UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2266

September Term, 2015

MALIK DAJOUR MOORE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Woodward,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: December 16, 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, Malik Dajour Moore, was convicted, following a jury trial in the Circuit Court for Wicomico County, of two counts of armed robbery, one count of first-degree burglary, and two counts of false imprisonment, among other lesser-included crimes. The trial judge sentenced him to an aggregate sentence of 60 years, with all but 25 years suspended. The convictions were the result of conduct committed during the early morning hours of 23 April 2015 after Moore and two confederates entered (via a window) an occupied residence at 604 Ridge Road in Salisbury.

Moore's appeal raises no challenge to the sufficiency of the evidence to sustain the convictions. The sole question posed in his brief is whether the circuit court abused its discretion in denying his morning-of-trial request to discharge his panel attorney, assigned by the Office of the Public Defender (OPD), principally because the attorney told Moore, at some point prior to the first day of trial, "have fun in jail." Accordingly, we shall not recite further details regarding the evidentiary bases for Moore's convictions, but instead shall dwell on the relevant exchanges, taken from the trial transcript, when Moore advanced, and the court denied, his discharge request.

Moore's assigned panel attorney, who represented him at trial, entered his appearance on 17 July 2015. The court postponed until 28 August 2015 the motions hearing that had been scheduled for July 17. When Moore and his attorney appeared before the court on August 28, another postponement of the motions hearing was granted. Moore did not complain on that occasion about his attorney. Ultimately, the pending

motions were withdrawn. On 22 July 2015, a two-day jury trial, to commence on 29 September 2015, was scheduled.

On the appointed day, and before jury selection or opening arguments, the following relevant exchanges took place in the courtroom:

> [DEFENSE COUNSEL]: Judge, Mr. Moore has told me that he wants a postponement to enable him to get another attorney. He said he's written to Chasity.[1] I've told him that the Public Defender won't give him another attorney and they won't panel – I'm a panel attorney, and they won't panel him another attorney.
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> THE COURT: You're Malik Moore?
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> THE DEFENDANT: Yeah.
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> THE COURT: You understand that once you hire the Public Defender or once the Public Defender represents you, you don't get to choose which Public Defender represents you in court.
>
> THE DEFENDANT: But I don't feel comfortable with him because numerous times he done made remarks like have fun in jail and saying stuff like that. I don't think he cares for me.
>
> THE COURT: Well, you understand the charges against you are very serious, very serious charges.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you understand you need an attorney to represent you, right?
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> THE DEFENDANT: Yeah, but I don't feel he's representing me, I feel he's just doing this to get by. Because every time he comes it's obvious he don't care, just have fun in jail. You stupid this, you're going to get smacked, all this. It's never what can we do or I'm going to try to do this, all right, we can do this. That's never what we can do. It's over. Have fun in jail.
>
> [DEFENSE COUNSEL]: That's a bit of an exaggeration, but some of the remarks were made at one visit. I spent last Friday hours with him determining what we could do with the information that he has.

[1] "Chasity" appears to be someone employed in the Office of the Public Defender. There is no evidence in the record of any written communication from Moore to "Chasity" regarding his displeasure with his assigned panel attorney. *See also infra* p. 4.

THE DEFENDANT: My family called telling me, they tell me, they even telling me he don't care, like when they talked to him they said he made remarks, too.

[DEFENSE COUNSEL]: I made one to your family, I spoke to somebody [t]here one time.

THE COURT: How old are you, Malik?

THE DEFENDANT: 19.

THE COURT: Obviously you're not a lawyer yourself.

THE DEFENDANT: No.

THE COURT: And you didn't have legal training. You understand you are in court up against the State's Attorney himself for Wicomico County. You can't possibly represent yourself, do you understand that?

THE DEFENDANT: Yes, but I don't know.

[DEFENSE COUNSEL]: He wants time to try to retain his attorney. His Hicks[2] date is November 11th.

THE COURT: Well, the case has been set for trial sometime now. The State is here prepared to try its case, there are a number of witnesses. I assume the State is opposed to a continuance.

[PROSECUTOR]: The State is, provided the Court finds that there's not good cause, after voir diring the witness.

I'd also like the Court, with your permission for the record, to explore in what context these statements by [defense counsel] were made, just so it's clear because I have been on the other side of [defense counsel]; to me he's been very diligent, e-mailing me, receiving all the discovery, going over all the interviews, calling me with questions. To me he's been very diligently preparing for trial.

THE DEFENDANT: So what they're saying is if we postpone this I represent myself.

[DEFENSE COUNSEL]: No, if we postpone this, if you fire me you represent yourself.

THE COURT: First of all –

[PROSECUTOR]: There's just no good cause.

THE COURT: – there's no good cause. First of all you have no meritorious reasoning, meaning you have no good reason to discharge [defense counsel].

THE DEFENDANT: My reason is –

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[2] In this context, counsel was referring apparently to *State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979).

THE COURT: But if you want to fire [defense counsel], you have a right to fire him or discharge him and represent yourself, but there is no good cause to postpone the case. Today is your trial date.

THE DEFENDANT: So you're saying by him basically not caring, just trying to go through, that's not a good reason. He's feeling though he is not really – to me I don't feel comfortable with my life in his hands right now basically.

THE COURT: It's like an iceberg, maybe you've been incarcerated in the jail, so maybe you're just seeing the tip of iceberg, you don't know how much he's been doing to get ready for trial and preparing a defense for you. And because he may make some offhand comment about jail doesn't mean he's not working diligently to represent you.

Well, I don't see any meritorious reason for you to discharge [defense counsel]. If you want to discharge him, you can do so, but, Mr. Moore, you're going to have to represent yourself today because there's no good cause to postpone this case.

So I'm assuming you wish to keep [defense counsel].

THE DEFENDANT: (Nodding head in the affirmative.)

THE COURT: All right, now do you want to put the plea on the record?[3]

[PROSECUTOR]: Your Honor, would you mind inquiring what efforts, if any, he's made [un]til today? I think that's one of the criteria.

THE COURT: To do what?

[PROSECUTOR]: What efforts he's made to this moment to remedy this situation.

THE COURT: To get another attorney?

[PROSECUTOR]: Uh-huh.

THE COURT: Have you made any effort to get an attorney?

THE DEFENDANT: Huh?

THE COURT: Have you tried to get an attorney at all?

THE DEFENDANT: I asked my case manager and she told me to write Ms. Chasity Simpson.

THE COURT: Well, I know the policy of the Public Defender, and counsel can correct me if I'm wrong. But once you get a Public Defender representing you, they don't let you pick and choose which one you want.

[3] After the court denied Moore's discharge of counsel request, the State put on the record that Moore rejected the State's pre-trial offer of a plea deal that would have "capped" the incarceration portion of the State's sentencing request at a total of 40 years, suspend all but 20 years.

THE DEFENDANT: I ain't trying to pick a specific one. I just wanted one that was going to try harder and like not basically appear to give up right in my face.

THE COURT: Well, I doubt if [defense counsel] has acted in the manner you described.

THE DEFENDANT: I mean even people – all right, I get it.

THE COURT: Now, you want to keep [defense counsel], that's in your best interest.

THE DEFENDANT: Yeah.

As noted earlier, Moore was convicted of the counts that resulted in his sentence. His appellate brief poses a single query for us: "Did the court abuse its discretion in denying Mr. Moore's request to discharge counsel when defense counsel had told Mr. Moore, 'have fun in jail?'" Our answer is "No."

Standard of Review

The parties agree that "abuse of discretion" is the appropriate appellate touchstone for our review of the trial judge's finding that Moore advanced an insufficiently meritorious basis for discharging his assigned panel attorney. *See Pinkney v. State*, 427 Md. 77, 86-87, 46 A.3d 413, 418-19 (2012). "Abuse of discretion," a much bandied-about phrase in the common law, is understood best as follows:

> One of the more helpful pronouncements on the contours of the abuse of discretion standard comes from Judge Alan M. Wilner's opinion in *North v. North,* 102 Md. App. 1, 648 A.2d 1025 (1994). Now retired from this Court, but then the Chief Judge of the Court of Special Appeals, Judge Wilner explained:
>
> > "Abuse of discretion" is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. It has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the

> logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice."
>
> There is a certain commonality in all these definitions, to the extent that they express the notion that 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. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective. That, we think, is included within the notion of "untenable grounds," "violative of fact and logic," and "against the logic and effect of facts and inferences before the court."

King v. State, 407 Md. 682, 697, 967 A.2d 790, 798–99 (2009) (quoting *North*, 102 Md. App. at 13–14, 648 A.2d at 1031–32) (alterations in original) (citations omitted).

Analysis

A request to discharge counsel, such as occurred here, is governed by Rule 4-215(e):[4]

> **(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

[4] Because "meaningful trial proceedings," as the cases define that phrase (*see State v. Hardy*, 415 Md. 612, 624-28, 4 A.3d 908, 915-17 (2010)), had not been conducted as of the time Moore lodged his request to discharge counsel, Rule 4-215(e) applies.

> 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. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Moore asks exclusively whether the trial judge's determination that "no meritorious reason" was presented, such as to persuade the judge to allow Moore to discharge his panel defense attorney and thereby obtain a trial postponement to secure substitute counsel, was an abuse of discretion.[5]

The trial judge's duties under the Rule have been described as:

> . . . once a defendant makes an apparent request to discharge his or her attorney, the trial judge's duty is to provide the defendant with a forum in which to explain the reasons for his or her request. The record also must be sufficient to reflect that the court actually considered th[e] reasons given by the defendant. . . . [I]f the court finds that the defendant's reason for discharging his defense counsel is not meritorious, it must first inform 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." Once the defendant is notified thus, the trial judge may proceed by "(1) deny[ing] the request and, if the defendant rejects the right to represent himself and instead elects to keep the attorney he has, continue the proceedings; (2) permit[ting] the discharge in accordance with the Rule, but require counsel to remain available on a standby basis; [or] (3) grant[ing] the request in accordance with the Rule and relieve counsel of any further obligation."

[5] The record does not make clear whether, had Moore's discharge request been found to be meritorious, he would be seeking a new panel attorney from the OPD or engaging privately-retained counsel. At best, the record permits an inference that it was Moore's intent to pursue the former option because of the reference to Ms. Simpson, who is apparently an OPD employee. There is virtually nothing in this record to corroborate that Moore complained, in writing or orally, to Ms. Simpson before trial.

State v. Taylor, 431 Md. 615, 631-32, 66 A.3d 698, 708 (2013) (alterations in original) (internal citations omitted). Because Moore challenges only the exercise of discretion in finding no meritorious cause, it is assumed for the purposes of this opinion that the trial judge complied in all other respects with the requirements of Rule 4-215(e).

Moore's argument is not frivolous on its face. Putting aside the vagaries of some of his "factual" assertions,[6] Moore's flagship factual support for his claim that he had a meritorious reason for wanting to discharge counsel is that his counsel said to him at some point "have fun in jail." From this, Moore deduced that his attorney did not "care[] for [him]," and was not representing him with an objective of achieving a favorable outcome. Defense counsel offered a limited acknowledgement that indeed he made such a remark, perhaps once or twice during a visit with Moore at the jail during trial preparation. Counsel admitted also making a remark (of presumably similar ilk, but of unspecified content) to Moore's family at some point before trial. Depending on context, such occurrences might persuade a judge that Moore had good cause to be less than confident that counsel would represent him with warm zeal in defending the serious charges Moore faced. Had the trial judge here found Moore's claim to be meritorious, we would be obliged, by application of the abuse of discretion standard, to affirm. Context, however, is critical to Moore's claim that the trial judge abused his discretion in

[6] "[S]aying stuff" to Moore, advising him that he "was going to get smacked," and making "remarks" to Moore's family are unilluminating and vague contentions that do not advance a comprehensible meritorious basis for discharge of appointed counsel.

finding no meritorious reason for Moore to discharge counsel. It is context that is lacking in the record regarding Moore's claim. The trial judge, although not required to articulate every step in his reasoning to reach his finding, was free to indulge mentally in a number of reasonable inferences (from the state of this record) that might have undergirded his decision to reject Moore's request.

Moore was given an opportunity to explain and elaborate more fully than he did the facts underlying his request. Moreover, he does not complain to the contrary. "Rule 4-215(e) and our case law construing that rule require no more of a trial court." *State v. Taylor*, 431 Md. 615, 629, 66 A.3d 698, 707 (2013). "A trial judge has no affirmative duty to rehabilitate a defendant's expression of why he or she may desire to discharge his or her counsel; rather, the trial judge has the duty to listen, recognize that he or she must exercise discretion in determining whether the defendant's explained reasons are meritorious, and make a rational decision." *Taylor*, 431 Md. at 642, 66 A.3d at 714. As in *Taylor*, the judge here did not ignore Moore's request. Moreover, just as the professed higher "comfort level" by Taylor with the desired new counsel was a non-starter as a sufficiently meritorious reason to warrant granting a request to discharge existing counsel (*see Taylor*, 431 Md. at 638, 66 A.3d at 712), Moore's concern that his assigned counsel did not "care[] for [him]" could be no more availing as a compelling legal reason to discharge counsel.

Given that Moore did not express publicly his displeasure with his attorney until the morning of the first day of trial (when it could be inferred that a possible reason for

this timing was perhaps to secure deferral of the day of reckoning), it might have aided Moore's request had he bolstered it with such "facts" as when counsel made to him the remark or remarks about having "fun in jail" (such that Moore may have had no reasonable opportunity to complain before trial) and the context in which the remark(s) was/were made (if the context were the remark(s) was/were made during an exchange discussing the State's plea offer, it could be inferred reasonably that defense counsel made the remark or remarks to focus a perhaps unreceptive client on the arguable reasonableness of the offer, in light of the serious charges and a possibly less-than-gripping prospect of what defense or defenses was/were available).

Although supplied largely by the prosecutor, the information on the record before the trial judge suggests that defense counsel had prepared for trial. He met with his client. He spoke to Moore's family. He interacted and negotiated with the prosecutor. He prepared *voir dire* questions and jury instructions to propose to the judge. In short, all that appeared of record was that defense counsel performed his role appropriately (other than the questioned remarks he conceded making to his client).

We are unable to conclude that the trial judge abused his discretion on the record before him, even if we would have acted differently had any of us been the trial judge confronted with the same record.

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