STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2218
A07-2279
A07-2364

State of Minnesota,
Respondent,

vs.

Dion Caress Pennywell,
Appellant.

Filed March 10, 2009
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. K4-07-1952

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

In this consolidated appeal of three convictions of third-degree sale of cocaine, appellant argues that the district court erred by telling appellant that it had no ability to grant his requests for a substitute public defender and that appellant could represent himself only if he convinced the court that he was capable of doing so. Because the district court did not misstate the law and because appellant did not make an unequivocal request to represent himself, we affirm.

FACTS

Appellant Dion Caress Pennywell sold cocaine to an undercover police officer on May 17, May 30, and June 5, 2007, while police were conducting a three-month operation involving controlled buys. Appellant was charged with three counts of third-degree sale of cocaine, in violation of Minn. Stat. § 152.023, subd. 1(1) (2006). A public defender was appointed to represent appellant at trial. Appellant refused the state's plea offer of "six months off the low end of the box" in exchange for which appellant would plead guilty to all three counts.

Appellant's trial was scheduled to commence on August 6, 2007. Due to settlement discussions involving a fourth charge against him and the receipt of late discovery, trial was rescheduled for the following week. At the August 6 pretrial hearing, appellant inquired as to the possibility of having a different public defender appointed. The district court told appellant he could ask "next Monday, after [appellant] had a long time to think about that idea." The district court then stated: "Let me tell you this as far

as whether or not you're going to be represented by the public defender's office. I have no control over who's assigned. That's strictly a matter for the public defender . . . to decide."

The first of appellant's three jury trials began August 13, 2007. At some point between August 6 and August 13, appellant contacted the public defender's office and requested a different attorney. His request was denied. At the pretrial hearing on August 13, appellant stated that he still wanted another attorney. The district court told appellant that his public defender would continue to represent him unless he hired his own counsel or decided to represent himself. Appellant then expressed his dissatisfaction with his public defender. Before voir dire that afternoon, appellant again expressed his desire for another public defender and asked the district court how self-representation would work if he opted to represent himself. Appellant eventually decided to continue with his appointed counsel.

The jury convicted appellant of the first count on August 15, 2007. Later that day, appellant's second trial commenced. After voir dire, appellant reiterated his dissatisfaction with his attorney. The jury convicted appellant of the second count on August 16, 2007.

Appellant's third jury trial commenced on August 20, 2007. Before voir dire, appellant again notified the district court that he was dissatisfied with his attorney. The jury convicted appellant of the third charge on August 21, 2007.

Sentencing took place on October 19, 2007. The district court denied appellant's motion for a continuance for a mental-health examination and determined that appellant

was not entitled to a dispositional departure. Appellant received concurrent sentences of 21, 33, and 34 months.

Appellant now challenges his three convictions in this consolidated appeal.

D E C I S I O N

I.

We first address appellant's contention that the district court abused its discretion by telling him that it had no ability to grant his requests for substitute counsel. We review a district court's decision not to appoint substitute counsel for abuse of discretion. *State v. Worthy*, 583 N.W.2d 270, 278–79 (Minn. 1998); *see also State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006).

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. "This right includes a fair opportunity to secure counsel of [one's] own choice." *State v. Fagerstrom*, 286 Minn. 295, 298, 176 N.W.2d 261, 264 (1970). But an indigent defendant does not have "the unbridled right to be represented by counsel of his own choosing." *Id.* at 299, 176 N.W.2d at 264. Rather, an indigent defendant must accept the court's appointee. *Id.* A defendant's request for a substitution of counsel will be granted "only if exceptional circumstances exist and the demand is timely and reasonably made." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977).

On August 6, 2007, the district court told appellant, "Let me tell you this as far as whether or not you're going to be represented by the public defender's office. I have no control over who's assigned. That's strictly a matter for the public defender . . . to

decide." Before voir dire for the first trial, appellant again requested a different attorney. The district court responded: "I don't have any control about that," and "[y]ou have a public defender, and the public defender's office has assigned [an attorney], and that's all I can do about it."

A district court misstates the law when it tells a criminal defendant that he may not have a different public defender under any circumstances. *State v. Lamar*, 474 N.W.2d 1, 3 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). But that is not what occurred here. The district court explained to appellant that it had no ability to appoint a specific attorney from the public defender's office. The district court did not state that it had no ability whatsoever to appoint substitute counsel. We therefore conclude that the district court did not err when it told appellant it had no control over which public defender had been or would be assigned to him.

We also conclude that appellant's requests for substitute counsel were not timely. Appellant waited more than a month after his first appearance to request substitute counsel. His first request was made on August 6, 2007, the date that his trial was scheduled to begin. Such a last-minute request is not timely. *See State v. Harris*, 407 N.W.2d 456, 463 (Minn. App. 1987) (stating that request for substitute counsel made "only 18 days before trial" was a last-minute request that would inevitably delay trial), *review denied* (Minn. July 31, 1987); *State v. Reed*, 398 N.W.2d 614, 616 (Minn. App. 1986) (stating that request for substitute counsel made one week before trial was not timely), *review denied* (Minn. Feb. 13, 1987).

Even if appellant's request was timely, we conclude that exceptional circumstances compelling the appointment of substitute counsel did not exist. Although Minnesota caselaw "does not specifically define what constitutes an exceptional circumstance[,] . . . our cases do indicate that exceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001) (rejecting more stringent standard adopted in *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996)). Personal tension between the attorney and the client does not constitute exceptional circumstances, *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999), nor does "[g]eneral dissatisfaction or disagreement with [the] appointed counsel's assessment of the case," *Worthy*, 583 N.W.2d at 297. A defendant has the burden of showing the existence of exceptional circumstances. *Worthy*, 583 N.W.2d at 297.

Appellant does not argue to this court that exceptional circumstances compelled the appointment of substitute counsel—i.e., that his trial counsel lacked competence or skill or committed any errors. Nor does appellant argue that the evidence was insufficient to support any of his three convictions. *See Lamar*, 4741 N.W.2d at 3 (noting that appellant did not point out "to any error made by his [trial] attorney or give[] any ground why he had good cause to have a new attorney" and that appellant did not challenge the sufficiency of the evidence supporting his conviction).

During appellant's second trial, the district court remarked that appellant's attorney had been providing him with a "high level of representation." The district court's assessment of the competence of appellant's trial counsel is supported by the

record. Appellant's counsel prevailed on several motions in limine. She also successfully argued for alterations to the jury instructions. Throughout the three trials, appellant's counsel notified the district court of appellant's wishes regarding substitution of counsel and his requests for mental-health and chemical-dependency evaluations.

The nature of appellant's dissatisfaction with his trial counsel appears to be that she was unable to obtain the result he wanted. Appellant repeatedly expressed a desire to be sent to the Minnesota Teen Challenge program for treatment. His trial attorney told him that it would be futile for her to ask the state to request that he be sent to Teen Challenge. Before appellant's third trial, the district court told appellant that his attorney was "absolutely right" in her assessment of the situation:

> [T]he question that she was trying to explain to you is that the prosecution agreeing or disagreeing or doing whatever they might do doesn't make any difference if I'm required to send you to prison. These are not, by statute, probation offenses. I would have to figure out some reason . . . why it would not be appropriate to send you to prison.

We therefore conclude that exceptional circumstances did not exist.

Appellant, citing *McKee v. Harris*, 649 F.2d 927, 933–34 (2d Cir. 1981), and *Benitez v. United States*, 521 F.3d 625, 634 (6th Cir. 2008), alleges that the district court was required to question him about his dissatisfaction with his public defender. But under Minnesota law, a "searching inquiry" is only required when an indigent defendant makes "serious allegations of inadequate representation before trial has commenced." *Clark*, 722 N.W.2d at 464. In *Clark*, the Minnesota Supreme Court concluded that it was "evident from the record that the [district] court was satisfied that appointed counsel had

conducted a proper investigation, was thoroughly prepared for trial, and had, in fact, maintained contact with [appellant]." *Id.* As we have already discussed, appellant does not argue to this court that his trial counsel was deficient. And the record does not support a conclusion that appellant made serious allegations of inadequate representation before any of his three trials commenced. We also note there were no exceptional circumstances that would compel the district court to appoint substitute counsel. We therefore conclude that the district court was not required to conduct a "searching inquiry" regarding appellant's dissatisfaction with his public defender.

II.

Appellant also contends that the district court erred by "intimat[ing] that [he] could not choose to represent himself unless he proved to the court that he was capable of doing so." This court applies the clearly erroneous standard in reviewing a district court's denial of a defendant's request to represent himself. *State v. Christian*, 657 N.W.2d 186, 190 (Minn. 2003).

A criminal defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 2540–41 (1975); *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990). Upon proper request, a defendant must be allowed to represent himself despite a "lack of the legal ability to conduct a good defense." *State v. Thornblad*, 513 N.W.2d 260, 262 (Minn. App. 1994). The right is unqualified only until trial begins, which is when voir dire commences. *Christian*, 657 N.W.2d at 191-93. A defendant's right to self-representation is so fundamental that deprivation of that right is

not subject to a harmless-error analysis. *Richards*, 456 N.W.2d at 263; *see also State v. Camacho*, 561 N.W.2d 160, 171 (Minn. 1997).

As a predicate to waiving the right to counsel, the Minnesota Supreme Court has adopted a two-pronged inquiry. *Camacho*, 561 N.W.2d at 171. First, if the district court has reason to doubt the defendant's competency, it must find "that the defendant is competent to stand trial." *Id.* (quotation omitted). Second, a defendant's request for self-representation must be "clear, unequivocal, and timely," as well as knowing and intelligent. *Richards*, 456 N.W.2d at 263.

On the afternoon of his first trial, before voir dire, appellant asked the district court: "Well, if I requested to represent myself, how is that done?" The following colloquy then took place:

District Court:	You tell me that you want to represent yourself, that you want to fire [the public defender], and then you have to convince me, all right—
Appellant:	Yes, sir.
District Court:	—that you'd be able to represent yourself, and—and I already have a problem with that because you told me you don't understand what's going on here.
Appellant:	Yes, sir.
. . . .	
District Court:	You've already told me you don't understand what's going on here, you've told me this is your first time through a jury trial, yeah?
Appellant:	Correct.
District Court:	So I would have, at least starting off, I would have some trouble convincing myself that it would be a good idea to permit you to go ahead and represent yourself.
Appellant:	Okay.

. . . .

District Court:	But I might be able to be convinced.
Appellant:	Okay.
District Court:	Of course, it is your constitutional right to represent yourself.
Appellant:	Yes, sir.
District Court:	Assuming that you can convince me that you can do so.
Appellant:	Yes, sir.
District Court:	So can I bring the jury panel in and can we get started here?
Appellant:	Yes, sir, yes, sir.

Appellant concedes that any request he made to represent himself "was not unequivocal." Appellant's argument appears to be that he did not press the district court on this matter because he did not think a request to represent himself would be successful. Appellant's argument requires this court to presume that the district court would have improperly denied his hypothetical request to represent himself. Because appellant never made an unequivocal request to represent himself, there is no denial of a request for this court to review.

Affirmed.