

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 0911

STATE OF LOUISIANA

VERSUS

RICKY McCLOUD

Judgment rendered: DEC 23 2009

**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Suit Number: 452906; Division: F
The Honorable Martin E. Coady, Judge Presiding**



**Walter P. Reed
District Attorney
Covington, LA**

**Counsel for Appellee
State of Louisiana**

**Kathryn W. Landry
Baton Rouge, LA**

**John H. Kraft
New Orleans, LA**

**Counsel for Appellant
Ricky McCloud**

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

DOWNING, J.

Defendant, Ricky McCloud, was charged by bill of information with one count of theft over \$500.00, a violation of La. R.S. 14:67(B)(1). Defendant entered a plea of not guilty and was tried by a jury. The jury returned a responsive verdict of theft between \$300.00 and \$500.00, a violation of La. R.S. 14:67(B)(2). The trial court sentenced defendant to a term of two years at hard labor.

The State instituted habitual offender proceedings against defendant seeking to have him adjudicated as a habitual offender. Following a hearing on the multiple offender bill the trial court adjudicated defendant as a third felony habitual offender.¹ The trial court vacated its previously imposed sentence and resentenced defendant to serve a term of four years at hard labor without benefit of probation or suspension of sentence.

Defendant appeals, citing the following counseled assignments of error:

1. The trial court erred in conducting essential parts of the trial in the absence of defendant.
2. The trial court erred in denying defendant time to hire his own lawyer given that he was not properly informed of the new trial date and had made bona fide efforts to retain counsel.

Defendant also filed a pro se brief assigning the following as error:

1. The trial was unfair where the court failed to have the defendant present in open court.
2. Defense counsel failed to object to errors in the case.
3. The verdict was improper where defendant was not in the presence of the jury when they reached the final verdict.

We affirm defendant's conviction, habitual offender adjudication and sentence.

¹ Although the trial court adjudicated defendant as a third habitual felony offender, the multiple bill set forth three previous convictions of possession of cocaine, entered on February 14, 1991 in the 22nd Judicial District Court of Louisiana; possession of cocaine, entered on June 6, 1995, and delivery of cocaine, entered on September 16, 1999, both in the 9th Judicial District of Florida.

FACTS

Linda Lawhorn managed the Gulf Chevron convenience store in Slidell, where defendant worked as a cashier. In June 2008, after defendant began his employment with the convenience store, Lawhorn was reviewing the computer records of the cashier activity for defendant's shift. Lawhorn noticed defendant's cash register had a \$78.00 discrepancy between the transactions and the cash deposited into the till. Further research into defendant's activities during June 2008 revealed that defendant had a pattern of voiding a high number of sales on his shifts. Eventually, Lawhorn obtained security footage, which showed four different angles of the cash register used by defendant. The security footage reflected that defendant would enter an item, then immediately void the item, but still accept cash for the transaction, while the customer left with the items. Once he accepted the cash, defendant would write something on a pad next to the register, and then place the money from the "voided" transaction into an unauthorized area of the cash register.

Lawhorn notified law enforcement of defendant's actions. Slidell Police Officer Daniel Suczenon reviewed the security footage and later arrested defendant.

Defendant did not testify at trial.

PRESENCE OF DEFENDANT

In his first counseled assignment of error and his first and third pro se assignments of error, defendant contends the trial court erred in conducting essential parts of the trial in his absence. Defendant argues he was not disruptive prior to his removal from the courtroom and at the time of his removal, he had not evidenced any desire to be absent from the courtroom

The transcript from the December 8, 2008 hearing reflects that David Craig, the public defender representing defendant, indicated that defendant claimed to have retained Rachel Yazback as hired counsel. The trial judge stated he had spoken with Yazback and that Yazback acknowledged being contacted by defendant, but had not been paid, and was not going to represent defendant. After being informed that Yazback would not be representing him, defendant stated that he did not wish to go to trial with Craig as his attorney.

Defendant repeatedly insisted that he was not informed that his trial was set for that date (December 8), despite receiving an appearance bond setting forth he was to appear in court on December 8, 2008. After being told by the trial court that his trial would move forward with Craig as his attorney, defendant declared that he was not ready for trial. The first jury panel entered the courtroom, and defendant then stated:

I'm not going through with this. I'm not going through with this.
Y'all can lock me up or whatever. I'm not going through with this.
This is not no fair trial. I'm not going through with this."

The trial judge informed defendant that he had a right to be present in the courtroom while the trial proceeded and a right to assist and consult with his counsel during trial, and commented that it would probably be best if defendant participated in his trial. Defendant responded to the trial judge by stating he had fired Craig at his previous appearance and reiterated that he wanted a fair trial with time to obtain private counsel. The trial court denied defendant's request, while defendant again argued he had no idea his trial was set for that date. At that point, the trial court ordered defendant from the courtroom.

Following jury selection, defendant was returned to the courtroom. The trial court again addressed defendant's rights to be present and participate in his trial. Defendant again responded that he was not aware of his trial date and repeated his

desire to have hired counsel. The following morning, prior to opening statements, the trial court noted that defendant was refusing to be represented by Craig and refusing to even enter the courtroom. The trial judge commented that he felt defendant's actions were "purely on his part an attempt to thwart the process of this trial continuing." The trial court further noted that defendant's outburst when the jury panel entered the courtroom on the previous day was also disruptive. A short time later, defendant again refused all opportunity to participate in his trial or be present.

In *Illinois v. Allen*, 397 U.S. 337, 343-44, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), the United States Supreme Court stated:

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant ... (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.

In the present case, the trial court initially ordered defendant out of the courtroom after he exhibited disruptive behavior in the presence of the first panel of the jury venire. Following jury selection, the trial judge once again addressed the defendant and stressed that he had the right to be present and participate in his trial. However, on the morning that trial was to begin, the defendant declined to be present and to participate in his trial despite the trial court's urgings that he do so. The defendant clearly indicated he was refusing to be present in the courtroom for the proceedings.

Based on the record, we cannot say the trial court abused its discretion in having the defendant removed from the courtroom at the beginning of jury

selection when defendant was clearly acting in a manner disruptive to the proceedings. Moreover, we cannot say the trial court erred in allowing the trial to proceed without defendant present, since the trial court on two occasions advised defendant of his right to be present and participate, but defendant refused to exercise these rights. It is clear from the record that defendant's disruptive behavior and his own refusal to be present during the proceedings are in no way an error attributable to the trial court.

These assignments of error are without merit.

DENIAL OF CONTINUANCE TO HIRE COUNSEL

In his second counseled assignment of error, defendant argues the trial court erred in denying defendant an opportunity to hire his own attorney given defendant's assertion that he was not properly informed of the new trial date and had made bona fide efforts to retain counsel.

According to the record, defendant was arrested in July 2008 and his trial was originally set for October 27, 2008. The transcript of October 27, 2008 indicates that Craig, the public defender appointed to represent defendant, filed a motion to continue the trial on the basis that Craig was not prepared to go to trial.² Defendant also told the trial court that he was not prepared for trial and claimed to be unaware that his trial was set for that day. He then argued that the prosecutor was "out to get" him. The matter was recessed so that defendant's pro se motions to recuse the trial court and prosecutor could be heard before another judge.

The following day, after the motions to recuse were denied, defendant refused to dress for trial and repeatedly said he was refusing to go to trial with Craig as his attorney. Defendant further attempted to fire Craig as his attorney. At that point, Craig reminded the trial court he had filed for a continuance the

² The record reflects that defendant attempted to hire Jerry Fontenot as his counsel. Fontenot had previously represented defendant in another matter; however, any confusion regarding Fontenot's representation of defendant in the present matter was resolved with the understanding that Fontenot would not be representing defendant.

previous day because he was unprepared to go to trial. The defendant then represented to the trial judge that his family would assist in obtaining private counsel if he were given enough time. The following exchange then occurred:

[THE COURT]:

Let me consider your motion. My problem is I don't know that you're going to get a lawyer. You have a lawyer here.

[THE DEFENDANT]:

I'm going to get one, I got one last time I will get one this time. My family will have one, that's not a problem. I will have a [lawyer] by the time the next time you come back to trial, time for me to go to trial again. I will have a lawyer, that's guaranteed.

[THE COURT]:

A lawyer that can try a case next month.

[THE DEFENDANT]:

That's going to be ready for trial.

[THE COURT]:

And has no conflicts?

[THE DEFENDANT]:

Ain't going to have no conflicts. I will be ready to go to trial because they have no case once again.

[THE COURT]:

All right. I will give you this chance.

The minute entry for October 28, 2008 indicates defendant was informed that his trial date would be December 8, 2008; however, the transcript does not reflect such an advisement. On November 6, 2008, defendant was released from St. Tammany Parish Prison and was given an appearance bond receipt that indicated he agreed to appear in court on December 8, 2008.

When defendant reported to court on December 8, 2008, he claimed he had no knowledge that his trial was set for that date. Although defendant had attempted to hire private counsel, he had been unable to pay the private counsel and was still unrepresented by private counsel. As previously discussed, defendant again sought a continuance on the basis that he wanted private counsel and had no idea he was going to trial on December 8, 2008. Defendant now asserts the trial

court erred in failing to provide him with more time to hire an attorney in light of his lack of knowledge regarding the December 8, 2008 trial date.

A motion for a continuance shall be in writing and shall allege specifically the grounds upon which it is based. La. Code Crim. P. art. 707. The granting or denial of a motion for continuance rests within the sound discretion of the trial court, and its ruling shall not be disturbed on appeal absent a showing of a clear abuse of discretion. La. Code Crim. P. art. 712; *State v. Castleberry*, 98-1388, p. 5 (La. 4/13/99), 758 So.2d 749, 755, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999). Whether refusal of a motion for continuance is justified depends on the circumstances of the case. Generally, the denial of a motion for continuance is not reversible absent a showing of specific prejudice. *State v. Strickland*, 94-0025, p. 23 (La. 11/1/96), 683 So.2d 218, 229.

The United States Constitution guarantees that the accused in all criminal proceedings shall have the assistance of counsel for his own defense. U.S. Const. amends. VI, XIV. The Supreme Court has further stated that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. See *Wheat v. United States*, 486 U.S. 153, 158-59, 108 S.Ct. 1692, 1696-97, 100 L.Ed.2d 140 (1988). The right of choice of counsel also is recognized by the Louisiana Constitution. La. Const. art. I § 13; see also *State v. Seiss*, 428 So.2d 444, 447 (La. 1983). An arbitrary or erroneous denial of counsel of choice, made without any regard for the circumstances of the particular case, is a constitutional violation requiring reversal. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Fuller v. Diesslin*, 868 F.2d 604, 608, cert. denied, 493 U.S. 873, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989).

However, the right to counsel of choice is not absolute. See *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697. Where considerations of judicial

administration supervene, the presumption in favor of counsel of choice is rebutted and the right must give way. See Fuller, 868 F.2d at 607 n.3.

In the present case, our review of the record leads us to conclude the trial court clearly balanced the defendant's right to choice of counsel with the interest of the orderly administration of justice in denying defendant's motion for continuance. First, we note that in the exchange between the trial judge and defendant on October 28, 2008, the defendant was clearly informed by the trial court that his case would be tried the next month. Defendant also received the appearance bond receipt following his release from jail, indicating he was to appear in court on December 8, 2008. Defendant should have been aware this was his trial date since the trial court had informed him the next time he was to be in court he would be tried.

Next, we note that although defendant had attempted to hire Yazback to represent him, he had not paid her, thus he never secured her representation. Because he was unable to afford private counsel, his only other option was to proceed to trial with Craig, the public defender, as his attorney.

Finally, defendant had previously asserted to the trial judge that he was not advised of his trial date and wanted more time to obtain private counsel. Under the circumstances of this case, we find the trial court did not err in denying defendant more time to obtain private counsel.

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second pro se assignment of error, defendant argues that his attorney did not effectively represent him because he failed to object to prejudicial errors. However, defendant asserts no specific instance of his attorney's alleged deficient performance.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue when raised by assignment of error on appeal, it may be addressed in the interest of judicial economy. *State v. Carter*, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

In the present case, defendant asserts his counsel was ineffective for failing to object to prejudicial errors, but fails to specify what such errors were.

Without further specificity, we cannot speculate on what actions of defense counsel could be deemed ineffective, which presents nothing for this court to review on appeal. Accordingly, this issue should be addressed through post-conviction relief in the trial court.³

This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the conviction, habitual offender adjudication and sentence.

CONVICTION, HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.

³ Moreover, the defendant would have to satisfy the requirements of La. Code Crim. P. art. 924, et seq., in order to receive such a hearing.