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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LEON SIMS, Defendant and Appellant.	B233826 (Los Angeles County Super. Ct. No. BA379806)

APPEAL from an order of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Craig C. Kling, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Leon Sims appeals from his conviction for possession of a controlled substance, contending the trial court abused its discretion when on the day of trial it denied his request for a continuance to retain a private attorney. We affirm.

BACKGROUND

On January 6, 2011, Los Angeles Police detectives Ronald Kitzmiller and James Miller observed defendant disposing of an off-white solid substance that turned out to be cocaine base. When they arrested him, he had 67 cents on his person and was homeless. He was charged with possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a).

At the conclusion of the preliminary hearing, defendant evinced dissatisfaction with his stand-in public defender, telling her, "Thought I was going to get to talk. I thought I was going to get to fucking talk. That's what you just told me before you brought me in here. I was going to get to address the judge. Fucking lying ass bitch." When the trial court intervened, he told the judge, "Fuck you."

On March 14, 2011, defendant moved to replace his assigned public defender with another public defender pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), stating he distrusted her because she did not communicate with him and took no action to have a prior strike stricken. The motion was denied. Defendant does not contend this was error.

On March 28, 2011, at least 10 weeks prior to trial, defendant's counsel represented to the court that defendant was unable to assist her with the defense. Defendant objected to any further delay, complaining his case had been trailed "for many excuses about some medical issue that" his public defender had "conjure[d] up." He said, "She just threatened in the court—in the bull pen that—because I wouldn't listen to her deal—this is what she was going to do. [¶] . . . . [¶] And I'm coming in, tell you she said, literally said, if you don't want to hear the deal, I'm going to go into the courtroom, declare a doubt, you're going to go state hospital [sic], the doctor is a [sic] my friend and he's going to declare you, I don't have to come in the courtroom, I can do it without you. [¶] This is her exact words. I got five people out there in the bull pen right now that will

come in here and state that she actually said that in those exact words. [¶] . . . . [¶] So, I'm saying that, once again, like I said last—two weeks ago, I got ineffective counsel. I don't need her on my case. [¶] And before we go any further with this and you [sic] honor that doubt that she claims [sic], get her off my case, because I don't need her." When the trial court informed defendant it would hear his second *Marsden* motion at a later time, he said of his counsel, "Oh, so in other words, you going to let her give me life in the penitentiary, in the county jail, back and forth for a measly simple little piece of cocaine that they claim I got, ain't even five dollars' worth of cocaine. And I been here since January 5th. She's giving me enough time . . . ."

Proceedings were suspended and defendant was required to undergo a competency evaluation. Defendant was found to be competent, and on April 15, 2011, abandoned his request for a second *Marsden* hearing, though he continued to express dissatisfaction with his attorney. He complained nothing was being done on his case and his attorney "never gave [him] opportunity [sic] or offered [him] the right to a speedy trial." The court told defendant, "In listening to you, I have really tried to be patient with you this morning. I spent yesterday afternoon reading your file, weighing very carefully whether or not I was going to give you a great break by striking a strike. And all you have fed me this morning is one complaint after the next. [¶] And so at this moment I have no intention of striking a strike to give you the benefit of a drug program because your behavior in this courtroom for the last 10 minutes has convinced me there isn't a drug program on this planet that you could succeed in because you can't listen to people. You can't figure out what is in your best interest."

On June 14, 2011, the day of trial, the trial court offered defendant one year in a diagnosis and treatment facility in return for an unrestricted guilty plea. If he completed the program he would be sentenced to probation rather than prison. The prosecution strenuously objected to the offer, citing defendant's extensive criminal history going back 20 years, including many drug-related arrests, three misdemeanor battery convictions that resulted in probation, a felony drug conviction that earned him probation, and two felony convictions that resulted in four- and five-year prison sentences.

After a lengthy discussion to address his questions about the program, defendant said, "I could have got an attorney, but I didn't. I decided that it wasn't all that serious. But it looks like it's becoming extremely serious. [¶] So, I mean, if I'm in a program for one year, I mean, who's to know who's gonna be stalking me in that program because of they finding out who I am and—and what my ailment might be presently, past, or future, based on the wealth of my family?" He said he wanted to take advantage of the program, but at the same time objected to it, asking, "isn't one year kind of harsh for what they claim I did? They—they claim that I did this. I mean, one year? I'm stuck one year?" The court then withdrew the offer.

After further conversation with appointed counsel, defendant agreed to accept the offer, but by that time it was no longer available. Defendant then asked counsel, "I don't get to go to the program?" Counsel responded, "That's okay. We will do the trial." Defendant said, "If I don't understand, I don't understand. What I need to do is fire you. that's what I need to do."

The following colloquy then occurred:

"THE DEFENDANT: 'I am—I have a situation here where my parents, right, asked me to ask for more time—or a little time to get a paid lawyer. They want to get me my own lawyer.'

THE COURT: 'No. You have an attorney. We are going forward.'

THE DEFENDANT: 'Okay. Then I don't have the right to a paid lawyer? Is that what you are saying?'

THE COURT: 'You have a lawyer.'

THE DEFENDANT: 'But I don't have the right, is what I'm saying?'

THE COURT: 'This information was filed on March 14, 2011. Today is June 14, 2011. You had three full months.'

THE DEFENDANT: 'I never had the opportunity—I never had the opportunity to be offered the right to get a paid lawyer. That's why I was—'

THE COURT: 'You had the opportunity.'

THE DEFENDANT: '—That's why I was asked to come in here and ask—'

THE COURT: 'No.'

THE DEFENDANT: '—if I have that right to a paid lawyer.'

THE COURT: 'You did, just not anymore.'

THE DEFENDANT: 'When—when did that time—when did I lose that opportunity?'

THE COURT: 'Anytime between January 10, 2011 when you were arraigned in municipal court—or limited jurisdiction court and this case was sent out for trial. Okay? [¶] A request to now try to hire a lawyer is untimely. We are ready to proceed to trial. The witnesses are here. We are going to proceed.'"

Detectives Kitzmiller and Miller, the only witnesses, were present in court. Defendant's parents were not present. No letter was given to the court from the parents requesting a delay and offering to pay the cost of a private attorney.

Defendant waived a jury trial, was found guilty by the court, and was sentenced to three years in prison.

DISCUSSION

Defendant contends the trial court abused its discretion when it denied his motion to continue trial to obtain a private attorney, which he claims deprived him of his constitutional right to engage counsel and to defend against the charge. We disagree.

"Continuances shall be granted only upon a showing of good cause." (Pen. Code, § 1050, subd. (e).) "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [Citation.] Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. [Citation.] There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589; *People v. Howard* (1992) 1 Cal.4th 1132, 1171.) "An important factor for a trial court to

consider is whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

"The burden is on [the defendant] to establish an abuse of judicial discretion in the denial of his request for continuance to secure new counsel. [Citation.] The resolution of the issue depends upon the circumstances of each case. [Citations.] The right of a defendant to appear and defend with counsel of his own choice is not absolute but must be carefully weighed against other values of substantial importance such as those seeking 'the orderly and expeditious functioning of judicial administration.' [Citation.] A defendant is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory [citation], and the trial court may in its discretion deny a motion for continuance to secure new counsel if the motion is made during trial. [Citations.]" (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506.)

When defendant was arrested he was homeless and had 67 cents in his pocket. Before trial he appeared at hearings on February 28, March 14, March 18, and April 15, 2011. At every hearing up to and including the day of trial he expressed dissatisfaction with his appointed counsel, cursing her at the preliminary hearing, moving twice to have her replaced, and complaining she was doing nothing on his case and would end up getting him "life in the penitentiary." On the morning of trial he indicated he had a wealthy family and could have obtained private counsel, but decided not to because the matter "wasn't all that serious." It was not until later in the morning, literally minutes before trial, that defendant finally relayed a request from his parents to ask for a continuance to secure new counsel. On this record, the trial court was well within its discretion to find defendant was dilatory in making the request.

Defendant argues the court could not properly exercise its discretion without first obtaining and considering all material facts. (*People v. Davis* (1984) 161 Cal.App.3d 796, 804.) Defendant then sets forth a long list of facts the trial court did not know, for example whether defendant in fact had wealthy parents who had contacted him and would fund his defense, the time it would take to secure new counsel, and whether a continuance would inconvenience the prosecution. We conclude these facts were

unnecessary. It was sufficient that defendant admittedly spoke with his parents some time before trial but chose not to heed their advice about seeking private counsel until his own actions necessitated that there in fact would be a trial. On these admitted facts alone, the court could reasonably find defendant to have been dilatory.

Defendant argues his belated request for a continuance to secure new counsel was not arbitrary, as it was not until the trial court withdrew its offer of a drug treatment program that defendant's frustration with appointed counsel "came to a head." The record does not support the argument. Defendant was at all times dissatisfied with appointed counsel, from the first hearing to the last. Nothing trial counsel did on the day of trial brought matters to a head. On the contrary, counsel obtained for defendant, over the prosecution's strenuous objection, the best deal he was ever likely to get. It was defendant's own reluctance to accept the deal that caused the offer to be withdrawn. It was also he alone who decided not to seek private counsel until minutes before trial started, and the witnesses were in court ready to testify. On this record we perceive no abuse of judicial discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.