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ATTORNEY FOR APPELLANT:

DALE W. ARNETT
Winchester, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

KARL M. SCHARNBERG
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SAMUEL L. PINKSTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 38A02-0812-CR-1099
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JAY SUPERIOR COURT
The Honorable Joel D. Roberts, Judge
Cause No. 38D01-0706-FD-52

May 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, Samuel Pinkston was convicted of public intoxication, a Class B misdemeanor, and possession of marijuana, a Class A misdemeanor. Pinkston subsequently admitted to being an habitual substance offender and was sentenced to an aggregate term of five years in the county jail. For our review on appeal, Pinkston raises a single issue, which we restate as whether the trial court abused its discretion when it denied his request for appointment of a new attorney. Concluding the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

On June 11, 2007, the State charged Pinkston with public intoxication, a Class B misdemeanor, and possession of marijuana, a Class A misdemeanor. The State also filed notices of intent to seek an enhancement of the possession of marijuana charge to a Class D felony based on a prior possession conviction,[1] and intent to seek habitual substance offender status on the basis of two prior possession convictions in 1990 and 2004. The trial court held a jury trial on August 13, 2008.

The trial court found Pinkston to be indigent and appointed Tom Diller to represent him. Diller entered his appearance on behalf of Pinkston on June 22, 2007. Diller had previously been a trial judge and had sentenced Pinkston to prison on an unrelated matter in 1997. On the morning of the trial, after the jury had been assembled but before jury selection, Pinkston requested the appointment of a new attorney. When asked by the trial court why he wanted Diller removed as counsel, Pinkston responded:

[1] Indiana Code section 35-48-4-11 provides that a person who knowingly or intentionally possesses marijuana commits a Class A misdemeanor, however the offense is a Class D felony if the person has a prior conviction of an offense involving marijuana.

> Well I've asked him several times to do things that he refuses. He says he can't do them. He's convicted me and sent me to prison back in 1997 and I figure that was a conflict. I don't know if he's held a grudge on that or what. I do not know. I would just a [sic] soon hire my own attorney. As I talked to him yesterday, he refused to do some of the things I asked him that I wanted done.

Transcript at 5. Diller explained to the court that he had informed Pinkston the things Pinkston wanted him to do would violate the rules of trial procedure and evidence. Diller also stated he had no recollection of sentencing Pinkston, he had probably sentenced thousands of people, and he held no grudge against Pinkston. Diller also indicated that he was prepared to represent Pinkston at the trial.

The trial court then made the following statements to Pinkston:

> Mr. Pinkston you do have the right obviously to have an attorney represent you. If you do not have the means yourself to hire a lawyer, you are entitled to have one appointed by the court and the court has, in fact, provided you with counsel. The law does not provide that you have the right to have counsel of your own choice. But Mr. Diller, as any attorney that would be representing you, is bound by the code of professional responsibility to meet his obligations to you as an attorney. Mr. Diller has extensive experience both as a trial judge, defense lawyer in criminal matters and a general practitioner in the law and I believe that he is fully capable of representing your interests. You certainly can discharge him, if that's what you wish to do Mr. Pinkston, but if you do that, the court is going to, at this late date, the day of the trial, this case has been pending since June 11, 2007. Mr. Diller entered his appearance for you on June 22, 2007 and to bring this up before the court particularly as it relates to matters, if I understand it correctly, that may not be admissible in any event, but that your counsel is aware of and can bring forward, if he chooses to do so or he believes it's appropriate to do so during the trial. It would appear to me that the options that you would have sir, if you wish to have Mr. Diller discharged, then the court would treat that as a waiver of your right to counsel. I would then consider whether or not the court should appoint an attorney to represent you if the court concludes that you are not capable of self representation in this case or the court could consider the third option, to allow you to represent yourself, but appoint standby counsel to assist you in your presentation of the case. But at this late in date [sic], I don't believe there's been a sufficient basis to believe that Mr. Diller is not both able and prepared to represent your interest at trial.

Tr. at 6-8. In response to a subsequent question from the trial court regarding whether Pinkston wanted Diller to continue to represent him, Pinkston responded, "Yes." Tr. at 9.

At the conclusion of the trial, the jury found Pinkston guilty of both charges. In lieu of proceeding with the enhancement phase of the trial, Pinkston admitted the habitual substance offender status, and, in return, the State did not seek an enhancement of the possession charge to a Class D felony. On November 18, 2008, the trial court held a sentencing hearing and sentenced Pinkston to 180 days for the public intoxication charge and one year for the possession charge to be served concurrently. The trial court also enhanced the sentence for possession by four years based on Pinkston's status as an habitual substance offender. Pinkston now appeals.

Discussion and Decision

I. Standard of Review

The decision to grant a defendant's request for change of counsel immediately before trial is a matter within the sound discretion of the trial court. Gilliam v. State, 650 N.E.2d 45, 50 (Ind. Ct. App. 1995). We will set aside the trial court's decision only when it constitutes a clear abuse of discretion that prejudices the defendant's right to a fair trial. Id.

II. Right to Counsel of Choice

Generally, a defendant enjoys the right to choose the attorney who will represent him at trial. United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006); Barham v. State, 641 N.E.2d 79, 82 (Ind. Ct. App. 1994). However, the right is not absolute, and an indigent defendant who requires the appointment of counsel does not have the right to

choose his counsel. Gonzalez-Lopez, 548 U.S. at 151; Moore v. State, 557 N.E.2d 665, 668 (Ind. 1990). The trial court determined Pinkston to be indigent and appointed counsel for him on June 15, 2007, over a year prior to the trial date. Despite this, Pinkston made no attempt to request a change of counsel or to bring the possibility of a conflict of interest to the trial court's attention until the morning of the trial just before the beginning of jury selection. A trial court is justified in denying a motion for a change of counsel made close to the trial date that would require the court to grant a continuance. Gilliam, 650 N.E.2d at 50. Specifically, "[m]otions for continuance to hire a new lawyer made on the morning of trial are particularly disfavored because granting them causes substantial loss of time for jurors, witnesses, lawyers, and the court." Roberts v. State, 500 N.E.2d 197, 199 (Ind. 1985).

In addition, after raising his objections to Diller's representation and hearing the trial court's response, Pinkston agreed to continue with Diller as his counsel. Pinkston argues that he did so only under the threat of having to proceed without an attorney. However, the trial court made no such threat. Instead, the trial court explained that it would treat Pinkston's discharge of Diller as counsel at this late date as a waiver of the right to counsel. The trial court further explained that it would then need to determine whether Pinkston was capable of defending himself and whether the trial court should appoint a standby attorney to assist him with his presentation of his case. In the event the trial court found Pinkston unable to defend himself, the trial court explained it would determine whether or not to appoint new counsel to represent him. Rather than threatening Pinkston, the trial court simply explained the effects of his decision to

discharge Diller as his counsel. As a result, the trial court did not abuse its discretion in denying Pinkston's request to appoint a new attorney.

III. Conflict of Interest

In addition, Pinkston fails to present any evidence of a conflict of interest or of the inability of Diller to adequately represent him. Pinkston argued that Diller refused to do certain things Pinkston requested but did not say what Diller refused to do. However, Diller explained to Pinkston that he was bound by the rules of procedure and evidence and could not do what Pinkston wanted. In addition, the trial court made clear to Pinkston that Diller could raise any issue Pinkston wanted raised at trial and ask the trial court to rule on its admissibility.

Pinkston also complained that Diller held a grudge against him because Diller had sentenced him for a crime in 1997. In response, Diller explained that he had sentenced thousands of defendants as a trial court judge, he did not remember sentencing Pinkston, and he did not hold a grudge against him. Our review of the record leaves us with the impression that Diller provided competent representation of Pinkston both prior to, during, and after the trial. Therefore, there is no evidence that Diller held a grudge against Pinkston.

Finally, Pinkston complained that Diller's representation of him creates a conflict of interest. Indiana Professional Conduct Rule 1.12 prevents an attorney from representing anyone in any matter in which the attorney participated personally and substantially as a judge without the written informed consent of all parties involved. Here, Diller sentenced Pinkston for an unrelated matter eleven years before representing

him in this matter. In addition, the crime for which Diller sentenced Pinkston is not one of the crimes used to establish the habitual substance offender status. Therefore, we discern no conflict of interest.

Conclusion

Pinkston does not have a constitutional right to choose his court-appointed counsel and he did not present evidence that it would be improper for Diller to represent him. In addition, Pinkston delayed requesting the change of attorney until the morning of trial. Therefore, the trial court did not abuse its discretion when it refused his request for a new attorney.

Affirmed.

DARDEN, J., and BAILEY, J., concur.