STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2091

State of Minnesota,
Respondent,

vs.

John Jose Kukert, Jr.,
Appellant.

Filed December 5, 2011
Affirmed
Schellhas, Judge

Clay County District Court
File No. 14-CR-09-4905

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Crippen, Judge.[*]

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

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

SCHELLHAS, Judge

On appeal from his convictions of conspiracy to commit aggravated robbery, first-degree aggravated robbery, second-degree assault, first-degree burglary, and aiding and abetting first-degree aggravated robbery, appellant argues that the district court erred by denying his request to appoint substitute counsel based on exceptional circumstances. We affirm.

FACTS

Respondent State of Minnesota charged appellant John Kukert with the commission of six felony offenses. At Kukert's first appearance on January 11, 2010, the district court appointed a public defender to represent him.

On February 5, Kukert appeared with his public defender for an omnibus hearing. The public defender asked for a continuance, stating, "Kukert has been housed in Crookston[, Polk County,] for all but a very short amount of time between the last two hearings, so he and I have not been able to effectively communicate and need to discuss the case at any . . . length at all." The court granted a continuance until February 22 and directed that Kukert be held at a local jail "the week of [February] 15th through the 19th" so the public defender could meet with him.

On February 16, Kukert sent the district court a letter[1] in which he chronicled concerns about his attorney as follows:

[1] The district court shared the letter with the public defender and the prosecutor.

> The last time I spoke with [the public defender] his words were, I'm only here to offer you advice. That's what they pay me a couple of bucks for. Now I plan on taking my case to trial, I've even prepared my own defense with facts I've taken from the police reports, many facts. I showed this to him and he didn't seem to think it would help my case much. His words and his demeanor gave me the very deep impression that when it comes time for trial, he will only stand by and not do much of anything. Another reason I believe this to be true is because when I was being housed in Polk County, I had no funds so I called him collect. He answered but didn't accept the charges. . . . I must have proper representation as well as proper defense. I feel that my current attorney will not provide that. *So I am asking that a different attorney be assigned to my case . . . .*

(Emphasis added.)

On February 22, during an omnibus hearing, Kukert's public defender raised the subject of Kukert's letter and his request for substitute counsel.

> PUBLIC DEFENDER: There is one other issue. I know Mr. Kukert did write a letter to the court addressing—well, questioning appointment of a public defender, and I believe he asked for a different attorney. I can explain to him public defense internal policy, but since the request was addressed to Your Honor, I just bring it to the court's attention whether the court sees fit to respond. I leave it to the court.
> THE COURT: John, when it comes to representation by the public defender that issue is one for the chief public defender. If you have issues or concerns, the court doesn't get involved in the assignment of the attorneys by the public defender system. You're always free to hire your own attorney if you're able to, but when you're involved with the public defender system the assignment is up to the chief public defender for the district ultimately and not the court, so you're aware of that.

Kukert subsequently appeared before the district court on March 18, April 15, April 26, and July 1. The April 15 transcript, which is less than one page in length,

indicates that the public defender appeared on behalf of Kukert to obtain a trial date, but the transcript does not indicate whether Kukert was present. The other hearing transcripts for Kukert's appearances subsequent to February 22 reveal that Kukert appeared with his public defender. Neither Kukert nor his public defender expressed any ongoing concerns by Kukert about his legal representation or raised the issue of substitute counsel. At the July 1 hearing, the county attorney disclosed that Kukert's codefendants would be testifying at his trial, and Kukert answered the following questions from his public defender in connection with his jury-trial waiver:

> PUBLIC DEFENDER: Mr. Kukert, whose idea was it for Judge Kirk to be the one to decide the facts in the case?
> THE DEFENDANT: It was mine really. I talked to you a long time ago about it, but—
> PUBLIC DEFENDER: So this is your decision. Is this—this is nothing that I encouraged or pushed you to do, is it?
> THE DEFENDANT: No.

On the record on the morning of trial, but outside of the presence of the judge and the prosecutor, Kukert's public defender discussed with him his purported alibi witness about whom Kukert had previously provided notice to the prosecutor.[2] Kukert's public defender informed him that investigation by the public defender's office "tended away from corroborating [Kukert's] alibi rather than—it didn't strengthen [Kukert's] alibi; in

[2] When defense counsel and defendant disagree on significant matters of tactics or strategy, the supreme court has suggested that "a record should be made by 'means which best serves to protect both the confidentiality of the attorney-client relationship and the safeguards present in the criminal system.'" *State v. Clark*, 722 N.W.2d 460, 464 n.2 (Minn. 2006) (quoting *State v. Eling*, 355 N.W.2d 286, 294–95 (Minn. 1984)). "We do not specify a single, appropriate manner of making a record in such cases." *Eling*, 355 N.W.2d at 295. "It is difficult to envision a circumstance, however, where the prosecuting attorney should ever be present at an on-the-record conversation between a defendant and defense counsel." *Id.*

fact, it weakened it." Kukert said that he understood that. His public defender also advised him that he had "a duty of candor toward the tribunal," and that if he had "reason to believe that testimony or evidence would be false," he had the option of refusing to put on the evidence. Kukert said that he understood that. His public defender also explained that if he "didn't think it would help [Kukert's] case," he had "a tactical right not to put some of that stuff on," and that "at [that] point [he wasn't] sure whether [they would] put it on or not." Kukert's public defender asked him whether he understood that the public defender had "a right and perhaps an ethical obligation not to put that stuff on," and Kukert said that he understood that. The public defender also explained to Kukert that he had the right to testify but no obligation to do so, that he was presumed innocent, that he did not have to prove his innocence, that the state had the burden of proving his guilt, and that whether he wished to testify would be a decision that he would make later. Nothing in the transcript suggests that Kukert had ongoing concerns about his public defender's legal representation of him.

Eleven witnesses testified at trial on behalf of the state, including two co-defendants and a participant in the crimes who was not charged. Only Kukert testified in his own defense. The district court found Kukert guilty of five of the six counts against him.

This appeal follows.

D E C I S I O N

Kukert argues that the district court committed reversible error by denying his letter request for substitute counsel because the court misstated the law and did not engage in a searching inquiry into the public defender's ability and competence. Kukert also argues that good cause exists for reversal.

"The decision to grant or deny a request for substitute counsel lies within the trial court's discretion." *Clark*, 722 N.W.2d at 464. "[A] defendant's constitutional right to counsel includes a fair opportunity to secure an attorney of choice, but an indigent defendant does not have the unbridled right to be represented by the attorney of his choice." *Id.* (quotation omitted). "[A] court will grant an indigent's request for different counsel only if exceptional circumstances exist and the demand is timely and reasonably made." *Id.* (quotations omitted). A defendant has the burden of showing the existence of exceptional circumstances. *State v. Worthy*, 583 N.W.2d 270, 279 (Minn. 1998).

"[E]xceptional 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). "General dissatisfaction or disagreement with appointed counsel's assessment of the case does not constitute . . . exceptional circumstances." *Worthy*, 583 N.W.2d at 279. Personal tension between defendant and counsel during trial preparation also does not constitute exceptional circumstances when it does not relate to counsel's ability or competence to represent a defendant. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

In *Clark*, on the morning that trial was scheduled to commence, the defendant made complaints to the district court about his public defender as follows:

> I got evidence that can help prove my innocence, and every time, I tell [the public defender] something about it, you know, she tell[s] me that, you know, it's not admissible or that's not happening, and I've been here four months, she has never came to see me or gave me any paperwork telling me that—you know, this what this statement is. Then she told me that it's like an open[-]and[-]shut case, that I need to plead to 60 months or, you know, I can't defend this, you know, so I don't—you know, every time we—you know she talked to me, we sitting in court, you know, I haven't had a chance to talk to her about no witnesses, nothing. I speak—you know, something to prove my innocence and I feel like she just don't have the same interests, you know.

722 N.W.2d at 464 (alteration in original). The district court responded to Clark's complaints by informing him that "[u]nder the [local public defender's internal] rules, you would not be re-assigned a different lawyer from the Public Defender's office." *Id.* (alternation in original). On appeal, Clark argued that "he raised substantial complaints about the effectiveness of the representation provided by appointed counsel, amounting to 'exceptional circumstances' such that the trial court should have conducted a more 'searching inquiry' before ruling on the request." *Id.* In response to that argument, the supreme court said:

> That may be so, particularly when a defendant voices serious allegations of inadequate representation before trial has commenced. But here it is evident from the record that the trial court was satisfied that appointed counsel had conducted a proper investigation, was thoroughly prepared for trial, and had, in fact, maintained contact with Clark.

Id. at 464−65 (footnote omitted).

Except for the timing of Kukert's request for substitute counsel, the facts related to Kukert's request for substitute counsel are strikingly similar to the facts in *Clark*. Kukert's complaints about his public defender, as expressed to the district court in his letter, were the same type of complaints as Clark's—complaints of general dissatisfaction or disagreement with counsel's assessment of the case and a suggestion that personal tension existed between the client and his attorney. Kukert's general complaints did not constitute "exceptional circumstances," such as "serious allegations of inadequate representation." *See id*. at 464. We therefore conclude that the district court did not err by not conducting a searching inquiry into the ability and competence of Kukert's public defender.

And, even if the district court should have conducted a searching inquiry into the ability and competence of Kukert's public defender, nothing in the record suggests that the district court's denial of substitute counsel prejudiced Kukert in preparing or presenting his defense so as to materially affect the outcome of the trial. *See State v. Vance*, 254 N.W.2d 353, 358−59 (Minn. 1977) ("In determining whether the trial court was within its sound discretion in denying a motion for a continuance [to obtain private counsel], 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.").

Despite our conclusion that the facts in this case did not require the district court to conduct a searching inquiry into Kukert's public defender's ability and competence, we agree with Kukert that the court misstated the law at the February 22 hearing when it told Kukert that the issue of "representation by the public defender . . . is one for the chief

public defender," and that "when you're involved with the public defender system the assignment is up to the chief public defender for the district ultimately and not the court." Appointment of a public defender and appointment of substitute counsel is the district court's ultimate decision. Minn. R. Crim. P. 5.04, subd. 1(1)–(2); *Clark*, 722 N.W.2d at 464. But any claimed error is harmless absent a showing of incompetent representation or good cause for a new attorney. *See State v. Lamar*, 474 N.W.2d 1, 2–3 (Minn. App. 1991) (holding, in case involving a defendant's hypothetical request for substitute counsel in the event conflict arose, that absent improper representation by defendant's attorney and absent showing of good cause to have a new attorney, district court's inaccurate statement to defendant that he could not have a different public defender under any circumstances was harmless error), *review denied* (Minn. Sept. 13, 1991). Kukert fails to make such a showing.

Similarly, Kukert fails to persuade us of any merit to his alternate argument that good cause exists to reverse and remand his case for a new trial. Kukert's reliance upon *Averbeck v. State*, 791 N.W.2d 559 (Minn. App. 2010), to support his argument is misplaced. In *Averbeck,* this court addressed the meaning of "good cause," as contained in Minn. Stat. § 609.165, subd. 1d (2008), regarding a court's discretion to grant relief sought in a petition to restore the right to possess a firearm "if the petitioner shows good cause to do so." 791 N.W.2d at 560–61. In that context, the *Averbeck* court stated that "good cause is a reason for taking an action that, in legal terms, is legally sufficient, and, in ordinary terms, is justified in the context of surrounding circumstances." *Id.* at 561. In

the context of the surrounding circumstances of this case, we conclude that good cause does not exist to reverse Kukert's conviction and remand for a new trial.

Affirmed.