COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2057-CR **Cir. Ct. No. 01-CF-143**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RAYMOND D. DAMOUTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 DEININGER, J. Raymond Damouth appeals a judgment convicting him of first-degree sexual assault of a child. He claims the trial court erred in denying his motion to suppress statements he made to police and in refusing to continue his trial to allow him to obtain successor counsel. We conclude the court erred in neither regard. Accordingly, we affirm the appealed judgment.

BACKGROUND

¶2 The State charged Damouth with having sexual contact with an eleven-year-old girl. He moved to suppress oral and written statements he had given to a detective. The detective testified at the suppression hearing that he and two social workers interviewed Damouth at Damouth's residence. Before questioning him, the detective advised Damouth that he was not under arrest and "would be free to go." Prior to admitting any contact with the victim, Damouth asked the detective if the detective felt Damouth needed an attorney. The detective turned around the inquiry, asking Damouth if he felt he needed one. According to the detective, Damouth "basically just then continued," and he "never asked for an attorney."

¶3 Damouth agreed to write a statement for the detective and began composing it while still at his residence. Before he finished, however, the detective arrested him and transported him to the county jail, where the detective informed him of his ***Miranda***[1] rights. Damouth completed his written statement at the jail. Before signing it, he told the detective "that he felt he may want to have his attorney advise him at that point basically what he should do with signing that." The detective told him "that was his choice," but signed or not, the detective would keep the statement. Damouth then signed the statement.

¶4 Damouth confirmed at the suppression hearing that the detective told him at the residence that he did not have to answer questions and was free to leave. Damouth testified that he did not feel free to leave, however, because "the

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

way I was raised and where I grew up, if an officer or someone you know of authority is speaking with you, like an adult, you stay there and wait to see what they have to say to you." Damouth also acknowledged that he had not specifically asked at the residence for an attorney but inquired only whether he should have one. Finally, he conceded that he had answered questions and provided the written statement "voluntarily" and "[w]ithout being coerced."

¶5 The most significant dispute in the suppression hearing testimony was over the timing of the ***Miranda*** warning. The detective testified that the warning was given soon after arriving at the jail, and that the only question asked of Damouth prior to the warning was if he wished to talk further with the detective. Damouth, however, claimed that he was asked some questions and had continued writing his statement before receiving the ***Miranda*** warning. Damouth also claimed the detective suggested that he include in his written statement that he had been abused as a child and felt remorse for the feelings of the alleged victim. The detective denied making these suggestions.

¶6 The trial court denied Damouth's suppression motion. It concluded Damouth was not in custody until he was taken from the residence to the jail, and that he was timely advised of his ***Miranda*** rights. The court also found Damouth had not been threatened or coerced into answering questions or providing the statement, and further that he "never did ask for an attorney."

¶7 Damouth's case was scheduled for a jury trial on January 23, 2002. On January 14th, his counsel, an assistant State Public Defender (SPD), moved to withdraw on the grounds that Damouth was no longer "financially eligible" for SPD representation. At a January 17th hearing on the request, counsel informed the court that Damouth had told her on January 10th that he "had inherited a

substantial amount of money." Counsel further informed the court that Damouth had retained private counsel to assume his defense.

¶8 The court told the public defender that "if you could guarantee that [private counsel] could appear and argue this case on the 23rd, then I certainly would allow you to withdraw." If not, the court said it would appoint her to continue in order to proceed with the trial as then scheduled. Damouth's newly retained counsel, who was present at the hearing, stated that she could not be prepared to try the case as scheduled and asked for a continuance to permit the change of counsel. The court denied the request, citing the interests of the victim and the court in proceeding to trial as scheduled. The court also noted that Damouth was represented by "adequate and competent" counsel and would not be prejudiced by continuing that representation.

¶9 Damouth's newly retained counsel immediately moved the court to reconsider its decision, and the court took up this motion the next day, January 18th. The court explained that, in its view, it was not denying Damouth the right to choose his own counsel but the privilege of having his trial postponed, noting that a defendant "has no constitutional right to … a continuance … [or] to control the court's calendar." The court again reviewed what it deemed to be the adverse effects of a continuance on the victim, other witnesses, prospective jurors and the court's own calendar, and accordingly, it denied the reconsideration motion.

¶10 The court entered an order appointing Damouth's public defender to represent him through the jury trial scheduled for January 23rd, citing as authority

WIS. STAT. § 753.19 (2001-02)[2] and ***State ex rel. Chiarkas v. Skow***, 160 Wis. 2d 123, 465 N.W.2d 625 (1991). The order recited that "this case presents a unique and unusual circumstance in which there is no reasonable alternative but to appoint an attorney" from the office of the SPD. It also provided that counsel would be compensated "at the fixed rate of compensation set forth in SCR 81.02," presumably to be reimbursed by Damouth to the office of the SPD.

¶11 The trial proceeded as scheduled and the jury returned a guilty verdict. Damouth retained private counsel and moved for a new trial on the ground that he had been denied the right to be represented at trial by counsel of his choosing. The court took up the motion immediately prior to sentencing and allowed brief testimony from Damouth and his former public defender regarding the circumstances of Damouth's becoming ineligible for SPD representation in early January. The court then reviewed at length the facts and factors which had prompted it to deny a continuance so that Damouth could change counsel less than a week before trial. The court denied the motion for a new trial, withheld sentence and placed Damouth on five years probation with conditions including jail time.

ANALYSIS

¶12 Damouth first argues that the trial court erred in denying his motion to suppress the oral statements he made to the detective prior to his arrest and the written statement he completed thereafter. He claims to have been "in custody" from the time the detective started questioning him at the residence because a reasonable person in his position would have considered himself "to be in custody

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

given the degree of restraint under the circumstances." In Damouth's view, because he was not given ***Miranda*** warnings at the very onset of the detective's interview at his residence, everything he said to the detective, as well as his subsequent written statement, must be suppressed.

¶13 Damouth also hints at a violation of his Fifth Amendment right to counsel. He asserts that his question at the residence, "Do you think I need an attorney" required the detective to cease questioning and to clarify whether he wanted an attorney. Damouth also refers to his comment at the jail that he wanted an attorney to review his written statement before signing it. Nowhere, however, does Damouth offer support for his theory that either or both of his mentions of an attorney constituted a request for counsel which required the detective to cease questioning him or to relinquish his written statement. Damouth cites ***State v. Walkowiak***, 183 Wis. 2d 478, 515 N.W.2d 863 (1994), which was expressly overruled by ***State v. Jennings***, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142. The holding of the latter case effectively disposes of any claim that Damouth's statements served to invoke his right to counsel. *See* ***id***., ¶36.

¶14 Thus, the only basis Damouth has developed for suppressing his statements is his claim that he made them while being subjected to a custodial interrogation without being advised of his ***Miranda*** rights. We reject this contention as well.

¶15 The State may not use in its case in chief a defendant's statements made during a custodial interrogation unless the defendant has been given the warnings required under ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). The Court defined a custodial interrogation in ***Miranda*** as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise

deprived of his [or her] freedom of action in any significant way."[3] ***Id***. The ***Miranda*** safeguards attach when a "suspect's freedom of action is curtailed to a 'degree associated with [a] formal arrest.'" ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (quoting ***California v. Beheler***, 463 U.S. 1121, 1125 (1983)). The relevant inquiry is: How would a reasonable person in the suspect's situation understand his or her circumstances? ***Id***. at 442.

¶16 We accept the trial court's findings of historical fact unless they are clearly erroneous; but whether a person is "in custody" for ***Miranda*** purposes presents a question of law which we decide de novo. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). In making this determination, we must consider the totality of the circumstances, including such factors as the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). To ascertain the degree of restraint imposed on a person, we consider such things as: whether the suspect is handcuffed; whether a weapon is drawn; whether a frisk is performed; the manner in which the suspect is restrained;

[3] "Interrogation" for ***Miranda*** purposes is express questioning, as well as any words or actions on the part of the police (other than those normally attendant to arrest and custody), "that the police should know are reasonably likely to elicit an incriminating response from the suspect." ***State v. Cunningham***, 144 Wis. 2d 272, 277, 423 N.W.2d 862 (1988) (quoting ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980)). The State does not claim that the detective's questioning of Damouth at the residence did not constitute an "interrogation," and we will therefore assume that it did.

whether the suspect is moved to another location; whether questioning took place in a police vehicle; and the number of officers involved. ***Id***. at 594-96.[4]

¶17 A single detective questioned Damouth at his own residence. The detective not only did not restrain Damouth in any way, but affirmatively told him that he was free to leave. We agree with the State that, given the location of the interview and the lack of restraint imposed, there is simply no basis in the record from which we could conclude Damouth was "in custody" for ***Miranda*** purposes. Until the detective informed him that he would be taken to the jail, a reasonable person in Damouth's position would not have understood himself to be in police custody. Damouth testified that because of his upbringing, he felt obliged to cooperate with the detective's questioning at the residence, but this does not alter our conclusion that he was not then in custody. Neither does the fact that one of the social workers may have followed him while he went to get a cigarette from the kitchen, when, during a break in the interview, the detective had stepped outside.

¶18 We agree, therefore, with the trial court that Damouth was not in police custody for Fifth Amendment purposes until just before departing for the jail. Damouth does not dispute that the detective did not question him further in the squad car, but claims that he was questioned and asked to complete his written statement at the jail before he was given his ***Miranda*** rights. The detective

[4] In support of his claim that he was "in custody" at the residence, Damouth cites ***State v. Swanson***, 164 Wis. 2d 437, 475 N.W.2d 148 (1991), a Fourth Amendment "arrest" case. The analysis required by the Fourth Amendment and that required by the Fifth Amendment are not always clearly distinguished in the case law, but "the analyses are not the same." ***State v. Morgan***, 2002 WI App 124, ¶¶13-16, ¶13 n.8, 254 Wis. 2d 602, 648 N.W.2d 23.

testified otherwise, however, and we conclude that the court implicitly credited the detective's testimony on this point when it ruled as follows:

> [T]he state has the burden of proof, and they have to prove certain elements before the statement of Mr. Damouth can be admitted into evidence. They have to show, number one, that they complied with Miranda including the issues of custody, interrogation and the defendant's understanding and waiver of his rights. There was a signed waiver prior or after he was taken into custody. The court finds that he was actually taken into custody at the time he left the residence in the Tomah area and was brought to the jail and thereafter…. And the court believes that the state has met its burden of proof …. [T]he defendant again has not succeeded in rebutting that finding by its evidence or other cross-examination evidence.

Before concluding its ruling, the court inquired of defense counsel "is there anything I have not addressed as far as your motions …?" Counsel replied in the negative, and we conclude Damouth thus understood that the court had found no custodial interrogation occurred prior to the administration of the ***Miranda*** warning.

¶19 We conclude that nothing Damouth told the detective or wrote in his statement was obtained in violation of his rights under the Fifth Amendment and ***Miranda***. The trial court therefore did not err when it denied his motion to suppress the written and oral statements.

¶20 We next address Damouth's claim that the trial court erred in denying his public defender's request to withdraw so that Damouth could be represented at trial by privately retained counsel. Damouth asserts that this denial

of "counsel of his choosing" violated his rights under the Sixth Amendment.[5] He acknowledges, however, that the withdrawal request was coupled with a request by his prospective successor counsel to postpone the scheduled jury trial. Accordingly, Damouth also asserts that the trial court erroneously exercised its discretion by refusing to grant a continuance so that he could be represented by privately retained counsel instead of the public defender.

¶21 We agree with Damouth that our review of the trial court's action in response to the public defender's request to withdraw, conjoined as it was with a request to postpone the impending trial, is of the trial court's exercise of discretion. *See* ***Phifer v. State***, 64 Wis. 2d 24, 30-31, 218 N.W.2d 354 (1974). Whether in exercising its discretion the court violated Damouth's constitutional rights, however, is a question of law which we decide de novo. *See* ***State v. Bintz***, 2002 WI App 204, ¶6, 257 Wis. 2d 177, 650 N.W.2d 913, *review denied*, 2002 WI 121, 257 Wis. 2d 119, 653 N.W.2d 891 (Wis. Oct. 21, 2002) (No. 01-2670-CR). Damouth relies heavily on the supreme court's discussion in ***Phifer*** to support his claim of error, and the State concurs that ***Phifer*** provides appropriate guidance for our review. Accordingly, we turn to the analysis in ***Phifer*** and apply it to the present facts.

[5] Damouth also asserts that a Fifth Amendment due process right is implicated, but we fail to see how our analysis or disposition would be different under a Fifth Amendment analysis. The relevant precedents, including the one principally relied upon by Damouth, treat the right to counsel of one's choosing as a corollary of the Sixth Amendment right to counsel, and we will do likewise. *See, e.g.*, ***Phifer v. State***, 64 Wis. 2d 24, 29-30, 218 N.W.2d 354 (1974) ("In order to implement the object of the sixth amendment, if a defendant wishes to hire his own counsel, he must be afforded a fair opportunity and reasonable time to secure counsel of his own choice." (footnote omitted)).

¶22 A "balancing test is appropriate to review the exercise of a trial court's discretion on a request for the substitution of trial counsel with the associated request for a continuance." ***Phifer***, 64 Wis. 2d at 31. Factors to be weighed include the length of delay requested; whether competent counsel is presently available to try the case; whether other continuances were requested and received by the defendant; the convenience or inconvenience to the parties, witnesses and the court; and whether the requested delay seems to be for dilatory purposes or is prompted by legitimate reasons. ***Id***. Damouth contends that the sole basis of the trial court's decision was a "generalized concern of inconvenience to the court and the witnesses." He asserts that this represented an improper "'myopic insistence on expeditiousness,'" ***id***. at 30 (citation omitted), that was greatly outweighed by other factors, not the least of which was his right to proceed with counsel of his choosing. We disagree.

¶23 The Sixth Amendment's guarantee of the assistance of counsel includes a right to representation by counsel of one's choice, but this subsidiary right is "qualified," not absolute. ***State v. Wanta***, 224 Wis. 2d 679, 702, 592 N.W.2d 645 (Ct. App. 1999). The supreme court explained in ***State v. Lomax***, 146 Wis. 2d 356, 432 N.W.2d 89 (1988), that when evaluating the weight to be accorded a defendant's interest in changing counsel, a court should consider the reason or reasons prompting the request for new counsel. ***Id***. at 361. ***Lomax*** involved a defendant's request for substitution of one appointed counsel for another on the morning of trial. We conclude a similar inquiry is appropriate when a defendant seeks shortly before trial to retain private counsel in lieu of proceeding with publicly provided counsel. *See, e.g.,* ***Wanta***, 224 Wis. 2d at 703-04.

¶24 Here, Damouth had three opportunities, two before trial and one after, to present the trial court with reasons for his request to change counsel a week before trial. He provided only one: a recent inheritance which rendered him financially ineligible for SPD representation. Nowhere in the record (or for that matter, in his argument on appeal) does Damouth assert that communication between him and his public defender had broken down, that she had a conflict of interest, that he deemed her ineffective, or even that he differed with her proposed defense strategy at trial. *See* ***State v. Robinson***, 145 Wis. 2d 273, 278-79, 426 N.W.2d 606 (1988) ("'[G]ood cause is required to warrant substitution of appointed counsel,'" such as a conflict of interest, a complete breakdown in communication or an "'irreconcilable conflict'" leading to an apparent injustice. (citations omitted)).

¶25 The sole reason prompting Damouth's public defender to seek withdrawal was thus an administrative eligibility determination having no bearing whatsoever on the attorney-client relationship which then existed between Damouth and his counsel. Damouth expressed neither a lack of confidence in his public defender nor a belief that she was not providing the adequate and effective representation guaranteed him under the Sixth Amendment. We conclude, therefore, that although Damouth's request to change counsel was "legitimate" and not for a "dilatory" purpose, *see* ***Phifer***, 64 Wis. 2d at 31, the reason prompting the request was not a constitutionally weighty one.

¶26 We next consider whether in weighing the competing considerations and denying Damouth's request, the trial court erroneously exercised its discretion. We conclude it did not.

¶27 The court determined that the interests of the victim, witnesses, jurors, and the court itself in proceeding with the trial scheduled to begin in less than a week outweighed Damouth's interest in retaining a new attorney. Damouth's trial had been calendared several months earlier, and the earliest new jury trial date would have been in May or June, a delay of some four or five months. Jurors had been summoned and witnesses made available for the January 23rd trial. The court apparently no longer had a back-up case available to try on that date. And, as the trial court also noted, it was required by statute to consider the victim's interests when deciding whether to grant a continuance. *See* WIS. STAT. § 950.04(1v)(a). It did so, and properly concluded that it was contrary to the twelve-year-old victim's interests to delay the trial for several months. *See* § 950.04(1v)(k) (Crime victims have a right "[t]o a speedy disposition of the case in which they are involved as a victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.").

¶28 As we have explained, Damouth's reason for requesting a change of attorneys one week before trial, although legitimate, was entitled to limited weight. The trial court properly weighed Damouth's interest in changing counsel against the interests of the victim, witnesses, jurors and the court itself in not postponing the impending trial. ***Phifer***, 64 Wis. 2d at 31. In so doing, the court applied the correct legal standard to the relevant facts, and reached a conclusion which a reasonable court could reach. In other words, the court did not

erroneously exercise its discretion. *See* ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).[6]

CONCLUSION

¶29 For the reasons discussed above, we affirm the appealed judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[6] Damouth asserts in cursory fashion that the supreme court's holding in ***State ex rel. Chiarkas v. Skow***, 160 Wis. 2d 123, 138, 465 N.W.2d 625 (1991), "completely precludes the action the court took" in ordering the public defender to represent Damouth at trial. ***Chiarkas***, however, involved a dispute between the office of the SPD and a circuit court, which the supreme court resolved in terms of the separation of powers doctrine and a court's "inherent authority" to appoint counsel. *See* ***id***. at 137-38. Whether the trial court exceeded its authority in requiring Damouth's public defender to continue to represent him after he was no longer indigent sheds no light on the question of whether the court violated Damouth's Sixth Amendment right to adequate and effective representation at trial. That is, even if Damouth's assertion were correct, it would not entitle him to a new trial.

Whether the court violated the dictates of ***Chiarkas*** is thus a question for the office of the SPD, not Damouth, to raise, and we need not address it here. We note, however, that the State correctly points out that the ***Chiarkas*** holding expressly permits a circuit court in "rare and unusual circumstances," ***id***. at 138, to appoint a public defender to represent a non-indigent individual. *See also* ***id***. at 139 ("[W]e do not hold that the circuit court may never appoint the State Public Defender to represent non-indigent individuals.… When no other reasonable alternative is available and the circuit court explicitly states the need to exercise its discretion, the circuit court may appoint counsel from the State Public Defender's Office to represent non-indigent individuals.").