In The

Supreme Court of Virginia

RECORD NO. 131038

DERRELL RENARD BROWN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a prosecution in the City of Richmond Circuit Court. Appellant Derrell Renard Brown was indicted for distribution of heroin (A. 1) and was tried on that charge by a judge, sitting without a jury.

On the morning of trial, Brown's appointed attorney, Catherine Rusz, Esq., reported to the court that she was prepared to conduct the trial, but in the event of a conviction, she would be unable to represent Brown at a sentencing hearing, due to an impending change in her employment. A. 7. She informed the court that Brown did not want his defense divided between different lawyers at different stages of the case. A. 8.

The attorney accordingly requested that the trial be continued so that another attorney, J. Alexis Fisher-Rizk, Esq., could conduct the entire defense. A. 8. The Commonwealth opposed the motion, based only on the fact

that it had witnesses present. The court denied the motion and directed, "we will move forward with the trial." *Id*.

Brown then asked the court to allow him to retain an attorney. A. 10. The court refused this motion, on the basis that it was then "a little late to bring that motion before the court." *Id*. Ms. Rusz informed the court that Brown had not known of her employment situation until the previous day, A. 11, but the court still refused the continuance. A. 11-12.

During the trial, Ms. Fisher-Rizk was in court for the first two prosecution witnesses, but she did not remain for the entire trial. A. 14, 29. At the conclusion of the trial, the court found Brown guilty, A. 28, and ordered a presentence report. A. 29, 30.

Shortly after trial, Brown retained an attorney, Angela D. Whitley, Esq., to represent him at sentencing. A. 33. At the beginning of the sentencing hearing, Ms. Whitley filed a motion seeking a new trial. A. 40. In that motion, she recounted Brown's continuance requests and pointed out that the trial had previously been continued at the

prosecution's request due to absent witnesses (A. 41, ¶6). She noted that Brown was wholly without fault in the circumstance that brought about his request, and could not possibly have made that request any sooner than he did. A. 43, ¶17.

After extensive colloquy, A. 54-71, the court denied the motion. A. 73. The court thereafter sentenced Brown to ten years in prison, with 54 months suspended. A. 81.

Brown appealed his conviction to the Court of Appeals of Virginia, which refused his petition for appeal by *per curiam* order. A. 86. This Court awarded Brown an appeal on November 18, 2013.[1]

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[1] On January 23, 2014, the Court granted Ms. Whitley's motion for leave to withdraw. The Court entered a further order on June 4, 2014, appointing the undersigned counsel; that order directed that appellate deadlines would run from the date of its entry.

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. [Preserved at A. 7-11, 40-43, 54-71.]

FACTS

The underlying facts of the alleged offense are not germane to this appeal, since the sole assignment of error relates to the trial court's refusal to continue the trial. The events relevant to the assignment are set out above in the statement of the case.

ARGUMENT

Standard of Review

The standard of review was set forth inaccurately by both parties on brief in the Court of Appeals. It is also where that court erred.

In the Court of Appeals and again in the petition for appeal in this Court, Brown cited *Haugen v. Shenandoah Valley DSS*, 274 Va. 27 (2007), for the premise that the refusal of a continuance motion is reversible error only where the trial court abused its discretion *and* the movant was prejudiced.[2] *See*, *e.g.*, petition for appeal at 8. The Commonwealth echoed this mistake in its brief in opposition below, at 5-6, citing *Ortiz v. Commonwealth*, 276 Va. 705, 722 (2008) for this premise. (The Commonwealth did not file a brief in opposition in this Court.)

As the discussion below explains, there is no prejudice prong in appeals involving a trial court's abridgement of a defendant's right to counsel of his choosing. The sole question is whether, under the circumstances of the case, the trial court wrongfully denied the defendant's right to counsel of his choosing. If so, the error is reversible.

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[2] Despite this erroneous reference in the standard-of-review section, Brown argued the correct decisionmaking standard in the argument section of both petitions. See petitions at 10-11 (Court of Appeals), 10-12 (this Court).

There are no reported cases from this Court that specify the standard of review in cases such as this. In the view of the undersigned, the assignment of error presents a mixed question of law and fact. The Court should accordingly extend deference to the trial court's factual findings, as set out in the record, but review de novo the application of law to those facts. *Gallagher v. Commonwealth*, 284 Va. 444, 449 (2012) (issues of constitutional interpretation reviewed de novo).

Discussion

The Court of Appeals' judgment deprives Brown of the right to the Assistance of Counsel.

A. Nature of the right to counsel.

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.[3]

United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557 (2006), explains the contours of this Amendment

[3] The Fourteenth Amendment extends Sixth Amendment protections to those prosecuted under state law.

in the context of the right to counsel of one's own choosing. In that appeal, the United States had argued that the Sixth Amendment was not violated "unless a defendant has been prejudiced." 548 U.S. at 145, 126 S.Ct. at 2562.

The high Court rejected this contention, which would have equated Sixth Amendment guaranties with those in the Due Process Clause.[4] It held that a Sixth Amendment violation is complete when a court wrongly denies a defendant counsel of his own choosing. 548 U.S. at 146, 126 S.Ct. at 2562. And because the violation of this right is structural error, a reviewing court may not engage in harmless-error analysis. 548 U.S. at 150, 126 S.Ct. at 2564-65; *accord Prieto v. Warden*, 286 Va. 99, 103 (2013).

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[4] Thus, for example, the prejudice prong in ineffective-assistance analysis under *Strickland v. Washington*, 466 U.S. 668, 691-96, 104 S.Ct. 2052 (1984) simply does not exist in these cases. 548 U.S. at 148, 126 S.Ct. at 2563.

B. The meaning of "counsel of choice".

The Assistance of Counsel Clause encompasses the right of a defendant to "a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55 (1932). There are, of course, limitations on such a right; for example, an accused may not demand to be represented by another person who is not admitted to practice in the relevant court. See *Gonzalez-Lopez*, 548 U.S. at 154-55, 126 S.Ct. at 2567 (Alito, J., dissenting). But where a defendant indicates that he can retain a licensed attorney, that clause affords him the right to do so.

Virginia law effectuates this guaranty. When a defendant becomes able to afford to hire a lawyer, the Code of Virginia requires the trial court to "grant reasonable continuance to allow counsel to be obtained and to prepare for trial." Code §19.2-159.1(B). When such counsel has been retained, the court is directed to discharge the appointed lawyer. *Id*.

C. <u>"Counsel of choice" in the context of court-appointed attorneys</u>.

Brown readily agrees that an indigent defendant does not have the luxury of choosing any member of a court's bar to represent him. But in addition to the issue of his ability to retain counsel, this appeal also implicates the right of a defendant not to be forced to undergo piecemeal representation by multiple appointed attorneys at different phases of trial.

An indigent defendant has a right to appointed counsel where, as here, his liberty is in jeopardy. *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 796-97 (1963). But the high Court's caselaw does not countenance staccato representation by a series of lawyers. The Supreme Court has expressly recognized that

> [d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Gonzalez-Lopez, 548 U.S. at 150, 126 S.Ct. at 2564.

Thus, while an indigent defendant has no choice in the appointment of counsel to represent him, the calculus is different where, as here, an appointed lawyer learns before trial that she cannot continue to representation into post-trial proceedings. In such a situation, the second attorney would be bound by tactical and strategic decisions made by the first lawyer. The attorneys may have different views of the case, and of the most efficient means to secure the objectives of the representation. RPC 1.2(a) (duty to abide by client's decision as to objectives of representation, and consult with client on means of pursuing those objectives).

To be sure, courts should be empowered to curb abusive assertions of this right, a circumstance not present here. (The prosecutor never asserted that Brown's request was in bad faith, and the trial court never made such a finding.) But where, as here, a defendant objects to divided representation as soon as he learns of the prospect, and where he does nothing to cause the division, he is entitled to

consistent, unified representation upon request. The Sixth Amendment does not contemplate revolving-door advocacy.

D. The trial court's ruling misapplied the law.

At the outset of the trial, the court made two discrete rulings on Brown's request for a continuance.

1. *Piecemeal representation*. First, in response to the piecemeal-representation issue, it stated that

> if this matter were to go forward at another proceeding [sentencing] and Ms. Rusz would not represent you, it's not uncommon for attorneys to step in on cases like that. Both attorneys are very competent and they practice before this court. And, all the witnesses are here. The court does not think this is a valid basis to grant a continuance, so we will move forward with the trial.

A. 9. The court thus focused mistakenly upon the component of competence, which is irrelevant in choice-of-counsel analysis. It addressed continuity of representation only obliquely, describing it as "not uncommon" without addressing the effect on the defense. *Compare* the *Gonzalez-Lopez* holding quoted above at 9-10.

At the sentencing hearing, Brown's retained attorney renewed this argument, A. 61, 69-70, after having briefed the issue. A. 40-41. The court again rejected it, thrice describing the practice of disjointed representation as "not uncommon." A. 71. But the court never addressed the question whether this apparently recurring practice is permissible in the face of *Gonzalez-Lopez*. The fact that a practice is routine in a given court does not legitimize it in the face of contrary authority. *Compare Martin v. Duncan*, 277 Va. 204, 206 (2009), reversing a practice that the trial court had found to be "pretty standard here in this court."

When a defendant is required to accept the counsel of a staggered succession of lawyers, the strategic detriment is real. Where, as here, the need for replacement counsel arises before trial, and is through no fault or contrivance of the accused, a trial court errs when it summarily rejects a continuance request, citing only its readiness for trial.

2. *Retention of counsel*. Before the trial, Brown advised the court that he was prepared to hire a lawyer, if

that were necessary to secure continuity of representation throughout the proceeding. A. 8 ("Breaking it up is a concern for him. . . . But, he has expressed to me that he would retain counsel, if necessary, to have one attorney handle the whole thing."), 10 (". . . he did want to mention that he wanted to retain counsel at this point rather than have [them] split up."). This was not an idle offer; shortly after the court refused the motion and convicted Brown, Ms. Whitley noted her appearance as retained counsel. A. 32.

Virginia law required the trial court to "grant reasonable continuance *to allow counsel to be obtained* and to prepare for trial." Code §19.2-159.1(B) (emphasis supplied). The Code also commands trial courts to afford such continuances as are necessary to comply with this mandate. Code §19.2-162. These statutes were specifically called to the trial court's attention, in writing and orally. A. 42, 63.

But the trial court based its decision on expedition instead of on the Code:

> . . . [W]e're here ready for trial now. It's a little late to bring that motion before the court. That's

> something that should have been brought before the court much earlier than today's date so the witnesses could be called off.

A. 10.

> It's also not uncommon for the court to have defendants come before the court on the day of trial and not want to move forward. . . . so the strategy is to try to get another attorney . . . but that normally happens early on in the process.

A. 72.

Brown's attorneys repeatedly emphasized to the court the undisputed fact that Ms. Rusz's inability to continue the representation was first communicated to Brown the day before trial, so he made his request as soon as possible thereafter. A. 11, 40, 43, 55, 59, 60, 63. The court noted this fact in passing, A. 72-73, describing it as only "a little wrinkle [in] the case." It then shunted this consideration aside because it recalled that Brown had indicated that he was not dissatisfied with his lawyer. A. 73.[5]

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[5] *Compare* A. 13, where the court noted that it had denied the continuance motions, then asked Brown, "Are you prepared otherwise to move forward today?"

3. *Time considerations*. Virginia law required that Brown be tried within nine months after the indictment. Code §§19.2-241, -243.[6] Since the indictment was dated July 5, 2011 (A. 1), trial had to begin no later than April 5, 2012. When he made his continuance request on February 24, 2012, that deadline was still several weeks away. Brown's counsel so apprised the trial court. A. 63 (case was "still well within the parameters of speedy trial").

The trial of this case had been continued twice before February 24, 2012. A. 3, 4. But neither continuance was attributable to Brown. The first occurred because his initial court-appointed attorney, Melvin Todd, Esq., had a conflict. A. 70. The second was granted at the prosecution's request, due to absent witnesses. A. 64. Accordingly, the first time Brown requested a continuance, the trial court refused it solely because "we are here prepared for trial and ready to go forward with the trial." A. 10.

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[6] Since Brown was admitted to bail before trial, the five-month limit in §19.2-243 did not apply here.

The only ground cited by the prosecutor to oppose the continuance request was, in full:

> We do have, I believe, seven witnesses here, and we also had to have a witness transported from another facility for this morning's trial. So, our position would be that we're ready to go forward.

A. 9. The court accepted this as a reason to refuse the request, for the convenience of the prosecution's witnesses.[7] This concern was allowed to trump Brown's right to the assistance of counsel of his choosing.

In this, the trial court erred.

E. Abuse-of-discretion analysis.

Brown offers the following analysis in the event that the Court concludes that the assignment of error is reviewed for abuse of discretion.

Abuse of discretion may be based on any of several factors:

> When a relevant factor that should have been given significant weight is not considered; when

[7] One such witness was a confidential informant who was in custody at the time; the other six were police officers and detectives. A. 62-63.

> an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Lawlor v. Commonwealth, 285 Va. 187, 213 (2013). A court also abuses its discretion when it commits an error of law or when its exercise of discretion was "guided by erroneous legal conclusions." *Id*.

In refusing Brown's request to continue the trial, the trial court abused its discretion. It failed to consider Brown's Sixth Amendment right to obtain counsel of his choosing, and ignored the mandatory-continuance provisions in Code §19.2-159.1(B), despite the fact that these doctrines had been briefed, A. 42, and argued orally, A. 61-63.[8]

Instead, the court *expressly* based its decision on an improper factor – the competence of the two appointed lawyers. A. 9, 11-12, 72. *Compare Gonzalez-Lopez*, 548 U.S. at 148, 126 S.Ct. at 2563 ("Deprivation of the right is

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[8] This Court will note that on both occasions when it explains its ruling, the trial court never mentions the Sixth Amendment or the statute. A. 9-12, 71-73.

‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.”).

The court also committed a clear error of judgment when it improperly balanced the prosecution’s desire for an immediate trial against the unchallenged circumstances that were presented to Brown the afternoon before trial. The court found Brown’s desire not to proceed to be “not uncommon,” perhaps regarding the continuance request as a ploy. But nothing in the record supports such a precipitate conclusion. Even the prosecutor never asserted that the continuance request was based on improper factors; the sole ground that he offered in opposition to the request was the convenience of his witnesses. A. 9; *see also* A. 67, 68.

Brown’s request was not an abuse of the system; no one ever suggested that in the trial court. The trial court gave improper weight to a desire for speed, and no weight at all to the mandates in the Sixth Amendment and the Code of Virginia.

CONCLUSION

The Assistance of Counsel Clause is more than a passing consideration; it is a right enjoyed by all Americans. The judgment below improperly abridges that right. That judgment should be reversed and the case remanded for a new trial, if the Commonwealth is so inclined.

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CERTIFICATE

I hereby certify that on this 11th day of July, 2014, pursuant to Rules 5:26(h) and 5:32(a)(3)(ii), fifteen paper copies of the foregoing Brief of Appellant and ten paper copies of the Appendix, along with 10 copies on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. The required copies of the Brief and Appendix, along with one copy on CD-Rom, have been served, via hand-delivery, upon:

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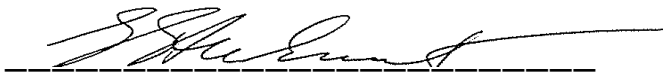

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