Circuit Court for Montgomery County
Case No. 133578C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1715

September Term, 2019

KAIREE DEYONTE DORSEY

v.

STATE OF MARYLAND

Berger,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: April 22, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a jury trial in the Circuit Court for Montgomery County, Kairee Deyonte Dorsey, appellant, was convicted of felony murder, second-degree murder, armed robbery, conspiracy to commit armed robbery, and use of a firearm in the commission of a crime of violence. The court sentenced appellant to life without the possibility of parole for felony murder. The conviction for second-degree murder was merged with the conviction for felony murder. Appellant was sentenced to 20 years for each of the remaining convictions, to be served consecutively to the life sentence and to each other, for a total sentence of life plus 60 years. Appellant noted a timely appeal, presenting one question for our review:

> Did the trial court abuse its discretion when it ruled that Appellant did not have a meritorious reason to discharge counsel?

For the following reasons we shall affirm the judgments of the circuit court.

BACKGROUND

On December 16, 2017, Andrew Turner was shot and killed during a drug transaction outside of an apartment in Germantown. On April 5, 2018, appellant was charged with Turner's murder, along with armed robbery, conspiracy to commit armed robbery, and use of a firearm in the commission of a felony. Christopher Breeden, appellant's co-conspirator, entered into a plea deal with the State, pursuant to which he agreed to testify against appellant.

On April 13, 2018, defense counsel entered his appearance on behalf of appellant. On the same date, defense counsel filed an omnibus motion which included a motion to

suppress evidence obtained as a result of an illegal search and seizure. The motion did not set forth any factual or legal basis for relief.[1]

Trial was originally scheduled for June 4, 2018. It was postponed twice; once upon the parties' joint motion, and then again at appellant's request.[2] Trial was ultimately scheduled to begin on Monday, June 3, 2019.

On May 31, 2019, the Friday before trial, a hearing was held, at which defense counsel requested a third postponement, on grounds that the defense was "still trying to talk to a witness." Defense counsel stated that appellant, who was not present at the hearing, told him "relatively early on" that he believed that the search of his apartment was illegal because police entered the apartment before the search warrant was signed. According to defense counsel, a "fair amount" of discovery was "missing," including the search warrant, and he had been "going back and forth" with the prosecutor about what discovery had been provided, and when. Before going out on medical leave for the month of April, he went through all the discovery again, to make sure he had everything, and advised the State what was in his possession.

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[1] The Court of Appeals has noted that "[i]t has apparently become the practice of some defense counsel to file [an omnibus] motion, seeking a panoply of relief based on bald, conclusory allegations," and that, in recognition of time constraints often faced by the defense, "some courts have routinely overlooked the impermissible generality of such motions and have permitted the defendant to make the complaint more specific at, or in preparation for, a hearing on the motion." *Denicolis v. State*, 378 Md. 646, 660 (2003).

[2] Appellant waived the requirement that his trial be held within 180 days. *See* Criminal Procedure Article, § 6-103; Md. Rule 4-271(a)(1).

The State "resupplied" discovery while defense counsel was on leave. Defense counsel reviewed everything upon his return from leave, including the search warrant, which was signed at 12:01 a.m. on March 1, 2018. Defense counsel conferred with appellant, who said it was his understanding that the police "went in" earlier than that.

Defense counsel then contacted appellant's girlfriend and her mother, who both lived in the same apartment as appellant. Apparently, they were not at home at the time the apartment was searched but told defense counsel that they received text messages and phone calls from their next door neighbor, who said that police "came in on [February] 28th[.]" Defense counsel informed the postponement court that police had conducted a search of the grounds of appellant's apartment complex, which he conceded would not have required a warrant, at approximately 10:00 p.m. on February 28th.

Defense counsel attempted to contact the neighbor to confirm that he had "solid evidence" to support the motion to suppress. Since returning from medical leave, he had been "trying to call" the neighbor but had not been able to speak with him. Defense counsel did not know if the neighbor returned his calls when he was away from his desk because the voicemail system in the public defender's office was not working. The neighbor apparently told appellant's girlfriend and her mother that he had tried to call defense counsel.

The prosecutor opposed the motion for postponement, stating that defense counsel had been provided with all discovery, including warrants, but that defense counsel had "issues where he didn't download some of it." The prosecutor argued that, in any event, no continuance was necessary as the State conceded that police entered appellant's

apartment prior to execution of the warrant. The prosecutor explained that, shortly after appellant was arrested, police went to the apartment to secure the premises while the search warrant was being obtained, to make sure that other occupants of the apartment did not destroy any evidence.[3] The prosecutor argued that securing the premises under such circumstances did not amount to an illegal search and informed the court that all evidence collected from the apartment was timestamped later than 12:01 a.m.

The court denied appellant's request for a postponement, stating "I'm not convinced that this is a significant enough issue, based on what I've heard, to justify continuing this trial. It's been set for a long time. This block of time has been blocked out for this trial for months, and I don't know when this case would be tried if it's not tried next week."

Trial

The case was called for trial in the afternoon session on the following Monday. As appellant entered the courtroom, the court asked if there were any preliminary issues, and both the prosecutor and defense counsel stated that there were none. The court asked defense counsel if appellant wanted to be provided with headphones so that he could be "present" at bench conferences. Defense counsel conferred with appellant and advised the court that appellant "would like to be able to hear what's going on."

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[3] In *Morris v. State*, 153 Md. App. 480, 493 (2003), we noted that "if an officer has probable cause to believe that a home contains evidence of crime and that the occupants, if left free of any restraint, might destroy the evidence, he [or she] is permitted to take reasonable steps to secure the residence and to hold the situation inviolate until a warrant to search the residence can be obtained." (citing *Segura v. U.S.*, 468 U.S. 796, 810 (1984)).

The court proceeded to address a voir dire issue and, at the request of defense counsel, gave a rule on witnesses. The court informed the parties that the jury panel would be sent to the courtroom in five to ten minutes, then took a recess to address a note from a jury in another courtroom.

When the court reconvened, defense counsel informed the court that appellant was unhappy with his representation. Defense counsel stated that appellant had spoken to a few private attorneys and wanted to request a continuance. The following colloquy ensued:

> THE COURT: And was this a decision [that appellant] made between the time I was here 10 minutes ago and the time that I'm here now?
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> [DEFENSE COUNSEL]: . . . I know - - I believe he's probably been thinking about it since last Thursday, when I spoke to him at the jail that night and I told him that I knew we were going to be asking for the continuance Friday . . . and I told him that I did not anticipate the [c]ourt granting the continuance, just given how late it was, that I thought it was a valid continuance request but I didn't think the [c]ourt was going to grant it.
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> At that time he did raise concerns that he had with me, specifically over the facts that I had not gotten in touch with those witnesses, that I had not talked with some other people earlier as well, and I know he was unhappy about that. . . . [I]f [] the continuance was not granted, I had a feeling that he was unhappy enough that he may look to fire me[.] . . . So while he told me while you were gone, I know it's something that he's - - I do believe this is something that he's been thinking about, and knowing that he looked, spoke to [private counsel] earlier on as well, I'm not sure how long he's been unhappy with me but I know that he has at least looked into private counsel for a while, and I think [ ] what happened over the weekend was the final straw for him.

The court then asked appellant to explain all of the reasons why he wanted to discharge defense counsel and the following colloquy occurred:

[APPELLANT]: Your Honor, I've been - - we've been going, you know, through this trial phase for about 10 months now, and . . . out of the 10 months that I've been incarcerated, you know, I've only seen [defense counsel] three times, you know. We didn't have sufficient time. When we - - when I did see him, it was just, you know, to let me know that I was coming to court, you know, and the time after that was January 23rd, was the last time I'd seen him, and you know, [defense counsel] had gone on vacation, you know, and I hadn't known anything about him going on vacation.

So, you know, I was kind of baffled about why he didn't come see me, and you know, when he did come see me, you now, he let me know that, you know, we're going to trial and stuff like that. I had already had in my mind that I was going to get rid of [defense counsel], also, while I was seeking counsel at the same time.

[THE COURT]: When did you have that in your mind?

[APPELLANT]: I started seeking counsel in November of 2018. I talked to [Mr. H.], and in December I talked to [Ms. C]. I actually, you know, gave her a retainer. I mean, a fee for just to come and talk to me, and then recently I talked to [Ms. R.], and I gave her my brother's number. My brother called. My brother is going to retain her.

But the facts, we didn't have sufficient enough time to even prepare for a case, and I feel as though that, you know, on [defense counsel's] behalf, he should have made an effort to, you know, start, you know, preparing, prepping for trial opposed to two weeks before trial, you know, which was the last minute, which would in turn have given us an opportunity to even present to you, you know, a motions hearing, would – probably would have, you know, we probably would have had a date for a motions hearing, but because of the time, the lapse in time, we didn't have enough time to even prepare that to you. So - - and I don't, I don't feel comfortable, you know, going to trial with [defense counsel].

So, you know, I ask that, you know, you, you relieve him of his duties and allow me to seek counsel. If I have to represent myself, I ask that you give me sufficient time,

> because an hour, a couple of hours or two will not be sufficient in order for me to go over the case. You know, there is discovery that I have not received about the case. There's a lot of discovery that I have not received about the case. Even the discovery that I do have, a lot of it does not pertain to this case.
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> So, you now, I need time to get the discovery, go over the discovery. What the State has I don't have it, and I would need time to be able to investigate probable witnesses. Thanks for letting me share.

The court asked defense counsel if he had anything to add. Defense counsel stated that appellant was "unhappy" that defense counsel did not hire an investigator or do more to track down the neighbor. The court then denied appellant's request for a continuance and asked appellant if he still wanted to discharge counsel. Appellant elected to retain defense counsel rather than represent himself, and the court proceeded with jury selection.

Appellant does not challenge the sufficiency of the evidence on appeal. We shall, however, provide a brief summary of the evidence, to provide context for the issue on appeal.

In the State's case-in-chief, Breeden testified that he set up a fake drug deal with Turner, pretending that he was going to purchase $1,200 worth of marijuana from Turner but intending to steal the drugs instead. Breeden asked appellant if he could borrow his gun, but appellant refused to lend it and said that he wanted to come along and participate in the robbery.

When appellant and Breeden arrived at Turner's apartment building, they split up. Their plan was for Breeden to meet Turner and steal the marijuana from him, and, "if

something went bad or anything like that, [appellant] was just supposed to come down, show up and to deter anything from happening[.]"

Breeden sent a Snapchat message to Turner to let him know that he had arrived and was downstairs. As Breeden waited for Turner, he looked up to the second-floor walkway of the apartment building and saw that appellant had Turner pinned against a wall. Appellant took the marijuana from Turner and demanded money from him as well. Breeden heard a "wrestling sound," followed by a gunshot. Appellant then rejoined Breeden, and the two men ran back to the Jeep that they had driven to Turner's building.

Turner's neighbors testified that, after the shooting, they saw two men run into a Jeep and drive away. The State introduced surveillance footage that showed two men entering Turner's building and running out a few minutes after Turner was shot. Breeden identified the men in the video as himself and appellant.

Turner's cause of death was determined to be a single gunshot wound to the chest and was ruled a homicide. A .357 shell casing was found at the scene of the shooting. Breeden testified that appellant's gun was a .357 Desert Eagle.

During execution of the search warrant for appellant's apartment, police recovered two .357 shell casings. Firearms analysis showed that the shell casings found at appellant's home and the casing found at the scene of the shooting had been fired from the same gun. As noted above, appellant was convicted of felony murder, second-degree murder, armed robbery, conspiracy to commit armed robbery, and use of a firearm in the commission of a crime of violence.

DISCUSSION

Under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, a criminal defendant "has an independent constitutional right to have the effective assistance of counsel and to reject that assistance and defend [them]self.'" *Dykes v. State*, 444 Md. 642, 648 (2015) (quoting *Williams v. State*, 321 Md. 266, 270-71 (1990)). Maryland Rule 4-215(e) "protects and administers the fundamental right to the assistance of counsel, along with the attendant right to counsel of one's choice[.]" *State v. Graves*, 447 Md. 230, 241 (2016).

When a criminal defendant makes a request to discharge counsel, the trial court must follow the three-step process set forth in Maryland Rule 4-215(e):

> Discharge of counsel – Waiver. If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel....

Appellant does not contend that the court failed to comply with the procedural requirements of the Rule. Instead, appellant asserts that the trial court abused its discretion in determining that his reasons for discharging his counsel were not meritorious.

As this Court has noted, "[t]here are few examples of what constitutes a 'meritorious' reason in Maryland case law." *Weathers v. State*, 231 Md. App. 112, 134 (2016). Although Rule 4-215(e) does not define "meritorious," the Court of Appeals "has equated the term with 'good cause.'" *Dykes*, 444 Md. at 652 (citing *Gonzales v. State*, 408 Md. 515, 531–33 (2009)) (additional citations omitted).

"[A] trial court's determination that a defendant had no meritorious reason to discharge counsel under Rule 4-215(e) is reviewed for abuse of discretion." *Cousins v. State*, 231 Md. App. 417, 438 (2017) (citation omitted). "'[A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.'" *Weathers*, 231 Md. App. at 132 (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)) (additional citation omitted). "To constitute an abuse of discretion, the decision 'has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" *Cousins*, 231 Md. App. at 438 (quoting *Evans v. State*, 396 Md. 256, 277 (2006)).

We have found meritorious reason to discharge counsel where counsel admitted on the morning of trial that he had never discussed the case with the defendant. *Weathers*, 231 Md. App. at 139. Other courts have found that good cause exists where there is "'a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which [could] lead . . . to an apparently unjust verdict.'" *Id.* at 139-140 (J. Graeff, concurring) (quoting *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981) (additional citations omitted).

In support of his contention that the court abused its discretion in finding his reasons to discharge counsel unmeritorious, appellant asserts that defense counsel's "mistakes" in trial preparation had him "understandably concerned" that defense counsel could not provide competent representation, and that it was "manifest" that defense counsel's performance was deficient. Specifically, appellant claims that defense counsel failed to make reasonable efforts to contact the neighbor and that counsel's performance was "clearly deficient" because he did not file a supplementary motion to suppress.

The State submits that the trial court properly exercised its discretion in finding appellant's reasons to discharge counsel unmeritorious. We agree with the State.

In determining whether a defendant's reasons for discharging counsel are "meritorious," "a trial court may choose to credit or discredit the arguments presented, and after doing so, must use its own judgment in making a ruling." *Cousins*, 231 Md. App. at 444. The reasons appellant provided to the court for wanting to discharge counsel was that defense counsel had met with him only three times, that defense counsel went on a vacation without notifying him, and that defense counsel did not begin preparing for trial until two weeks before the trial date. Appellant maintained that, as a result of defense counsel's alleged untimely trial preparation, he was deprived of the opportunity to present a motion to suppress.

According to defense counsel's statements to the court at the postponement hearing, however, defense counsel was engaged in trial preparation at least as early as March, more than two months before trial. With respect to the motion to suppress, defense counsel stated that he was missing discovery, including the search warrant; that he did not have the

search warrant until April; that he reviewed it upon his return from medical leave; and that, since that time, had been trying, without success, to contact the neighbor to determine whether he had personal knowledge that police had actually searched the apartment prior to 12:01 a.m. The court was entitled to credit defense counsel's statements with respect to trial preparation and efforts to investigate potential grounds for the suppression of evidence.[4]

We disagree with appellant's contention that defense counsel's decision not to file a supplemental motion to suppress before speaking with the neighbor compelled a conclusion that appellant lacked effective representation. The State conceded on the record what the neighbor had reported: that police entered the apartment on February 28th. According to the prosecutor, the entry was not an illegal search but a valid procedure to prevent the destruction of evidence while the search warrant was being obtained, and police evidence logs established that nothing was collected prior to issuance of the warrant. The prosecutor's representations were not disputed in the circuit court, nor are they challenged on appeal. On these facts, we cannot conclude that defense counsel's decision to defer filing a supplementary pretrial motion until he confirmed that there were legitimate

[4] Appellant claims that one of the reasons defense counsel gave for failing to contact the witness were that "he could not open electronic discovery." We see no support for this contention in the record. Defense counsel did not indicate that he was unable to open electronic discovery, but only that he was missing discovery from the State. The prosecutor asserted that the search warrant had been provided and that defense counsel had "issues" with respect to downloading discovery. Even assuming the court accepted the prosecutor's explanation, it is not clear what the "issues" were or whether they should have been within defense counsel's ability to resolve.

grounds for the suppression of evidence amounted to a meritorious reason to discharge counsel.

Furthermore, the timing of appellant's request weighs against a finding that his request to discharge counsel was meritorious. As the Court of Appeals has stated, "requests to discharge [counsel] should not be used as 'eleventh hour' tactics to delay the trial[.]" *State v. Campbell*, 385 Md. 616, 635 (2005) (citation omitted). Significantly, appellant told the court that he had been thinking of discharging counsel for over six months. He named three attorneys that he had spoken with since that time and said that he had "recently" decided to retain one of them. Yet, appellant did not request to discharge his appointed counsel until after asking to be supplied with headphones, so that he could hear what took place at the bench during trial, and right before jury selection was about to begin. "Courts have consistently held that the right to counsel does not give an accused the unfettered right to discharge current counsel and demand different counsel shortly before or at trial." *Fowlkes v. State*, 311 Md. 586, 605 (1988). "Although the right to counsel generally embodies a right to retain counsel of one's choice, a defendant may not manipulate this right so as to frustrate the orderly administration of criminal justice." *Id.* (citations omitted).

As the Court of Appeals has observed, "the trial judge is in a unique position to 'sense the nuances' of the situation" in determining whether the Sixth Amendment right to counsel has been violated. *Alexis*, 437 Md. at 483 (citations omitted). We perceive no abuse of discretion in the court's finding that appellant lacked a meritorious reason for discharging counsel.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.