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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RODNEY KEVIN ROGERS, Defendant and Appellant.	B214404 (Los Angeles County Super. Ct. No. BA331591)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, William Sterling, Judge. Affirmed.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Rodney Kevin Rogers appeals from a post-judgment order revoking his probation and executing a previously suspended state prison sentence. Rogers contends he was denied his rights to counsel of his choice and to due process by the trial court's refusal to grant his newly-retained counsel a continuance to prepare for the probation violation hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 10, 2008, Rogers entered a negotiated plea of no contest to one count of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) and admitted he had previously suffered one prior drug-related offense within the meaning of Health and Safety Code section 11370.2, subdivision (a). Pursuant to the plea agreement, the trial court sentenced Rogers to an aggregate term of eight years in state prison, suspended execution of sentence and placed Rogers on three years of formal probation.

On August 26, 2008, the People alleged Rogers had violated probation as a result of his arrest on August 22, 1008, for selling cocaine base. (Health & Saf. Code, § 11352, subd. (a); case No. BA345472.) Rogers appeared in court with appointed counsel and denied the allegation. The trial court summarily revoked probation and scheduled a contested probation violation hearing for September 8, 2008, to trail the proceedings in the newly filed case.

In the months that followed, Rogers appeared in court with appointed counsel on seven different occasions prior to the probation violation hearing; the last of these appearances was on Friday, January 9, 2009 in Department 100, when the court granted a motion to dismiss case No. BA345472, the People having elected solely to pursue the probation violation.[1] The parties announced their readiness to proceed with the probation violation hearing, and the matter was transferred to Department 133, where Rogers was ordered to appear the following Monday, January 12, 2009.

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[1] The People also had case No. BA345472 dismissed as charged against codefendant Marvin Cropper, and proceeded against him in the same probation violation hearing. Cropper is not a party to this appeal.

On the morning of January 12, 2009, Rogers, who was still represented by appointed counsel, appeared with retained attorney Garo Ghazarian and asked leave to have him substituted in as his counsel. The trial court stated the request was untimely, given that the case had been pending for some time, all parties had answered ready to proceed with the hearing, and the People had their witnesses present to testify. The court explained that Rogers had "more than adequate notice to get ready on this" and had ample opportunity to hire private counsel, which had not been affected by the People's recent decision to dismiss the newly filed case. Finding no good cause for a continuance, the trial court indicated it would grant the motion to substitute counsel only if attorney Ghazarian were ready to try the alleged probation violation. The court agreed to a two-hour noon recess to enable attorney Ghazarian to confer with Rogers.

Attorney Ghazarian informed the trial court he had already discussed the case with appointed counsel and believed he would be able to prepare for the hearing during the two-hour recess. He added, however, if Rogers's "wishes are contrary to the court's position, obviously, there's nothing I can do about that. . . . [T]he court is not inclined to give me additional time to prepare. I'm unfortunately in the awkward position of being unable to disagree with court [sic] without really having read anything to see if there's anything more I should have been doing before this afternoon."

When the hearing resumed the same day, Ghazarian told the trial court he was ready to proceed; and Rogers confirmed he wanted to replace appointed counsel with Ghazarian. The court granted Rogers's request, and the hearing commenced.

According to the People's hearing evidence, Rogers was arrested after an undercover narcotics officer watched him and other individuals engage in the sale of rock cocaine outside a residence.[2] Rogers testified in his defense that he was at the residence waiting for his girlfriend and saw the other individuals arrive. However, Rogers denied interacting with them, or possessing or selling rock cocaine.

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[2] Codefendant Cropper was among the other individuals at the residence.

At the conclusion of the hearing, the trial court took the matter under submission. On January 16, 2009, after listening to further argument from counsel, the court found Rogers in violation of probation. The court continued sentencing until February 4, 2009, at which time the court ordered executed the previously suspended eight-year state prison sentence.

DISCUSSION

A continuance in a criminal proceeding is to be granted only upon a showing of good cause. (§ 1050, subd. (e).) This motion is left to the trial court's discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) Although generally a defendant must be given a reasonable opportunity to employ and consult with counsel of his own choice, the trial court need not always grant a continuance to allow a defendant to retain private counsel. (*People v. Courts* (1985) 37 Cal.3d 784, 790.) "The right of a defendant to appear and defend with counsel of his choice is not absolute." (*People v. Rhines* (1982) 131 Cal.App.3d 498, 506; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*Courts*, at pp. 790-791.) In deciding whether the trial court's denial of a continuance was so arbitrary as to deny due process, this court "looks to the circumstances of each case, '"particularly in the reasons presented to the trial judge at the time the request [was] denied."' [Citations.]" (*Id.* at p. 791.) "Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal. [Citation.]" (*People v. Doolin, supra*, 45 Cal.4th at p. 450.)

Rogers claims the trial court abused its discretion in denying his newly-retained attorney a brief continuance to prepare for the probation violation hearing and thereby deprived Rogers of his rights to counsel of his choice and to due process. He cites several cases in support of this contention, but discusses *People v. Lara* (2001) 86 Cal.App.4th 139, *People v. Crovedi* (1966) 65 Cal.2d 199, and *People v. Courts, supra*, 37 Cal.3d 784 at some length. None of them apply here.

In *Lara, supra*, 86 Cal.App.4th at pages 150-154, the Court of Appeal held the trial court erroneously required the defendant to show inadequate representation or irreconcilable conflict in seeking to replace retained counsel, although such showing is required only when a defendant wants to relieve appointed counsel (see *People v. Marsden* (1970) 2 Cal.3d 118). Thus the issue in *Lara* was whether the trial court's treatment of the defendant's request to discharge his retained counsel as a *Marsden* motion constituted reversible error.

In *Crovedi, supra,* 65 Cal.2d at pages 206–209, the Supreme Court determined the trial court erred when it discharged the defendant's counsel, who had suffered a heart attack in the middle of the trial, even though a physician stated the attorney could resume the trial in two months, the same amount of time it would take successor counsel to prepare for trial. Here, by contrast, Rogers was not deprived of counsel of his choice or of due process because the trial court granted his request to replace appointed counsel with attorney Ghazarian, who tried the probation violation.

In *Courts, supra*, 37 Cal.3d at page 796, the California Supreme Court held the trial court erred in denying the defendant's request for a continuance so retained counsel could be brought into the case, finding the defendant had been reasonably diligent in trying to replace the attorney appointed by the trial court with retained counsel. *Courts* is inapposite here, primarily because neither attorney Ghazarian nor Rogers asked the trial court to continue the probation violation hearing.

We understand Rogers's position that the trial court's stated refusal to allow a continuance if it were to grant the motion to substitute counsel presented Rogers with "a Hobson's choice" of either proceeding with his counsel of choice, who was new to the case, or keeping appointed counsel, whom he no longer wished to represent him. However, Ghazarian neither expressed any reservations to the trial court about proceeding with the hearing without a continuance, nor made a specific request for more time to prepare. Instead, Ghazarian stated he was not challenging the court's finding as to the lack of good cause for a continuance and, given the two-hour noon recess, he would be prepared to try the probation violation. He told the court his only concern was

whether Rogers would agree to having him substitute in without a continuance. Thereafter, following the noon recess, Ghazarian answered he was ready to proceed immediately, and defendant confirmed he wanted to replace appointed counsel with Ghazarian. Nothing in the record suggests either Rogers or Ghazarian believed that trying the probation violation without more time to prepare was somehow prejudicial; and Rogers does not identify any reason for being dissatisfied with Ghazarian's representation of him at the two-day hearing.[3]

In any event, the trial court did not abuse its discretion by denying a continuance on the morning of the probation violation hearing for lack of good cause. Unlike the defendant in *Courts*, Rogers was unjustifiably dilatory in replacing appointed counsel. The probation violation hearing had been pending for over four months and Rogers's request to substitute counsel was made after all parties had announced their readiness to proceed. Additionally, Rogers offered no excuse for the lateness of his request, stated no reason for changing counsel, and identified no basis for dissatisfaction with the performance of appointed counsel. (See *People v. Blake*, *supra*, 105 Cal.App.3d at pp. 623-624.)

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[3] Although Rogers now suggests that a continuance might have enabled attorney Ghazarian to gain *Pitchess* discovery (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, Evid. Code, § 1043 et seq.), based on the attorney's comments at sentencing, or to move to sever Rogers's hearing from that of Marvin Cropper's, Rogers acknowledges those issues have been forfeited. Nor does he claim that either of his counsel rendered ineffective assistance.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.