Varriano to represent him, but that he was not prepared to represent himself because he felt he needed an attorney's assistance. The district court advised appellant that it would not grant a continuance to hire another attorney, leaving appellant with the choice of accepting Varriano's representation or representing himself. Varriano moved for a mistrial so that appellant could be represented by the attorney of his choice. The district court denied the motion.

Appellant protested, stating that he had already hired a different attorney and believed that he had done everything he could to secure representation by the new attorney. The district court explained: “[N]either [Varriano nor appellant] said anything about any reservations about representation; and I’m going to require the case to proceed to trial now. This is an untimely request for substitution of counsel. . . .” Appellant was found guilty by the jury, convicted, and sentenced to 58 months’ imprisonment. This appeal followed.

D E C I S I O N

This court reviews the denial of a motion for mistrial for abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). This is because the district court “is best situated to decide whether, for compelling reasons, the ends of substantial justice cannot be attained without discontinuing the trial.” *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997) (quotation omitted). “A mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred.” *Manthey*, 711 N.W.2d at 506 (quotation omitted). A district court considering a mistrial may also consider less-drastic alternatives. *Long*, 562 N.W.2d at 296. The decision to grant or deny a continuance is also committed to the discretion of the district court and should be based on all the facts and circumstances surrounding the request. *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977). “In determining whether the [district] court was within its sound discretion in denying a motion for a continuance, this court looks to whether the defendant was so

prejudiced in preparing or presenting his defense as to materially affect the outcome of the trial.” *Id.* at 358-59.

The Sixth Amendment to the United States Constitution guarantees the right of a nonindigent criminal defendant to choose who will represent him or her. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561 (2006). But that right is not absolute. *Id.*; see *State v. Courtney*, 696 N.W.2d 73, 81 (Minn. 2005) (describing right as “fair opportunity to secure counsel of [one’s] own choice”). A district court has “wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar.” *Gonzalez-Lopez*, 548 U.S. at 152, 126 S. Ct. at 2565-2566 (citations omitted). A continuance to substitute counsel “is properly denied when the defendant has not been diligent in procuring counsel or in preparing for trial.” *Courtney*, 696 N.W.2d at 82.

A court is within its discretion to deny a continuance for substitution of counsel when the motion is made at or near the time of trial and the defendant already has competent, prepared counsel. See *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998) (holding that district court did not abuse its discretion in 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 court with name of attorney willing to represent them); *Vance*, 254 N.W.2d at 359 (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 could not be certain of securing private representation).

Appellant argues that the district court’s calendar and scheduling concerns are insufficient grounds to deny a motion for a continuance for substitution of counsel, but the cases he relies on are distinguishable. In *In re Welfare of T.D.F.*, the respondent’s attorney was out of town. 258 N.W.2d 774, 775 (Minn. 1977). Denial of the motion for continuance left the respondent represented by counsel who were not prepared and not familiar with the case. *Id.* In *City of Minneapolis v. Price*, the defendant’s attorney withdrew on short notice, through no fault of the defendant, which left the defendant with no representation at trial. 280 Minn. 429, 434, 159 N.W.2d 776, 780 (1968). Unlike the respondent in *T.D.F.*, who was left with unprepared counsel, and the defendant in *Price*, who was left with no counsel, appellant was represented by competent counsel prepared to mount a defense.

These cases are also distinguishable because the lack of prepared counsel was not caused by any failure by the client. *See T.D.F.*, 258 N.W.2d at 775 (noting that respondent’s attorney of record had been given timely notice, but was out of town); *Price*, 280 Minn. at 434, 159 N.W.2d at 780 (concluding that “[w]hile a trial court is justified in denying a motion for continuance if a defendant discharges his counsel for purposes of delay, or if he fails to act diligently to replace counsel who withdraws well in advance of trial, it is reversible error to deny the motion when, without fault of the defendant, the original defense counsel withdraws on short notice” (citations omitted)).

In contrast, in *Courtney*, the defendant's attorney withdrew, resulting in all subsequent court correspondence being sent directly to the defendant. 696 N.W.2d at 82. Although the defendant obtained new counsel, he did not inform the new attorney about the trial date until two days before the trial was to begin. *Id.* The district court denied his motion for a continuance, and the supreme court affirmed, reasoning that “[b]alancing [the defendant’s] right to counsel of his choice against the public interest of maintaining an efficient and effective judicial system, and in light of [the defendant’s] lack of diligence, we conclude that the trial court did not abuse its discretion when it denied [the defendant’s] motion for a continuance.” *Id.* The court explained:

While we cannot on this record say unequivocally that [the defendant] was engaged in an intentional effort to manipulate the . . . trial date, we can say that his lack of diligence in both obtaining counsel and, once having obtained counsel, his failure to inform counsel of the selected trial date was the cause of his counsel’s limited preparation time.

Id.

Varriano filed notice of substitution in all of appellant’s other cases on May 26, 2006. Both appellant and Varriano assert that the notice of substitution should also have included this case. But appellant appeared in court on June 27, represented by Varriano, and waived his speedy-trial demand because Varriano had a conflict with the scheduled trial date. Appellant appeared for trial on August 29, again represented by Varriano. Although appellant interrupted the proceedings several times, it was not until after the jury was selected and sworn and opening statements had been delivered that appellant mentioned that he had fired Varriano. Although appellant was aware that this case was

pending, and was present when trial was originally scheduled for June 27, there is no evidence that any other attorney filed a certificate of representation in this case or attempted to appear on appellant's behalf. Appellant's failure to communicate the trial schedule to his new attorney or to inform the court that he had fired Varriano and hired a new attorney demonstrate a lack of diligence in pursuing his right to counsel of choice. Because appellant acquiesced in Varriano's continued representation and received the assistance of competent, prepared counsel, the district court neither abused its discretion in denying his motion for a mistrial nor deprived him of his right to representation by the counsel of his choice.

Affirmed.