

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD TRAVIS GAMELIN,

Defendant-Appellant.

UNPUBLISHED

April 24, 2007

No. 271040

Chippewa Circuit Court

LC No. 06-008190-FH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of unlawful taking or use of a motor vehicle, MCL 750.414. Pursuant to MCL 769.11, he was sentenced as a third habitual offender to two to four years in prison. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

After defendant's stepfather's store was entered and two snowmobiles were used and damaged, defendant was charged with breaking and entering a building and unlawful taking or use of a motor vehicle. Four business days before trial was scheduled to begin, defendant appeared in court and orally moved to have his appointed counsel removed from the case. Defendant informed the trial court that he would be attempting to retain counsel, but that he had not yet been able to do so. The trial court denied defendant's motion, noting that trial was scheduled to begin in a few days, and that defendant had not in fact retained other counsel. The jury acquitted defendant of breaking and entering, but convicted him of unlawful taking or use of a motor vehicle.

We review de novo whether defendant was denied the constitutional right to counsel of his choice. See *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). We review for an abuse of discretion the trial court's decision affecting a defendant's right to counsel of choice. *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003).

The Sixth Amendment affords criminal defendants the right to retain counsel of their own choosing.¹ *United States v Gonzales-Lopez*, ___ US ___; 126 S Ct 2557, 2561; 165 L Ed 2d 409

¹ The Sixth Amendment right to counsel is applicable to the states through the Due Process (continued...)

(2006); *Akins, supra* at 557. The wrongful denial of a criminal defendant's right to counsel of choice constitutes structural constitutional error that is not amenable to harmless error review. *Gonzales-Lopez, supra* at 2564. However, the constitutional right to the counsel of choice is not absolute. *Id.* at 2565. The right applies only to criminal defendants who retain counsel, and does not apply to indigent defendants for whom counsel is appointed. *Id.* There are other limitations on the right to counsel of choice as well. *Id.; Akins, supra* at 557. For example, a defendant may not insist on retaining an attorney who is not a member of the bar, or an attorney for whom representation of the defendant would constitute a conflict of interest. *Gonzales-Lopez, supra* at 2565. Nor may a defendant insist on retaining a specific attorney as a tactic to delay or postpone trial. *Id.* at 2566; *Akins, supra* at 557.

In the present case, defendant had the right to be represented by retained counsel of his choice subject to the forgoing permissible limitations. However, although defendant sought to have appointed counsel removed, he had not yet retained counsel, and was not certain that he would be able to do so. Because defendant had not yet retained counsel, he was not entitled to avail himself of the Sixth Amendment right to counsel of choice. *Gonzales-Lopez, supra* at 2565.

Moreover, defendant articulated no reason for seeking to have appointed counsel removed from the case. Considered in conjunction with the fact that trial was scheduled to begin in four business days, this fact led to the reasonable conclusion that defendant was simply attempting to delay trial. As noted, an attempt to delay trial is not a permissible reason for seeking substitution of counsel. *Gonzales-Lopez, supra* at 2566; *Akins, supra* at 557.

Defendant relies on *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972), where our Supreme Court held that a denial of the defendant's motion for a continuance to allow substitute retained counsel constituted an abuse of discretion. However, the defendant in *Williams* had in fact retained other counsel, was engaged in a bona fide dispute with his then-current counsel, and moved promptly for substitution once the dispute arose. *Id.* at 578.

Defendant's assertion that he would retain counsel was speculative only, and defendant gave no legitimate reason for seeking removal of his appointed counsel from the case. Moreover, the trial court's decision did not prejudice defendant, as defendant's appointed counsel secured an acquittal on one of two offenses with which defendant was charged. In sum, defendant had not yet retained counsel at the time he requested removal of his appointed attorney. Accordingly, the Sixth Amendment right to counsel of choice did not apply. *Gonzales-Lopez, supra* at 2565. The trial court's denial of defendant's request to remove appointed counsel and to allow him to retain a new attorney was not structural error. *Id.* Nor did the trial court's decision constitute an abuse of discretion under the circumstances. *Akins, supra* at 558-559. Defendant is not entitled to a new trial.

(...continued)

Clause of the Fourteenth Amendment. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005); see also *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello