

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 18, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2008AP2954-CR

Cir. Ct. No. 2004CF7066

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON E. KURTZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM SOSNAY, Judge. *Affirmed.*

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

¶1 KESSLER, J. Jason E. Kurtz appeals from an order denying his motion for postconviction relief. Kurtz argues that he is entitled to a new trial because the trial court erroneously exercised its discretion when it denied Kurtz's pretrial motion to change counsel and when it affirmed that decision after

conducting a retrospective evidentiary hearing that we ordered as a result of Kurtz's first appeal. See *State v. Kurtz*, No. 2007AP339-CR, unpublished slip op. ¶¶5-7 (WI App June 24, 2008) ("*Kurtz I*"). Because the trial court concluded that evidence at the retrospective hearing did not establish a substantial breakdown in communication at the time Kurtz requested new counsel, and because there are facts in the record supporting that conclusion, we affirm the trial court's exercise of discretion.

BACKGROUND

¶2 In February 2006, Jason E. Kurtz was convicted, after a jury trial, of first-degree reckless homicide and delivering a controlled substance.¹ He filed a

¹ In our decision in Kurtz's first appeal, we summarized the background facts:

Kurtz was charged with selling gamma-hydroxybutyric ("GHB") acid ("ecstasy") to a woman who later died from ingesting that substance, and [with] selling more than fifty grams of gamma-butyrolactone ("GBL" also known as "ecstasy") approximately eight months after the alleged GHB incident. The State later amended the GHB charge to first-degree reckless homicide. The charges were tried together, and a jury found Kurtz guilty of both the GHB homicide and the GBL sale, in violation of WIS. STAT. §§ 940.02(2)(a) (amended Feb. 1, 2003), 961.14(5)(ag) (2003-04) and 961.41(1)(hm)4. (amended Feb. 1, 2003). For the homicide, the trial court imposed a thirty-five-year sentence, comprised of twenty-and fifteen-year respective periods of initial confinement and extended supervision. For the GBL sale, the trial court imposed a consecutive sixteen-year sentence, comprised of six-and ten-year respective periods of initial confinement and extended supervision. Kurtz moved for a new trial on the basis of the trial court's denial of his severance motion and for a retrospective hearing on the change of counsel motion. The trial court summarily denied the motion; Kurtz appeal[ed].

State v. Kurtz, No. 2007AP339-CR, unpublished slip op. ¶2 (WI App June 24, 2008) (footnote omitted).

(continued)

postconviction motion asserting that the trial court had erroneously exercised its discretion when it denied his pretrial motion to change counsel. The trial court denied Kurtz's postconviction motion. On appeal, we concluded that the trial court erroneously exercised its discretion prior to trial when it failed to conduct a full hearing on Kurtz's motion to change counsel.² See *Kurtz I*, No. 2007AP339-CR, unpublished slip op. ¶10. We further concluded that due to the insufficient hearing on Kurtz's pretrial motion, the record was "insufficient for us to meaningfully review the trial court's denial" of Kurtz's pretrial motion. *Id.* We reversed that part of the trial court's order denying Kurtz's motion for postconviction relief and remanded the case with directions directing the trial court to hold a "retrospective evidentiary hearing" at which it should "allow Kurtz to fully explain his reasons for requesting new counsel to determine whether new counsel was warranted." *Id.*, ¶¶1, 10; see also *State v. Lomax*, 146 Wis. 2d 356, 362-65, 432 N.W.2d 89 (1988) (directing the trial court to conduct a retrospective evidentiary hearing to develop the record concerning the trial court's denial of a motion to change attorneys).

¶3 On remand, the trial court conducted the retrospective evidentiary hearing, which we discuss in detail below. It concluded that Kurtz's motion to change counsel was properly denied and, therefore, denied the motion for postconviction relief. Kurtz appealed again. We now consider whether Kurtz's

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² We affirmed on all other grounds. See *Kurtz I*, No. 2007AP339-CR, unpublished slip op. ¶1.

motion to change counsel was properly denied based on the record established at the retrospective evidentiary hearing.

DISCUSSION

¶4 At issue is whether the trial court erroneously exercised its discretion when it denied Kurtz’s postconviction motion, having concluded that Kurtz’s pretrial motion to substitute counsel was properly denied. Kurtz argues that the trial court applied the wrong legal standards and erroneously found “that there was insufficient evidence of a breakdown in communication.” Because we conclude that the evidence presented at the hearing supports the trial court’s decision, we affirm.

I. Legal standards.

¶5 “Decisions related to the substitution of counsel are within the sound discretion of the [trial] court.” *State v. McMorris*, 2007 WI App 231, ¶18, 306 Wis. 2d 79, 742 N.W.2d 322. “[T]he exercise of discretion is not the equivalent of unfettered decision-making.” *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). To be upheld, a discretionary act “must demonstrably be made and based upon facts appearing in the record and in reliance on the appropriate and applicable law.” *Id.*

¶6 In *Lomax*, reviewing the discretionary denial of a motion to change counsel that was made on the day of trial, our supreme court described the standard of review to be applied:

In evaluating whether a trial court’s denial of a motion for substitution of counsel is an [erroneous exercise] of discretion, a reviewing court must consider a number of factors including: (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 communication³ that prevented an adequate defense and frustrated a fair presentation of the case.

Id., 146 Wis. 2d at 359. The discretionary determination ““must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.”” *Id.* (citation omitted).

¶7 The court in *Lomax* explained that the factors for review it was announcing in *Lomax* were consistent with previously announced factors pertinent to a motion to change counsel:

We believe these factors are consistent with the factors previously set out by this court. For instance, in *State v. Johnson*, 50 Wis. 2d 280, 285 n.4, 184 N.W.2d 107 (1971), this court stated the defendant must show “good cause” to warrant substitution of counsel.

³ Although the court in *State v. Lomax*, 146 Wis. 2d 356, 432 N.W.2d 89 (1988), used the phrase “total lack of communication,” Kurtz asserts (and the State agrees) that “an absolute breakdown in communication” is not required in every case. Rather, as we have recognized, a defendant may be entitled to a new trial where there was a “substantial breakdown in communications.” See *State v. Jones*, 2007 WI App 248, ¶19, 306 Wis. 2d 340, 742 N.W.2d 341. We agree that under the facts of this case, Kurtz was required to show only a “substantial breakdown in communications.” See *id.* Further, we reject Kurtz’s suggestion that the trial court was actually applying the “total lack of communication” standard. Although the trial court quoted that language from *Lomax* on one occasion, the transcript makes clear that the trial court was not asking Kurtz to prove a “total lack of communication.”

In *Phifer v. State*,^[4] 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974), this court set out six factors for trial courts to consider in the exercise of their discretion when there is a request for substitution of trial counsel with the associated request for a continuance.... The factors enunciated in *Phifer* allow the trial court to balance all relevant factors. This balances the defendant's constitutional right to counsel against societal interest in the prompt and efficient administration of justice.

Lomax, 146 Wis. 2d at 360. The court observed that “[w]hen all of the defendant’s complaints about counsel are known to the judge, judicial discretion may be exercised in application of the factors in *Phifer*.” *Lomax*, 146 Wis. 2d at 362.

⁴ In *Phifer v. State*, 64 Wis. 2d 24, 31, 218 N.W.2d 354 (1974), our supreme court reviewed the denial of a request for new counsel, made five days before trial was to begin, wherein Phifer sought the appointment of what would have been his third attorney. *Id.* at 28-29. The court discussed the need to have standards by which a reviewing court may determine whether a trial court has properly exercised its discretion in the circumstances where the trial will be delayed if the change of counsel is allowed. *Id.* at 31. The court held that a balancing test was appropriate and identified six factors to be considered:

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;
6. Other relevant factors.

Id. We observe that these factors seem most pertinent in cases where the motion for new counsel is made shortly before the scheduled trial. In the instant case, Kurtz’s request was made at a time when there was no trial date set.

¶8 In *State v. Jones*, 2007 WI App 248, 306 Wis. 2d 340, 742 N.W.2d 341, we considered the denial of a request to change counsel in October when the trial was set for February of the following year. *Id.*, ¶¶8-10. Relying on *Lomax*, we affirmed that an “indigent defendant *is* entitled to a lawyer with whom he or she can communicate.” *Jones*, 306 Wis. 2d 340, ¶13 (emphasis in *Jones*). We returned *Jones* to the trial court for a retrospective evidentiary hearing, with the instruction that “[t]he trial court must ... make sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible; mere conclusions, unless adequately explained, will not fly.” *Id.* We instructed that “[i]f, at the conclusion of that hearing, the trial court determines that there was a substantial breakdown in communications between Jones and his lawyer, he is to be given a new trial, which is the relief Jones seeks on this appeal.” *Id.*, ¶19.

¶9 With these legal standards in mind, we consider the retrospective hearing on Kurtz’s motion for new counsel.

II. The retrospective hearing.

¶10 At the hearing, Kurtz’s two trial attorneys, Assistant State Public Defenders Stephen Sargent and Robin Dorman, testified concerning their pretrial relationship with Kurtz. Kurtz also testified.

¶11 Sargent testified that he was appointed in December 2004 and thereafter he discussed plea offers with the State and presented them to Kurtz, but Kurtz was not interested. Sargent said that initially he was able to communicate with Kurtz about trial preparation, strategy and other matters, but this changed when the State amended the charges in September 2005 to include reckless homicide. Sargent testified that one of the reasons Kurtz refused to accept a plea

was because he did not want to admit he voluntarily delivered the drugs that killed the victim. Sargent also testified that he thought relating the plea offers to Kurtz soured Kurtz's trust of both attorneys, but that in Sargent's experience such a reaction is not unusual.

¶12 Sargent testified that he filed a motion questioning Kurtz's competency in early November 2005 and then filed a motion to withdraw as counsel later that month. The motion stated the following grounds to withdraw as counsel:

1. Mr. Kurtz has requested that attorney Stephen Sargent remove himself as defense counsel.
2. The defendant does not feel Mr. Sargent is properly representing Mr. Kurtz in this criminal matter.
3. Attorney Sargent has spoken to ... Mr. Kurtz and has attempted to resolve any differences between attorney and client. Counsel does not feel that the attorney client relationship will improve.

¶13 Dorman joined the defense team in September 2005, shortly after the homicide charge was added. Dorman testified that she believed that accepting one of the plea offers was in Kurtz's best interest and she tried to convince him of that. Dorman said she thought that these efforts led Kurtz to believe she was working for the State rather than for him. She also testified that she discussed with Kurtz the case's strengths and weaknesses, the evidence and the potential witnesses. She was able to relay details about the case to Kurtz and he gave her tasks to perform which she understood. She also told him she did not think he had a high likelihood of success at trial.

¶14 Dorman testified concerning her communication with Kurtz. When asked "whether the primary reason for the breakdown in communication was a

desire of the defense team that the defendant accept a negotiation,” Dorman replied: “I think that was part of it, but I think there had been a breakdown even before I got ... onto the team ... when I was just talking about how we were going to approach the homicide defense.” She said that raising questions about Kurtz’s competency also contributed to the communication problems she had with Kurtz.

¶15 Kurtz testified about a letter he wrote to the trial court in November 2005, which stated:

Hello Judge,

I am writing to you in regards to my current charges and pending trial time. I ask you for a possible adjournment and new defend[a]nt counsel for personal and spiritual reasons, due to confinement, decisions [and] time frames made on each of these, and more. Out of slight personal-emotional constraints I request new counsel. I thank you for your time. Bless you.

(Some capitalization omitted.) Kurtz also testified about his relationship with his attorneys. Although the trial court specifically found Kurtz’s testimony was not credible, and although Kurtz’s testimony was frequently as difficult to understand as his letter to the trial court, he testified essentially consistently with Sargent’s and Dorman’s statements that he was not satisfied with the plea offers they received. Kurtz told the court that “[i]f the right plea agreement was offered I would probably optionally considered it [sic].” Kurtz said that in the situation of not being satisfied with the plea offers, his feeling was that “the next option was to request a new counsel.”

¶16 The trial court made detailed findings. It found that there was testimony about a breakdown in trust in the context of communicating offers from the State that Kurtz did not accept. Both counsel related a change in the relationship with Kurtz to those offers and indicated, as the court explained, that

Kurtz “did not want to plead because he wanted the truth to come out. He believed that the truth would come out and that God would allow the truth to have that happen.” The court concluded that Kurtz was trying to say he did not intend to cause the death of the victim and therefore wanted to go to trial. The trial court found that Kurtz went to trial and that he would have done so under any circumstances.

¶17 After observing Kurtz testify at the retrospective hearing, the trial court also found Kurtz’s testimony “that he was unable to communicate with counsel” was not credible and that Kurtz did not establish that communication “had broken down to the extent that it impacted and frustrated the presentation of the case.” The trial court found that Sargent’s motion for a competency evaluation, and the subsequent finding that Kurtz was competent, did not frustrate the defense or infringe on Kurtz’s rights, although it may have strained their communication. We conclude that these findings are supported by the record and are not clearly erroneous. Kurtz takes issue with the trial court’s decision, arguing the findings are clearly erroneous. We disagree.

¶18 Further, we agree with the trial court that the established facts do not constitute a basis to require the appointment of new counsel. Defense counsel has an obligation to present the State’s offers to the client and to recommend what counsel believes is in the client’s best interest. *See State v. Ludwig*, 124 Wis. 2d 600, 610-11, 369 N.W.2d 722 (1985). Where, as here, the client persistently refuses to accept an offer either because of his personal belief about whether his conduct constitutes the crime with which he has been charged, in spite of what were apparently counsels’ attempts to correct his misunderstanding, or because he is seeking a better offer, we agree with the trial court that this does not constitute a

“substantial breakdown of communications” justifying a change of counsel. *See Jones*, 306 Wis. 2d 340, ¶19.

¶19 Kurtz also asserts that the trial court erroneously found that giving Kurtz new counsel would delay the proceedings. We reject this argument. Although the court provided a summary of the case that mentioned adjournments, because no trial date existed at the time Kurtz requested new counsel, we do not read the court’s decision as relying on a concern about delay.

¶20 Finally, Kurtz argues that the trial court erroneously considered the effectiveness of Sargent and Dorman’s representation at trial as evidence that new counsel had not been warranted. We agree that matters that occurred after November 2005 were not relevant to the issue presented at the retrospective hearing. However, we do not agree that the court actually relied on events that occurred after November 2005 in making its decision. The court mentioned the communication that occurred between trial counsel and Kurtz at trial, but then explicitly noted that what happened at trial “is not controlling here, and I’m not suggesting that it is.”

¶21 For the foregoing reasons, we conclude that the trial court’s finding, that Kurtz had not established a substantial breakdown in communications, was not clearly erroneous. Accordingly, the court did not erroneously exercise its discretion when it denied Kurtz’s motion for postconviction relief.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

