

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2010AP1877-CR

Cir. Ct. No. 2001CF159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHANE SISONGKHAM,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Khane Sisongkham appeals an order sentencing him after revocation of his extended supervision and an order denying his motion for a new reconfinement hearing. He argues that the circuit court's decision

denying his motion for a continuance violated his federal and state constitutional right to counsel of his choice and his right to due process of law.

¶2 Sisongkham was convicted on June 30, 2003, of one count of endangering safety by use of a dangerous weapon and two counts of armed robbery, all as a party to a crime. He was sentenced to five years of imprisonment for endangering safety, with two years of initial confinement and three years of extended supervision. He was also sentenced to concurrent terms of ten years' imprisonment on each of the armed robbery counts, with four years six months of initial confinement and five years and six months of extended supervision. On April 1, 2008, Sisongkham was released on extended supervision. On March 30, 2009, he was revoked from extended supervision on the two armed robbery counts.

¶3 The circuit court scheduled the reconfinement hearing for June 30, 2009. Seven days before the hearing, Attorney Synde French filed a notice of retainer and moved to continue the sentencing date because she was scheduled to be away on vacation. The circuit court rescheduled the hearing for July 29, 2009. On July 13, 2009, Attorney French filed a letter with the court asking for another continuance because she had a serious medical condition that required her to stop working on cases requiring a high degree of intensity or concentration until late September or early October. The circuit court denied the motion, explaining that it did not want another delay in the sentencing hearing, which had been pending since the revocation decision in late March. The circuit court allowed an attorney appointed from the State Public Defender's office to substitute for Attorney French, who had been privately retained, because Sisongkham did not have sufficient funds to retain another attorney. At the rescheduled hearing on August 24, 2009, the circuit court imposed the maximum sentence of five years,

six months and six days. Sisongkham filed a motion for a new reconfinement hearing. The circuit court denied the motion.

¶4 Sisongkham argues that his constitutional right to counsel of his choice was violated by the circuit court's decision denying his motion for a continuance. He contends that he exhausted all of his funds retaining Attorney French and was therefore forced to proceed with an attorney appointed by the State Public Defender's office. The State counters that Sisongkham had no constitutional right to counsel of his choice because a reconfinement hearing is not a criminal proceeding, and the right to counsel of one's choice applies only in criminal proceedings.

¶5 “The Sixth Amendment guarantee of assistance of counsel includes a qualified right to representation by counsel of the accused's choice.” *State v. Wanta*, 224 Wis. 2d 679, 702, 592 N.W.2d 645 (1999); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Because the right is qualified, it may be overridden where the circuit court concludes, in the exercise of its discretion, that other concerns are paramount. *Mulkovich v. State*, 73 Wis. 2d 464, 474, 243 N.W.2d 198 (1976). For example, a defendant's right to select counsel “cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice and deprive such courts of their inherent power to control the same.” *Phifer v. State*, 64 Wis. 2d 24, 30, 218 N.W.2d 354 (1974).

¶6 When deciding whether to grant a continuance, the circuit court should consider: (1) the length of the delay requested; (2) whether there is competent counsel presently available to try the case; (3) whether other continuances have been requested and received by the defendant; (4) the convenience or inconvenience to the parties, witnesses and the court; and

(5) whether the delay is for legitimate reasons or whether its purpose is dilatory. *Wanta*, 224 Wis. 2d at 703-04 (citation omitted). Where, as here, a decision to deny a motion for a continuance may impinge on the right to counsel of one's choice, the circuit court "must balance a defendant's constitutional right to counsel of choice against the societal interest in prompt and efficient administration of justice." *Id.* at 703. Whether a denial of a continuance is so arbitrary as to violate due process depends on the circumstances present in each case. *Phifer*, 64 Wis. 2d at 31.

¶7 The parties focus their argument on whether a reconfinement hearing should be characterized as civil in nature or criminal in nature, thus affording a defendant the right to an attorney of the defendant's choice. We do not need to resolve this issue to decide this appeal. Even if we assume for the sake of argument that a reconfinement hearing is a criminal proceeding to which the qualified right to counsel of one's choice applies, the circuit court did not misuse its discretion in denying the motion for a continuance.

¶8 The circuit court denied the motion because it did not want to delay the hearing until late September or October. The circuit court explained that Sisongkham had been revoked in late March and the only issue that needed to be decided was the amount of reconfinement time. The circuit court noted that Sisongkham was facing federal charges, which could result in him being transferred from state to federal custody until the federal charges were resolved, thus further delaying the reconfinement hearing unless it was held before Sisongkham was transferred on the federal charges. The circuit court also pointed out that this was Sisongkham's second request for a continuance and he was being held in the county jail pending the hearing, so the delay was causing him to lose the opportunity to take advantage of rehabilitative activities that the prison system

could offer. The circuit court stated that, while it appreciated “the defendant’s desire to appear at the reconfinement hearing with the attorney of his choice ... the court had a duty to ensure that cases are not unnecessarily or unreasonably delayed.” Based on the circuit court’s explanation of its reasons, we conclude that the circuit court did not misuse its discretion in denying the motion for a continuance. Moreover, the decision did not violate Sisongkham’s right to due process because it was not arbitrarily made.

By the Court.—Orders affirmed.

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

