IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 131038

DERRELL RENARD BROWN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ASSIGNMENT OF ERROR 2

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 8

ARGUMENT 9

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENSE MOTION FOR A CONTINUANCE MADE THE MORNING OF TRIAL; NOR DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S JUDGMENT. 9

Standard of Review 9

Analysis 11

The Sixth Amendment right to counsel 11

The court did not display "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." 15

CONCLUSION 23

CERTIFICATE OF TRANSMISSION AND SERVICE 24

TABLE OF AUTHORITIES

Page

Cases

Johnson v. Commonwealth,
50 Va. App. 600, 652 S.E.2d 156 (2007) 10

Johnson v. Commonwealth,
51 Va. App. 369, 657 S.E.2d 812 (2008) 10, 21, 22

Jones v. Barnes,
463 U.S. 745 (1983) 17

Landrum v. Chippenham & Johnston-Willis Hosps.,
282 Va. 346, 717 S.E.2d 134 (2011) 11

Lawlor v. Commonwealth,
285 Va. 187, 738 S.E.2d 847, cert. denied, 134 S. Ct. 427 (2013) . 10, 11

London v. Commonwealth,
49 Va. App. 230, 635 S.E.2d 721 (2006) 22

Morris v. Slappy,
461 U.S. 1 (1983) ..... passim

Ortiz v. Commonwealth,
276 Va. 705, 667 S.E.2d 751 (2008) 9

Perry v. Commonwealth,
280 Va. 572, 701 S.E.2d 431 (2010) 9

Shifflett v. Commonwealth,
218 Va. 25, 235 S.E.2d 316 (1977) 16

Thomas v. Commonwealth,
244 Va. 1, 419 S.E.2d 606 (1992) 9

United States v. Chapman,
593 F.3d 365 (4th Cir. 2010) 17

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) ..... passim

Wheat v. United States,
486 U.S. 153 (1988) 11

Constitutional Provisions

U.S. Const. amend. VI ..... passim

U.S. Const. amend. XIV 2

Statutes

Virginia Code § 18.2-248 2

Virginia Code § 19.2-159.1 13

Virginia Code § 19.2-159.1(B) 13, 14

Virginia Code § 19.2-162 ..... 13, 14

Virginia Code § 19.2-243 4

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BRIEF OF THE COMMONWEALTH

STATEMENT OF THE CASE

The issue before this Court is whether the trial court erred when, on the morning of trial, with numerous witnesses present, the court denied a continuance request by an indigent defendant on the ground that the defendant wanted to retain counsel in order to have the same attorney represent him at the trial and sentencing phases of his criminal proceeding.

The defendant, Derrell Renard Brown, was indicted in the Circuit Court of the City of Richmond for possession of heroin with intent to

distribute, in violation of Virginia Code § 18.2-248. He was convicted as charged in a bench trial held February 24, 2012. (App. 30-31). At a hearing held September 25, 2012, the court sentenced Brown to 10 years in prison, with 4 years and 6 months suspended. (App. 83-85).

Brown noted an appeal of the judgment to the Court of Appeals of Virginia. That Court, by per curiam order entered June 5, 2013, denied Brown's appeal. (App. 86-90). By order entered November 18, 2013, this Court granted an appeal on the single assignment of error Brown presented in his petition for appeal.[1]

ASSIGNMENT OF ERROR

> The Court of Appeals erred in finding that the trial court did not abuse its discretion by denying appellant's motion for continuance to retain counsel of his own choosing after appellant's appointed attorney indicated that she would be unavailable to represent him during sentencing proceedings should the trial court convict him in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF FACTS

The facts pertinent to the Assignment of Error in this case concern events in the criminal proceeding, not the offense for which the defendant

[1] A delay in this case was occasioned by the withdrawal of appellate counsel and the subsequent appointment by this Court of new counsel for Brown.

stands convicted. Therefore, the Statement of Facts will recite only those facts from proceedings below.

On April 14, 2011, the same day he was arrested, Derrell Brown executed a financial statement in the General District Court for the City of Richmond, in which he stated he had no assets. (R. 3; Add. 3). On that date, he requested appointment of an attorney. (R. 4; Add. 4). The court appointed the public defender, (Add. 4), and attorney Melvin Todd of the Public Defender's Office was assigned to represent the defendant on the drug charge at issue. (App. 2, 3; Add. 2, 4). Mr. Todd appeared at the preliminary hearing held in the district court on May 19, 2011. (Add. 1-2).

The circuit court trial was initially set for September 28, 2011. (App. 2). However, it was necessary for Todd to withdraw as counsel, due to a conflict of interest. (App. 3, 11, 46, 54). Consequently, the circuit court appointed private attorney Catherine Rusz to represent the defendant. (App. 3). The withdrawal of Todd and the appointment of Rusz to represent Brown necessitated a continuance of the trial date to November 17, 2011. (App. 3).

On November 17, 2011, the Commonwealth requested a continuance of the trial based on the unavailability of a witness. (App. 4, 7). The

defense agreed to the continuance. (App. 7). The trial was then set for February 24, 2012. (App. 4).[2]

On the morning of trial, the court asked Brown's counsel, Ms. Rusz, if she was prepared for trial. (App. 7). Counsel responded that she was ready, but added she had a motion. (App. 7). She advised the court that she had accepted a position with the Indigent Defense Commission and thus, as a result of that new job, she would not be able to represent Brown at a sentencing hearing if he were to be convicted of the charge. (App. 7).

Ms. Rusz added that Brown had "some discomfort at the idea of having two defense attorneys handling the case throughout the trial and the potential sentencing." (App. 7). Ms. Rusz asked the court to "consider continuing the matter and appointing Ms. Fisher-Rizk from my office to handle the case. That way Mr. Brown would have one attorney that could handle the entire case for him, if it does get that far." (App. 8). The court confirmed that Rusz was appointed, not retained. (App. 8). Ms. Fisher-

[2] For purposes of speedy trial pursuant to Virginia Code § 19.2-243, neither continuance was chargeable to the Commonwealth. The continuance necessitated by the withdrawal of counsel was granted upon defense request, and the record reveals that the defense agreed to the continuance requested by the Commonwealth because of a missing witness. (App. 3, 7).

Rizk had been present that morning and had left available trial dates with Ms. Rusz. (App. 8).

Upon questioning from the court, Ms. Rusz advised that Brown had no problem with representation by either Rusz or Fisher-Rizk, but his concern was "[b]reaking it up." (App. 8). Counsel added that Brown had "expressed" to her that he "would retain counsel if necessary," in order to have one attorney handle both the trial and sentencing. (App. 8).

The prosecutor stated that while he understood counsel's "predicament," seven witnesses for the Commonwealth, including a prisoner transported from a correctional facility, were present that day and the prosecution was ready to go forward with the case. (App. 8-9). The court, likewise acknowledged Brown's concern, but questioned whether that concern was a valid basis to continue the case. (App. 9). Ms. Rusz assured the court that she was prepared to try the case that day, but wanted to bring Brown's concern to the court's attention. (App. 9).

In explaining its ruling to the defendant, the court said it understood the defendant's concern, but noted counsel substitution was "not uncommon." (App. 9). The court commented that both Rusz and Fisher-Rizk were "very competent" attorneys who practiced before that court, and stated all the witnesses were present. (App. 9). The court concluded that

Brown had not presented a “valid basis to grant a continuance” and the trial would proceed that day. (App. 9).

Following the ruling, defense counsel advised the court that Brown “wanted” to retain counsel “rather than have the split up.” (App. 10). The court denied the motion, commenting that one could always choose his own attorney if he were able to pay for that attorney. (App. 10). The court also noted that the request had been made on the day of trial, which was too late. (App. 10).

Before the trial began, the defendant addressed the court. Brown said the reason he “wanted” to retain counsel was that his former appointed counsel had withdrawn from representation and now current counsel would need to withdraw after trial and another lawyer take her place. (App. 11). Brown told the court if he retained counsel, that lawyer would go forward and remain for the whole case. (App. 11). Ms. Rusz advised the court that she had only been able to advise Brown the previous day about her new job. (App. 11). The court expressed to Brown and his counsel that it was always important to the court that a defendant receive zealous representation. The court had no concern about that issue in the instant case. (App. 11-12).

The bench trial thereafter began. Brown advised the court he was ready for trial and had no witnesses. (App. 13). Ms. Fisher-Rizk was present during the first "couple" of witnesses. (App. 14, 29). At the conclusion of evidence and argument, the court found Brown guilty as charged. (App. 28). The case was set over for the preparation of a pre-sentence report. (App. 29). The court appointed Ms. Fisher-Rizk to represent the defendant at that proceeding. (App. 29, 30).

After trial, the defendant's family, on his behalf, retained attorney Angela Whitley to represent the defendant. (App. 35). In a pleading regarding preparation of the transcript of trial at state expense, Ms. Whitley asserted that Brown was indigent. (App. 35).

Counsel filed a motion to set aside the verdict and for a new trial based on the court's refusal to grant Brown a continuance to retain counsel. (App. 40-44). The Commonwealth filed a written response to the motion. (App. 46-50). In all, the court granted three defense requests for continuance of the sentencing hearing. (App. 38, 39, 45).

At the hearing held September 25, 2012, the court heard argument on the defense motion to set aside the verdict. (App. 54-73). The defendant addressed the issue in allocution. (App. 78-80). The court

denied the motion to set aside/for a new trial and imposed sentence. (App. 73, 83-85).

SUMMARY OF ARGUMENT

Pursuant to the Sixth Amendment to the United States Constitution, an indigent criminal defendant facing potential incarceration is entitled to competent, effective assistance of counsel, but he is not entitled to demand representation by a particular attorney. A defendant who does not require court-appointed counsel is entitled to counsel of his choosing, although that right is not without limitation. These are two distinct rights.

A trial court has great latitude in determining whether to grant a "day of trial" request for continuance to retain counsel. The holding in United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), does not mandate a reversal in the instant case. Indeed, Morris v. Slappy, 461 U.S. 1 (1983), is instructive in analyzing the issues now before this Court.

In light of the facts and circumstances facing the trial court at the time Brown requested the continuance, the trial court did not display "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Morris, 461 U.S. at 11-12 (citation omitted).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENSE MOTION FOR A CONTINUANCE MADE THE MORNING OF TRIAL; NOR DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S JUDGMENT.

Standard of Review

On appeal, this Court reviews the evidence in the light most favorable to the Commonwealth, the prevailing party below. See Perry v. Commonwealth, 280 Va. 572, 578, 701 S.E.2d 431, 435 (2010).

In his brief in this Court, the defendant asserts that he erred when he previously identified the standard of review as abuse of discretion with resulting prejudice. He further contends that both parties and the Court of Appeals incorrectly applied that standard of review below. He argues that because the request at trial for a continuance was based on the constitutional right of a criminal defendant to counsel of his choosing, the legal issue is subject to *de nov*o review on appeal. (Def. Br. at 5-6).

When an appellate court reviews a trial court's denial of a request for a continuance, that decision is reviewed for an abuse of discretion. See Ortiz v. Commonwealth, 276 Va. 705, 722-23, 667 S.E.2d 751, 762 (2008); Thomas v. Commonwealth, 244 Va. 1, 13, 419 S.E.2d 606, 613 (1992).

While it is true that where the right to counsel of choice has been erroneously denied, "[n]o additional showing of prejudice is required to

make the violation complete," Gonzalez-Lopez, 548 U.S. at 146, the ultimate decision regarding the granting or denial of a continuance request is reviewed for an abuse of discretion.[3]

The Supreme Court of the United States has recognized that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." Morris, 461 U.S. at 11-12 (citation omitted). Accord Johnson v. Commonwealth, 51 Va. App. 369, 374, 657 S.E.2d 812, 814 (2008). "[W]hile [this Court's] abuse of discretion standard of review necessarily must include a review of any legal conclusions made concomitant with a lower court's exercise of discretion, that does not mean abuse of discretion review is partially de novo." Lawlor v. Commonwealth, 285 Va. 187, 214, 738 S.E.2d 847, 862, cert. denied, 134 S. Ct. 427 (2013).

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[3] Citing Gonzalez-Lopez, 548 U.S. at 150, Brown asserts that an erroneous denial of a defendant's Sixth Amendment right to counsel of his choice is a structural error. (Def. Br. at 7). However, the "structural" nature of an error merely precludes a harmless error analysis if such an error is found to have occurred. A determination of whether the Sixth Amendment right has been violated in the first place is not affected by the "structural classification." Johnson v. Commonwealth, 50 Va. App. 600, 604, 652 S.E.2d 156, 158 (2007).

"'[W]hen a decision is discretionary . . . . the court has a range of choice, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" Id. at 212-13, 738 S.E.2d at 861 (quoting Landrum v. Chippenham & Johnston-Willis Hosps., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (ellipses in original, other citation omitted).

Analysis

In light of the facts and circumstances facing the trial court at the time Brown requested a continuance of the trial to retain an attorney, the court's denial of the request was not erroneous.[4] The Court of Appeals did not err in refusing to disturb the trial court's judgment.

The Sixth Amendment right to counsel

Where the accused can afford counsel, he is entitled to counsel of his choosing. An "element" of the Sixth Amendment right to counsel "is the right of a defendant who does not require appointed counsel to choose who will represent him." Gonzalez-Lopez, 548 U.S. at 144. The Supreme Court has recognized that the right to choose counsel is not absolute. See Wheat v. United States, 486 U.S. 153, 159 (1988) (while right to be

[4] The defendant did not assign error to the denial of the motion to set aside verdict and for a new trial.

represented by attorney of one's choosing is "comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers").[5] See also Gonzalez-Lopez, 548 U.S. at 152 (trial court has wide "latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar") (citations omitted).

There is no dispute that the Sixth Amendment to the United States Constitution guarantees an indigent criminal defendant facing potential incarceration the right to representation by counsel. Brown acknowledges that a defendant in need of court-appointed counsel is not entitled to choose the attorney who will represent him. (Def. Br. at 10). See Gonzalez-Lopez, 548 U.S. at 151 ("the right to counsel of choice does not extend to defendants who require counsel to be appointed for them").

Brown argues on appeal, however, that Supreme Court case law "does not countenance staccato representation by a series of lawyers," (Def. Br. at 9), and that a defendant should not be "forced to undergo piecemeal representation." (Def. Br. at 9). He has cited no authority for

[5] As Brown acknowledges on brief, this right is not without limitation; for example, he notes that counsel must be admitted to practice in the court in question. (Def. Br. at 8).

these precise propositions. As noted above, the Supreme Court in Gonzalez-Lopez recognized that the trial court must balance the right to counsel of choice with other legitimate concerns of trial. See Gonzalez-Lopez, 548 U.S. at 152.

In the instant case, the defendant was indigent. He executed a statement under oath that he had no assets. (Add. 3). He asked the court to appoint counsel for him. (Add. 4). On the day of trial he did ***not*** advise the circuit court that he had obtained the means to hire an attorney to represent him. He proffered no change in circumstances. Indeed, he did ***not*** advise the court that he or his family ***was able*** to retain counsel; rather he advised the court that he ***wanted*** to retain counsel. (App. 11). Ms. Rusz said that Brown had told her he "would" retain counsel, (App. 8), and he wanted to retain counsel, (App. 10), but she did not proffer any information indicating Brown or his family could retain an attorney.

The provisions of § 19.2-159.1(B) and § 19.2-162 were not applicable to the instant case.[6] When the defense asked for a continuance, there was

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[6] Code § 19.2-159.1. provides, in pertinent part:

> A. The court shall thoroughly interrogate any person making the statement of indigency required in § 19.2-159 and shall further advise such person of the penalty which might result from false swearing, as provided in § 19.2-161.

no reference to those statutes.[7] As noted above, the defendant did not advise the court of any change in circumstances as contemplated by Code §19.2-159.1(B).

Furthermore, there was no evidence in this case that Brown had sought to retain counsel at any time between indictment and trial, a fact noted by the Court of Appeals in its denial order in the case. (App. 87-88). Also, as the Court of Appeals noted, Brown did not advise the trial court of any particular attorney he wished to retain. (App. 88).

> B. The statement and oath of the defendant shall be filed with the papers in the case, and shall follow and be in effect at all stages of the proceedings against him without further oath. In the event the defendant undergoes a change of circumstances so that he is no longer indigent, the defendant shall thereupon obtain private counsel and shall forthwith advise the court of the change of circumstances. The court shall grant reasonable continuance to allow counsel to be obtained and to prepare for trial. When private counsel has been retained, appointed counsel shall forthwith be relieved of further responsibility and compensated for his services, pro rata, pursuant to § 19.2-163.

Code § 19.2-162 provides in general terms that "[c]ourts before which criminal proceedings are pending shall afford such continuances and take such other action as is necessary to comply with the provisions of this chapter."

[7] While post-trial retained counsel Angela Whitley cited those Code sections in her motion to set aside the verdict and for a new trial, the Code sections were not cited to the trial judge at the time the request for the continuance was made at the beginning of the trial on February 24, 2012.

Post-trial counsel Angela Whitley filed a pleading in the case advising the court that the defendant's family had retained her services on behalf of the defendant. (App. 35). Even Whitley noted, however, in a request for a transcript at state expense, that Brown was indigent. (App. 35). The trial court ordered that a trial transcript be provided to Brown at state expense. (App. 38).

The court did not display "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay."

In the instant case, Brown was not dissatisfied with the services of Ms. Rusz; nor did he oppose representation by Ms. Rusz's law partner, Ms. Fisher-Rizk. (App. 8). Rather, his only complaint was his discomfort at having one attorney handle the trial of the case and a different attorney represent him at the sentencing proceeding, should one be necessary. (App. 7, 8, 11).

As the Court of Appeals noted below, neither Brown nor Rusz indicated that Rusz was not prepared. (App. 88). While Brown argues on appeal that this "component of competence" is not a proper consideration in analyzing the propriety of the denial of the continuance request, (Def. Br. at 11, 17), such a factor can be considered in addressing a last minute

continuance request by an indigent defendant. See Morris, 461 U.S. at 12 ("In the face of the unequivocal and uncontradicted statement by a responsible officer of the court that he was fully prepared and 'ready' for trial, it was far from an abuse of discretion to deny a continuance").

Furthermore, while it is true that Brown had only learned about Rusz's new job the day before, the fact remains that he asked for the continuance to retain counsel the day trial was set to begin, when several witnesses were present. See Shifflett v. Commonwealth, 218 Va. 25, 30, 235 S.E.2d 316, 320 (1977) (in order to warrant delay by last minute change of counsel, exceptional circumstances must exist).

Brown argues that it was necessary to have one lawyer handle all the phases of trial because different attorneys understand and handle issues differently. (Def. Br. at 9-10). He cites Gonzales-Lopez for this proposition. His reliance is misplaced, however. The facts in Gonzales-Lopez stand in stark contrast to those in the instant case. There, due to an erroneous application of the local rules of court by the trial judge, one of the defendant's retained attorneys was prohibited from participating in the trial, or even from sitting at counsel table. See Gonzalez-Lopez, 548 U.S. at 143. The attorney had actually represented the defendant at an evidentiary

hearing in the case pursuant to a provisional grant of *pro hac vice*, which was later revoked. See id. at 142.[8]

As Brown cites on brief (Def. Br. at 9-10), the Court in Gonzales-Lopez, listed several aspects of a criminal case which might be handled differently by different counsel. Those issues included: strategies regarding investigation and discovery, development of theories of defense, jury selection, examination of witnesses, presentation of argument, and even matters such as plea agreements and defendant cooperation with the government. See Gonzalez-Lopez, 548 U.S. at 150.[9]

In the instant case, however, once the trial on February 24, 2012 was over and Rusz was no longer able to represent Brown, only the sentencing

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[8] In Gonzalez-Lopez, unlike the instant case, the government conceded that the trial court had erred. See id. at 144. The Supreme Court accepted the concession. Thus, the only question before the Court was the proper remedy for a Sixth Amendment violation of this type. The Court rejected the government's argument that the error was harmless. See id. at 148-50.

[9] On brief, the defendant cites to a Rule of Professional Conduct to argue that counsel has a duty to abide by a client's decision as to objectives of representation and consult with the client on means of pursuing those objectives. (Def. Br. at 10). However, as a matter of criminal law, "defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." United States v. Chapman, 593 F.3d 365, 367 (4th Cir. 2010) "The only decisions that have been identified by the Supreme Court as belonging exclusively to the defendant are 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" Chapman, 593 F.3d at 368 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)).

proceeding would remain. The factors at issue for that proceeding are quite different from the decisions counsel must make at the trial.

As the trial court noted, it is not uncommon for substitution of counsel to occur. (App. 9). Indeed, unexpected events occur necessitating new counsel to step in after the representation has begun. For example, counsel may die, become physically unable to continue the representation, or be called up to military duty. In those instances, the defendant does not begin the criminal process anew.[10]

The decision in Morris v. Slappy is instructive. In that case, Slappy was charged with five felonies. The court appointed the public defender to represent him. See 461 U.S. at 5. Deputy Public Defender Goldfine was assigned to represent Slappy. Goldfine represented the defendant at the preliminary hearing and supervised an extensive investigation. See id. Shortly before trial, Goldfine was hospitalized for emergency surgery. Six days before the scheduled start of trial, the public defender assigned senior

[10] By analogy, in this very appeal, there has been what Brown would call "piecemeal representation." After the appeal had been granted by this Court, but before briefing or oral argument, the attorney who handled the appeal in the Court of Appeals and who prepared the petition for appeal in this Court withdrew from the representation, due to extraordinary circumstances. This Court appointed a new attorney to represent Brown. The newly-appointed counsel picked up the case as it stood at the time of the appointment.

trial attorney Hotchkiss to represent Slappy. See id. Hotchkiss reviewed the files and the investigation conducted by Goldfine and met several times with the defendant. See id.

On the first day of trial, Slappy told the trial court Hotchkiss had not had enough time to prepare because he had been involved in the case for only a day and a half. See id. at 6. The court noted records indicated otherwise. Hotchkiss said he was prepared to try the case based on his study of the investigation and his conferences with the defendant. See id. The defendant said he was satisfied with the public defender, but Hotchkiss had just not had enough time to fully prepare. See id. The trial court expressed confidence that the Public Defender's Office would represent the defendant adequately and commented that Hotchkiss was an experienced lawyer. The court denied the request for continuance. See id. at 6-7.

On the second day of trial, Slappy again complained to the court. He told the court he had nothing against Hotchkiss, but told the court that Goldfine was his attorney. See id. at 7. In a pro se habeas corpus petition, Slappy said that as long as Goldfine was in the hospital, he had no attorney. See id. at 8. Subsequently, Slappy refused to cooperate with Hotchkiss. He was convicted of three of the five charges. See id. at 8-9. A second trial began on the two unresolved charges the next week. Once

again, the defendant refused to cooperate with Hotchkiss. The defendant was convicted of the remaining counts. See id. at 9.

In a post conviction federal habeas corpus petition, Slappy alleged the trial court abused its discretion both in denying a continuance to allow Hotchkiss additional time to prepare and in denying a continuance to permit Goldfine to represent him. See id. at 9. The district court denied relief, but the United States Court of Appeals for the Ninth Circuit reversed that judgment on appeal. The federal appeals court held that the Sixth Amendment right to counsel was "without substance if it did not include the right to a meaningful attorney-client relationship." Id. at 10.

The United States Supreme Court granted certiorari and rejected the Ninth Circuit's holding that the Sixth Amendment right to counsel included a right to a meaningful relationship between attorney and client. See id. at 13. The Court noted there was no authority for such a holding and referred to the requirement for a meaningful relationship between client and attorney as a "novel ingredient of the Sixth Amendment." Id.

Likewise, Brown's assertion that the Sixth Amendment does not contemplate piecemeal representation is a novel interpretation of the Sixth Amendment. While having the ***same*** qualified and zealous attorney

represent one for the guilt and sentencing portions of a trial may be ideal, it is not guaranteed by the Sixth Amendment.

In Johnson, the Court of Appeals addressed an issue similar to the one before this Court. In that case, the circuit court appointed an attorney to represent the defendant. The court thereafter granted several continuances of the trial date. See Johnson, 51 Va. App. at 372-73, 657 S.E.2d at 813. On the morning of trial, an attorney who had been retained by the defendant's family a week earlier appeared and requested a continuance. The trial court denied the request and the case proceeded with Johnson's court-appointed counsel representing him. See id. at 373, 657 S.E.2d at 813.

On appeal, Johnson argued the trial court had violated his Sixth Amendment right to counsel by denying his motions for substitution of counsel and a continuance. See id. at 373, 657 S.E.2d at 813-14. The Court of Appeals rejected Johnson's argument and affirmed the trial court's judgment. The Court of Appeals held that although the family had hired retained counsel a week before trial, neither Johnson nor the attorney had so advised the trial court until the morning of trial, and there had been a number of continuances already in the case, including some at the defendant's request. See id. at 375, 657 S.E.2d at 815. The Court of

Appeals concluded that the trial court's decision was "neither unreasoning nor arbitrary." Id. at 375, 657 S.E.2d at 815.[11]

While the facts in Johnson are not identical to those before the Court in the instant case, the critical point recognized by the Court of Appeals in that case was that the trial court had discretion in weighing the facts and circumstances before it, and the trial court had not erred in denying Johnson's last minute request for continuance. Cf. London v. Commonwealth, 49 Va. App. 230, 239, 635 S.E.2d 721, 725 (2006) (where defendant's family hired new counsel sixteen days before the scheduled trial date, newly-retained counsel so notified the trial court four days later, and no prior continuances had been granted at the defense request, the trial court abused its discretion in denying defendant's motion to substitute counsel and grant a reasonable continuance for counsel to prepare for trial).

The trial court in the instant case did not abuse its discretion in denying Brown's continuance request. Significantly, even under a *de novo* review of the trial court's rulings, and the Court of Appeals' affirmance of those rulings, this Court should affirm the judgments below.

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[11] This Court refused Johnson's petition for appeal on July 17, 2008. Record No. 080664.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Virginia and the Circuit Court for the City of Richmond should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On August 5, 2014, the required number of copies of this brief were hand-delivered to the Clerk of this Court and an electronic copy was sent to the Court at scvbriefs@courts.state.va.us. Three copies were sent by UPS Ground Delivery to L. Steven Emmert, Esq., Sykes, Bourdon, Ahern & Levy, P.C., 281 Independence Boulevard, 5th Floor, Virginia Beach VA 23462, counsel for the appellant. An e-mail copy was sent to counsel at emmert@virginia-appeals.com. The brief complies with Rule 5:26(b).

The Commonwealth desires to present oral argument in this case.

_____

Virginia B. Theisen
Senior Assistant Attorney General

ADDENDUM

WARRANT OF ARREST—FELONY

COMMONWEALTH OF VIRGINIA Va. Code § 19.2-71, -72

Bonded 4,000

Richmond/Manchester
CITY OR COUNTY

[x] General District Court [x] Criminal [ ] Traffic
[ ] Juvenile and Domestic Relations District Court

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth of Virginia forthwith to arrest and bring the Accused before this Court to answer the charge that the Accused, within this city or county, on or about 03/30/2011 (DATE) did unlawfully and feloniously in violation of Section

18.2-248, Code of Virginia:
possess a controlled substance classified in Schedule I or II with intent to manufacture, sell, give, or distribute it.

Heroin

IBR# 20110330-0617

CERTIFIED TO THE GRAND JURY

I, the undersigned, have found probable cause to believe that the Accused committed the offense charged, based on the sworn statement of:

4414

OFFICER WATSON, S. 2838 R.P.D., Complainant.

04/13/2011 08:56 PM
DATE AND TIME ISSUED

Mark William Barnard
[ ] CLERK [x] MAGISTRATE [ ] JUDGE
Mark William Barnard

CCRE is Required
FORM DC-312 (MASTER, PAGE ONE OF TWO) 12/08

CASE NO. C11-6622

ACCUSED:
BROWN, Derrell [redacted]
LAST NAME FIRST NAME MIDDLE NAME
[redacted]
ADDRESS/LOCATION
Richmond, VA 23224

4191-CWS

RACE	SEX	BORN MO. DAY YR.	HT. FT. IN.	WGT.	EYES	HAIR
B	M	[redacted]	6' 01"	185	BRO	BLK

SSN [redacted]
DL# STATE

CLASS U FELONY

[V] EXECUTED by arresting the Accused named above on this day:

4/14/11 0025
DATE AND TIME OF SERVICE

JB Norton, Arresting Officer

7001, RPD 120
BADGE NO., AGENCY AND JURISDICTION

for CT Woody, SHERIFF

Attorney for the Accused: Pub. Def. Office
APR 14 2011

Short Offense Description (not a legal definition):
DRUGS: POSSESS W/INTENT TO MANUF/SELL SCH I, II

Offense Tracking Number:
764GM1100003290

FOR ADMINISTRATIVE USE ONLY
Virginia Crime Code:
NAR-3043-F9

F

9AM
4-14-11
Hearing Date/Time
5-19-11
@9:00

FELONY

WAIVER OF PRELIMINARY HEARING

Understanding my right to a preliminary hearing before the Court named in this warrant to determine whether there is probable cause to believe that I committed a felony AND, having the consequences of my waiver explained to me by the Judge of this Court, I nevertheless WAIVE MY RIGHT TO A PRELIMINARY HEARING on the felony charged in this warrant. Certified to the Circuit Court of this jurisdiction.

ACCUSED ..... DATE

ATTORNEY FOR ACCUSED ..... JUDGE

Offense Tracking Number: 764GM1100003290

Preliminary Hearing Costs	
120 Ct. Appt. Atty	$.....
113 Court Reporter	.....
113 Witness	.....
.....	.....
TOTAL	.....

[✓] The Accused named within was brought before me or appeared this day, and upon hearing the evidence, I order the case certified to the grand jury of this jurisdiction, at its next term date, having found probable cause to believe that the Accused committed the felony charged in this warrant.

[ ] Bail on certification $.....

[ ] I ORDER the accused discharged at preliminary hearing and the charge is dismissed.

[ ] The charge was reduced to .....

The Accused was this day:

[ ] tried in absence [✓] present

[✓] PROSECUTING ATTORNEY PRESENT (NAME)

[✓] DEFENDANT'S ATTORNEY PRESENT (NAME)

[ ] NO ATTORNEY [ ] ATTORNEY WAIVED

[ ] Interpreter present

Plea of Accused:

[ ] not guilty [ ] Witnesses sworn

[ ] nolo contendere

[ ] guilty [ ] Plea voluntarily and intelligently entered after the defendant was apprised of his right against compulsory self-incrimination and his right to confront the witnesses against him.

[ ] Plea and Recommendation

And was TRIED and FOUND by me:

[ ] not guilty [ ] guilty as charged

[ ] guilty of .....

VCC .....

[ ] facts sufficient to find guilt but defer adjudication/ disposition to .....
DATE AND TIME

and place accused on probation, §§ 4.1-305, 18.2-57.3, 18.2-251 or 19.2-303.2.

[ ] A separate order for First Offender is attached and incorporated in this order.

..... DATE ..... JUDGE

[ ] I ORDER a nolle prosequi on the prosecution's motion

[ ] I ORDER the charge dismissed [ ] with prejudice

[ ] conditioned upon payment of costs (accord and satisfaction), § 19.2-151.

[ ] under §§ 4.1-305, 18.2-57.3, 18.2-251 or 19.2-303.2.

I impose the following Disposition:

[ ] FINE of $ ..... with $ ..... suspended

[ ] JAIL SENTENCE of .....

imposed, [ ] of which ..... days

mandatory minimum, with .....suspended

for a period of ....., conditioned upon being of good behavior, keeping the peace, obeying this order and paying fines and costs.

Credit is allowed pursuant to § 53.1-187 for time spent in confinement.

[ ] Serve jail sentence beginning .....

[ ] on weekends only

[ ] Work release [ ] authorized if eligible [ ] required

[ ] not authorized

[ ] Public work force [ ] authorized [ ] not authorized

[ ] on PROBATION for .....

[ ] VASAP [ ] local community-based probation agency

[ ] DRIVER'S LICENSE suspended for .....

[ ] Restricted Driver's License per attached order

[ ] Ignition interlock for .....

[ ] RESTITUTION of $ .....

due by .....

payable to: .....

.....

with interest thereon from .....
[ ] DATE OF LOSS OR DAMAGE [ ] TODAY'S DATE

[ ] as condition of suspended sentence

[ ] COMMUNITY SERVICE ..... hours to be completed by ..... and supervised by .....

[ ] to be credited against fines and costs

[ ] Contact prohibited between defendant and victim/victim's family or household members

[ ] Reimburse Commonwealth for investigatory medical fees

[ ] Pay $50 fee to the Court for Trauma Center Fund

[ ] Other.....

.....

[ ] Bail on Appeal $ .....

DRIVER'S LICENSE/PRIVILEGE TO DRIVE IN VIRGINIA SUSPENDED EFFECTIVE IN 15 DAYS IF FINES, COSTS, FORFEITURES, PENALTIES OR RESTITUTION ARE NOT PAID. Va. Code § 46.2-395.

MAY 19 2011 ..... DATE ..... JUDGE

G.L. Rupe

FINE	.....
COSTS	
461 FIXED MISD FEE	.....
462 FIXED DRUG MISD FEE	.....
001 INT CRIM CHILD FEE	.....
113 WITNESS FEE	.....
113 IGNITION INTERLOCK	.....
113 DUI FEE	.....
113	.....
120 CT. APPT. ATTY	180
121 TRIAL IN ABSENCE FEE	.....
125 WEIGHING FEE	.....
133 BLOOD TEST FEE	 2
137 TIME TO PAY	.....
192 TRAUMA CENTER FEE	.....
228 COURTHOUSE CONSTRUCTION FEE	.....
234 JAIL ADMISSION FEE	.....
243 LOCAL TRAINING ACADEMY FEE	.....
244 COURTHOUSE SECURITY FEE	.....
OTHER (SPECIFY)	.....
.....	.....
TOTAL	$.....

[ ] Stay of the proceedings pursuant to § 16.1-131.1

..... DATE ..... JUDGE

FINANCIAL STATEMENT – ELIGIBILITY DETERMINATION Case No. .....
FOR INDIGENT DEFENSE SERVICES Commonwealth of Virginia VA. CODE § 19.2-159

PRESUMPTIVE ELIGIBILITY

[ ] I currently receive the following type(s) of public assistance in ..... CITY/COUNTY

[ ] TANF $ ..... [ ] Medicaid [ ] Supplemental Security Income $ .....

[ ] SNAP (food stamps) $ ..... [ ] Other (specify type and amount) .....

[ ] I currently do not receive public assistance.

Names and address of employer(s) for defendant and spouse:

Self .....

Spouse (not applicable if alleged victim) .....

NET INCOME:	**Self**	**Spouse**
Pay period (weekly, every second week, twice monthly, monthly)	.....	.....
Net take home pay (salary/wages, minus deductions required by law)	$	.....
Other income sources (please specify)		
.....	.....	$ .....

EMPLOYMENT HISTORY:
Were you employed at the time of your arrest? [ ] yes [ ] no
If yes, my net take home pay was [ ] per week [ ] month $ .....
If no, length of time since last employed? .....
Total wages earned last calendar year? $ .....

TOTAL INCOME	$	+	=	COURT USE ONLY	A

ASSETS:		
Cash on hand	$	.....
Bank Accounts at:	$	.....
Any other assets: (please specify)		
_____ with a value of	$	.....
Real estate – $ _____ NET VALUE	$	.....
Motor Vehicles { _____ YEAR AND MAKE with net value of	$	.....
Motor Vehicles { _____ YEAR AND MAKE with net value of	$	.....
Other Personal Property: (describe)		
TOTAL ASSETS	$	.....
	$	+ ..... = COURT USE ONLY B

Number in household defendant has financial responsibility for, including defendant: .....

EXCEPTIONAL EXPENSES (Total Exceptional Expenses of Family)

Medical Expenses (list only unusual and continuing expenses)	$ .....
Court-ordered support payments/alimony	$ .....
Child-care payments (e.g. day care)	$ .....
Other (describe):	$ .....

This statement is made under oath. Any false statement may constitute a violation of law under Virginia Code § 19.2-161 and be subject to criminal penalty, including incarceration.

TOTAL EXPENSES $ ..... = COURT USE ONLY C
COLUMN "A" plus COLUMN "B" minus COLUMN "C" equals available funds = _____

I hereby state that the above information is correct to the best of my knowledge.

Name of defendant (type or print) ..... Darrell Brown

..... DATE _____ SIGNATURE

Sworn/affirmed and signed before me this day.

APR 14 2011 DATE _____ SIGNATURE _____ TITLE

FORM DC-333 REVISED 11/10 (A111864 12/10)

REQUEST FOR APPOINTMENT OF A LAWYER

Commonwealth of Virginia

Case No. J11-6622

VA. CODE ANN. §§ 16.1-266, 267 §§ 19.2-159, 160, 163

[ ] Circuit Court
[ ] General District Court
[ ] Juvenile and Domestic Relations District Court

CITY OR COUNTY

Brown, Derrell Adult

ADDRESS TELEPHONE NUMBER

TO THE ADULT: You have been charged with an offense punishable by death or confinement in a state correctional facility or in jail, including charges for revocation of suspension of imposition or execution of sentence or probation; or you are a party in a case involving allegations of abuse and/or neglect or a case in which you may be subjected to termination of your residual parental rights and responsibilities. You have the right to be represented by a lawyer with respect to this matter. In addition, the court shall consider appointing counsel to represent the parent or guardian of a child who is the subject of a foster care plan, foster care review or permanency planning hearing. You may retain a lawyer at your own expense or, if it is determined by the court that you are unable to afford a lawyer, this court will appoint a lawyer to represent you. If the judge appoints a lawyer to represent you, the lawyer will be paid with public funds whether or not you are convicted. However, if you are convicted, you shall pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. You may also waive your right to a lawyer.

REQUEST FOR APPOINTMENT OF A LAWYER—STATEMENT OF INDIGENCY

I, the undersigned, have been advised this day by this Court of my right to be represented by a lawyer in the case involving me; I certify that I am without means to employ a lawyer and I hereby request the Court to appoint a lawyer for me. My financial statement accompanies this request.

I have been informed that the lawyer appointed for me will be paid with public funds, but if I am convicted of a criminal offense, I shall have to pay the amount of the court-appointed lawyer's fee as part of the costs of prosecution. This lawyer will represent me in this case in all state courts until relieved or replaced by another lawyer.

If the court finds me to be not indigent, and if the court then declines to appoint a lawyer to represent me, I understand that I may employ my own lawyer. But, if I appear without counsel on the trial date, I may be deemed to have waived my right to counsel.

4/4/11 Derrell Brown

DATE ADULT

The Court was advised that ....., a lawyer, has been retained to represent the accused in this Court.

This information was provided by:

[ ] the above-named person [ ] the lawyer [ ] .....

DATE [ ] JUDGE [ ] CLERK

ORDER OF APPOINTMENT OF COUNSEL

THE REQUEST FOR APPOINTMENT OF A LAWYER WAS EXECUTED UNDER OATH. HAVING EXAMINED THE ADULT AND CONSIDERED OTHER COMPETENT EVIDENCE, I FIND THAT

[ ] the Adult is not indigent and not entitled to representation by a court-appointed attorney.

[ ] the Adult is indigent within the guideline set forth in the law and is entitled to representation by court-appointed counsel;

[ ] the Adult is not indigent and the Adult refuses to either employ counsel or waive his right to representation by a lawyer, but that the following circumstances and the ends of justice require the appointment of counsel:

.....

.....

Therefore I appoint the lawyer indicated below to represent the adult at such hearings and all other stages of the proceeding in this court and in any other court to which this case may be appealed or certified until relieved or replaced by another lawyer.

[ ] The Clerk shall send a copy of this Order to the Indigent Defense Commission as notice that the lawyer indicated below is not on the list maintained by the Commission, but has otherwise demonstrated to the Court an appropriate level of training and experience.

5-19-11 @ 9:00

NEXT HEARING DATE AND TIME

NAME, ADDRESS OF COURT APPOINTED LAWYER

Public

APR 14 2011

DATE

DM

JUDGE

FORM DC-334 REVISED 11/06 (A110843 9/10)