

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,)	
)	Case No: 18-2014-CR-02438
Plaintiff and Appellee,)	
)	Supreme Court No. 20150307
)	
vs.)	
)	
Justin Edward Baker,)	
)	
Defendant and Appellant.)	

Appeal from the Criminal Judgment
Entered September 29, 2015 in Grand Forks County District Court
Northeast Central Judicial District, State of North Dakota,
The Honorable Donald Hager Presiding

APPELLEE'S BRIEF

Carmell Mattison, ND ID# 06052
Assistant State's Attorney
Grand Forks County Courthouse
124 South Fourth Street
P.O. Box 5607
Grand Forks, North Dakota 58206
(701) 780-8281

Megha Kholwadwala
Third-Year Law Student
Certified under the Rule for
Limited Practice of Law by
Law Students
(On-Brief)

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STATEMENT OF THE ISSUES

- I. Trial Judge's ruling at the Change of Plea Hearing on July 21, 2015, did not deny Justin Edward Baker his sixth amendment right of counsel.

STATEMENT OF FACTS

[¶1] On November 14, 2014, Defendant, Justin Edward Baker, (hereinafter “Defendant”) was charged with the crime of escape by the State of North Dakota when he failed to return to the Grand Forks County Correctional Center on October 27, 2014, after having been granted temporary leave following his conviction in Case No. 18-2014-CR-00358, a felony offense. Appellant’s App. at 5

[¶2] On November 21, 2014, Defendant submitted an application for appointed defense services and received a notice of eligibility for a court appointed attorney. Appellant’s App. at 6. Hankey Law Firm was assigned to this case on November 24, 2014.

[¶3] Defendant and his attorney, Mr. Hankey, entered into plea negotiations with the State. During these negotiations, Defendant reached a plea agreement on his escape charge with the State. Pursuant to the plea agreement, a change of plea hearing was scheduled for July 21, 2015. CPT P.3. L 15-17

[¶4] The weekend before the change of plea hearing, Defendant had a discussion about the plea agreement with his family. During that discussion, Defendant decided that he would not accept the plea agreement and would proceed to trial. CPT P.3. L 19-23

[¶5] The Defendant and his father had a conference with Defendant’s attorney, Blake Hankey. At this conference, Mr. Hankey was informed that Defendant wished to proceed to trial. Mr. Hankey was also informed that Defendant was going to look into getting a new attorney. CPT P.3. L 23-25

[¶6] On July 21, 2015, District Judge Donald Hager presided over the change of plea hearing. Based upon the defendant's request to obtain new counsel, Mr. Hankey wished to withdraw from the case. CPT p.4, L 20-21

[¶7] Before granting the motion to withdraw, the following colloquy occurred:
CPT p.4, L 20-21

THE COURT: Has your client talked to another attorney for private hire?

DEFENDANT: My father has been trying to get a hold of a contact of his. He was unable to get a hold of them yesterday, unfortunately, before we had to come in today. But he is still in the process of doing that. CPT p.4, L 22-25

MR. HANKEY: I know his dad has been looking into private counsel for him, as well, as we sit here right now. CPT p.6 L 5-6

THE COURT: The court is not going to reappoint another defense counsel based on what I have heard so far. So it is going to be private counsel or pro se. CPT p.6 L 14-17

THE COURT:This is actually ten weeks from today, which gives you plenty of time to consult an attorney. That attorney---you know, I expect Mr. Hankey, based upon your wishes, is going to file a motion to withdraw. And, again, the court normally would approve that if you have a difference of opinion with his advice. However, as I indicated, I am not going to appoint another attorney on our defense contract. Mr. Hankey is a quite capable attorney who has appeared in front of me at jury trials and performs quite well. Once your private attorney is hired, he need to file his notice of appearance with is following the motion to withdraw. P.7, L 17-25, p. 8, L 1-4.

[¶8] Defendant's jury trial began on September 29th, 2015, in which he appeared *Pro Se* and he was found guilty of escape. Appellant's App. at 6

[¶9] Defendant appealed the judgment stating that the trial judge improperly denied his sixth amendment right to counsel.

STANDARD OF REVIEW

[¶10] The district court's denial of a defendant's motion for substitute counsel is reviewed for an abuse of discretion. *See* United States v. Anderson, 570 F.3d 1025, 1031 (8th Cir. 2009); United States v. Nguyen, 526 F.3d 1129, 1134 (8th Cir. 2008); and United States v. Armstrong, 112 F.3d 342, 345 (8th Cir. 1997). An appellant must show justifiable dissatisfaction, which can arise from irreconcilable conflict, a complete breakdown in communication, or a conflict of interest. Frustration with a counsel's performance or disagreement with tactical decisions is not enough to require substitution. *See* Anderson at 1031 (quoting United States v. Boone, 437 F.3d 829, 839 (8th Cir. 2006)).

[¶11] A district court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misapplies or misinterprets the law.” State v. McAvoy, 2007 ND 178, ¶17, 741 N.W.2d 198, 201 citing State v. Wardner, 2006 ND 256, ¶26, 725 N.W.2d 215.

LAW AND ARGUMENT

I. Defendant was not denied his sixth amendment right to counsel

[¶12] A defendant has a right to be represented by counsel, but he does not have the right to choose his own particular appointed counsel. A defendant must show “justifiable dissatisfaction” with appointed counsel in order to be granted a substitute. United States v. Exson, 328 F.3d 456, 460 (8th Cir. 2003). When a defendant does not carry his burden, a court may require him to either accept the services of appointed counsel, or represent himself *pro se*. United States v. Swinney, 970 F.2d 494, 498 (8th Cir. 1992). Contrary to Defendant’s arguments, such a choice is permitted under law and is not tantamount to denying a defendant his Sixth Amendment protections.

[¶13] The matter of substitution of appointed counsel is committed to the sound discretion of the trial court and, absent a showing of good cause for the substitution, a refusal to substitute is not an abuse of discretion. State v. Klein, 1997 ND 25, 22, 560 N.W.2d 198 (quoting In Interest of J.B., 410 N.W.2d 530, 532 (N.D. 1987)).

[¶14] In United States v. Barrow, 287 F.3d 733, 738 (8th Cir. 2002), the Court held that a disagreement between a defendant and his counsel over tactical decisions does not constitute justifiable dissatisfaction. In United States v. Smith, the Court upheld denial of substitute counsel to an indigent defendant where, despite communication problems, the district court found no valid conflict of interest or complete breakdown in communication, but rather, found the defendant caused many of the difficulties, and differences would have arisen with any appointed counsel. United States v. Smith 62 F.3d 1073, 1077-78 (8th Cir. 1995).

[¶15] In United States v. Mentzos, 462 F.3d 830, 839 (8th Cir. 2006), the court

held:

An accused does not have an absolute right to counsel of his own choosing, and a district court may properly require the defendant to choose either to proceed *pro se*, with or without the help of standby counsel, or to utilize the full assistance of counsel, who would present the defendant's defense. The substitution of counsel is committed to the sound discretion of the trial court, and the defendant bears the burden of showing justifiable dissatisfaction with appointed counsel to be granted a substitute.

[¶16] In the present case, the Defendant claims that the district court improperly denied him his sixth amendment right to counsel. It should be noted that Defendant was provided a court appointed counsel. However, just the weekend before the change of plea hearing Defendant informed his attorney that he was going to look into hiring another attorney. In addition to that, Defendant never provided any reason as to why he wanted a new attorney. While discussing with the Court, Mr. Hankey stated, "I guess, you know, Mr. Baker and I have a couple difference of opinion about how this case is going to proceed. Certainly, I could talk to him more about that but if I would file a motion to withdraw, the court would know, I guess, kind of what the basis generally is, or what is going on. I am not sure the court would grant that." CPT p. 5 L 21-25. p. 6 1-2. However, nothing further was discussed regarding these disagreements by the Defendant. These disagreements did not amount to irreconcilable conflict or conflict of interest as Mr. Hankey was still willing to represent the Defendant. Furthermore, Defendant did not allege a single incident where Mr. Hankey failed to represent him diligently and therefore Defendant failed to provide a valid reason for a new attorney.

[¶17] Moreover, after Mr. Hankey filed a Motion to Withdraw, Defendant did not request a substitution of counsel. Defendant wanted to hire his own attorney of choice ten

weeks prior to trial. Both the defendant and Mr. Hankey made the following statements during the Change of Plea hearing on July 21st, 2015.

THE COURT: Has your client talked to another attorney for private hire? CPT p.4, L 20-21 **DEFENDANT:** my father has been trying to get a hold of a contact of his. He was unable to get a hold of them yesterday, unfortunately, before we had to come in today. But he is still in the process of doing that. CPT p.4, L 6-12

MR. HANKEY: I know his dad has been looking into private counsel for him, as well, as we sit here right now. CPT p. 6 L 5-6.

[¶18] After hearing all the parties, the court agreed to accept Mr. Hankey's motion to withdraw based upon the defendant's wishes and found that Defendant's dissatisfaction with his counsel was not a justifiable reason to appoint new counsel because Defendant did not provide any basis as to why he wanted Mr. Hankey to withdraw. Defendant clearly expressed his intentions to hire a private attorney at the Change of Plea hearing on July 21, 2015. Therefore, the court did not act arbitrarily, unconscionably, or unreasonably and the Defendant was not denied his right to another court appointed counsel because he never requested a substitute of counsel at the Change of Plea hearing.

II. Defendant voluntarily waived his right to counsel when he failed to retain a private counsel.

[¶19] The failure of a defendant to secure counsel after being advised of the right and after being given reasonable opportunity, has been characterized as a waiver by some courts, *see* Wilson v. State, 2013 ND 124, ¶28, 833 N.W.2d 492; Nation v. State, 445 N.E.2d 565, 569 (Ind.1983), and as a forfeiture by other courts. *E.g.*, Fischetti v. Johnson, 384 F.3d 140, 146 (3d Cir.2004).

[¶20] In City of Grand Forks v. Corman, 2009 ND 125, ¶¶14-15, 767 N.W.2d 847, the Court concluded that Corman knowingly and intelligently waived his right to counsel when he decided to represent himself. In Corman, the defendant's request for a court-appointed counsel had been denied twice. Moreover, the record did not reflect that Corman made any attempts to retain his own counsel, other than a statement that he "talked to a few attorneys." The North Dakota Supreme Court stated, "The record reflects that when Corman was finally faced with the choice of representing himself or hiring his own lawyer, he voluntarily chose to represent himself." Id. at 14.

[¶21] Similarly, in the present case, Defendant was given sufficient opportunity to hire a private counsel. Defendant had ten weeks between the Change of Plea hearing and the trial date to hire an attorney. Like Corman, records do not show that the Defendant made arrangements to secure the services of an attorney except his statement at the Change of Plea hearing that him and his father are in process of hiring a new attorney.

[¶22] In City of Fargo v. Habiger, 2004 ND 127, ¶23, 682 N.W.2d 300, the court said that the record must reflect satisfaction of a two-part test employed to determine whether a waiver of the right to counsel was effective: (1) whether the waiver was voluntary; and (2) whether the waiver was knowing and intelligent.

[¶23] While determining the first part of the test, the Habiger court looked at the defendant's behavior. The court looked at the defendant's familiarity with the legal system and noticed that he is not a stranger to the legal system. The court also looked at the records reflecting his experience in hiring attorneys to represent him and that he had also represented himself in the past. Moreover, the defendant specifically informed the district court that he would employ counsel independently. In Habiger, the court

concluded that defendant's behavior was the functional equivalent of voluntary waiver of his right to an appointed attorney. Id. at 25.

[¶24] Applying the Habiger analysis in the present case, it is apparent from the records that the Defendant was able to communicate with the court as well as he has past experiences with the legal system. Also, Defendant has sufficient experience in court proceedings as he was recently convicted in one of the cases against him. Moreover, like Habiger, Defendant specifically informed the district court that he wishes to retain a private attorney. As, the court determined in Habiger, Defendant's behavior was the functional equivalent of voluntary waiver of his right to an appointed attorney.

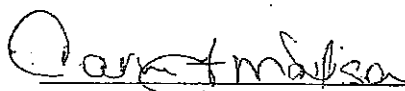
[¶25] In the process of determining the second part, the Habiger court looked at a letter from the district judge informing the defendant that he needed to be prepared and understand the rules of procedure under which the trial would proceed. Additionally, the court also looked at the defendant's comments indicating that he has experience with the courts. Id. at 28

[¶26] Similarly, in the present case, the defendant was given the opportunity by Judge Hager to go through rules and procedure if he decides to represent himself in the trial. Looking at the totality of circumstance it is clear that the Defendant understood his options with regard to his representation. Thus, the Defendant voluntarily, knowingly, and intelligently waived his right to court appointed counsel and chose to represent himself.

CONCLUSION

[¶27] North Dakota law requires the court to appoint an attorney to an indigent defendant. In the present case, Defendant was provided a court appointed counsel. The court's decision not to appoint a new counsel for the Defendant not arbitrary or capricious as the Defendant did not request a new attorney nor did he provide any justification for a new attorney. When given the choice to either hire a private attorney or represent himself, the Defendant ultimately chose to represent himself at trial. Thus, the Defendant voluntarily, knowingly, and intelligently waived his right to counsel, and therefore, the Court did not deny Defendant his right to counsel under the Sixth Amendment of the United States Constitution. For these reasons, the State of North Dakota requests that Defendant's appeal be denied.

Dated this 25 day of February, 2016.



Carmell Mattison
ND ID #06052
Assistant State's Attorney
Grand Forks County Courthouse
124 South Fourth Street
P.O. Box 5607
Grand Forks, North Dakota 58206
(701) 780-8281



Megha Kholwadwala
Third Year Certified Law Student