IN THE COURT OF APPEALS OF IOWA

No. 0-181 / 99-1148
Filed April 28, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN HOWARD BURG,
Defendant-Appellant.

Appeal from the Iowa District Court for Kossuth County, Frank B. Nelson, Judge.

Defendant appeals from the judgment and sentence entered upon his convictions for first-degree robbery, two counts of second-degree kidnapping, and unauthorized possession of an offensive weapon. **AFFIRMED.**

Thomas M. Magee, Emmetsburg, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, David Skilling, County Attorney, and Scott Brown, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ.

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[redacted] Constitutional rights are often perceived as immutable and uncompromising. In reality, constitutional rights are designed to protect the citizenry from identifiable harms. Absent the presence of those harms, there can be no constitutional violation. Steven Burg claims an abridgment of his constitutional right to counsel stemming from the trial court's failure to appoint him an attorney for a period of three months. However, because he cannot show this deprivation of counsel led to an identifiable harm, no constitutional mandate was violated. Therefore, the district court is affirmed.

I. Background Facts & Proceedings.

In April of 1998 the defendant, Steven Burg, robbed the Happy Chef Restaurant in Algona, Iowa. He was quickly arrested and charged with a host of crimes including robbery, kidnapping, assault, and unauthorized possession of offensive weapons. At his initial appearance the court appointed Burg an attorney. Burg later waived his right to a speedy trial, and the case proceeded in normal course for the next six months.

In late November of 1998 Burg's attorney was hired by the Kossuth County Attorney's Office and was later permitted to withdraw as Burg's counsel due to the obvious conflict of interest. In permitting counsel's withdrawal, the court for unknown reasons ordered Burg to obtain his own attorney within twenty days. Burg, incarcerated, was unable to obtain an attorney and remained in jail without the benefit of counsel until late February 1999 when the county attorney

who was prosecuting the case realized Burg's situation and requested a local attorney contact Burg. Burg declined that attorney's assistance.

In mid-March, on the day prior to trial, the district court appointed Burg counsel, disqualified the Kossuth County Attorney's Office from representing the State, and rescheduled the trial for late May of 1999. Burg filed a motion to dismiss alleging a deprivation of his Sixth Amendment right to counsel during the three months he was without counsel. The district court denied the motion, and the supreme court denied his writ of certiorari. Burg then waived his right to a jury trial and agreed to submit the case to the court on the minutes of testimony. The court found Burg guilty of first-degree robbery, two counts of second-degree kidnapping, and possession of an offensive weapon.

Burg now appeals, claiming the trial court erred in permitting his original court-appointed attorney to withdraw without a hearing and he was denied his Sixth Amendment right to counsel.

II. Appointed Counsel's Withdrawal.

Burg first claims the trial court erred in permitting counsel to withdraw without a hearing.

A. Standard of Review. We review a district court's decision to permit the withdrawal of trial counsel for an abuse of discretion. *State v. Rhode*, 503 N.W.2d 27, 35 (Iowa App. 1993).

B. The Merits. Under local rule 7.2 of the third judicial district,

> Any withdrawal by an attorney in any cause shall be in accordance with Ethical Consideration 2-34 and Disciplinary Rule 2-110 of the Iowa Code of Professional Responsibility for Lawyers. No attorney shall withdraw except on application to and permission of the court.

> [redacted] appearance of another attorney representing the party is [redacted] hearing on application to withdraw shall be ordinarily [redacted] with adequate notice of such hearing to be given to all [redacted] in the cause.

(Emphasis added.) On the record before us, the trial court did not abuse its discretion in finding this particular situation failed to necessitate a hearing or that Burg suffered any harm as a result. The nature of the conflict that emerged as a result of appointed counsel's new position with the prosecutor's office presented such a clear and straightforward conflict of interest that a hearing was not required. *See Atley v. Ault*, 191 F.3d 865, 872 (8th Cir. 1999). Even if we were to construe a hearing was necessitated, Burg did not suffer any prejudice, as the trial court found there *was a conflict* and properly permitted counsel to withdraw. The preference for a hearing is to protect criminal defendants from the situation where a court denies counsel from withdrawing without making adequate inquiry into the pervasiveness of the conflict. *Id.* at 871-72. The converse situation, however, where the court permits withdrawal based on a clear conflict does not threaten an accused's constitutional right to counsel. Therefore, Burg did not suffer any identifiable harm even if a hearing was necessitated.

III. Sixth Amendment Right to Counsel.

Burg also claims he was denied his Sixth Amendment right to counsel during his [redacted]-month interim without appointed counsel.

A. Standard of Review. We review constitutional claims of error de novo. *State v. Johnston*, 406 N.W.2d 794, 796 (Iowa 1987).

B. The Merits. The Sixth Amendment to the United States Constitution ensures a criminal defendant the assistance of counsel for his defense. U.S.

Inherent in crafting such a protection is without counsel a criminal defendant will befall some type of identifiable harm. *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d 657, 667 (1984) ("[W]e begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."). Therefore, in order for a court's delay in appointing counsel to violate the Sixth Amendment, prejudice must generally be shown. *Id.* ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."); *Chambers v. Maroney*, 399 U.S. 42, 54, 90 S. Ct. 1975, 1982-83, 26 L. Ed. 2d 419, 430 (1970) ("[W]e are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel . . . ."); *United States v. Mays*, 69 F.3d 116, 123 (6th Cir. 1995) (finding a defendant failed to show prejudice despite a five-month delay in appointing new counsel). Because Burg cannot show he suffered any identifiable prejudice, his claim must fail.

The only claim of prejudice Burg contends occurred during that three-month time period was his inability to withdraw his waiver of speedy trial. There is, however, no evidentiary support Burg ever intended to withdraw his waiver or the opportunity to withdraw his waiver would have had a significant effect on the outcome. Burg, with the assistance of his originally appointed counsel, waived his right to speedy trial on June 8, 1998. It was not until six months later, on December 7, 1998, that his counsel filed his withdrawal. Therefore, Burg had

ample opportunity to withdraw his waiver of speedy trial prior to his counsel's departure.

Additionally, the original trial date was set for March 16, 1999. Thus, even if Burg had withdrawn his waiver of speedy trial on December 7, 1998, the ninety-day period to try Burg would not have elapsed until March 7, 1999—a mere nine days before the original trial date. Such a small time difference cannot be construed to be of constitutional magnitude. *See United States v. Mays*, 69 F.3d at 123 (ruling despite a 142-day delay in the appointment of counsel, during which depositions were taken and eighty-six docket entries were recorded, the defendant suffered no prejudice).

The events which befell Burg were not only unfortunate, but not of his own making. The originally appointed defense counsel bears at least some responsibility by not ensuring his former client had procured representation. Notwithstanding this series of missteps, Burg simply did not suffer any identifiable prejudice. His constitutional claim must fail, and his convictions are affirmed.

AFFIRMED.

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