

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES DAVID POST,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2010

No. 293239

Kent Circuit Court

LC No. 09-001677-FH

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of unarmed robbery, MCL 750.530, for which the trial court sentenced him as a second habitual offender, MCL 769.10. After the trial was commenced and jeopardy attached, the parties reviewed some last minute and previously unknown evidence and agreed on a plea bargain to a reduced charge. Because the trial court neither abused its discretion in refusing to adjourn the trial, nor abused its discretion in refusing to accept the plea on the ground that it was not timely, we affirm.

**I. FACTS**

This case arises from a shoplifting incident. On an evening in January 2009, loss prevention officers at a J.C.Penny store observed defendant leaving the store with a large bag full of merchandise for which he had not paid. Store personnel confronted defendant in the parking lot, and defendant kicked and otherwise struggled with them. The prosecutor charged defendant with unarmed robbery.

At trial, as jury selection was about to start, defendant's appointed attorney informed the trial court that defendant wished to proceed with private counsel, but that the attorney of choice was not immediately available, and that defendant requested an adjournment. The trial court denied the request, observing that defendant was bound over for trial several months earlier, that defense counsel was appointed at that time, and that the prosecutor offered a plea bargain that defendant rejected several weeks before trial. A plea procedure including critical time limitations for presentation of a plea were contained within the trial court's pretrial order of February 16, 2009. The pretrial order limitation on pleas was reinforced by the prosecutors letter of February 25, 2009, stating, "NO REDUCED PLEA WILL BE PERMITTED ON DAY OF

TRIAL”, per Administrative Order 1996-18.(Emphasis in the original.) Trial resumed with the selection of and the swearing in of the jury, opening statement, and the taking of testimony from the first witness. Just before the first witness testified, the prosecutor learned of the existence of surveillance tapes that actually recorded the defendant. The existence of the tapes was disclosed to defense counsel, he reviewed the tapes, and all agree that the existence of the surveillance tapes was only just learned. During the witness testimony surveillance tapes were introduced. At that juncture defense counsel objected as he had only become aware of the surveillance tapes that morning, had not studied them, and had not reviewed them with the defendant. The video recording showed the defendant shoplifting in the store. Counsel requested a continuance to study the tapes and review the matter with defendant. The court believed the request reasonable and the matter was continued for 24 hours.

Counsel, defendant, and defendant’s fiancée studied the films that same day. Counsel and defendant met with the prosecutor and the prosecutor offered the previously rejected plea bargain that the defendant had rejected. Defendant, however, now agreed to accept the plea offer to a reduced charge and the matter was taken to the trial judge. The trial court rejected the request to allow a reduced plea. The trial court opined, “That there’s no right for a defendant to plead guilty to a reduced charge. Especially after a cutoff date or certainly after the trial had commenced with selection of the jury.” “...the Court’s thinking at the time, that it was simply too late, not timely.” At the time of submission of the action to the jury, the court engaged counsel on the issue of his review of the tapes during the referenced continuance. Counsel advised that had the defendant learned earlier of the tapes that would have aided in resolution. The trial court did inquire of the prosecutor as to the exercise of reasonable discretion in charging. Neither party announced any intrusion by the court into the prosecutor’s discretion in charging and the parties agreed with the trial court, “And certainly nobody is entitled to a plea agreement.”

Ultimately, the jury found defendant guilty of unarmed robbery, MCL 750.530. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to four to 22½ years in prison. Defendant now appeals as of right.

## II. CHOICE OF COUNSEL

This Court reviews a trial court’s decision affecting a defendant’s right to the attorney of choice for an abuse of discretion. *People v Adkins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). Likewise a trial court’s decision on a motion for a continuance or adjournment. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). “An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Plumaj*, 284 Mich App 645, 648; 773 NW2d 763 (2009) (internal quotation marks and citation omitted).

The Sixth Amendment of the United States Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.”<sup>1</sup> The United States Supreme Court has held that “an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.” *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). This right is of such fundamental importance that erroneous denial of it is a structural error requiring reversal, with no harmless-error doctrine available to excuse the error. *Id.* at 146-150. However, as with all rights, this one is not absolute. *Id.* at 151-152. The United States Supreme Court has “recognized a trial court’s wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar . . .” *Id.* at 152 (internal citations omitted).

Among the criteria for evaluating a court’s decision in this regard are whether the defendant had a legitimate reason for wanting new counsel, “such as a bona fide dispute with his attorney,” whether the defendant was negligent in asserting his rights in the matter, or whether the defendant is just trying to delay trial. *People v Echavarría*, 233 Mich App 356, 369; 592 NW2d 737 (1999). In this case, defendant has neither identified a dispute with his appointed attorney, nor satisfactorily explained why he did not try to retain counsel of his own choosing until just before trial.

Defendant asserts that the trial court promised him that proceedings would be delayed until his child was born. But defendant points to only his own affidavit to support that assertion. Given the lack of any record evidence of such a promise, and that any such accommodation of a criminal defendant would be highly unusual, we are not persuaded that defendant was entitled to rely on any such promise.<sup>2</sup>

Defendant had no justification for waiting until the last minute to gather funds and arrange for retained counsel. The trial court pointed out that defendant was bound over for trial several months earlier, that counsel was appointed at that time, and that the prosecutor offered a plea bargain several weeks before trial and defendant rejected it. Had defendant hoped that the trial court would delay proceedings pending the birth of defendant’s child or for any other reason, he had ample opportunity to inquire about that possibility. Because defendant proceeded with appointed counsel with no apparent dispute with that representation, then at the start of trial announced his preference for retained counsel whose own schedule apparently did not comport with the scheduling of the instant trial, the trial court’s decision to press ahead with appointed

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<sup>1</sup> See also Const 1963, art 1, § 20.

<sup>2</sup> Defendant does not specify whether this alleged promise came from the judge, as opposed to some lower court officer or employee, or whether it took the form of guaranteeing actual deference to the timing of his child’s birth, as opposed to mere informal assurances that the wheels of justice would likely turn slowly enough that his child would be born before the start of trial.

counsel did not lie outside the range of reasonable and principled outcomes. *Plumaj*, 284 Mich App at 648; *Adkins*, 259 Mich App at 556; *Coy*, 258 Mich App at 17.

### III. PLEA

“A trial judge’s decision to accept or reject a plea is reviewed for abuse of discretion.” *Plumaj*, 284 Mich App at 648. The great majority of criminal cases are disposed of through plea bargaining. *People v Killebrew*, 416 Mich 189, 197; 330 NW2d 834 (1982). “Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part . . . .” *Santobello v New York*, 404 US 257, 261; 92 S Ct 495; 30 L Ed 2d 427 (1971). Plea proceedings must be conducted with “fairness in securing agreement between an accused and a prosecutor.” *Id.* However, “There is . . . no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion.” *Id.* at 262 (citations omitted). “[R]ejection of a tardy plea is within the discretion of a trial court.” *People v Grove*, 455 Mich 439, 464; 566 NW2d 547 (1997). In exercising that discretion the court may consider issues of public interest and the proper administration of justice. *People v Wright*, 99 Mich App 801, 822-823; 298 NW2d 857 (1980). An abuse of discretion only occurs if a trial court selects an outcome that is not within the range of reasonable and principled outcomes. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). In *Grove*, the Supreme Court upheld the trial court’s refusal to consider a plea agreement proffered by the parties one day before the first day of trial. *Grove*, 455 Mich at 464. The court cited *United States v Ellis*, 547 F2d 863, 868 (CA 5, 1977) for the proposition that a proper consideration in making this decision was “to control the scheduling of trial procedures in ongoing prosecutions, plus a broad interest of docket control and effective utilization of jurors and witnesses.” *Grove*, 455 Mich at 466.

Defendant has never accused the prosecution of deliberately delaying disclosure of the surveillance video recording at issue. Apparently that crucial piece of evidence came to light only when store employees appeared for trial. The record displays no purposeful delay on the part of the prosecution, and defendant was given a full opportunity to study the evidence before proceeding further with the trial. The only circumstance between the first offer and the second offer was that at the time of the second offer, defendant realized that he had been found out. The tapes showed defendant in the act of stealing the merchandise. However, as the prosecution keenly observes, at the time of the first plea offer defendant was aware that he had stolen the items but chose to rely on his right to have the prosecutor prove beyond a reasonable doubt that which he now, cannot deny. Because a pretrial order established a time frame for the negotiation and taking of pleas on agreement, the trial had commenced, prejudice had attached by virtue of the empanelled and sworn jury, and testimony had been received, all before the attempt to resolve the criminal proceedings by plea, the trial courts refusal to accept a plea to a reduced

charge was not an abuse of discretion as it was an outcome within the range of reasonable and principled outcomes. *Grove*, 455 Mich at 471.

Affirmed.

/s/ Christopher M. Murray

/s/ Kirsten Frank Kelly

/s/ Pat M. Donofrio