

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

Filed February 26, 1986

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

DEAN L. BAILEY,

)

Defendant-Appellant.

)

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5-630
84-1970

Appeal from the Iowa District Court for Marshall County (No. CR 6679)

- Dale Ruigh and David L. Hansen, Judges.

Defendant appeals judgment and sentence on the criminal charge of third-degree sexual abuse on the ground the trial court erred in denying defendant's request that trial counsel be permitted to withdraw from defendant's case.

AFFIRMED.

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Phillip J. Krejci, Marshall County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Snell, JJ.

Defendant, Dean Bailey, appeals judgment and sentence on the criminal charge of third-degree sexual abuse on the ground the trial court erred in denying defendant's request that trial counsel be permitted to withdraw from defendant's case.

On November 28, 1983, Bailey was charged by information with third-degree sexual abuse in violation of Iowa Code section 709.4(3) (1983). Kevin O'Hare was defendant's first court-appointed counsel. His application to withdraw on the grounds of irreconcilable differences with defendant was granted on or about January 11, 1984. Patrick Wilson was appointed on or about that date to replace him.

On October 18, 1984, defendant pled guilty to the offense as charged, apparently as part of a plea bargain to remain free on bail until sentencing. Both attorneys agreed to the plea bargain and during the hearing the court fully complied with Iowa Rule of Criminal Procedure 8(2)(b). On October 22, however, the trial court discovered it had overlooked Iowa Code section 811.1(1)¹, which prohibits bail to a defendant awaiting sentencing after pleading guilty to sexual abuse in the third degree. The court, therefore, entered an order revoking the

¹Section 811.1 provides that:

All defendants are bailable both before and after conviction, by sufficient surety, or subject to release upon condition or on their own recognizance, except that the following defendants shall not be admitted to bail:

1. A defendant awaiting judgment of conviction and sentencing following either a plea or verdict of guilty of a class "A" felony, murder, felonious assault, sexual abuse in the second degree, sexual abuse in the third degree in violation of section 709.4, subsections 1 and 3, kidnapping, robbery in the first degree, arson in the first degree, or burglary in the first degree.

defendant's conditions of release and ordering his confinement pending sentencing. Bailey filed his application to withdraw his guilty plea on the same date, which subsequently was permitted on November 7, 1984.

On October 23, 1984, defendant's court-appointed attorney Wilson filed his application to withdraw, citing irreconcilable differences. The defendant also made an oral request that Wilson be excused as counsel. The court held a hearing on October 24 at which defendant and Wilson were present.

Judge Ruigh denied the request on November 7 on these grounds: (1) Wilson had provided effective assistance of counsel throughout except for the section 811.1(1) problem which, because of the court's order, had been corrected; (2) the case needed to be tried on November 14 to meet the one-year deadline pursuant to Iowa Rule of Criminal Procedure 27(2)(c), and preparation would be jeopardized by changing counsel at the eleventh hour; and (3) no other attorney had entered an appearance on behalf of defendant, even though defendant had indicated he might have counsel from Dubuque and that he was indigent.

Judge Hansen held a hearing on a motion for continuance and a renewed motion to withdraw on the same facts on November 14, just prior to commencing trial. The state resisted on the ground the case had been pending one year and no other attorney had come forward. Attorney Wilson indicated that although defendant was uncooperative with him, he was prepared to try the case. Judge Hansen refused to grant the continuance or the renewed motion to withdraw. The matter proceeded to jury trial and defendant was convicted as charged.

Our task in this appeal is to determine if the trial court abused its discretion in denying defendant's attorney's motion to withdraw as counsel and defendant's motion to continue to have a different counsel represent him. See State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977), cert. denied 434 U.S. 903 (1977); see

also State v. Williams, 285 N.W.2d 248, 254 (Iowa 1979), cert. denied 446 U.S. 921 (1980); State v. Taylor, 211 N.W.2d 264, 267 (Iowa 1973).

If a defendant demonstrates good cause through his complaint about his counsel, the trial court must appoint substitute counsel. State v. Hutchison, 341 N.W.2d 33, 41 (Iowa 1983). It is recognized that: "Good cause is [not] to be determined solely to the subjective standard of what the defendant perceives. While the loss of trust is certainly a factor in assessing good cause, a defendant seeking substitution of assigned counsel must nevertheless afford the court with legitimate reasons for lack of confidence. [Authorities]." McKee v. Harris, 649 F.2d 927, 932 (2d Cir. 1981), cert. denied 456 U.S. 917, 102 S. Ct. 1773 (1981).

Iowa law provides:

The subjective dissatisfaction of an indigent defendant with court appointed counsel cannot be made the sole basis for demand for appointment of new counsel as a matter of constitutional right. In the event the indigent defendant is dissatisfied with court appointed counsel, he has the right to ask appointment of new counsel stating the reasons for his dissatisfaction. The court then determines the propriety of appointment of new counsel.

Roberts v. Bennett, 258 Iowa 1101, 1107, 141 N.W.2d 628, 632 (1966).

No doubt the error which culminated in defendant's plea bargain being rejected and him being incarcerated affected his relationship with counsel. The error, however, appears to have resulted from all the parties overlooking the requirements of § 811.1(1) and the prejudice was corrected by the trial court. Given the one-year time constraint on trial expired November 28, 1984 (which would have required rescheduling within two weeks, which seems unlikely), that defendant claimed he had the opportunity to retain his own counsel despite his assertion of indigency, that defendant had irreconcilable differences with both of his court-appointed attorneys, and that his trial attorney was well-

prepared for trial, we cannot find the trial court erred by denying defendant's request. Defendant's incarceration and the attendant circumstances could understandably lead to tension and even possibly result in good cause to appoint another counsel in a similar context. However, the error was caused when all of the parties, not just defense counsel, overlooked the requirements of § 811.1(1). Given the context of this oversight and the other mitigating factors supporting the trial court's decision, we affirm.

AFFIRMED.