

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
Nos. 0295 & 0500
September Term, 2015
ON REMAND FROM
THE COURT OF APPEALS

JOSEPH RUSSELL GEAR

v.

STATE OF MARYLAND

Wright,
Graeff,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: May 17, 2016

*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.

Appellant, Joseph Russell Gear, was tried and convicted by a jury in the Circuit Court for Anne Arundel County (Goetzke, J.) of credit card theft, credit card fraud, two counts of rogue and vagabond and three counts of theft of property worth less than \$1,000. Appellant’s convictions for credit card theft and credit card fraud were merged, with all but five years suspended for credit card fraud and he was sentenced to ten years of incarceration. He was also sentenced to a concurrent three-year term for rogue and vagabond, a concurrent term of eighteen months for one theft conviction, a suspended three-year term for the second rogue and vagabond conviction, a consecutive, suspended eighteen-month term for the second theft conviction and a concurrent, suspended eighteen-month term for the final theft conviction. The court also imposed a five-year term of probation and ordered appellant to pay \$1,976.00 in restitution.

Appellant filed an appeal to this Court in which he raised, *inter alia*, the question, “Did the lower court err in denying the request for a postponement without following the procedure mandated by Md. Rule 4-215(e)?”

In an unreported opinion, *Gear v. State*, Nos. 295 and 500,¹ September Term, 2015, filed December 29, 2015, we held:

In the case *sub judice*, appellant, through counsel, requested a postponement to hire private counsel. Although arguably incidental to his intent, appellant’s statement could reasonably lead a trial judge to conclude that he wanted to discharge counsel, similar to the facts in *Gambrill*.² Gambrill’s attorney stated, “[y]our honor, on behalf of Mr. Gambrill, I’d request a postponement. He indicates that he would like to hire

¹ Opinion originally filed as No. 295. Later corrected to reflect consolidation.

² 437 Md. 292 (2014).

private counsel in this matter.’ In the instant case, although appellant’s counsel did not expressly state appellant’s clear intent to discharge counsel, the statement concerning postponement and the desire to hire private counsel triggered the Rule 4–215 colloquy.

Gear v. State, Nos. 0295 & 500 SEPT. TERM 2015, 2016 WL 29249, at *8 (Md. App. Jan. 4, 2016) (citations omitted).

In addressing the requirement that a defendant be permitted “to explain the reason for the request to discharge counsel, we opined:

When a court makes the determination that a defendant’s request adequately invokes the application of the Rule, the court “shall permit the defendant to explain the reasons for the request. Md. Rule 215(e).

This requirement is an indispensable part of Maryland Rule 4- 215, subsection (e) in that it essentially leads the trial judge into the various opinions set forth therein . . . allowing a defendant to specify the reasons for his request is an integral part of the Rule and cannot be dismissed as insignificant.

Id. (citing *Williams v. State*, 321 Md. 266, 272–73 (1990)). We thereafter determined that the circuit court “was compliant with the procedural requirements of Rule 4-215 in denying the request for postponement and [that the circuit court] did not commit error.” *Id.* at *9.

On April 22, 2016, the Maryland Court of Appeals filed its opinion in *State v. Jeriko Graves*, No. 57 SEPT. TERM 2015, 2016 WL 1613289 (Md. April 22, 2016). In *Graves*, counsel for the Respondent (Graves) moved for a postponement because Respondent had advised him that he would rather retain another attorney to represent him. After engaging in the litany outlining the charges facing Respondent, the following colloquy occurred:

THE COURT: . . . Now, sir, if I find that you do not have a meritorious reason to discharge counsel, then the trial will proceed as scheduled. Do you understand that?

RESPONDENT: Yes, I do?

THE COURT: All right. Have you hired [new counsel]?

RESPONDENT: No, sir, I haven't hired him.

THE COURT: Have you paid [new counsel]?

RESPONDENT: Sir?

THE COURT: Have you paid him?

RESPONDENT: No, sir.

THE COURT: All right. Have you personally spoken to him about this case?

RESPONDENT: Yes, I was incarcerated and my fiancé . . . went and got a figure from him what he would represent me for.

THE COURT: Okay.

RESPONDENT: And I was trying to get that together as soon as I got out of here.

THE COURT: All right. The Court will deny your request to postpone the motions hearing The case is set today.

Graves, supra, at *2.

After sanctioning the procedure employed in *Taylor v. State*, 431 Md. 615 (2013), in which the defendant confirms the reason espoused by his lawyer, on the record, for his request to discharge counsel, the Court of Appeals, in *Graves*, explicates the requirement, imposed by Maryland Rule 4–215(e):

Our decision in *Taylor* therefore adds an additional layer to our holding above: *if the defendant is not directly asked ‘why do you want to discharge your attorney[,]’ and the reasons for the request instead come from defense counsel, then the defendant must be consulted on the record concerning those reasons* [I]nviting the defendant to weigh-in on the reasons given by defense counsel is sufficient to provide a ‘forum’ for the defendant to explain the reasons for the request under Md. Rule 4–215(e).

* * *

Lastly, the State implies that Respondent was given an opportunity to explain the reasons for his request when asked whether he wanted to discharge his counsel at the end of the court's colloquy. We disagree. Asking Respondent *whether he wanted to fire* his counsel is not the equivalent of asking him *why he wanted to discharge his counsel*. Md. Rule 4–215(e) does not contemplate that a criminal defendant is trained in the law, and as such, the rule does not expect that a defendant will know to proffer information that is not solicited by the court. As we noted in *Pinkney*,³ the rule ‘begins with a trial judge inquiring about the reasons underlying a defendant's request[.]’

Graves, supra, at *10–11 (citations omitted) (emphasis supplied).

In the case *sub judice*, the Court of Appeals, in a *Per Curiam* Order, filed April 25, 2016, vacated the Judgment of this Court and remanded the case to this Court for further consideration in light of the Court’s decision in *Graves, supra*. In support of his argument that “the circuit court did not make any inquiry of Mr. Gear personally before denying the request for a postponement,” appellant recounts the following trial colloquy, in his Supplemental Brief and Appendix:

[ASSISTANT PUBLIC DEFENDER]: We are here for trial today. It has been Mr. Gear’s intention from the first day that I met him to hire private counsel. He has told me that he has wanted to hire private counsel. I spoke—

³ *Pinkney v. State*, 427 Md. 77 (2012).

THE COURT: But he hasn't yet apparently.

[ASSISTANT PUBLIC DEFENDER]: He has not yet.

THE COURT: Okay.

[ASSISTANT PUBLIC DEFENDER]: I spoke this morning with an attorney by the name of Burrige DuBois. His (sic) office, I believe, is in Bowie—who told me that Mr. Gear had, in fact, consulted with her and he has not hired her yet. It is Mr. Gear's intention. He had wanted to hire her and in talking to Mr. Gear, he tells me that he did not do so for a couple of reasons mainly because his girlfriend, who is in court today—now his legal wife, who is in court today, did have some medical problems. She had an extended procedure. I believe it was open heart surgery. And Mr. Gear tells me, and his wife confirms, that she was essentially in the hospital for about a month. And he was, for that month, by her bedside taking care of her as well as taking care of her when she was released from the hospital which obviously had a detrimental effect on his ability to obtain work. So he tells me it's just a situation where he could not come up with the funds in a timely manner.

THE COURT: Okay.

[ASSISTANT PUBLIC DEFENDER]: He has pretty much been adamant that he wants private counsel, again, since the first day that I met him.

THE COURT: Well, a lot of talk and no action from what I gather. So what's the State's position?

PROSECUTOR: State vehemently opposes. We have ten witnesses here. Many of them have taken off work multiple days and this case has been going on long enough. The incidents date back to July.

THE COURT: Yeah. These cases go back to June and July of last year and Mr. Gear is fortunate to have one of the finest lawyers in the State of Maryland representing him. So the case is set for trial and you're going to be scheduled before Judge Goetzke this morning. Okay? Thank you

[ASSISTANT PUBLIC DEFENDER]: Thank you, Your Honor.

THE COURT: Your request for a postponement is denied.

Patently, the litany in the instant case does not comport with requirements of Md. Rule 4–215(e) as determined by the Court of Appeals in *Graves, supra*. As *Graves* instructs, if the accused is not directly asked, by the court, as to why he or she wants to discharge counsel and the reasons are instead provided by counsel, then the accused must still be consulted, on the record, as to those reasons. As the above colloquy illustrates, Gear was not directly asked by the court as to why he wanted to discharge his counsel. Although counsel provided the reasons, the court was still required to consult with Gear, on the record, or invite him to “weigh-in on the reasons given by defense counsel” as to why he wanted to discharge counsel, thereby creating the “forum” Rule 4–215(e) mandates. Strict compliance with the Rule is required to ensure a defendant's rights to a fair trial and to counsel. *Gutloff v. State*, 207 Md. App. 176, 191 (2012) (quoting *Knox v. State*, 404 Md. 76, 87 (2008)). Failure to comply with the Rule constitutes reversible error. *Id.*

In light of the decision in *Graves, supra*, we are constrained to reverse the Judgment of the Circuit Court for Anne Arundel County.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
REVERSED;
COSTS TO BE PAID BY ANNE ARUNDEL
COUNTY.**