

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 31, 2011

v

ROGER LEE KELLY,

No. 296500  
Saginaw Circuit Court  
LC No. 07-029171-FC

Defendant-Appellant,

---

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following jury trial of one count each of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b, carrying a dangerous weapon with unlawful intent, MCL 750.226, and carrying a concealed weapon (CCW), MCL 750.227(2). We affirm.

The victim was a longtime friend and business partner of defendant. The victim was shot in a store the two men owned and his body dumped in a landfill. Investigating a report of a missing person, police detectives discovered the victim's pickup truck and blood at the scene of the crime. After first denying any involvement in the disappearance, defendant eventually admitted that he killed the victim.

Defendant argues on appeal that he is entitled to a new trial because he was denied due process when the trial court refused to replace his court appointed attorney for the second time. We review a trial court's decision regarding substitution of counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Id.*]

On the first day of trial, the court took up several motions that defendant had personally filed. One of these matters involved his request for new counsel predicated, in part, on counsel's alleged failure to contact purported exculpatory witnesses. Defendant made repeated references to unnamed witness below and on appeal, but made, and now makes, no specific assertion as to what they could testify. He does assert that some number of these persons have knowledge of the nature of his relationship with the victim, but he does not indicate what that knowledge is and how it was obtained.

In one confusing correspondence with the court, defendant appeared to assert that he was asked by counsel to summarize the potential evidence coming from several persons on his witness list, who, according to defendant, he never asked his prior counsel to interview. Defendant appears to suggest that, because he never requested the witnesses be interviewed, he can have no way to know "if these statements are complete" unless counsel personally interviews them. If defendant has an incomplete understanding of what their evidence might be, he cannot reliably assert that they have first-hand knowledge of relevant evidence. In any event, as on appeal, he failed to identify these witnesses. Moreover, defendant did offer witnesses that testified regarding his relationship with the victim and testified himself to the contentious nature of the relationship. Defendant has not demonstrated that any additional witnesses who may have offered similar testimony would have changed the outcome of the trial.

Based on the record before us, we see no abuse of discretion on the part of the trial court. Defendant has failed to show that there was a legitimate difference of opinion with counsel regarding the witnesses to be called and, thus, the required good cause to have new counsel appointed was not established.<sup>1</sup>

Defendant also argues that counsel should have been replaced because counsel failed to "take advantage" of the court's ruling that defendant was entitled to an independent psychiatric examination at the state's expense. The state's forensic examiner concluded that defendant was competent to stand trial and "displayed no deficits in psychological or intellectual functioning sufficiently severe to impair his understanding of the nature and object of the proceedings against him or his ability to assist rationally in his defense."

Under MCL 768.20a(3), the trial court may "order that the county pay for an independent psychiatric evaluation" if a defendant is indigent, upon a showing of good cause. The statute provides further that "[t]he prosecuting attorney may similarly obtain [an] independent psychiatric evaluation." MCL 768.20a(3). In the instant case, defendant was evaluated at the state's request, but apparently neither of his appointed counsel ever scheduled an independent

---

<sup>1</sup> We also note that defendant made repeated demands that his trial commence expeditiously, asserting that the delay was untenable. Indeed, in one correspondence sent while being represented by his second attorney, he specifically asked the court to disallow any further continuances and told the court he had informed counsel that any further delay would "result in his termination." In another correspondence he wrote, "As much as I would like to insist that [counsel] be replaced, I am now in a position where I can no longer accept another continuance."

psychiatric examination, even though the court had granted defendant's motion requesting an examination at county expense. In all of the cited correspondence sent to the trial court, defendant never indicated that he wanted counsel replaced because of a fundamental disagreement over pursuing an independent psychiatric evaluation. Indeed, defendant did not even tell the court that he believed he was legally insane at the time of the crime. MCL 768.21a.

As defendant offers no proof on appeal that he suffers from mental illness or mental retardation, let alone that one of these disorders affected his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, there is no basis for this Court to conclude that the affirmative defense of insanity was a viable defense that his replacement counsel should have pursued vigorously.

Defendant also argues that he was denied the effective assistance of counsel at trial. In order to sustain a claim that counsel was ineffective, defendant must show both that counsel's "representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must also show that counsel's decisions did not constitute sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Defendant argues that counsel was ineffective for failing to pursue an independent psychological evaluation. However, defendant fails to show that it was objectively unreasonable not to pursue an insanity defense. The evaluation in the record does not support it, and defendant offers nothing on appeal except a series of unsupported assertions of various problems with his mental functioning. As noted above, defendant does not show how these conditions eroded his "capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law." MCL 768.21a. As the statute clearly provides, "Mental illness . . . does not otherwise constitute a defense of legal insanity." *Id.*

Defendant argues that he provided counsel "with a list of *res gestae* witnesses" that "contained over twenty names." However, none of the correspondence with the court in which defendant complained about counsel's performance indicates that he provided such a list to counsel. And, as noted above, the record is confusing regarding the witnesses to which he was referring. On appeal, he also fails to identify them and continues to fail to set forth specifically what they could testify.

Defendant also asserts that he was denied his right to a speedy trial by counsel's actions. He acknowledges that he had a hand in the delay, but characterizes himself having "reluctantly agreed with his counsel's requests for these adjournments." The record does not support these assertions. In fact, on several occasions defendant personally agreed to a delay when asked by the court. See *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). He also sought to have both appointed counsel removed. The record also shows no evidence that defendant was prejudiced by the delay. He asserts that witnesses were lost and memories faded, but these are unsubstantiated claims. He also indicates he suffered prejudice to his person by being "subjected to oppressive pretrial incarceration, anxiety, and concern." Again, however, while the delay may have been a hardship, he was complicit in creating it.

Defendant's claim that counsel was ineffective for failing to seek exclusion of his confessions is also without merit. Defendant asserts that the statements were involuntary, that "[h]is interviews were a leered [sic] attempt to make him confess to actions he repeatedly denied," but he provides no argument beyond mere derogatory characterizations in support. He speaks of "naked detention," but specifies neither what he means by this nor how he was subjected to it. He belittles the notion that he confessed due to some "divine despotic notion," but provides nothing more in support than this disparaging attack on the idea that this is what occurred. The jurors were shown the interview tapes and could evaluate them for themselves.

Finally, defendant asserts that counsel was ineffective for failing to cross-examine several witnesses about certain matters. As with all of his previous claims, however, he provides this Court with nothing beyond his mere assertions that the witnesses could be challenged with the circumstances indentified. He has failed to overcome the presumption that counsel's representation was effective.

Affirmed.

/s/ Jane E. Markey  
/s/ E. Thomas Fitzgerald  
/s/ Douglas B. Shapiro