

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 1, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2538-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DION PATTON,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Dion Patton appeals from a judgment entered after a jury convicted him of first-degree intentional homicide and first-degree sexual assault of a child, contrary to §§ 940.01(1) and 948.02(1), STATS. He claims that the trial court erroneously exercised its discretion by denying his trial counsel's

motion to withdraw, which was coupled with a request for a continuance. Because the trial court did not erroneously exercise its discretion, we affirm.

## I. BACKGROUND

On November 12, 1995, Annie Mullins went to work, leaving her seven-month-old daughter, Kalie, with Patton. Patton was Mullins's live-in boyfriend. At approximately 11 a.m., Patton called Mullins at work and told her that Kalie did not look good. Patton told Mullins that Kalie was not breathing. Kalie was taken to St. Luke's hospital where she was pronounced dead. An autopsy revealed that the cause of death was manual strangulation, and that Kalie had mucoid-appearing fluid, which contained spermatozoa, coming from her vagina.

After reading Patton his rights, the police elicited a statement from him. Patton stated that on November 8, 1995, as he was changing Kalie's diaper, he became sexually excited, masturbated, and ejaculated onto his hand. He then inserted and removed his finger into Kalie's anus for about one hour. He also told the police that on November 12, 1995, Kalie woke up crying and he became very angry because she would not stop crying. He said that he grabbed her by the neck and squeezed until he could squeeze no more. Kalie stopped crying, and he put her in her crib. Several hours later, he checked on her, and she was not breathing.

Patton was charged with first-degree intentional homicide and first-degree sexual assault of a child. One week before trial, Patton had a disagreement with his attorney about the theory of defense. His attorney was planning to present a defense which involved Patton acknowledging that he committed certain conduct. Trial counsel stated that Patton had agreed that presenting this theory was the best defense. However, shortly before trial, Patton changed his mind and

wanted counsel to present a defense on the theory that Patton was not involved in the crimes in any way. Because of this conflict, counsel filed a motion to withdraw and for an adjournment. The motion was heard on the day trial was scheduled to begin. The trial court denied the motion. The case was tried to the jury. The jury convicted. Patton now appeals.

## II. DISCUSSION

Counsel's motion to withdraw, coupled with a motion for a continuance, is addressed to the sound discretion of the trial court. *See State v. Scarbrough*, 55 Wis.2d 181, 186, 197 N.W.2d 790, 793 (1972); *see also State v. Lomax*, 146 Wis.2d 356, 360, 432 N.W.2d 89, 91 (1988). We will not reverse a trial court's discretionary determination if the trial court examined all the facts, applied the proper legal standards and reached a reasonable determination. *See State v. Dwyer*, 143 Wis.2d 448, 457, 422 N.W.2d 121, 124 (Ct. App. 1988), *aff'd*, 149 Wis.2d 850, 440 N.W.2d 344 (1989). The request should not be granted unless "good cause is shown." *State v. Johnson*, 50 Wis.2d 280, 285 n.4, 184 N.W.2d 107, 110 n.4 (1971).

In denying Patton's counsel's motion to withdraw and for an adjournment, the trial court reasoned:

The Court would note that this case was charged in November 1995. The initial appearance was November 14, 1995.

There were numerous, there have been numerous appearances in the Court for various reasons set forth on the record. A scheduling order was entered in this case, setting this case for the date of trial, and the date of that scheduling order was December 14, 1995.

And now, three months later, we are on the date of trial after all of those appearances, and we now have a

request on the day of trial for counsel to withdraw from representation of Mr. Patton for the reason that the defendant has changed his theory of defense.

It seems to me, given the statements made by counsel, that that change is of the defendant's own decision. There is a statement that when it comes time to "walk the walk," as it were, he can't do it.

....

... This case has been discussed on numerous occasions, and it seems to me that by now seeking an adjournment on the day of trial, on the day of trial the Court can only conclude that the defendant, when faced with the obvious – that the case is going to trial and it's not going to be dismissed or go away – the defendant doesn't want that.

Certainly that's understandable, that the defendant doesn't want that, but I think to wait to the date of trial is to manipulate the system, and the Court will not tolerate that.

We are ready to proceed at this time. All of the motions have been heard, and the Court will deny the motion to adjourn and will deny the motion to withdraw as counsel.

Our evaluation of the trial court's ruling involves evaluating:

(1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

*Lomax*, 146 Wis.2d at 359, 432 N.W.2d at 90. Having evaluated these three factors, we cannot conclude that the trial court erroneously exercised its discretion in denying the motion.

It appears from the record that the trial court made an adequate inquiry of Patton's complaint. The trial court was apprised of the problem that arose between Patton and his attorney—that Patton had changed his theory of

defense. The trial court took the time to evaluate whether this conflict necessitated a delay and appointment of new counsel. We conclude that the trial court's inquiry was adequate.

Next, we consider the timeliness of the motion. The motion was made on the day trial was scheduled to begin. All parties were present. Witnesses, including medical experts, were available to testify. Although the alleged conflict arose only a week prior to trial, we agree with the trial court that Patton's request was a mere tactic to delay. Patton had agreed to the original defense theory until one week before trial. Patton and his counsel had been preparing the original defense for several months. Patton did not complain about counsel's strategic choices or tactical decisions until Patton decided he wanted to present a theory different from the one that Patton and his attorney had agreed upon. Under these circumstances, we conclude that Patton's request was not timely.

Third, we conclude that the alleged conflict was not so great that it likely resulted in a total lack of communication or prevented an adequate defense. Counsel competently defended Patton on Patton's chosen theory of complete innocence. His valiant defense effort is evidenced by the record as well as the fact that Patton has not alleged on appeal that any of his counsel's conduct constituted ineffective assistance. It does not appear that Patton and counsel were unable to communicate or that counsel was not able to present an adequate defense.

Accordingly, after reviewing the trial court's ruling and the record as a whole, we cannot conclude that the trial court's determination constituted an erroneous exercise of discretion. It considered the pertinent facts, including the time the case was pending, the length of time that Patton had agreed to counsel's

theory of defense, the fact that Patton changed his mind at the last minute regarding the defense theory and the fact that the State was ready to proceed.

The record demonstrates that the trial court applied the proper legal factors, basing its decision on the preparation that had already occurred and its belief that Patton was attempting to manipulate the system as a delay tactic. These are proper factors to consider in deciding whether to grant a motion to withdraw.<sup>1</sup> Further, this court has held that mere disagreement over trial strategy is not good cause for allowing an attorney to withdraw. *See State v. Robinson*, 145 Wis.2d 273, 278, 426 N.W.2d 606, 609 (Ct. App. 1988).

Patton claims that because the trial court denied the motion, he was denied his right to present a defense of complete innocence. He theorizes that a conflict arose between his right to defend himself as innocent and his counsel's ethical responsibility not to suborn perjured testimony. We are not persuaded by Patton's theory because, after reviewing the record, we cannot conclude that counsel's ethical obligations compromised the defense.

---

<sup>1</sup> Patton also claims that the trial court erroneously exercised its discretion when it denied the motion because the trial court did not apply the legal factors set forth in *State v. Lomax*, 146 Wis.2d 356, 360, 432 N.W.2d 89, 91 (1988). In *Lomax*, the supreme court set forth factors to consider when determining whether good cause exists to justify granting a motion for substitution of counsel filed in conjunction with a motion for a continuance. The factors include: (1) "the length of the delay requested;" (2) "whether the 'lead' counsel has associates prepared to try the case in his absence;" (3) "whether other continuances had been requested and received by the defendant;" (4) "the convenience or inconvenience to the parties, witnesses and the court;" (5) "whether the delay seems to be for legitimate reasons; or whether its purpose is dilatory;" and (6) "other relevant factors." *Id.* at 360, 432 N.W.2d at 91. (Internal quotations removed). As noted above, our review demonstrates that the trial court properly exercised its discretion. The fact that the trial court did not specifically mention and/or address each of the *Lomax* factors does not render its decision erroneous. The *Lomax* case does not stand for the proposition that a trial court must consider each of these factors or else its decision constitutes an erroneous exercise of discretion. The *Lomax* list merely provides the court with relevant factors to consider to reach a reasonable conclusion. In the instant case, the pertinent factors were considered.

The record demonstrates that Patton exercised his right not to testify. The trial court ensured that Patton knew of his right to testify on his own behalf and determined that Patton knowingly and voluntarily waived that right. We note that Patton does not argue that he wanted to offer testimony and his attorney refused to put him on the stand because he believed Patton would perjure himself. In light of these factors, we conclude that Patton's claim is without merit. According to the record, counsel competently defended Patton on the theory of innocence that Patton insisted on proffering. The conflict that Patton theorizes existed in support of his claim that the trial court erroneously exercised its discretion simply did not occur. Patton was able to present his chosen theory of defense—that he was completely innocent, and his counsel was not forced to suborn testimony that he believed to be false because Patton waived his right to testify on his own behalf.<sup>2</sup>

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

---

<sup>2</sup> Because the trial court did not erroneously exercise its discretion in denying the motion to withdraw, it logically follows that it was not error to deny the accompanying motion for a continuance. The purpose of the continuance was to allow time for new counsel to be appointed. Because new counsel was not necessary, there was no reason for a continuance.





