

Court of Appeals, State of Michigan

ORDER

People of MI v Thomas James Earls

Kirsten Frank Kelly
Presiding Judge

Docket No. 281248

Kurtis T. Wilder

LC No. 05-006016 FC

Elizabeth L. Gleicher
Judges

This matter is before this Court on three separate motions: defendant's Motion to Have Tape Recording Transcribed that will substantiate that Appellate Counsel Flanagan is ineffective and Engaging in Malfeasance; defendant's Motion for Substitution of Counsel, or Allow Appellant to Represent Himself with Stand-by Counsel; and Attorney Terrence Flanagan's Motion to Reconsider Order Denying Motion to Withdraw as Appellate Counsel and for the Appointment of Substitute Appellate Counsel.

After review of these motions, this Court orders the following: defendant's Motion to Have Tape Recording Transcribed that will substantiate that Appellate Counsel Flanagan is ineffective and Engaging in Malfeasance is DENIED; Defendant's Motion for Substitution of Counsel, or Allow Appellant to Represent Himself with Stand-by Counsel is DENIED; and, Attorney Terrence Flanagan's Motion to Reconsider Order Denying Motion to Withdraw as Appellate Counsel and for the Appointment of Substitute Appellate Counsel is also DENIED.

In the motions before us, defendant asserts that he is being forced to have an appellate attorney who is ineffective, while Attorney Flanagan asserts that there has been a breakdown in the attorney-client relationship sufficient to support the substitution of counsel. We conclude that neither defendant's assertions nor Attorney Flanagan's assertions are supported by the record.

On April 6, 2011, the trial court appointed Attorney Flanagan to represent defendant as defendant's appellate counsel. On April 11, 2011, this Court entered an order directing that counsel file a brief on defendant's behalf within 56 days of the Clerk's certification of our order, and further directing that defendant may file a Standard 4 brief, in accordance with Administrative Order 2004-6, in the event counsel should choose not to raise an issue requested by defendant. According to the record before us, Attorney Flanagan had a telephone consultation with defendant within a week of his appointment by the trial court, sent defendant a letter of introduction on April 14, 2011, and requested the lower court record in this matter which he received on May 6, 2011.

On May 9, 2011, defendant sent a letter to this Court in which he accused counsel of "dereliction" in the performance of his duties. Again, according to the record, Attorney Flanagan communicated with defendant on May 13, 2011, by letter, and again on May 25, 2011, by telephone. On May 26, 2011, defendant wrote this Court asserting in part that he had tape recorded the May 25, 2011, conversation with counsel, that counsel had been condescending toward him and refused to meet or discuss appellate issues with him, and that accordingly, this Court should discharge Attorney

Flanagan as his counsel. On May 31, 2011, Attorney Flanagan filed with the trial court a Motion to Withdraw as Appellate Counsel and For the Appointment of Substitute Appellate Counsel. On June 20, 2011, the trial court denied this motion. On July 1, 2011, Attorney Flanagan filed a Motion to Withdraw as Appellate Counsel and For the Appointment of Substitute Appellate Counsel in this Court. This Court denied the motion on July 19, 2011.

On July 27, 2011, defendant filed the instant Motion to Have Tape Recording Transcribed that will Substantiate that Appellate Counsel Flanagan is Ineffective and Engaging in Malfeasance, as well as the instant Motion for Substitution of Counsel or to Allow Appellant to Represent Himself with Standby Counsel. Defendant asserts that the granting of his Motion to Have Tape Recording Transcribed that will Substantiate that Appellate Counsel Flanagan is Ineffective and Engaging in Malfeasance would assist this Court in making “an informed decision” as to whether Attorney Flanagan is providing ineffective assistance to defendant in violation of defendant’s rights under the Sixth and Fourteenth Amendments of the United States Constitution. Defendant’s Motion for Substitution of Counsel or to Allow Appellant to Represent Himself with Standby Counsel is self-explanatory. On August 8, 2011, Attorney Flanagan filed the instant Motion to Reconsider Order Denying Motion to Withdraw as Appellate Counsel and For the Appointment of Substitute Appellate Counsel. Attorney Flanagan asserts that the allegations made in defendant’s July 27, 2011, motion, vividly demonstrate that there has been a total breakdown in the attorney-client relationship, such that his continuation as counsel for defendant is untenable. We disagree with the assertions made by both defendant and Attorney Flanagan.

It is well established that an indigent defendant, who requires that counsel be appointed for him or her, does not have a Sixth Amendment right to counsel of the defendant’s own choice. In *Wheat v United States*, 486 US 153, 158-159; 108 S Ct 1692; 100 L Ed 2d 140 (1988), the United States Supreme Court discussed a defendant’s right to counsel of his or her own choice, stating:

“The Sixth Amendment to the Constitution guarantees that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.’ In *United States v Morrison*, 449 US 361, 364; 101 S Ct 665; 66 L Ed 2d 564 (1981), we observed that this right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, *Powell v Alabama*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932); *United States v Ash*, 413 US 300, 307; 93 S Ct 2568; 37 L Ed 2d 619 (1973), we have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). We have further recognized that the purpose of providing assistance of counsel ‘is simply to ensure that criminal defendants receive a fair trial,’ *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and that in evaluating Sixth Amendment claims, ‘the appropriate inquiry focuses on the adversarial process, not on the accused’s relationship with his lawyer as such.’ *United States v Cronin*, 466 US 648, 657 n 21; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Thus, while the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

See *Morris v Slappy*, 461 US 1, 13–14; 103 S Ct 1610; 75 L Ed 2d 610 (1983); *Jones v Barnes*, 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983).”

In *Caplin & Drysdale, Chartered v United States*, 491 US 617, 624; 109 S Ct 2646; 105 L Ed 2d 528 (1989), the US Supreme Court reiterated that “The [Sixth] Amendment [right to counsel] guarantees [impecunious] defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.”

In *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the United States Supreme Court held that the right to counsel extends to those defendants who are indigent and seek assistance of counsel to appeal their convictions. However, *Halbert* does not grant to an indigent defendant seeking the assistance of counsel to file an appeal any greater rights to counsel than are available to an indigent defendant at trial.

Defendant contends, without benefit of reference to any pleading that Attorney Flanagan has filed on his behalf, that Attorney Flanagan is ineffective as his appellate counsel. Attorney Flanagan contends, in reference to defendant’s pleadings, that the mere fact of these allegations having been made against him constitutes a breakdown in the attorney-client relationship that warrants substitution of counsel on behalf of defendant. However, as the Supreme Court has made clear in *Cronic* and *Caplin & Drysdale* in particular, defendant is entitled to adequate representation, not necessarily counsel of his choosing, and our inquiry must focus on the adversarial process and not on the relationship between defendant and Attorney Flanagan.

In accordance with our obligation to focus on the adversarial process, then, we conclude that because Attorney Flanagan has yet to file a brief on defendant’s behalf, there is no basis on the record to support defendant’s claims that Attorney Flanagan is ineffective. As such, substitution of counsel is not warranted. Moreover, there is no right to appointed standby counsel, *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003), and defendant’s request for the same is properly denied. To reiterate, defendant’s Motion to Have Tape Recording Transcribed that will substantiate that Appellate Counsel Flanagan is ineffective and Engaging in Malfeasance is DENIED; Defendant’s Motion for Substitution of Counsel, or Allow Appellant to Represent Himself with Stand-by Counsel is DENIED; and, Attorney Terrence Flanagan’s Motion to Reconsider Order Denying Motion to Withdraw as Appellate Counsel and for the Appointment of Substitute Appellate Counsel is also DENIED.

Because there has been a delay in filing defendant’s brief due to the pending motions, we once again order that Attorney Flanagan shall file a brief on defendant’s behalf within 56 days from the Clerk’s certification of this order. Attorney Flanagan is permitted to exercise reasonable professional judgment in selecting those issues most promising for review and is not required to advance every argument urged by defendant. See *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983); *People v Reed*, 198 Mich App 639, 646-647; 499 NW2d 441 (1993), aff’d 449 Mich 375 (1995). Should Attorney Flanagan choose to not raise an issue requested by defendant, then defendant may file a Standard 4 brief in accordance with the procedure and deadlines contained within Administrative Order 2004-6.

The prosecution's brief is due 35 days from the date of service of appellant's brief. The prosecution may file a supplemental brief in response to any Standard 4 brief filed by defendant within 35 days of the date of service of the Standard 4 brief.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

AUG 31 2011

Date

A handwritten signature in black ink, appearing to read "Larry S. Royster", written over a horizontal line.

Chief Clerk