

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1962

September Term, 2015

HERSCHEL WALTER VICK a/k/a
HERSCHEL BROWN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 5, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Herschel Walter Vick appeals from his conviction in the Circuit Court for Worcester County of possession of heroin, possession of cocaine, and resisting arrest. He raises the following questions for our review:

- “1. Did the trial court comply with Maryland Rule 4-215?
2. Should this Court decline to undertake direct review of Vick’s ineffective assistance of counsel claim?
3. Should this Court decline to consider Vick’s claim regarding a motion to suppress that was neither raised by Vick nor ruled on by the trial court?”

We shall hold that when appellant’s attorney advised the circuit court that appellant wished to discharge his attorney, and the circuit court did not permit appellant to explain his reasons for his request, the circuit court abused its discretion. Accordingly, we shall reverse.

I.

Appellant was convicted by a jury in the Circuit Court for Worcester County with the offenses of possession of heroin, possession of cocaine, and resisting arrest. The court sentenced appellant to a term of incarceration of one year on each offense, to be served consecutively.

We set out the facts briefly so as to put appellant’s remarks regarding counsel into context. Worcester County police officer Carmean arrested appellant on April 29, 2014, on a twelve year old outstanding bench warrant (driving on a suspended license), and based upon appellant’s conduct, the officer charged him with resisting arrest. An emergency

medical team transported appellant to Atlantic General Hospital in Berlin, Maryland to treat the injuries he sustained during his arrest. At the hospital, Officer Carmean saw a clear piece of glass type pipe, which Officer Carmean believed to be a broken piece of a crack pipe, fall out of appellant's pocket. In appellant's wallet, Office Carmean found a bag that contained cocaine and an envelope that contained heroine.

Appellant appeared before the District Court represented by the public defender and he prayed a jury trial. On August 6, 2015, appellant appeared before the Circuit Court for Worcester County for trial. Appellant's counsel requested a continuance of the case, stating medical concerns as well as appellant's desire to seek different counsel. The following colloquy took place:

[DEFENSE COUNSEL]: Your Honor, we would be asking for a continuance.

THE COURT: I'll hear your argument.

[DEFENSE COUNSEL]: Mr. Vick is—his concern is that he feels as counsel that I don't have the best interests in his case. His family would like to be able to retain private counsel. The Hicks date is not until September the 19th.

In addition to that, I would just add that he's got some medical concerns. He will be undergoing a procedure for his hernia he reports to me on August the 13th. And his wife was recently released or discharged from the ICU in North Carolina. His wife is still living in North Carolina. Mr. Vick has always had ties in this area. And he—his concern is trying to get his wife up here. She needs some assistance. I have some papers that Mr. Vick just handed me.

THE COURT: Before we get to that point. Let's discuss the representation issue.

[DEFENSE COUNSEL]: Sure.

THE COURT: I'm trying to find- look through this file. This case has been pending for some time. First I think it was down in District Court at one time anyway on August 30, 2014. I guess this is the same case. The file is pretty substantial.

In May you asked for a continuance for the purpose of a jury trial, and that motion was granted. So you've already had one postponement in order to get a—you're going to go to trial today unless I grant a continuance for health reasons. But the matter of representation is, your choice is you may proceed to trial with the attorney that's standing at the counsel table before you, or you can represent yourself. And if you do so and you want her to sit in the back—

[APPELLANT]: So in other words you're telling me, I'm forced to go with this attorney that's not acting in my best interest.

THE COURT: You're not forced to go with that attorney. You can go without an attorney, or you can represent yourself. But you've been advised on at least one occasion that you couldn't wait until the date of trial to have an attorney. If you want to hire a private attorney, you've got to hire a private attorney. You can't wait until you get to trial and then—it would go on forever. Two months from now you would want another attorney.

[APPELLANT]: I didn't wait until the day of trial. She was already my attorney.

THE COURT: Yesterday. Yesterday you asked for a continuance.

[APPELLANT]: *I asked for a continuance because none of my witnesses - my key witnesses—*

THE COURT: *Here's what's going to happen. . . .*

The circuit court told appellant it had advised him on at least one prior occasion that he could not wait until the date of trial to hire a private attorney. The court then stated that the case would go to trial that day, explaining appellant's options for representation as follows:

THE COURT: . . . You're going to trial today. Your choice is she can stay and represent you to the best of your ability, or you can fire her and you can represent yourself, but you're not going to get a continuance to get another attorney in a case that's been pending for almost a year. And you've been advised of your rights to an attorney for almost a year. Since the 30th of August of 2014, you were advised of your rights to an attorney and the necessity of getting one. You can't keep going on forever. So your choice is to proceed with her or to proceed without her.

[APPELLANT]: So I guess that's a matter of record. That's good for the Court of Appeals.

THE COURT: That's fine.

[APPELLANT]: I'm not going to -

THE COURT: I sat on the Courts of Appeals for 20 years. Have a good trip up there if you think that's where you're going.

[APPELLANT]: I don't believe this. You're forcing me to represent myself, and you a judge.

THE COURT: No. I'm not forcing you to represent yourself. You can either be represented by the Public Defender, or you can represent yourself. That's up to you.

[APPELLANT]: Well, I don't think the Public Defender is acting in the best of my interests. I'm going to just let you do what you want to do, and I'll just appeal it.

THE COURT: Call the jury up. I'd ask you to sit in the back and be-right here and be available if he wants to ask you any questions.

The circuit court explained to appellant the jury roll-call and voir dire process. Before beginning the roll-call, the State asked the circuit court to clarify if it meant to deny the motion to continue, which the court did as follows:

THE STATE: Your Honor, just one point of clarification. When you were making your ruling on the motion to continue, you said granted. Did you mean denied?

THE COURT: I meant to deny the motion for continuance. My understanding is he has some health problems. Later this month he has scheduled some kind of a hernia operation or some kind of medical procedure, but that's not scheduled today. And my understanding is it's scheduled later this month.

If he's found innocent, there won't be any problem. If he's found guilty, it's something I'll consider at the time, whether I order a PSI or revoke bond or whatever it may be. Call the jury in.

The court denied appellant's request to continue the case and appellant proceeded to trial pro-se, with appointed public defender acting as stand-by counsel.

During jury selection, appellant again asked the court to continue the case, explaining as follows:

[APPELLANT]: My witness is not here. I don't know—I stopped by his house this morning. Can I have enough time to call to see if I can get him in here, get at least one of them here because this is the only reason I asked for a continuance. The main, key witness, Mr. James Brittingham, he's on a cruise in the Bahamas. He won't be back until the 13th.

THE COURT: The file doesn't reflect that you have summoned these witnesses.

[APPELLANT]: She was supposed to do it.

THE COURT: The docket entries indicate that you haven't summonsed these particular witnesses. Even if you had summonsed them, the fact that when a witness goes on a cruise to the Bahamas, it's not, generally speaking a sufficient reason to postpone the trial.

Stand-by counsel explained to the judge that she had disclosed this witness to the State, but that due to some court clerk office complications, she did not subpoena the witness, and that because the witness had appeared previously, she did not have the subpoena issued. The trial court denied appellant's motion to continue the case and proceeded to trial.

At trial, appellant testified on his own behalf. He explained to the jury that he had requested his attorney to subpoena the security cameras nearby where he was arrested because the video would show that he did not resist the arrest. He stated as follows:

"I asked to subpoena for the cameras. On that picture what the State's Attorney had, it's a camera on that pole right there. And I had asked my attorney about a subpoena for the—but when I asked about it, they told me that it didn't work no more."

The jury convicted appellant of possession of heroin, possession of cocaine, and resisting arrest. This timely appeal followed.

II.

Appellant's primary argument is that the circuit court erred in failing to conduct a proper inquiry into the reasons for his request to discharge his counsel, denying his request to discharge counsel to engage new counsel, and requiring him to proceed to trial self-represented. Appellant argues that Md. Rule 4-215 is mandatory, and thus, a court must provide appellant with an opportunity to explain his request to discharge counsel. Appellant states that the court denied him the opportunity to explain his request, and maintains that if the circuit court allowed him to explain his reasons, he would have demonstrated good cause to discharge counsel.¹

The State concedes that if Rule 4-215 applies, *i.e.*, before "meaningful trial proceedings" have begun, then reversal is required. On the other hand, if, as the State urges, we conclude that appellant's request came *after* meaningful trial proceedings began, *i.e.*, on the morning of trial, which we should consider as a meaningful trial proceeding, then the reversal mandate of Rule 4-215 is inapplicable and we should apply the deferential standard of abuse of discretion to review these proceedings. The thrust of the State's argument, however, is that Rule 4-215 is a minefield, treacherous for a trial judge to maneuver, and that this Court should reconsider the interpretation of "meaningful trial proceedings" and find that even though voir dire had not yet begun, appellant requested to discharge his counsel after meaningful trial proceedings had commenced. The State concludes that meaningful proceedings were underway because appellant's request to

¹ Specifically, appellant would have informed the circuit court that his counsel failed to subpoena witnesses, failed to subpoena public videotape of his arrest, and failed to pursue his motion to suppress the evidence seized by Officer Carmean at the hospital.

discharge counsel was made on the morning of trial, and that appellant was once again using tactics to delay the trial.

III.

Rule 4-215(e), implementing the constitutional right to counsel, provides as follows:

“If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a) (1)-(4) of this Rule if the docket or file does not reflect prior compliance.”

Rule 4-215 addresses waiver of counsel, and implements a defendant's constitutional right to counsel and the corresponding right to reject counsel and to proceed to trial appearing pro-se, or self-represented. *Gonzales v. State*, 408 Md. 515, 529-30 (2009); *Alford v. State*, 202 Md. App. 582, 607-08 (2011). When the Rule is applicable, the plain language of the Rule requires that the court permit the defendant to explain the reasons for the request to discharge counsel. Judge Glenn C. Harrell, writing for the Court

of Appeals in *Williams v. State*, 435 Md. 474, 485-86 (2013), explained the purpose underlying the Rule:

“The purpose of Rule 4-215 is to ‘protect that most important fundamental right to the effective assistance of counsel, which is basic to our adversary system of criminal justice.’ That right is guaranteed by the Sixth Amendment to the United States Constitution, which is applied to the states via the Fourteenth Amendment, and by Article 21 of the Maryland Declaration of Rights. Accordingly, ‘we have held consistently that the requirements of the Rule are mandatory,’ that its ‘mandates [] require strict compliance,’ and that ‘a trial court’s departure from the requirements of Rule 4-215 constitutes reversible error.’”

Id. at 272. (Internal citations omitted).

When applicable, the provisions of the Rule are mandatory, require strict compliance, and the trial court’s departure from the Rule’s strictures constitutes reversible error. *State v. Brown*, 342 Md. 404, 424 n.10 (1996); *Wood v. State*, 209 Md. App. 246, 279-80 (2012). The Rule is applicable before “meaningful trial proceedings” have begun. *Brown*, 342 at 427-28. When a defendant moves to discharge counsel *after* trial proceedings have commenced, Rule 4-215 is inapplicable, and we evaluate the trial court’s ruling on a request to discharge counsel under the more lenient abuse of discretion standard. *Brown*, 342 Md. at 420-22, 426-28.

Whether Rule 4-215 is applicable, and whether “meaningful trial proceedings” had commenced, is in our view, a tempest in a teapot, because under any standard, when a

defendant seeks to discharge counsel, the court should afford the defendant an opportunity to state the reasons therefor. Any review of this record leads to the conclusion that the trial judge did not permit appellant to explain his reasons for wishing to discharge his counsel, and under any test, a defendant must be afforded an opportunity to explain to the court his reasons for wishing to discharge counsel. *Id.* at 428 (concluding that even though “Rule 4-215(e) does not apply to decisions to discharge counsel after trial has begun, the trial court must determine the reason for the requested discharge before deciding whether dismissal should be allowed.”). Whether the more lenient standards of *Brown v. State* or the mandatory strictures of Rule 4-215 apply, a defendant in a criminal case, upon making a request to discharge counsel, must be afforded an opportunity and a forum to explain the reasons for the request.² *Brown*, 342 Md. at 428; Rule 4-215(e). Under the *Brown* factors, the trial court should consider the following six-factor test in determining whether to permit discharge of counsel:

“(1) the merit of the reason for discharge; (2) the quality of counsel’s representation prior to the request; (3) the disruptive effect, if any, that discharge would have on the proceedings;

² A defendant must be provided with an opportunity to provide his or her own “colloquy” explaining the request to discharge counsel separate from defense counsel. *State v. Graves*, 447 Md. 230, 251-52 (2016) (finding that the Court of Appeals decision in *State v. Brown*, 342 Md. 404, indicates that “the defendant” in rule 4-215 refers to the client, as opposed to defense counsel.). Compare *Taylor*, 431 Md. 615, 625-26, 633-35 (2013) (finding that the trial court provided defendant with a proper forum to explain his reasons for discharge when it invited the defendant to weigh-in on the explanation to discharge counsel provided by defense counsel) with *Brown*, 342 Md. at 430-31 (declining to find that the trial court provided defendant with proper forum to explain his reasons for discharge when it relied on defense counsel’s explanation that the request to discharge counsel was based on advice of respondent’s father, and did not then allow respondent to provide his own explanation).

(4) the timing of the request; (5) the complexity and stage of the proceedings; and (6) any prior requests by the defendant to discharge counsel.”

Brown, 342 Md at 428.

There is no suggestion by any party in this case that appellant’s counsel did not make a clear and unequivocal statement that his client desired to discharge counsel. Irrespective of both the timing of appellant’s request and that the initial request came from appellant’s attorney, the trial court had an obligation to permit appellant to explain personally his reasons for wanting to discharge his counsel. *See Brown* factor number (1) the merits of the reason for discharge; *Graves*, 447 Md. at 251-52. While we are mindful of the stresses upon trial judges of waiting jurors and the orderly administration of justice concerns, in protecting and implementing a criminal defendant’s right to counsel, the trial judge nonetheless must give the defendant the opportunity to explain.

Appellant was cut-off when he tried to explain his reasons and was denied his opportunity to explain his reasons.³

**JUDGMENTS OF THE CIRCUIT COURT
FOR WORCESTER COUNTY REVERSED.
CASE REMANDED TO THAT COURT
FOR A NEW TRIAL. COSTS TO BE PAID
BY WORCESTER COUNTY.**

³ While appellant explained to the trial judge that his attorney failed to subpoena both a witness and public security camera footage, these statements were made after the trial judge had ruled on the motion to discharge counsel.

-Unreported Opinion-
