

2010 WL 4656818 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina.

STATE OF NORTH CAROLINA,
v.
Michael Thomas CARTER, Defendant.

No. COA10-1110.
October 21, 2010.

From Buncombe County Nos. 10 CRS 1246-47, 10 CRS 1249-52

Defendant-Appellant's Brief

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***i INDEX**

TABLE OF CASES AND AUTHORITIES	ii
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF GROUNDS FOR APPELLATE REVIEW	3
STATEMENT OF THE FACTS	3
ARGUMENT:	
I. THE TRIAL COURT ERRED BY DENYING MR. CARTER'S REQUEST TO CONTINUE THE PROBATION VIOLATION HEARING IN ORDER TO HIRE PRIVATE COUNSEL IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS	5
A. Standard of Review	5
B. Argument	5
CONCLUSION	11
CERTIFICATE OF SERVICE	13

***ii TABLE OF CASES AND AUTHORITIES**

Case Law:

<i>People v. Brady</i> , 275 Cal.App.2d 984, 80 Cal.Rptr. 418 (1969)	8
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)	6
<i>State v. Gibson</i> , 229 N.C. 497, 50 S.E.2d 520 (1948)	9
<i>State v. Jones</i> , 172 N.C.App. 308, 616 S.E.2d 15 (2005)	10
<i>State v. McFadden</i> , 292 N.C. 609, 234 S.E.2d 742 (1977)	6, 8
<i>State v. Morris</i> , 275 N.C. 50, 165 S.E.2d 245 (1969)	6
<i>State v. Phillip</i> , 261 N.C. 263, 134 S.E.2d 386 (1964)	9
<i>State v. Smathers</i> , 287 N.C. 226, 214 S.E.2d 112 (1975)	5
<i>State v. Speller</i> , 230 N.C. 345, 53 S.E.2d 294 (1949)	6, 9
<i>State v. Taylor</i> , 354 N.C. 28, 550 S.E.2d 141 (2001)	10
<i>State v. Tunstall</i> , 334 N.C. 320, 432 S.E.2d 331 (1993)	10
<i>State v. Williams</i> , 355 N.C. 501, 565 S.E.2d 609 (2002), cert. denied, 537 U.S. 1125, 154 L.Ed.2d 808 (2003)	10

Statutory Provisions:

N.C. Gen. Stat. § 7A-27 (b) (2009)	3
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Constitutional Provisions:

N.C. Const., Art. I, sec. 11	5
U.S. Const., Amend. XIV	5

***1 QUESTION PRESENTED**

I. DID THE TRIAL COURT THE TRIAL COURT ERR BY DENYING MR. CARTER'S REQUEST TO CONTINUE THE PROBATION VIOLATION HEARING IN ORDER TO HIRE PRIVATE COUNSEL IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS?

STATEMENT OF THE CASE

On July 23, 2008, Michael Thomas Carter pled guilty to three counts of felonious breaking and/or entering, one count attempted felonious breaking and/or entering, two counts felonious larceny, one count attempted felonious larceny, four counts misdemeanor larceny, four counts felonious possession of stolen goods, one count misdemeanor possession of stolen goods, seven counts breaking and/or entering a motor vehicle, one count conspiracy to obtain property by false pretenses, one count **exploitation** of the **elderly**/disabled, four counts injury to personal property, and one count first degree *2 trespass. Judge Alma L. Hinton sentenced him to six (6) terms of imprisonment of six (6) months minimum to eight (8) months maximum in the North Carolina Department of Correction with all sentences running concurrently. The court suspended the sentences and placed him on supervised probation for a period of sixty (60) months. (R. pp. 6-10; R. pp. 16-17; R. pp. 22-24; R. pp. 29-31; R. pp. 36-38; R. pp. 43-44).

Judge Laura J. Bridges conducted a probation violation hearing on March 18, 2010, based upon violation reports filed on February 15, 2010. The violation reports alleged curfew violations and monetary violations. (R. pp. 4-5; R. pp. 14-15; R. pp. 20-21; R. pp. 27-28; R. pp. 34-35; R. pp. 41-42). The court found Mr. Carter in wilful violation of the terms and conditions of his probation on all cases. Judge Bridges placed all of his suspended sentences into effect to run consecutively to each other. (R. pp. 11-13; R. pp. 18-19; R. pp. 25-26; R. pp. 32-33; R. pp. 39-40; R. pp. 45-46). Defendant entered written notice of appeal on March 23, 2010. (R. p. 47).

The court reporter delivered the transcript on July 16, 2010. Defendant-Appellant served his Proposed Record on Appeal on the Buncombe County District Attorney's Office on August 20, 2010. (R. p. 53) The Record was settled on August 25, 2010, by agreement of the parties. (R. p. 51). The Record *3 on Appeal was filed September 10, 2010, and docketed September 14, 2010. (R. p. 1). The North Carolina Court of Appeals mailed the printed Record on Appeal on September 21, 2010.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This case comes on for appellate review as a final judgment from Buncombe County Superior Court pursuant to [N.C. Gen. Stat. § 7A-27\(b\)](#) (2009).

STATEMENT OF THE FACTS

Probation Officer Clay Long filed the probation violation reports in this case on February 15, 2010. The violation reports alleged that Mr. Carter violated the terms and conditions of his probation by leaving his residence during prohibited hours and failing to pay monetary amounts due. (R. pp. 4-5; R. pp. 14-15; R. pp. 20-21; R. pp. 27-28; R. pp. 34-35; R. pp. 41-42).

When Mr. Clay filed the reports on February 15, 2010, Mr. Carter was incarcerated in the Buncombe County jail. Based upon his incarceration he requested appointment of a public defender to represent him in the matter. (T. p. 2, lines 2-20).

The State called the case for hearing on March 18, 2010. Upon calling the case Mr. Carter's appointed counsel made a motion to continue to allow him to hire private counsel. The *4 State opposed the motion. (T. p. 2, lines 2-11). Judge Bridges questioned Mr. Carter as to why he requested a public defender if he intended to retain counsel. (T. p. 2, lines 14-15).

In response to the court's inquiry, Mr. Carter explained that he could not afford to hire counsel as long as he was incarcerated. At his first appearance Mr. Carter did not know whether he would be released from custody prior to the hearing; accordingly, he requested a public defender. As he was ultimately released he wanted to retain counsel. (T. p. 2, lines 16-20). Mr. Carter also informed the court that he was employed and produced documentation in court. (T. p. 21, line 21 through T. p. 3, line 2).

The court next inquired about whether Mr. Carter had already hired an attorney. Mr. Carter began his answer when the court interrupted him and stated that the motion was denied. (T. p. 3, lines 3-5).

After denial of his motion Mr. Carter admitted to being in wilful violation of his probationary sentence. (T. p. 4, line 24 through T. p. 5, line 3). The court found Mr. Carter in wilful violation of the terms and conditions of his probation on all cases and activated his sentences to run consecutively to each other. (R. pp. 11-13; R. pp. 18-19; R. pp. 25-26; R. pp. 32-33; R. pp. 39-40; R. pp. 45-46).

*5 Other facts necessary for an understanding of the case are included in each argument.

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING MR. CARTER'S REQUEST TO CONTINUE THE PROBATION VIOLATION HEARING IN ORDER TO HIRE PRIVATE COUNSEL IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS.

ASSIGNMENT OF ERROR NO. 3

T. p. 2, line 5 through T. p. 4, line 24.

A. Standard of Review

A motion to continue ordinarily is addressed to the sound discretion of the trial judge, and a ruling on the motion is not subject to appellate review unless it is shown that the judge abused that discretion. "But when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable." *State v. Smathers*, 287 N.C. 226, 230, 214 S.E.2d 112, 114-15 (1975).

B. Argument

The North Carolina and United States Constitutions guarantee each individual the right to counsel in criminal cases. *N.C. Const., Art. I, sec. 11*; *U.S. Const., Amend. XIV*; *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *6 *State v. Speller*, 230 N.C. 345, 351, 53 S.E.2d 294, 298 (1949). The accused's right to counsel includes the right to select and retain an attorney of his choice. *State v. Morris*, 275 N.C. 50, 55, 165 S.E.2d 245, 248 (1969). "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (quoting *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932)). Thus, the denial of defendant's motion in this case presents a constitutional question concerning his right to have counsel of his choice.

The probation officer filed the probation violation reports in this case on February 15, 2010. The record does not disclose when Mr. Carter was placed into custody or when he was released. It does reflect that he was incarcerated at the time of his first appearance and that the probation violation hearing took place on March 18, 2010. Thirty-one days passed between filing the

reports and the hearing. As Mr. Carter was incarcerated for a portion of those thirty-one days, he had only weeks (in any event less than one month) to secure employment, hire an attorney, and prepare his defense.

The trial court's denial of Mr. Carter's motion to continue presents a constitutional question concerning his right to select and retain counsel of his choice. After *7 defense counsel made the motion to continue the following exchange took place between Mr. Carter and the court:

THE COURT: Mr. Carter?

THE DEFENDANT: Yes, ma'am.

THE COURT: If you were going to hire your own attorney, why did you ask for a public defender?

THE DEFENDANT: I asked for a public defender because I was in the county jail, actually, at the time and there was no way I was going to be eligible to afford my own attorney. But I am out now and eligible to work, and I'd like to get my own attorney.

THE COURT: Are you working?

THE DEFENDANT: Yes ma'am?

THE COURT: Where at?

THE DEFENDANT: It's for a woman named Brenda Smith, who owns her own cleaning company out in Haywood County. I have a letter of recommendation right here from her.

THE COURT: Have you hired an attorney?

THE DEFENDANT: No, ma'am, but --

THE COURT: Motion denied.

(T. p. 2, line 12 through T. p. 3, line 5)

*8 While a defendant enjoys a constitutional right to have counsel of his choice, the North Carolina Supreme Court has recognized that the right to be defended by chosen counsel is not absolute. *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (quoting from *People v. Brady*, 275 Cal.App.2d 984, 993, 80 Cal.Rptr. 418, 423 (1969)). In that case the Court stated that

... [d]ue process is not denied every defendant who is refused the right to defend himself by means of his chosen retained counsel; other factors, including the speedy disposition of criminal charges, demand recognition, particularly where defendant is inexcusably dilatory in securing legal representation

...

State v. McFadden, 292 N.C. at 613, 234 S.E.2d at 745. The *McFadden* Court also stated that “[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial.” *Id.* at 616, 234 S.E.2d at 747.

It is implicit in these Constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. *9 *State v. Phillip*, 261 N.C. 263, 266, 134 S.E.2d 386, 389 (1964); *State v. Speller*, 230 N.C. 345, 353-54, 53 S.E.2d 294, 299-300 (1949). However, no set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. *State v. Gibson*, 229 N.C. 497, 501-02, 50 S.E.2d 520, 524 (1948).

The record in no way indicates that Mr. Carter violated the *McFadden* guidelines. The trial court appeared troubled that Mr. Carter had not secured retained counsel prior to the hearing date; however, as stated *supra*, he had one month between arrest and hearing with part of that time spent in the county jail. The factors presented in the record demonstrate that Mr. Carter was not inexcusably dilatory in securing legal representation. March 18, 2010 was the first hearing after his arrest and release from custody; he had a small window after release in which to retain counsel.

Mr. Carter recognizes the speedy disposition of criminal charges is an important factor for the State; however, one must ask what constitutes “speedy”. In a struggling economy with record unemployment, requesting an additional few weeks to secure the counsel of his choice does not constitute unnecessary obstruction or delay of trial. It does not make Mr. Carter inexcusably dilatory.

*10 Even if the motion raises a constitutional issue, a denial of a motion to continue is grounds for a new trial only when defendant shows both that the denial was erroneous and that he suffered prejudice as a result of the error. *State v. Jones*, 172 N.C.App. 308, 311-12, 616 S.E.2d 15, 18 (2005) (quoting *State v. Taylor*, 354 N.C. 28, 33-34, 550 S.E.2d 141, 146 (2001)). To establish that the denial of a continuance motion was prejudicial, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. To demonstrate that the time allowed was inadequate, the defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion. *State v. Williams*, 355 N.C. 501, 540-41, 565 S.E.2d 609, 632 (2002) (quoting *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993), *cert. denied*, 537 U.S. 1125, 154 L.Ed.2d 808 (2003)).

The most glaring aspect of Mr. Carter's hearing is that he admitted the violations, including their wilfulness. His appointed counsel issued no subpoenas and submitted no exhibits or written documents on his behalf. When Mr. Carter presented the document from his employer the trial court refused to consider it. This facet alone demonstrates that his case would have been better prepared had the continuance *11 been granted and that he was materially prejudiced by the denial of his motion. As Mr. Carter was employed at the time of the hearing, and the violations included monetary conditions, employment information and his ability to pay were crucial to his case.

While the constitutional right to have counsel of choice is not absolute, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Mr. Carter did not receive that opportunity. The denial of his motion to continue presents a Constitutional question as it denied him the Constitutional guarantees that an accused and his counsel must have a reasonable time to investigate, prepare and present the defense of the accused.

CONCLUSION

Based upon the foregoing arguments, Defendant-Appellant Carter respectfully requests that the sentences imposed be vacated and the cases be remanded for appropriate proceedings.