STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY THOMAS COOK,

Defendant-Appellant.

UNPUBLISHED
January 14, 2021

No. 351522
Oakland Circuit Court
LC No. 2018-269498-FH

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] his convictions for carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and domestic violence, MCL 750.81(2). The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 2 to 25 years' imprisonment for CCW and felon-in-possession and to 56 days, with credit for time served, for domestic violence. And although defendant's CCW sentence was concurrent with his two-year sentence for felony-firearm, his felon-in-possession sentence was consecutive to his felony-firearm sentence. We affirm in part and reverse in part, remanding for further proceedings consistent with this opinion.

I. BACKGROUND

On February 20, 2019, defendant pleaded guilty to CCW, felon-in-possession, and felony-firearm, and he pleaded no-contest to domestic violence. Sentencing was scheduled to occur on April 3, 2019, with Ronald L. Marsh representing defendant as retained counsel. The presentence report reflects that the day after defendant's plea, a presentence interview was scheduled for March 12, 2019 via telephone. Defendant informed the presentence report writer that he intended to obtain new counsel. On March 12th, defendant informed the presentence report writer that he had

[1] *People v Cook*, unpublished order of the Court of Appeals, entered January 27, 2020 (Docket No. 351522).

obtained new counsel and was not sure he should complete the interview as he planned to vacate his plea. The presentence report writer advised defendant to speak with new counsel and rescheduled defendant's interview for the following day. When contacted the next day, defendant "advised that he [had] spoke[n] with counsel and that he would not be appearing for his interview." The presentence report writer again "advised . . . defendant to speak with his new counsel and provided an interview appointment for March 14, 2019" in the event that defendant changed his mind. Defendant did not appear and the presentence report writer returned the matter to the circuit court for further action, listing a different attorney as representing defendant.

On April 3, 2019, the circuit court revoked defendant's bond and he was incarcerated in the county jail.[2] The record also reflects that the court adjourned sentencing to May 1, 2019. In the interim, on April 12th, the presentence report writer interviewed defendant at the Oakland County jail.

A week later, defendant, who remained incarcerated in the county jail, mailed a motion to terminate representation, to vacate his plea, and to appoint counsel. Therein, defendant described himself as proceeding "in pro se" and cited to the Michigan Rule of Professional Conduct (MRPC) 1.16.[3] Defendant further claimed that Marsh had advised him to plead guilty as charged because the prosecutor had stated that the judge might revoke defendant's bond. According to defendant, before he pled, Marsh advised him not to "draw attention to himself" and failed to advise the court of the prosecutor's "vexatious [and] intimidating tactics." Defendant added that Marsh failed to defend him against the positive drug test allegations that resulted in defendant's bond being revoked in April. Moreover, Marsh failed to advise defendant of defenses available to the firearms charges. Defendant asserted that his inability to continue to pay Marsh was "the reason for his [Marsh's] dereliction." Defendant described Marsh's performance as "deficient." Defendant asked to vacate his plea because it was tainted by prosecutorial misconduct, his plea was involuntary, Marsh was "grossly incompetent," and defendant was actually innocent of the domestic violence charge. Defendant described his request to vacate his plea as timely, contending that the prosecution was not prejudiced and that justice mandated vacation of his plea. Defendant noted that he had a right to counsel and was "financially unable to retain one," citing MCR 6.005. Defendant requested: (1) "Marsh be removed as counsel"; (2) his pleas be vacated; (3) he "be

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[2] This transcript is not contained in the lower court record.

[3] MRPC 1.16 provides:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
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> * * *
>
> (3) the lawyer is discharged.
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> * * *
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> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

appointed counsel at public expense"; and (4) the matter be remanded back to the district court. Defendant filed a notice of hearing for May 1st.

On May 1st, at the beginning of the rescheduled sentencing hearing, Marsh asked the trial court to permit him to withdraw as defendant's attorney, pointing out that defendant had moved *in propria persona* to remove Marsh as his attorney. Marsh informed the circuit court that his relationship with defendant had broken down based on defendant's allegations. The court stated that it would not grant the motion to withdraw and planned to proceed with sentencing.

Marsh then informed the court that he had not reviewed the presentence investigation report with defendant given the motion defendant had filed. The court responded that Marsh had not withdrawn, and, until there was a motion to withdraw, it would not take "things" that defendant had filed, with the exception of letters related to sentencing. As Marsh had not reviewed the presentence investigation report with defendant, the court offered to adjourn the matter for a week because it was not going to permit Marsh to withdraw.

Marsh again mentioned that defendant had moved to withdraw his plea. Initially, the court responded, "No, no, no, no . . . ." Thereafter, the court informed Marsh that it had not seen a pleading "from an attorney" indicating that defendant wanted to withdraw his plea and that defendant had "[c]ounsel right now." After Marsh again stated that the allegations in defendant's motion created "an absolute conflict between" the two of them, the court noted that defendant had not provided a reason to withdraw his plea. The circuit court then opined that defendant had "buyer's remorse" regarding his decision to plead.

Marsh agreed that that might be the case, but it placed him in "an impossible situation . . . based on [defendant's] motion." The court flatly rejected Marsh's assertion, noting that it was there for a sentencing and that it had a plea. The court stated that Marsh "did everything you were supposed to do."

The court then asked if Marsh was appointed or retained. After Marsh confirmed that he was retained, the trial court said: "Oh." The court then asked defendant whether he intended to retain a new lawyer and inquired about why he had not done so earlier. Defendant told the court that he could not afford another attorney. Noting that defendant had retained counsel, the trial court declined to appoint an attorney, telling defendant "You want to get a new lawyer, get a new lawyer. I'll give you a week." When defendant asked if he could "say something," the court advised against it, suggesting that defendant speak with his "lawyer about it."

Marsh again asked if the trial court would allow him to withdraw. The trial court responded: "You have two weeks. You want to get a new lawyer?" Defendant then said: "I withdraw my motion . . . ." The trial court told defendant and Marsh that they "need[ed] a couple weeks to talk to each other and see what's gonna happen here."

Two weeks later, on May 15th, the trial court sentenced defendant, who was represented by Marsh. At sentencing, Marsh advocated vigorously on defendant's behalf and successfully obtained a slight reduction in defendant's sentencing guidelines range.

Defendant now appeals.[4]

II. MOTION TO WITHDRAW

Defendant's statement of the question presented is that the trial court erred in denying Marsh's motion to withdraw. The substance of defendant's arguments, however, is that the trial court abused its discretion by denying defendant's request for appointed counsel because Marsh and defendant informed the court that there had been a breakdown in their attorney-client relationship and that defendant had informed the court that he was indigent. Defendant further contends that the trial court's actions "forced" him "to continue with a lawyer not of his own choosing and without appointing new counsel." Defendant recognizes that he verbally withdrew his motion on the record, but maintains it is unclear which motion he withdrew: (1) the motion to remove Marsh, (2) the motion to withdraw defendant's plea, or (3) another motion.[5] Regardless, defendant maintains his withdrawal was the product of resignation in light of the trial court's denials of Marsh's request to withdraw, defendant's request to withdraw his plea, and defendant's request for court-appointed counsel despite his lack of funds to hire a new attorney.

Initially, we must decide whether these issues were waived. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). In light of the trial court's rulings, we cannot conclude that defendant waived his right to raise these issues.

Because these issues were not waived, we review a defendant's preserved challenge to the trial court's decision regarding a motion to withdraw for an abuse of discretion. *People v Walker*, 276 Mich App 528, 546-547; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059; 743 NW2d 914 (2008). Defendant also requested court-appointed counsel, which was effectively a motion for a continuance so that newly-appointed counsel could prepare for sentencing. We review a trial court's decisions on whether to permit the substitution of counsel and a continuance for an abuse of discretion. *People v McFall*, 309 Mich App 377, 382; 873 NW2d 112 (2015); *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). A trial court abuses its discretion when its decision "falls outside the range of principled outcomes," *McFall*, 309 Mich App at 382, or when it misapplies or misunderstands the law. *People v Humphrey*, 312 Mich App 309, 318; 877 NW2d 770 (2015); *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). Finally, "[w]e review de novo questions of constitutional law." *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

The constitutional right to counsel includes the right of a defendant, who does not require appointed counsel, to choose his own retained counsel. US Const, Am VI; Const 1963, art 1, § 13; *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). The right to counsel of choice

[4] On appeal, defendant is represented by appointed counsel.

[5] We note that the initial lower court record filed with this Court did not contain a copy of defendant's motion. Upon inquiry, the lower court provided a copy of defendant's *in propria persona* motion, requesting several forms of relief.

"commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 US at 146. "A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied." *Id*. at 150 (emphasis in original). Additionally, an erroneous deprivation of a defendant's right to retained counsel of his choice is a structural error requiring reversal. *Id*. at 148-149.

The right to retained counsel of choice, however, is not absolute. *Id*. at 144. For example, a defendant may not insist on being represented by a layperson, by an attorney who has declined to represent him, by an attorney who has a relationship with the opposing party, or by an attorney who represents a codefendant, even if the defendant waives any conflict. *Id.* at 151-152; *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692; 100 L Ed 2d 140 (1988); MCR 6.005(F) and (G). Moreover, the court retains "wide latitude in balancing the right of counsel of choice against the needs of fairness . . . and against the demands of its calendar . . . ." *Gonzalez-Lopez,* 548 US at 152 (citations omitted). Stated otherwise, a court must weigh the defendant's right to retained counsel of choice against " 'the public's interest in the prompt and efficient administration of justice.' " *Aceval*, 282 Mich App 386-387, quoting *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).[6]

In this case, before the rescheduled sentencing hearing, defendant moved *in propria persona* for his retained attorney, Marsh, to be removed from that role. The record further reflects that in mid-March, defendant reported to the probation department that he had retained other counsel.

On May 1st, the rescheduled sentencing date, Marsh verbally moved the court to permit him to withdraw as defendant's attorney because defendant had filed a motion to remove him and because defendant's motion reflected that there had been "an absolute breakdown" in their relationship. The court indicated that it would not consider defendant's *in propria persona* motion "because he's got [c]ounsel right now, until such time as there's a motion to withdraw." Eventually, after Marsh informed the trial court that defendant had retained him, the court asked defendant if he was going to retain a new lawyer. Defendant told the court he could not afford

[6] Although defendants have the right to counsel of their choice if they retain one, indigent defendants only have the right to *effective* appointed counsel. *Aceval*, 282 Mich App at 386-387. As such, counsel appointed for an indigent defendant need not be of the defendant's choosing, and a defendant may not obtain counsel of his choice by requesting substitute counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). " 'Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.' " *Id*., quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991) (citations omitted). "When a defendant asserts that the defendant's assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011) (quotation marks and citation omitted).

another attorney, and the court refused to appoint an attorney to represent him because defendant had a retained attorney—Marsh. At that point, for the second time, Marsh asked, "Will the Court allow me to withdraw?" The court responded by adjourning sentencing for two weeks to give defendant and Marsh time "to talk to each other and see what's gonna happen here." Two weeks later, the court sentenced defendant with Marsh as his counsel and without further addressing defendant's earlier motion to remove Marsh.

On this record, it appears that the trial court either proceeded on the mistaken factual premise that Marsh was defendant's court-appointed counsel, or it failed to recognize that the actual relationship between defendant and Marsh mattered to its legal analysis. Under either scenario, the court abused its discretion.[7] *Humphrey*, 312 Mich App at 318; *Waterstone*, 296 Mich App at 132. In our view, the record plainly reflects that defendant sought to discharge Marsh. Defendant acted on the advice of new counsel he was attempting to secure. Defendant filed a motion to remove Marsh as his attorney and asked the trial court to appoint counsel for him as he had insufficient resources to retain new counsel. On the record, defendant asked the trial court to appoint counsel for him as well. Thereafter, the trial court adjourned sentencing for two weeks, demonstrating that the court's calendar was not a major concern as weighed against defendant's assertion of his Sixth Amendment right to retained counsel of choice. Cf. *People v Akins*, 259 Mich App 545, 338-559; 675 NW2d 863 (2003) (determining that the trial court would have permitted the defendant to retain an attorney of his choice provided that attorney was prepared to timely proceed with the previously-scheduled joint trial of the codefendant). "[W]here, as here, it is apparent that the defendant, not the [retained] attorney, instigated the withdrawal motion, the defendant's Sixth Amendment rights should trump . . . ." *United States v Brown*, 785 F3d 1337, 1347 (CA 9, 2015).[8] Under the Sixth Amendment, "[a] defendant enjoys a right to discharge

[7] Even if Marsh had been defendant's court-appointed attorney, we would nevertheless find an abuse of discretion. First, Marsh's on-the-record assertions that there had been a breakdown in the attorney-client relationship was a "mere allegation" that would not have been sufficient to support a finding of good cause. *Strickland*, 293 Mich App at 398. Defendant, however, detailed his grievances against Marsh in his motion, which the court declined to consider because defendant was represented by Marsh. Defendant's motion reflected a breakdown in their relationship as, in defendant's view, counsel's performance was deficient for numerous reasons and influenced by defendant's lack of payment. Second, it does not appear from the court ordering a two-week adjournment that a substitution would have unduly disrupted the judicial process. *Traylor*, 245 Mich App at 462. In any event, the trial court was obligated to "hear the defendant's claim and, if there [was] a factual dispute, take testimony and state its findings and conclusion on the record." *Strickland*, 293 Mich App at 397 (quotation marks and citation omitted). Instead, the trial court essentially covered its ears, refusing to consider defendant's *in propria persona* motion, taking no testimony on the matter, and failing to make any findings or conclusions on the record. *Id.* Thus, even if Marsh had been appointed by the court to serve as defendant's lawyer, the court's resolution of these issues would have fallen outside the range of principled outcomes. *McFall*, 309 Mich App at 382.

[8] "The opinions of lower federal courts are not binding on this Court, but those opinions may be considered for their persuasive value." *People v Head*, 323 Mich App 526, 540 n 1; 917 NW2d

retained counsel for any reason unless a contrary result is compelled by the purposes inherent in the fair, efficient and orderly administration of justice, . . . and . . . if the trial court allows a defendant to discharge his retained counsel, and the defendant [] financially qualifie[s], the court must appoint new counsel for him . . . ." *Id*. at 1340 (quotation marks and citations omitted).

The remaining question is whether Marsh's appearance on defendant's behalf at sentencing impacts the outcome. It is conceivable that defendant independently reached the conclusion that Marsh should represent him. However, in light of the trial court's prior rulings and without any additional inquiry, it is just as likely, if not more likely, that, outside of securing retained counsel in a two-week timeframe while jailed and without funds, defendant recognized that Marsh would continue to represent him no matter what defendant said or did. By rejecting defendant's decision to remove Marsh as his retained attorney in the absence of any adverse impact on the orderly administration of justice, the trial court denied defendant his Sixth Amendment right to choose counsel. And thus, structural error, requiring reversal, occurred. *Gonzalez-Lopez*, 548 US at 150-152.

III. PRESENTENCE JAIL CREDIT

Defendant argues that the trial court erred in refusing to grant him one additional day of jail credit toward his sentence by failing to include the date his sentence was imposed. As this issue will likely arise again, we will address it.

Whether a defendant is entitled to credit for time served before sentencing under MCL 769.11b is a question of law that we review de novo. *People v Raisbeck*, 312 Mich App 759, 765; 882 NW2d 161 (2015).

The jail-credit statute, MCL 769.11b, provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Under this statute, a sentencing court must award a defendant credit toward his ultimate sentence for conviction-related jail time he served before being sentenced. *People v Idziak*, 484 Mich 549, 568-569; 773 NW2d 616 (2009), quoting MCL 769.11b ("The sentencing court ha[s] no discretionary authority to circumvent the operation of the statutory scheme. MCL 769.11b 'neither requires nor permits' sentencing credit except as provided in the statute.").

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752 (2018). Because the federal and state constitutional rights are the same, *People v Hoang*, 328 Mich App 45, 55; 935 NW2d 396 (2019), reliance on federal authority is particularly appropriate. See also *United States v Jimenez-Antunez*, 820 F3d 1267, 1271 (CA 11, 2017) ("[A] defendant may discharge is retained counsel without regard to whether he will later request appointed counsel.").

In construing a statute, "our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language." *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018). Where the statute's "language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). "We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Id*. We recognize that our Supreme Court has already determined that "the primary purpose of the sentence credit statute is to equalize as far as possible the status of the indigent and less financially well-circumstanced accused with the status of the accused who can afford to furnish bail." *People v Prieskorn*, 424 Mich 327, 340; 381 NW2d 646 (1985) (quotation marks and citation omitted).

In this case, defendant was scheduled to be sentenced on May 1, 2019. On that date, the Michigan Department of Corrections calculated that defendant had served 43 days in jail.[9] In so doing, MDOC appears to have included May 1, 2019, the day of defendant's sentencing, in its sentencing credit calculation.

Two weeks later, on May 15, 2019, defense counsel argued that defendant was entitled to 57 days of jail credit—the 43 days of credit from May 1, plus the 14 days attributable to the court's two-week adjournment. When the court inquired, it was informed that defendant was entitled to 56 days of credit. Thereafter, the court awarded defendant 56, not 57, days of jail credit.

Defendant's argument has superficial appeal as he was sentenced at 2:00 p.m. on May 15, 2019, meaning he was incarcerated in jail for 14 hours on that date "prior to sentencing." But defendant's judgment of sentence reflects that the "sentence date" for his convictions was May 15, 2019. Once sentenced, a defendant is no longer being held because he is denied bond, but because he is sentenced to incarceration. In enacting MCL 769.11b, "[t]he Legislature sought . . . to give a criminal defendant a right to credit for any presentence time served 'for the offense of which he is convicted[.]' " See *Prieskorn*, 424 Mich at 341, quoting MCL 769.11b. If "the Legislature intended that convicted defendants be given sentence credit for all time served *prior to sentencing day*, . . . it would not have conditioned and limited entitlement to credit to time served 'for the offense of which [the defendant] is convicted.' " *Id*. (emphasis added). Stated otherwise, the day of sentencing is not "prior to sentencing"; instead, the sentencing date is counted as time served against defendant's prison sentence. Reading MCL 769.11b in this manner is also consistent with the statute's purpose of "equaliz[ing] as far as possible the status of the indigent and less financially well-circumstanced accused with the status of the accused who can afford to furnish bail." *Prieskorn*, 424 Mich at 340. Therefore, the sentencing court properly ruled that defendant was not

[9] Defendant was incarcerated in jail as follows:

12/10/18 – 12/13/18	Arrest – Bond	4 days
12/26/18 – 1/1/19	Warrant Arrest – Bond	7 days
3/31/19 – 5/1/19	Bond [Revoked]	32 days

entitled to another day of jail credit for the time he spent incarcerated in jail on the day he was sentenced.

IV. DOUBLE JEOPARDY

In a Standard-4 brief, defendant argues the Legislature did not intend for cumulative punishments to be imposed for felon-in-possession and felony-firearm convictions for a single act of possession. Accordingly, defendant contends that his sentences for both offenses violate his double jeopardy protections.

Initially, we note that this issue is not properly before us. Under MCR 7.205(E)(4), an appeal granted by leave is limited to the issues raised in the application and supporting brief. Our order granting leave in this case was so limited. *Cook*, unpublished order of the Court of Appeals, entered January 27, 2020 (Docket No. 351522) ("This appeal is limited to the issues raised in the application and supporting brief."). The issues raised in defendant's delayed application were limited to the issues we have already addressed. Nothing in Administrative Order No. 2004-6, 471 Mich c, cii (2004), excludes Standard-4 briefs from the limitation imposed under MCR 7.205(E)(4). In any event, even if we opted to address defendant's unpreserved constitutional claim, we would be bound to reject it under *People v Calloway*, 469 Mich 448; 671 NW2d 733 (2003), *People v Mitchell*, 456 Mich 693, 697-698; 575 NW2d 283 (1998), and *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001). See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987) (stating that a majority decision of the Supreme Court binds us under stare decisis); MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

We do not retain jurisdiction.

/s/ Anica Letica
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien