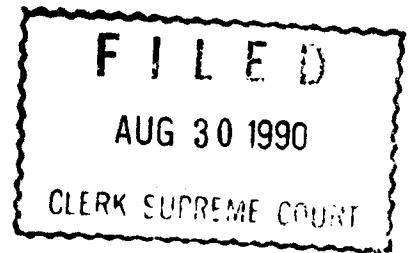


IN THE COURT OF APPEALS OF IOWA

No. 0-299 / 87-1269



STATE OF IOWA,

Appellee,

vs.

FERMAN JONES,

Appellant.

722

Appeal from the Iowa District Court for Lee County,
Joel J. Kamp, Judge.

The defendant appeals from his convictions, following a jury trial, for two counts of assault causing injury. He contends the district court erred in (1) refusing to allow his second court-appointed attorney to withdraw due to an attorney-client conflict and (2) refusing to grant a mistrial following defendant's expression of dissatisfaction with his attorney in the jury's presence.

AFFIRMED.

Bryan J. Humphrey, Fort Madison, for appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats and Robert Glaser, Assistant Attorneys General; and Michael Short, County Attorney, for appellee.

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

DONIELSON, J.

Prison inmate Ferman Jones was accused of attacking two prison guards. He was charged with two counts of assault causing injury. Jones was provided with the court-appointed services of attorney Peter Hansen at his arraignment. Mr. Hansen moved to withdraw as counsel due to Jones' refusal to communicate with him. Following a hearing on May 20, 1987, this motion was granted and Jerald Gregg was appointed to represent Jones. Speedy trial was not waived, requiring that trial be held by July 7, 1987. Trial was scheduled for June 30, 1987.

On June 25 attorney Gregg filed a motion to withdraw as counsel for Jones. Hearing on the matter was held on June 30. Gregg stated Jones refused to communicate about the case with him and consequently he did not feel he could adequately represent Jones' interests. Jones stated there was a conflict between himself and Gregg and joined in the request that Gregg be permitted to withdraw. The district court denied Gregg's motion to withdraw.

At the beginning of Jones' jury trial, and in the presence of the jury, Jones stated, "May I be appointed another attorney as requested, Your Honor? He's not of any assistance. I told you the other day I don't feel comfortable with him." The trial judge then admonished and excused the jury, heard more from the defendant and counsel, and denied Jones' request for substitution of counsel. Gregg then moved for a mistrial, stating that

Jones' comments would prevent the jury from giving any credibility to attorney Gregg. The district court declined to grant a mistrial.

At the conclusion of the trial, the jury found Jones guilty of two counts of assault causing injury. Jones appeals from the resulting convictions.

Jones contends the district court abused its discretion in denying attorney Gregg's motion to withdraw as counsel and in declining to grant a mistrial following his comments to the court and in the presence of the jury.

I. COURT'S REFUSAL TO APPOINT OTHER COUNSEL. The right to counsel is not at issue here but rather the right of appointment of a third attorney when defendant has refused to cooperate with two other court-appointed counsel. Cf. Roberts v. Bennett, 258 Iowa 1101, 1108, 141 N.W.2d 628, 632 (1966) (indigent defendant who dismissed his first appointed counsel was not deprived of constitutional rights by trial court's refusal to appoint second counsel for his appeal). Trial courts have broad discretion in considering a motion for substitution of counsel. State v. Williams, 285 N.W.2d 248, 254 (Iowa 1979), cert. denied, 446 U.S. 921 (1980). We review decisions of the trial court concerning substitution of counsel for abuse of discretion, State v. Hutchison, 341 N.W.2d 33, 41-42 (Iowa 1983); see also United States v. Allen, 789 F.2d 90, 92-93 (1st Cir. 1983), cert. denied, 479 U.S. 846 (1986) and we will affirm the trial court's

decision unless that discretion was exercised for reasons clearly untenable or to an extent clearly unreasonable. State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). When a defendant makes a substantial complaint about his counsel the court is required to hold a hearing and must appoint substitute counsel if the defendant demonstrates sufficient cause. Hutchison, 341 N.W.2d at 41 (citations omitted).

Here, the court did hold a hearing on Gregg's motion to withdraw. The motion was based upon Jones' refusal to communicate with him about the case. At the hearing, Jones told the court that Gregg's authority was restricted to getting the charges dismissed and he expressed dissatisfaction with Gregg for not filing a motion to dismiss the charges. The court concluded that the previous change of attorneys created good cause for an extension, and offered Jones the opportunity to file the motion beyond the time limit. Following a rather confusing conversation between Jones and the court, the court denied the motion to substitute counsel, Jones refused to waive his right to speedy trial and stated, through attorney Gregg, that he was prepared to proceed to trial. Jones also refused to waive his right to counsel.

While Jones contends the he and Gregg had a conflict concerning a motion to dismiss, the trial court offered Jones an opportunity to have that motion heard. In response, Jones claimed there was a conflict between himself and Gregg because Gregg had sought to withdraw.

Jones did not present sufficient cause to require substitution of counsel. Jones merely announced a subjective dissatisfaction with his court appointed attorney and "[t]he 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." Roberts, 258 Iowa at 1107, 141 N.W.2d at 632. The trial court did not abuse its discretion in concluding Jones had not demonstrated sufficient cause to require substitution of counsel.

Jones contends that the trial court must substitute counsel where an attorney-client conflict is so great that it results in a total lack of communication preventing an adequate defense because defendant is thereby deprived of effective assistance of counsel. However, Jones has not demonstrated an attorney-client conflict. He has merely demonstrated a consistent refusal on his part to communicate with his counsel. His refusal to communicate with Gregg began as soon as Gregg was appointed. Jones' voluntary choice to refuse to communicate with counsel waived any right to more effective counsel than was possible under the circumstances. See, e.g., Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985), cert. denied, 475 U.S. 1031 (1986).

II. COURT'S REFUSAL TO GRANT MISTRIAL. As noted previously, Jones told the court of his dissatisfaction

with counsel in the jury's presence. He now contends the trial court erred in failing to grant his motion for a mistrial because his outburst prejudiced the jury against him.

"A party to a criminal trial proceeding will not be permitted to complain of error with respect to the admission or exclusion of evidence where * * * he himself has acquiesced in, committed, or invited the error." State v. Hinkle, 229 N.W.2d 744, 750 (Iowa 1975). Jones, on this assignment, "suffers from a self-inflicted wound." State v. Washington, 257 N.W.2d 890, 893 (Iowa 1977), cert. denied, 435 U.S. 1008 (1978).

Further, the trial court promptly admonished the jury to disregard any statements made and Jones' failed to move to strike his comments.

Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of cautionary instruction, will prevent any prejudice. A defendant who asserts that these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court.

State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986). Jones has failed to meet the heavy burden of demonstrating the trial court's denial of his motion for mistrial was a clear abuse of discretion. We find no error.

AFFIRMED.