

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TEDEARO LAMONT BURRELL,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2008

No. 276600

Macomb Circuit Court

LC No. 2006-001915-FH

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and was sentenced as a third habitual offender, MCL 769.11, to 18 months to 40 years in prison. He appeals as of right and we affirm.

I. Basic Facts

An undercover detective arranged to meet defendant in a parking lot to conduct a cocaine transaction involving “an eight ball of crack cocaine.” When the detective arrived at the meeting place, defendant entered the detective’s car and handed him two clear plastic baggies containing a total of 3.2 grams of cocaine. In return, the detective paid defendant the prearranged price of \$150 in prerecorded funds. After completing the transaction, the detective signaled other officers and defendant was arrested. The money retrieved from defendant’s hand matched the prerecorded funds.

II. Motion to Withdraw

Defendant argues that the trial court abused its discretion by denying defense counsel’s motion to withdraw and by failing to appoint new counsel. We disagree.

A. Background

Defense counsel was defendant’s third court-appointed attorney. On the first day of trial, defense counsel moved to withdraw, and the following exchange occurred:

[*Defense counsel*]: There's been some factors that happened since the last time we were in court that lead me to—to make this motion. I was [defendant's] third attorney on this case.

*The court*: Exactly.

[*Defense counsel*]: And since the appointment, [defendant] has been completely uncooperative with me, as far as, you know, he's given me a lot of instructions and things to do . . . . He's been demanding that I file civil . . . charges against all the police officer[s] involved in this. He said [that I should] do that for him. That's not my job to file civil charges against the police officers involved. He's—

*The court*: No, you've got one job and one job only. That's to defend him in this—this trial, period.

[*Defense counsel*]: Well, [defendant] doesn't understand that.

*The court*: Well, he's understanding it right now.

[*Defense counsel*]: Now—now he's also demanding that I—I produce a second hidden set of police reports that he insists the police have.

*The court*: [Prosecutor], have you provided all the discovery as required by the statute?

[*Prosecutor*]: Yes, Judge. There was just one set of police reports, those reports have been provided. There's no additional report.

*The court*: All right. What else?

[*Defense counsel*]: He's refused to discuss the incident with me. When I—when I try to talk to him about what happened [and what] the trial [is] about . . . he said that, you're working for the prosecutor. I'm not going to talk to you about that. You just get this other information for me. He's insisting that there's some second set of police reports.

*The court*: Okay.

[*Defense counsel*]: —He says I'm holding out on him. He's filed a grievance with me with the attorney grievance, also we're in an adversary position right now and I can't represent him if he's got this adversary position . . . . The attorney/client relationship, in my mind, no longer exists. If he's going to get adequate counsel—

*The court*: He's look. This is [your] third court-appointed attorney, right? Is that right, sir?

\* \* \*

[Defendant]: Yeah.

*The court:* How many do you want? I'm not going to go through the entire roster of court-appointed attorneys. You've gone through two very fine attorneys and you've got a very fine attorney here.

[Defendant]: They got records that said I was framed by the police department and ain't nobody doing nothing about it.

\* \* \*

*The court:* There's apparently no evidence to substantiate that accusation. It's not his job to file civil suits. It's—his job to defend you on this trial and this trial only and that's what we're going to do today. I'm going to deny [defense counsel's] motion to withdraw.

Subsequently, after a short recess and discussion, defense counsel placed the following on the record:

I know this case has been on the docket for a long time. In my present state of mind and with the relations with [defendant], I don't feel I can adequately represent him . . . . [Defendant] has indicated he wants subpoenas for a number of people who I have not subpoenaed, including a woman whose name I hadn't heard until now. I know that these are going to be issues if he's convicted, that—if he's allowed the opportunity to bring these people in at this time, maybe it won't be an issue, you know. . . .

We would ask for an adjournment so that he can get new counsel so that he can get these subpoenas out, so he can start fresh. I know he's had two attorneys before me, that hasn't worked out. I'm just placing this on the record.

The trial court again denied the motion.

## B. Standard of Review

When reviewing a trial court's decision to deny a defense attorney's motion to withdraw and a defendant's motion for a continuance to secure other counsel, several factors must be considered:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarría*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

The trial court's decision will not be disturbed absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

“An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.” [*Id.* (citation omitted).]

### C. Analysis

Defendant did not assert a constitutional right necessitating a third substitution of counsel. Neither defendant nor defense counsel articulated a difference of opinion with regard to a fundamental trial tactic. Defendant was dissatisfied because defense counsel did not file civil charges against the police officers or obtain a “hidden” police report that purportedly exculpated him. As the trial court explained, however, defense counsel’s only job was to defend defendant in the criminal case. Further, defendant failed to provide factual support for his claim that another police report existed showing that he was “framed,” and the prosecutor indicated that defendant had been provided with all discovery and police reports. Thus, counsel’s failure to execute defendant’s instructions in this regard did not establish good cause for substitution of counsel.

An additional basis for defense counsel’s motion to withdraw was that defendant filed a grievance against him. On appeal, defendant asserts that his filing of a grievance against defense counsel “is a strong indication of an irreconcilable difference of opinion between the lawyer and his client . . . .” However, the reasons defendant gave for the lack of confidence and trust in his attorney were not substantial. In addition to the matters previously mentioned, defendant made unsupported allegations that defense counsel was “working for” the prosecution and had not provided defendant with all discovery materials. The record does not disclose any improper communication between defense counsel and the prosecutor, and defendant does not otherwise identify the basis for this claim on appeal. A mere allegation that defendant lacked confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause. *Traylor, supra* at 463; see also *People v Otter*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974). Likewise, defendant’s general unhappiness with counsel’s representation is insufficient. See, e.g., *Traylor, supra* at 463 (holding that a defendant’s filing of a grievance against his counsel is insufficient alone to warrant the appointment of new counsel).

In addition, defense counsel complained that defendant was uncooperative and would not discuss the case with him. However, a defendant may not intentionally break down the attorney-client relationship by refusing to cooperate with his appointed counsel and later argue that good cause exists for substitution. *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985); *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). Furthermore, counsel’s motion to withdraw was made on the date set for trial. The jury and witnesses were present, and the prosecutor was ready to proceed. A substitution of counsel at that point would have unreasonably delayed the judicial process. In sum, because there was no bona fide dispute that supported a finding of good cause to allow appointed counsel to withdraw and permit a continuance to enable defendant to obtain new counsel, the trial court did not abuse its discretion by denying counsel’s motion to withdraw and by failing to appoint new counsel.

### III. Independent Investigator

Defendant next argues that the trial court erred when it denied his motion to appoint a private investigator to search for a second “hidden” police report that allegedly contained exculpatory information. We disagree. We review a trial court’s decision whether to appoint an investigator for an abuse of discretion. See *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001).

A court-appointed investigator is not ““automatically mandatory but rather depends upon the need as revealed by the facts and circumstances of each case.”” *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984) (citation omitted). The trial court has discretion to determine whether an indigent defendant has demonstrated that an investigator is necessary to ensure due process. See *Johnson, supra* at 260. A defendant’s reasons cannot rest on “pure conjecture.” *Id.*

We find no abuse of discretion. Defendant did not demonstrate that an investigator was necessary to ensure due process, and his reasons for requesting an investigation were based on pure conjecture. Defendant provided no factual support for his claim that there was a clandestine police report, and the police witnesses testified that no such “hidden” police report existed. Further, the prosecutor confirmed on the record that the defense had been provided with all discovery and police reports. The prosecutor did explain that “some reports” contained the name of a different officer than the detective to whom defendant had sold the cocaine, and noted that this different officer was available to be questioned. However, the defense did not question the other officer.

Furthermore, at a motion hearing, defendant stated that he could “go home” to get the police report and then he would have “two identical police reports saying [he] did the same thing from two different officers.” Later, defendant indicated that he “got the police report, [he] just can’t get a hold of it. It say[s] [the other officer’s] name.” Defendant’s remarks indicated that he already had a copy of the second police report that he was requesting. Therefore, assuming that the second “hidden” report actually existed, no investigator was required to obtain it. The trial court did not abuse its discretion by denying defendant’s request for an independent investigator.

### IV. Witness List

Defendant also argues that the trial court abused its discretion by allowing the prosecutor to present witnesses after failing to timely file a witness list. We disagree. MCL 767.40a(3) provides that “[n]ot less than 30 days before trial, the prosecutor shall send to the defendant or his attorney, a list of the witnesses the prosecutor intends to produce at trial.” “A trial court must exercise discretion in fashioning a remedy for noncompliance with a discovery statute,” and an abuse of discretion will not be found unless the defendant can show that he was prejudiced by the prosecution’s failure to comply with the statute. *People v Williams*, 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

On the first day of trial, defense counsel indicated that he did not have the prosecutor’s witness list, and objected to “any witnesses being called.” The trial court responded that the record indicated that the prosecution had filed its witness list on September 12, 2006. Indeed, a copy of the prosecution’s witness list—dated September 12, 2006, nearly four months before

trial—is contained in the lower court file. Although defense counsel claimed that he had not *personally* received the witness list, he was defendant’s third appointed counsel and he acknowledged that he had been given a copy of the file. Moreover, the prosecution witnesses consisted of the detective who purchased the cocaine from defendant, the arresting officer, and a forensic scientist who tested the substance. These witnesses should not have surprised the defense. Therefore, even assuming *arguendo* that the prosecution failed to comply with the statute, defendant was not prejudiced by the prosecution’s failure in this regard. *Williams, supra* at 59-60. The trial court did not abuse its discretion in denying defendant’s motion to strike the prosecution’s witnesses. *Id.*

## V. Right to Present Witnesses and Right to Testify

### A. Right to Present Witnesses

Defendant further argues that the trial court erred when it denied him the right to subpoena witnesses. We disagree. “An accused in a criminal prosecution has the right to compulsory process for obtaining witnesses in his favor.” *People v Loyer*, 169 Mich App 105, 112; 425 NW2d 714 (1988). However, “a criminal defendant’s right to compulsory process is not absolute, and the constitution does not grant the right to subpoena any and all witnesses a party might wish to call.” *Id.* at 112-113. A defendant must establish to the satisfaction of the trial court that the witness he seeks to subpoena is a material witness without whose testimony the defendant could not safely proceed to trial. MCL 775.15. The trial court’s decision is reviewed for an abuse of discretion. *Loyer, supra* at 113.

Defendant failed to meet his burden. On the first day of trial, defendant sought to subpoena two informants and his parole officer. The trial court requested an offer of proof. At one point defense counsel indicated that there were three individuals in the car at the arranged meeting and that “one of them *may* have been an informant that was involved in this frame up job.” On appeal, defendant claims that the proposed witnesses could “cast doubt on the prosecution witnesses.” Defendant did not make an adequate offer of proof below. Apart from generally stating that the witnesses would have testified favorably on his behalf, he did not identify what the proposed testimony would have been or how the witnesses’ testimony would have been helpful. Because defendant failed to show that he could not safely proceed to trial without the witnesses, the trial court did not abuse its discretion by denying defendant’s untimely request to subpoena the witnesses.

### B. Right to Testify

We reject defendant’s final claim that the trial court denied him the right to testify. After the prosecution rested, the trial court asked defendant if he intended to testify. Defendant replied, “I’ll testify when my agent gets here. My parole agent.” The court replied: “I’ll take that as a no.”<sup>1</sup> Thereafter, defense counsel indicated that he would not be calling any witnesses and closing arguments commenced. Defendant did not express his wish to testify, and counsel’s

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<sup>1</sup> The trial court had already denied defendant’s request to subpoena his parole agent, and there was no indication that the parole agent was expected in court.

remarks clearly indicated that defendant did not intend to testify in his own defense. By intentionally relinquishing a known right, defendant waived any claim of error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Further, there is no requirement that there be an on-the-record waiver of defendant's right to testify. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985).

Affirmed.

/s/ Kathleen Jansen

/s/ Pat M. Donofrio

/s/ Alton T. Davis