

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE HOUSTON A/K/A STEVIE
HOUSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37392

FILED

MAR 29 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit murder, three counts of attempt murder with use of a deadly weapon, and three felony counts of discharging a firearm out of a motor vehicle.

Following the jury's verdict, the district court sentenced appellant Steve Houston to forty-eight months with a minimum parole eligibility of twelve months for conspiracy to commit murder. Houston was sentenced to 156 months for each count of attempt murder with use of a deadly weapon to run concurrently, with a minimum parole eligibility of forty-eight months plus an equal and consecutive term for the use of a deadly weapon enhancement. Houston was sentenced to 120 months for each felony count of discharging a firearm out of a motor vehicle, with a minimum parole eligibility of twenty-four months. The felony counts were ordered to run concurrently, but consecutively to the other four counts against him.

Houston claims that the district court acted arbitrarily when it refused to permit him to waive his right to a speedy trial. Houston further claims that the district court's action cannot be classified as harmless error because it is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."¹ We disagree.

In Arizona v. Fulminante,² the United States Supreme Court noted that structural error is found when there has been an error that has infected the entire trial "from beginning to end."³ However, "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon the expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel."⁴

Here, the district court, as well as Houston's own attorneys, cautioned that a motion to continue at the last minute would not likely be granted. Houston was arraigned on October 10, 2000. Trial was scheduled for December 11, 2000. Houston did not retain private counsel until December 8, 2000. The public defender indicated that he was prepared to proceed to trial, and that Houston had not provided a defense

¹See Johnson v. State, 117 Nev. ___, ___, 17 P.3d 1008, 1013 (2001) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).

²499 U.S. 279.

³Id. at 309.

⁴Morris v. Slappy, 461 U.S. 1, 11 (1983) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)); Johnson v. State, 90 Nev. 352, 353, 526 P.2d 696, 696-97 (1974).

that was inapposite to the defense being presented by the public defender. Therefore, since Houston was warned by the district court as well as his own attorneys, but still failed to retain private counsel until three days before trial, we conclude that the district court did not abuse its discretion when it refused to grant Houston's motion to continue.⁵

Houston argues that the State's failure to invoke its right to trial within sixty days at the time of arraignment constituted a waiver of that right. Houston also argues that the district court acted arbitrarily when, over sixty days after arraignment, it allowed the State to invoke its right to trial within sixty days.

NRS 174.511 provides: "The State, upon demand, has the right to a trial of the defendant within 60 days after his arraignment." (Emphasis added). Further, pursuant to NRS 174.511, the court may grant a continuance if the defendant requires more time to prepare for his defense.

Here, although the State did not invoke its right to a speedy trial at Houston's arraignment, the record indicates that Houston had invoked his right to a speedy trial on October 10, 2000. While Houston claims that his attorney invoked this right without authorization, he provides no evidence that the public defender engaged in such an act.

⁵Houston notes the factors enumerated in Barker v. Wingo, 407 U.S. 514, 530 (1972) that should be considered in deciding whether a defendant has been deprived of the right to a speedy trial (length of the delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant). However, neither Houston nor the State alleges that their right to a speedy trial was violated. Therefore, the factors enumerated in Barker are irrelevant in determining whether the district court abused its discretion in refusing to grant a motion for continuance.

The record indicates that Houston invoked his right to a speedy trial at his arraignment on October 10, 2000, upon which a trial date was set, negating a need for the State to invoke its right to a speedy trial. Although Houston claimed that he opposed a speedy trial, the district court suggested that he should have contacted his attorney in October to have the trial date extended. Houston argued that the public defender would not return any of his calls, but could not provide a reason as to why he failed to retain alternate counsel for the entire sixty-day period after arraignment. Therefore, since Houston invoked his right to a speedy trial at his arraignment and failed to obtain alternate counsel until the weekend prior to trial, the district court did not act arbitrarily when it refused to accept Houston's waiver of his right to trial within sixty-days.

Houston next claims that the State failed to make a diligent, good-faith effort to bring him to trial because it did not assert its right to a speedy trial at arraignment, but later wished to invoke that right. We disagree.

"In Nevada, a defendant has a statutory right to a trial within 60 days after arraignment."⁶ In addition, "[t]he prosecution . . . must discharge its 'constitutional duty to make a diligent, good-faith effort to bring [the defendant to trial].'"⁷

⁶Furbay v. State, 116 Nev. 481, 484, 998 P.2d 553, 555 (2000). See NRS 178.556(2).

⁷Id. (quoting Moore v. Arizona, 414 U.S. 25, 26 (1973) (alteration in original)).

The record indicates that Houston invoked his right to a speedy trial, trial was set, and Houston was brought to trial on the scheduled date, consistent with his assertion of his right to a speedy trial. Again, the State had no reason to invoke its right to a speedy trial at the arraignment since Houston asserted that right. We conclude that the State did not fail to make a diligent, good-faith effort to bring Houston to trial because Houston was brought to trial as scheduled.

Houston next claims that the district court acted arbitrarily when it denied the public defender's motion to withdraw. The public defender believed that, since his office represented a key witness in a previous case, there was a conflict in representing Houston in this case. We disagree. In Koza v. District Court, this court held that "the public defender must . . . avoid acting adversely to its former client[s]" while representing current clients.⁸ However, the trial court's determination as to whether an attorney must be disqualified will not be disturbed absent an abuse of discretion.⁹

In Koza, the defendant was represented by the public defender's office, which also previously represented her co-defendant. Neither defendant would waive attorney-client privilege. In addition, a deputy in the public defender's office was going to be called as a witness after allegedly witnessing events relating to a statement the defendant made to police officers. The State argued that the public defender's representation of the co-defendant was "nominal" and that the public

⁸99 Nev. 535, 539, 665 P.2d 244, 246 (1983).

⁹Robbins v. Gillock, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993).

defender did not show sufficient grounds for disqualification. The district court agreed, denying the public defender's motion to withdraw. However, this court held that "[t]he public defender's office has a conflict between its duty to provide vigorous representation to [its client] and its duty not to disclose any statements made by its former client."¹⁰ Therefore, we ordered the issuance of a writ of mandamus compelling the district court to grant the public defender's motion to be disqualified as counsel, and to appoint new counsel to represent petitioner.¹¹

Here, although Houston's attorney did not personally represent the witness in the trial against him, he was a deputy from the public defender's office. Unlike the circumstances in Koza, there was no potential for a deputy of the public defender's office to testify and the witness was not a co-defendant in the case against Houston. In addition, the witness here waived the attorney-client privilege. The facts of the case against the witness did not involve the same facts and the witness was cautioned not to unnecessarily volunteer information regarding facts beyond very specific questioning. The public defender acknowledged that he did not have any information regarding the witness that was not available to any other defense attorney, other than the fact that the witness failed a polygraph test.

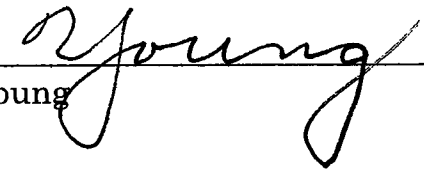
We conclude that the public defender was not acting adversely to a former client in representing Houston since the witness waived attorney-client privilege and the public defender had no personal knowledge of any of the facts of the case against the witness. Therefore,

¹⁰Koza, 99 Nev. at 539, 665 P.2d at 246.

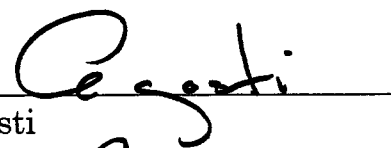
¹¹Id.

we conclude that the district court did not abuse its discretion in denying the public defender's motion to withdraw. Accordingly, we

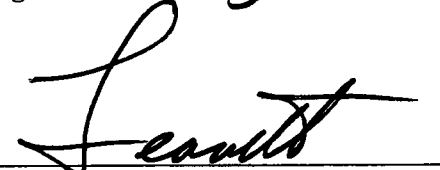
ORDER the judgment of the district court AFFIRMED.

 J.

Young

 J.

Agosti

 J.

Leavitt

cc: Hon. Donald M. Mosley, District Judge
Clinton & McCurry, Chtd.
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk