NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 2027

STATE OF LOUISIANA

VERSUS

TYRONE HUGGINS

Judgment Rendered: JUN - 8 2012

* * * * * *

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Suit Number 27,018

Honorable Thomas J. Kliebert, Jr., Presiding

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

The defendant, Tyrone Huggins, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. The defendant pled not guilty. The defendant filed a motion to suppress and, following a hearing on the matter, the trial court denied the motion. The defendant subsequently withdrew his not guilty plea. The court conducted a Boykin hearing wherein the defendant pled guilty as charged. The defendant was sentenced to twenty years at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

Because the defendant pled guilty, the facts were not developed at a trial. The factual basis for the guilty plea, provided during the Boykin hearing, is as follows:

> [O]n or about June 23, 2010, in the Parish of Ascension you committed armed robbery when you broke into Piccadilly armed with a pistol, approached Derek Adair and James Williams, ordered them to the ground, ordered them to open the safe, and placed a large sum of cash in your bag.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court abused its discretion in failing to make an inquiry before denying his alternative motions to either have his counsel removed or to allow defendant to act as co-counsel. Specifically, the defendant contends that the failure of the court to hold a hearing on these issues was an abuse of discretion that rendered his right to counsel "a mere formality of form over substance."

On the first day of trial on March 1, 2011, just prior to voir dire, a brief bench conference was held wherein the defendant stated that he wanted to excuse his lawyer. The court responded, "Go back." When the first panel of prospective

jurors was seated to begin the voir dire examination, a recess was taken and the following colloquy among the court, defense counsel, and the defendant took place:

> Ms. Jones [defense counsel]: Your Honor, my client has informed me that he does not feel that I have filed the appropriate motions, that he feels that we are not prepared, that I have not subpoenaed the appropriate witnesses, that he has several motions that he wants to file himself. One is a motion to suppress the statement, which there really wasn't a statement other than, I just do my thing, when asked about the money. But he denied that he had committed the robbery every time they talked to him. The other one is a motion -- and here's the first one, Your Honor, a motion to suppress. May I approach the bench?
>
> MR. HUGGINS: You mean I can give it to him on the mike or whatever?
>
> MS. JONES [defense counsel]: What?
>
> MR. HUGGINS: I got to say this over the mike, right?
>
> MS. JONES [defense counsel]: Right. And, Your Honor, his second motion is a motion to appear as co-counsel pro se, and may I approach the bench?
>
> THE COURT: Uh-huh.
>
> MR. HUGGINS: I have to say this on the mike?
>
> MS. JONES [defense counsel]: And I advised him that he cannot appear as co-counsel because he is not a practicing attorney; that however, he does have a right to represent himself. Now, I've just seen those motions for the first time this morning, Your Honor, so one of them says that I've discussed the pitfalls with him but I haven't.
>
> THE COURT: All right, you can file these in the record. The Court's not going to hear them today being filed untimely; they'll be denied.
>
> MS. JONES [defense counsel]: I think he has some other things he wants to say.
>
> THE COURT: What else you got?
>
> MR. HUGGINS: I would like to uh -- I would like to file a motion to act as my co-counsel.
>
> THE COURT: Okay, I just denied that as being untimely....

Initially, we note that, because the defendant did not make a Crosby reservation at the time that he entered his unqualified guilty plea in this matter, he has waived the right to appeal the trial court's denial of his motion to act as co-counsel. See State v. Crosby, 338 So. 2d 584 (La. 1976). In any event, we find that this assignment of error lacks merit.

In his brief, the defendant contends that if the court was "wary" of allowing him to act as co-counsel, then the court "should have at least made an effort to ascertain whether [he] desired to avail himself of the right to self-representation." We do not agree. With no specific request, orally or in writing, by the defendant to represent himself, the court was under no obligation to ascertain if the defendant desired to represent himself. See State v. Brown, 03-0897 (La. 4/12/05), 907 So. 2d 1, 22, cert. denied, 547 U.S. 1022, 126 S. Ct. 1569, 164 L. Ed. 2d 305 (2006) (a defendant who chooses to represent himself must ask clearly and unequivocally to proceed pro se and he must also make his request in a timely manner). See also State v. Wright, 45,980 (La. App. 2d Cir. 1/26/11), 57 So. 3d 465, 475-76, writ denied, 11-0421 (La. 9/2/11), 68 So. 3d 520. Moreover, a criminal defendant who has acquiesced in the representation of counsel, who for the first time requests to represent himself the morning of trial under circumstances which indicate that the request was a delaying tactic, and who makes no showing at all of any particular reason for his delay in asserting that right has impliedly waived his right to self-representation. State v. Hegwood, 345 So. 2d 1179, 1182 (La. 1977).

It is clear the defendant made an oral motion to act as co-counsel. While the defendant may have wanted his counsel removed, there is nothing in the record to indicate the defendant wanted to represent himself. In the more than eight months prior to the first day of trial that defense counsel, Susan Jones, represented the defendant, the defendant filed no *pro se* motions seeking to represent himself. The only *pro se* motions filed by the defendant between June 28, 2010 (beginning of

representation) and March 1, 2011 (first day of trial), were a motion to suppress and a motion to appear as co-counsel. In the *pro se* motion to appear as co-counsel, which was filed on March 1, 2011, the defendant requests "that he be allowed to participate as co-counsel, and requests this Court to grant him permission to appear pro se as co-counsel with said Attorney Ms. Susan Jones." It appears, thus, that based on the record before us, the defendant, for the first time on the first day of trial, sought to act as co-counsel, and at the denial of that request, he sought to have his counsel fired.

Generally, a defendant represented by counsel is bound by the motions and strategic decisions filed by counsel. State v. Bodley, 394 So. 2d 584, 593 (La. 1981) (represented defendant bound by attorney's decisions regarding trial tactics); United States v. Daniels, 572 F. 2d 535, 540 (5th Cir. 1978) (represented defendant cannot personally insist on calling a particular witness, but rather "is bound by his attorney's decisions during trial"); United States v. O'Looney, 544 F. 2d 385, 391-392 n.5 (9th Cir.), cert. denied, 429 U.S. 1023, 97 S. Ct. 642, 50 L. Ed. 2d 625 (1976) (represented defendant cannot question attorney's strategic and tactical trial decisions). Similarly, "'[w]hile an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative.'" Brown, 907 So. 2d at 22 (quoting Bodley, 394 So. 2d at 593). A trial court has the discretion to allow a defendant to act as his own co-counsel. State v. Mathieu, 10-2421 (La. 7/1/11), 68 So. 3d 1015, 1019 (per curiam) (citing United States v. Edwards, 101 F. 3d 17, 19 (2d Cir. 1996) (per curiam) ("The decision to grant or deny 'hybrid representation' lies solely within the discretion of the trial court.")). State v. Carter, 10-0614 (La. 1/24/12), __ So. 3d __.

The right to counsel cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice.

State v. Seiss, 428 So. 2d 444, 447 (La. 1983). While the right to counsel of choice in a criminal trial is guaranteed by the United States and the Louisiana Constitutions, there is no constitutional right to make a new choice on the date a trial is scheduled to begin, with the attendant necessity of a continuance and its disrupting implications to the orderly trial of cases. State v. Leggett, 363 So. 2d 434, 436 (La. 1978). The right to counsel of choice must be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage within the procedural framework of the criminal justice system of which it is a part. State v. Lee, 364 So. 2d 1024, 1028 (La. 1978). Once the day of trial has arrived, the question of withdrawal of counsel rests largely within the discretion of the trial court. Lee, 364 So. 2d at 1028. The Louisiana Supreme Court has frequently upheld the trial court's denial of motions for a continuance made on the day of trial when the defendant is dissatisfied with his present attorney but had ample opportunity to retain private counsel. Leggett, 363 So. 2d at 436. See State v. Dilosa, 01-0024 (La. App. 1st Cir. 5/9/03), 849 So. 2d 657, 666-68, writ denied, 03-1601 (La. 12/12/03), 860 So. 2d 1153; State v. Spradley, 97-2801 (La. App. 1st Cir. 11/6/98), 722 So. 2d 63, 67, writ denied, 99-0125 (La. 6/25/99), 745 So. 2d 625.

The defendant had over eight months, as noted, to either seek new counsel or make it known to the court that he wished to represent himself. He did neither. On the first day of trial, the only issue brought to the court's attention regarding the defendant's representation was a request by the defendant *pro se* to act as co-counsel. Considering the foregoing, we cannot say the defendant exercised his request to act as co-counsel or to dismiss his attorney in a reasonable time, manner, or stage of the proceedings. Accordingly, the trial court did not err in denying the defendant's motions. See Dilosa, 849 So. 2d at 666-68.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in not allowing him to withdraw his guilty plea. Specifically, the defendant contends that the court did not uphold its promise to sentence him to no more than twenty years because his sentence was twenty years without benefits.

On March 1, 2011, a Boykin examination was conducted and the defendant pled guilty. On May 23, 2011, defense counsel filed a motion to set aside the guilty plea. A record minute entry indicates that on June 27, 2011, that motion was denied. The defendant was sentenced about a month after the denial of the motion.

A trial court may permit the withdrawal of a guilty plea at any time before sentencing. La. C.Cr.P. art. 559(A). Under this article, a defendant has no absolute right to withdraw a previously entered plea of guilty. The court's decision is discretionary, subject to reversal only if that discretion is abused or arbitrarily exercised. State v. Barnes, 97-2522 (La. App. 1st Cir. 9/25/98), 721 So. 2d 923, 925.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed .2d 274 (1969), requires that a trial court ascertain, before accepting a guilty plea, that a defendant has voluntarily and knowingly waived his right against self-incrimination, his right to a jury trial, and his right to confrontation. State v. Fields, 95-2481 (La. App. 1st Cir. 12/20/96), 686 So. 2d 107, 109. The transcript of the Boykin examination in this case indicates the court informed the defendant of these rights. The court also explained the terms of the plea agreement, and the defendant made clear his decision to plead guilty without having been forced, threatened, or coerced. Defense counsel acknowledged that she was present during the court's questioning of the defendant in open court prior to the plea being accepted; that she informed the defendant of his rights prior to the hearing as well as the consequences of his guilty plea; that she went over the (guilty plea) form with the defendant in detail;

and that she was satisfied the defendant's guilty plea was a voluntary act on his part.

The defendant asserts in his brief that the court did not specifically explain to him that his sentence would be without benefit of probation, parole, or suspension of sentence. According to the defendant, a sentence of twenty years without benefits is "much more onerous than a straight sentence of twenty years."

The transcript of the Boykin hearing clearly indicates the defendant agreed to a sentencing cap of twenty years when he pled guilty. The court explained to the defendant that under the plea bargain agreement, he would receive no more than a twenty-year sentence and the State would not file a habitual offender bill in exchange for his guilty plea. The court explained to the defendant that it was deferring sentencing, and that if it decided the defendant should receive more than twenty years after reviewing the presentence investigation report, then he had the right to withdraw his guilty plea. The defendant indicated he understood the terms of the guilty plea. Following is that relevant portion of the Boykin colloquy:

> THE COURT: ... Your counsel and the district attorney conducted plea bargaining relative to your case; they have agreed upon you to be sentenced in accordance with a pre-sentence investigation that's going to be performed and submitted to the Court. Now, I've told you and I'll tell you again that should that recommendation come back and once I know about all your background and all that stuff, and I decide that you should get more than 20 years, I'll allow you to withdraw your plea. You understand that? In other words, basically the law says 10 to 99 but I'm telling you if it ends up more than 20, you can start over and withdraw your plea. You understand that?
>
> A. [defendant]: I was told. I don't quite understand but I was told. Yes, I was told about it, you know. I'm going to say yes, I do understand but I don't understand.
>
> THE COURT: I want you to understand. What you don't understand?
>
> A. [defendant]: That mean I can't get more than --
>
> THE COURT: You cannot get more than 20 years.

A. [defendant]: Okay. Yes, I understand.

THE COURT: In other words, if I get up here and I say -- you come up for sentencing in May and I say 25 years –

A. [defendant]: Yes, sir.

THE COURT: -- you can tell Ms. Jones, look, I'm not taking the 25 years; I want to withdraw my plea. And I'm telling you I will allow you to withdraw it.

A. [defendant]: Yes, sir.

THE COURT: Okay?

A. [defendant]: Yes, sir.

THE COURT: All right. Do you intend to appeal any rulings or orders entered by the Court prior to your plea today?

A. [defendant]: Not unless you give me 25 years.

THE COURT: Well, okay, but anything happened prior to today? See, that would be like two months from now.

MS. JONES [defense counsel]: Before, before today.

THE COURT: Anything that happened before today.

A. [defendant]: No, sir.

THE COURT: Do you still wish to plead guilty?

A. [defendant]: Yes, sir.

THE COURT: Have you been promised anything by anyone to get you to plead guilty other than what we just talked about?

A. [defendant]: No, just what we just talked about.

THE COURT: Has anyone forced you, threatened you, coerced you, or beat you to get you to plead guilty?

A. [defendant]: No, sir.

THE COURT: They tell me on or about June 23, 2010, in the Parish of Ascension you committed armed robbery when you broke into Piccadilly armed with a pistol, approached Derek Adair and James Williams, ordered them to the ground, ordered them to open the safe, and placed a large sum of cash in your bag. Do you agree with that?

A. [defendant]: No, but I do.

THE COURT: No, if you don't agree with it, I'm not taking your plea.

A. [defendant]: I do, I agree. I agree with it.

THE COURT: Okay.
A. [defendant]: Yeah. I want the plea.

THE COURT: So you did that?

A. [defendant]: Yes, sir.

THE COURT: You went there and you robbed them, took their money?

A. [defendant]: I agree with that.

The defendant's contention that the court did not explain to him that his sentence would be without benefits is baseless. At the Boykin hearing, the court explained to the defendant the definition of armed robbery, as well as the sentencing range. Specifically, the court stated: "The range of penalties are imprisonment at hard labor for not less than 10 years and not more than 99 years without benefit of probation, parole, or suspension of sentence." Further, the defendant on the day he pled guilty filled out and signed a guilty plea form. The form was also signed by the court, assistant district attorney, and defense counsel. On the form, which states that counsel had conducted plea-bargaining relative to the defendant's case, the defendant indicated that he could read and write the English language; that he understood his rights; and that he wished to plead guilty. The guilty plea form also provides the definition of and sentencing range for armed robbery. In particular, the form states: "The range of penalties for this offense ARE IMPRISONMENT AT HARD LABOR FOR NOT LESS THAN TEN YEARS AND FOR NOT MORE THAN NINETY-NINE YEARS, WITHOUT BENEFIT OF PROBATION, PAROLE, OR SUSPENSION OF SENTENCE."

Accordingly, the defendant's claim that he was not informed that his sentence was to be served without benefits is not supported by the record. The

court thoroughly advised the defendant of his constitutional rights and determined that he knowingly and voluntarily waived those rights. Throughout the Boykin colloquy, the defendant indicated his willingness to plead guilty. Based on a thorough review of the entire record, we find the court did not abuse its discretion in denying the motion to set aside the guilty plea. See Barnes, 721 So. 2d at 925.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.