

IN THE COURT OF APPEALS OF IOWA

No. 6-209 / 03-0990
Filed May 10, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WALTER DIONNETAY MARSHALL,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister and Alan Pearson, Judges.

Walter Marshall appeals from his conviction and sentence of robbery in the first degree, burglary in the first degree, sexual abuse in the second degree and interference with official acts. **AFFIRMED.**

James Hall of Hall Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vaitheswaran and Eisenhauer, JJ.

HUITINK, P.J.

Walter Marshall appeals from his conviction and sentence of robbery in the first degree, burglary in the first degree, sexual abuse in the second degree and interference with official acts in violation of Iowa Code sections 711.2, 713.1, 713.3(1)(d), 709.1(1), 709.3(1) and 719.1(1) (2003).

I. Background Facts and Proceedings.

On October 16, 2002, the State filed a four-count trial information charging seventeen-year-old Walter Dionnetay Marshall with robbery, burglary, and sexual abuse. The charges were based on allegations that Marshall entered Melissa Higdon's residence on September 29, 2002, robbed her at gunpoint, bound her hands and feet, and sexually abused her. Marshall pleaded not guilty, and the case was set for trial on December 17, 2002.

After Marshall's first two court-appointed lawyers withdrew, attorney Del Werner was appointed to represent Marshall. Werner was granted two continuances of the trial date to complete discovery. Marshall's case was set for trial on April 29, 2003. A pretrial conference was set for April 25, 2003.

On April 24 Marshall filed a written request to dismiss Werner as his attorney. At an April 25 hearing on Marshall's request, Judge Pearson asked Marshall why he wanted a new attorney. Marshall responded as follows:

I felt he represented the previous defendant, he wasn't representing my rights. Also, I'm in the process of trying to get my own attorney, I'm trying to, so I want to have my own attorney. Also I just wasn't – I mean he wasn't there when I needed him and I just felt he wasn't representing me right.

Judge Pearson then asked Marshall if he had hired a new attorney. Marshall responded he was in the process. Judge Pearson requested that Marshall be

more specific as to why he wanted a new attorney. Marshall responded by stating:

He's just --- I mean he's not -- I just feel he's not representing my best interest. I'm willing -- through all this. I mean he's not representing me right. I just feel like I got no rights.

Judge Pearson denied Marshall's request by stating:

Mr. Marshall, I will not at this point relieve Mr. Werner. The case will remain set for trial. I will tell you this. If you hire a lawyer and your new lawyer makes a request for a continuance in order for time to prepare, the court will grant that with an open mind, but if you, for whatever reason, do not end up hiring a lawyer, then you need to be ready to go to trial next Tuesday with Mr. Werner as your counsel. Subjective feelings are not an adequate basis to change counsel, particularly three days before trial.

On the day Marshall's trial began, Judge Fister, the trial judge, received a telephone call from attorney Robert Wright, Jr. informing the judge that Marshall's family wanted to retain him to represent Marshall. The record made concerning attorney Wright's inquiry includes the following:

The other thing is, I just got a call this morning from an attorney in Des Moines named Robert Wright, Jr. And I know that name but I don't know the lawyer. And he said that Mr. Marshall's family had contacted him and wanted to hire him to represent Mr. Marshall. And he wanted to know whether it was too late or whether he could file an appearance or what he could do about this. And all he told me about it was, is that the family was either unaware of or -- of what investigation Mr. Werner had done as far as the facts of the case or whatever they knew about it they thought maybe more could be done. And I told Mr. Wright that -- And he acknowledged that he knew it was awfully late in the proceedings for this to happen. And I told him that I guess that if he had filed an appearance and asked for a hearing on it I would have held a hearing on it, but all I could do -- I would do at this point is I would have a hearing with the lawyers who are in the case so they could make whatever record they wanted to on whether we should proceed with the trial at this time or not.

And all I know about it -- and you can correct me if I'm wrong -- is that Mr. Marshall applied for and qualified for a court-appointed attorney. I'm aware that Mr. Werner has represented defendants

facing charges like this in the past and has experience with it, and an indigent defendant does not have the right to the attorney of his or her choice. Witnesses have been subpoenaed, and I guess, and the jury has been called but no one sworn yet.

So I also told Mr. Wright that I didn't know of any law on the subject one way or the other. And I didn't say to him, but I'll say to you, that as far as I know that as long as a person gets their right to an attorney that's about all they have to say about it, otherwise it's a matter of discretion I would think.

The State resisted any substitution of counsel or continuance because the State had eighteen witnesses under subpoena. The State also informed Judge Fister of Judge Pearson's ruling indicating Judge Pearson would have considered a continuance if Marshall retained a new attorney.

After allowing the State and Marshall's attorney to make a record concerning Wright's telephone call, Judge Fister concluded:

[T]here's no emergency; all of the deadlines for development of this case have passed. Mr. Marshall's family has had a long time to get a new lawyer in here and prepare to try this case by today, and I think they have waited too long. Families always worry about other family members and how well they're represented and whether everything has been done that could be done.

[B]ut at this late date I'm – with no other appearance on file, I'm going to go ahead with it. We're going to start our trial and we're going to go through it.

At trial Melissa Higdon testified that three men entered her bedroom while she was sleeping, robbed her at gunpoint, and that one of the men bound her hands and feet and sexually abused her. The State's case also included Marshall's incriminating statements made to investigators and DNA comparison evidence matching known samples of Marshall's DNA with semen discovered on swabs taken from Higdon.

Marshall was convicted of first-degree robbery, first-degree burglary, and second-degree sexual abuse and sentenced accordingly. On appeal Marshall raises the following issues:

- I. Walter Marshall's constitutional right to be represented by the counsel he had retained was wrongfully vanquished by the trial court.
- II. The honorable Judge Fister adversely affected and interfered with the appellant's constitutionally guaranteed right to choose and retain appellant's counsel of choice.
- III. The court abused its discretion when it interfered with the appellant's right to retain private counsel.
- IV. The appellant contends a miscarriage of justice would be allowed if the appellant is not granted a new trial.
- V. The appellant, a minor while in custody, was never read his *Miranda* warnings, and his parents were never contacted by the arresting officers.

II. Standard of Review.

Generally, we review the trial court's rulings on a request for substituted counsel for an abuse of discretion. *State v. Artzer*, 609 N.W.2d 526, 529 (Iowa 2000); *State v. Kirchner*, 600 N.W.2d 330, 333 (Iowa Ct. App. 1999). To the extent Marshall's claims on appeal implicate a denial of his constitutional right to counsel, our review of the trial court's ruling is de novo. *State v. Tejada*, 677 N.W.2d 744, 749 (Iowa 2004).

III. The Merits.

We first consider Marshall's arguments made in points I through III of his brief. The State contends that Marshall did not preserve error on his claim that his constitutional rights were violated by the court's failure to allow Marshall the counsel of his choice. We find that Marshall preserved error by writing a letter requesting his attorney withdraw and expressing his desires for new counsel at the hearing held regarding Marshall's request on April 25, 2003.

The Sixth Amendment to the United States Constitution requires that in all criminal prosecutions, the accused enjoy the right to assistance of counsel in his defense. U.S. Const. amend. VI; *Tejeda*, 677 N.W.2d at 749. The Sixth Amendment is made applicable to the states through the Fourteenth Amendment. U.S. Const. amend. XIV; *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975); *Tejeda*, 677 N.W.2d at 749. This requirement does not “guarantee a ‘meaningful relationship between an accused and his counsel.’” *Tejeda*, 677 N.W.2d at 749 (quoting *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001)).

When a defendant requests new appointed counsel, the defendant must show sufficient cause to justify replacement. *Tejeda*, 677 N.W.2d at 749 (citing *Lopez*, 633 N.W.2d at 778-79). “Sufficient cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.” *Id.* at 749-50 (citing *Lopez*, 633 N.W.2d at 779). “The decision to grant a motion for substitute counsel is a matter within the trial court’s discretion.” *Id.* at 750. “Last-minute requests to substitute counsel, insofar as they constitute a delay tactic, are disfavored.” *Id.*

The court has a duty to inquire into a defendant’s allegation of a breakdown in communication with his lawyer. *Id.* The purpose of conducting an inquiry is best articulated by the United State Court of Appeals for the Tenth Circuit in the following:

“Even if a defendant’s counsel is competent, a serious breakdown in communication can result in an inadequate defense.” A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses to call and trial strategies to pursue, discussing

whether the defendant himself should testify, and helping formulate other bread-and-butter decisions that can constitute the core of a successful defense. A trial court's failure to appoint new counsel when faced with a total breakdown in communication may thus constitute a denial of counsel in violation of the Sixth Amendment.

Id. (quoting *United States v. Lott*, 310 F.3d 1231, 1250 (10th Cir. 2002)).

The court makes an adequate inquiry where the judge personally asked the defendant at a hearing to explain the nature of the communication problem. *Id.* at 751 (citing *Lopez*, 633 N.W.2d at 781). In *Lopez*, when the defendant failed to give the judge any reason a breakdown in communication occurred, the court held that *Lopez's* complaints had nothing to do with his counsel's representation. *Tejeda*, 677 N.W.2d 751. In *Tejeda*, the court found the record inadequate because the court merely asked *Tejeda's* attorney to respond to *Tejeda's* request for new counsel. *Id.*

The court is not required to "conduct a hearing every time a dissatisfied defendant lodges a complaint about his attorney." *Id.* The court must conduct some kind of inquiry to determine if a complete breakdown in communication has occurred. *Id.* To show a breakdown in communication has occurred the "defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible." *Id.* at 752 (quoting *Lott*, 310 F.3d at 1249). Additionally, the court can substitute counsel if it finds a conflict of interest or an irreconcilable conflict with the client. *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995).

Here, Marshall, through his attorney, moved for permission to dismiss Werner as his defense attorney. In the letter attached to the motion, Marshall

informed his attorney of six reasons he wanted a new attorney. He felt that Werner was not representing him correctly or professionally. He maintained that Werner was not returning Marshall's mother's phone calls or available when Marshall needed him. Marshall also believed that Werner was neither experienced in cases like this nor properly skilled to handle his case. He stated that Werner was not prepared for depositions or aggressive enough.

The day after the motion was filed, the court held the final pretrial conference as scheduled. At that hearing, Judge Pearson asked Marshall twice why he did not want Werner to represent him. Marshall repeatedly responded that he did not feel Werner was representing his best interests. Marshall did not elaborate on any of the reasons stated in the letter. At that point, Judge Pearson refused to relieve Werner, but indicated to Marshall that "if he hired a lawyer and your new lawyer makes a request for a continuance in order for time to prepare, the court will grant that with an open mind"

Contrary to Marshall's claims, we find Judge Pearson made adequate personal inquiries concerning the reasons for Marshall's dissatisfaction with Werner. Nothing Marshall stated or wrote indicates that Werner and Marshall experienced a complete breakdown in their communications.

Additionally, Judge Fister's decision to proceed to trial did not violate Marshall's right to counsel by proceeding with the trial on the day he was contacted by Wright. Although Judge Fister did not personally address Marshall, Judge Fister was aware of the pretrial hearing regarding Marshall's request for a new attorney. He was also informed that Judge Pearson had told Marshall that if he retained an attorney he would consider a continuance. Nothing in the record

indicates that Marshall had retained an attorney. Judge Fister specifically stated that Wright had been contacted by the Marshall family and they “wanted to hire him to represent Marshall.” Wright had not filed an appearance. Judge Fister conceded that if an appearance was filed he would have held a hearing on the issue of Marshall’s representation. Therefore, because Wright had not filed an appearance and Judge Pearson held a hearing on the issue of substituting counsel, Judge Fister adequately addressed Marshall’s request for substituted counsel by holding a hearing with the attorneys to discuss Wright’s call. We do not need to address whether Marshall was entitled to a continuance, because no motion for a continuance was made.

Marshall also argues that he is entitled to a new trial and that his rights were violated because he was neither informed of his rights under *Miranda* nor were his parents contacted. No motion for new trial or motion to suppress was filed by the trial attorney, and he is not arguing his trial counsel was ineffective in failing to file these motions. In general, matters not raised in the trial court will not be considered for the first time on appeal. *State v. Bonstetter*, 637 N.W.2d 161, 167 (Iowa 2001). We find that Marshall did not preserve error on these issues.

AFFIRMED.