Circuit Court for Baltimore County
Case No. C-03-CR-21-002620

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 0206

September Term, 2023

MELVIN TUCKER

V.

STATE OF MARYLAND

Reed,
Tang,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: August 9, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Melvin Tucker, was convicted in the Circuit Court for Baltimore County of sexual abuse of a minor, second-degree rape, and third-degree sex offense. Appellant presents the following question for our review:

> "Did the circuit court deny Tucker's constitutional right to counsel by failing to conduct the inquiry required by Maryland Rule 4-215 and denying a postponement that was needed for Tucker to retain new counsel?"

For the reasons set forth below, we shall hold that the circuit court violated appellant's rights under Md. Rule 4-215 and shall reverse appellant's conviction and remand for a new trial.

I.

Appellant was indicted by the Grand Jury of Baltimore County of sexual abuse of a minor (Count 1), second-degree rape (Count 2), third-degree sex offense (Count 3), fourth-degree sex offense (Count 4), and second-degree assault (Count 5). The State entered a *nolle prosequi* on Counts 4 and 5. A jury convicted appellant of all remaining counts. For sentencing purposes, the court merged Count 3 with Count 2. The trial court sentenced appellant to a term of incarceration of twenty-five years on Count 1 and to life imprisonment with all but twenty-five years suspended on Count 2, followed by five years' probation.

The charges stem from appellant's alleged sexual assault of an eight-year-old overnight guest at his house. The present appeal arises from appellant's attempts to be represented by counsel during his jury trial. From the inception of the case, appellant was

represented by an attorney whom we shall call Lawyer 1. Appellant's trial, in this case, was initially set for December of 2021, but was postponed until April of 2022 and then to October 12, 2022, first so that the case could be specially assigned, and then to accommodate witness schedules.

Over the summer of 2022, appellant's relationship with Lawyer 1 broke down. In March of 2022, the trial court held a motions hearing concerning whether the State would be permitted to present testimony from two victims other than the one who was the primary subject of the charges. The trial court ruled in favor of the State. According to Lawyer 1, after this motions hearing, appellant failed to communicate with Lawyer 1 or to respond to Lawyer 1's attempts to contact him, making it difficult to take the necessary steps to be adequately prepared for trial.[1] Lawyer 1 filed a motion to withdraw on June 29, 2022.

Between June 29 and August 3, when the motion was heard, appellant became frustrated with Lawyer 1's failure to respond to an email sent outside working hours and threatened to contact the Attorney Grievance Commission if Lawyer 1 did not produce answers to his inquiries immediately. Given this issue, Lawyer 1 represented on August 3 that he could not, in good conscience, continue to represent appellant. The trial judge denied Lawyer 1's motion, citing the fact that the case was too close to trial and that a new counsel might not have time to be prepared.

[1] Appellant disputes this representation regarding his behavior and alleges that he did communicate with Lawyer 1. Because our ruling does not turn on who was at fault for the communication issues, we need not resolve this discrepancy.

On August 4, just one day after the hearing, Lawyer 1 filed a supplemental motion to withdraw. Lawyer 1 alleged that appellant and appellant's father had approached him after the August 3 hearing and that appellant's father had verbally and almost physically assaulted him. Lawyer 1 alleged that appellant's father "got directly in [his] face" and threatened to "fuck [him] up, and kick [his] fucking ass right then and there." Lawyer 1 alleged that appellant was smiling and laughing the whole time.[2] At a hearing on August 12, 2022, the trial court found good cause to excuse Lawyer 1. The court struck Lawyer 1's appearance. At the August 12 hearing, appellant expressed that he had been looking for new counsel for several months. The court warned appellant that, if he showed up on the trial date without an attorney, he could be found to have waived his right to an attorney by inaction.

On October 7, three days before the scheduled start of the trial, appellant represented that he was not prepared to go to trial without counsel. He informed the trial judge that he had been working on obtaining counsel since the August 12 hearing. He indicated that he was facing difficulties because he had exhausted his funds paying Lawyer 1 and now could not afford the services of a new attorney. He requested a postponement so that he could obtain new counsel. He also brought with him a new attorney, Lawyer 2, whom he had not yet retained but wanted to retain. Lawyer 2 would not be prepared to go to trial on October

[2] Appellant, once again, disputes this recounting of events. He alleged at the hearing on Lawyer 1's motion that it was Lawyer 1 who has stormed out of the courtroom and then charged at appellant. Once again, because our ruling does not turn on who was at fault for the altercation, we need not resolve this discrepancy.

12. The trial court set the case for a postponement hearing in front of another judge on October 11.

At the October 11 postponement hearing, appellant, once again, appeared with Lawyer 2. Lawyer 2 was appellant's attorney in a custody case. Lawyer 2 represented that appellant had reached out to him about the criminal case as early as April, 2022. He also represented that appellant had been in contact with Lawyer 3, a Tennessee attorney who specialized in cases like appellant's and who would be willing to represent appellant. In July, Lawyer 3 had asked Lawyer 2 to be co-counsel so that she could represent Appellant *pro hac vice*. Lawyer 2 represented that he would be willing to represent appellant either alone or alongside Lawyer 3.

However, neither Lawyer 2 nor Lawyer 3 could represent appellant in a trial starting on October 12. Both had schedule conflicts with the proposed trial date. Neither had yet had the opportunity to review the full discovery file, which appellant had only provided to them the previous week. The discovery file provided by Lawyer 1 appeared to be missing several documents. And, in any case, appellant had yet to retain either of them because of his depleted funds. As a result, Lawyer 2 requested that the trial be postponed to permit appellant to retain Lawyer 2 and Lawyer 3 and for Lawyer 2 and Lawyer 3 to prepare a defense.

Immediately after hearing from Lawyer 2, the postponement judge ruled on appellant's motion to postpone. The court asserted that appellant was the architect of his own situation due to his altercation with Lawyer 1, that appellant was abusing his right to counsel, and that appellant was "playing games." The court stated that "[h]ad he come in

here two, two and a half months ago with public defender—somebody from the Public Defender's Office, another private attorney, and said my new attorney needs time to get acclimated to these facts, it would have certainly been a different kettle of fish," but that, as things stood, he believed that appellant was simply trying to postpone the proceedings while he accrued time in home detention. The court concluded:

> "This is absolutely outrageous. I will not countenance it. The postponement request is denied and any reviewing Court who takes a look at this, I do not do this lightly. This Defendant is entitled to counsel. He has had counsel. He, of his own free will and volition, decided to precipitate these situations, I guess like many criminal defendants, seeking to postpone his way out of, you know, a situation that, that bears serious consideration. He's charged with sex abuse of a minor, maximum jail time—term of 25 years. Second degree rape, maximum jail term of 20 years. Sex offense in the third degree, maximum penalty of 10 years. I understand all that and we do bend over backwards to accord folks their 6th Amendment rights. I certainly do every day, sitting up here as the Lead Judge in the Criminal Division, but there comes a time when a trial judge is required to make a tough finding and that's what I'm doing right here. Is that the Defendant is playing the system and he has had every option and right to engage counsel to take the matter seriously, not to play games. *I am denying this postponement request because I think he's done all those things. So, you will be at the American Legion Hall tomorrow morning at 9:00 AM.*"

Only after ruling on the motion did the trial court ask appellant if appellant had anything he wanted to say. Appellant represented as follows:

> "Ah, I do wanna say that I do take this matter very seriously. I, I have—there hasn't been a, a week, maybe even a day or 2, that has gone by that I have not been in contact with an attorney to, to work on this—[Lawyer 3] and [Lawyer 2] here. The, the, the strain from—financially from Lawyer 1 has kept me from retaining as of yet. As I have been working hard to do that, I've depleted my 401K and my savings to [Lawyer 1]. Of course, not being an attorney myself, I was not aware that

> specific things were missing that I did not have until recently, which I now know. I also want to add that it is on video surveillance that I did not threaten, in any way, [Lawyer 1] in the hallway. I highly disagree with the way that has been painted."

The postponement judge then reiterated his ruling:

> "THE COURT: This episode that resulted in Lawyer 1's appearance being stricken happened 2 months ago, and as near as I can tell, even resolving all inferences in your favor, you've done almost nothing about getting an attorney to come in here, get prepared for trial in October and go forward with your defense. And coming in here at the last minute, the day before the trial is set in a child sex offense case,—do you have minor witnesses in the case?
>
> [THE STATE]: Yes, Your Honor.
>
> THE COURT: I'm not gonna do it. I'm just-- I think it's outrageous and I think you, sir, are playing games with the Court's time and with, perhaps,—I don't have any reason to know this, but with the idea that there's a victim of tender years in this case who is presumably prepared to go forward with a trial tomorrow. So, the postponement request is denied. Thank you."

Appellant proceeded to trial without counsel and was found guilty and sentenced as described above. This timely appeal followed.

II.

Appellant argues that the trial court failed to follow the appropriate procedures before denying his motion for a postponement. Appellant argues that Rule 4-215 requires that the court permit a criminal defendant to explain his lack of representation and, if appellant presents a facially meritorious reason, to inquire into that reason and give that

reason due consideration. He maintains that the postponement judge ruled before inquiring with appellant at all and, even after appellant spoke, the postponement judge made no attempt to delve into appellant's reasons for failing to procure counsel, giving appellant's comments no consideration, and thereby violating his right to counsel. Thus, he argues he is entitled to a new trial in which his right to counsel will be protected.

The State argues that, while the judge announced that he was inclined to rule against appellant before appellant had a chance to speak, the court did not issue its final ruling until after appellant spoke. As for the sufficiency of the court's inquiry, the State argues that there is no fixed set of questions the court must ask. Rather, the court must make sufficient inquiry to determine whether a defendant has a meritorious reason for not having retained trial counsel. The State maintains that the court had sufficient information, based on its review of the history of the case and the representations made by all parties, without further inquiry.

III.

A defendant has a right to be represented by counsel in a criminal proceeding under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. To protect this fundamental right, the Supreme Court of Maryland has adopted Maryland Rule 4-215. *Knox v. State*, 404 Md. 76, 87 (2008). Rule 4-215(d) sets forth the procedures to be used by the trial court when a defendant appears in court on the day of a trial or hearing without counsel and indicates that he wants counsel to represent him. It provides as follows:

> "If a defendant appears in circuit court without counsel on the date set for hearing or trial, indicates a desire to have counsel, and the record shows compliance with section (a) of this Rule, either in a previous appearance in the circuit court or in an appearance in the District Court in a case in which the defendant demanded a jury trial, the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial."

We review the ultimate decision as to whether the defendant has presented a meritorious reason for his appearance without counsel for abuse of discretion. *Grant v. State*, 414 Md. 483, 491 (2010). However, we do not merely review the court's ultimate decision on postponement. Rule 4-215(d) is construed as a checklist of procedures that the court must follow before finding that a defendant has waived the right to counsel by inaction. *Knox*, 404 Md. at 87. The procedures are mandatory and must be complied with regardless of the crime charged, the type of plea entered, or the degree of prejudice to the defendant. *Id.* They are strictly construed, and failure to follow those procedures constitutes reversible error. *Id.*

In evaluating whether a defendant has a meritorious reason for lacking counsel, a trial court's inquiry "(1) must be sufficient to permit it to exercise its discretion . . . (2) must not ignore information relevant to whether the defendant's inaction constitutes waiver . . . and (3) must reflect that the court actually considered the defendant's reasons for

appearing without counsel before making a decision." *Grant*, 414 Md. at 491. It is not enough that a defendant is permitted to give an explanation. *Moore v. State*, 331 Md. 179, 186 (1993). The record must demonstrate that the lower court actually considered that explanation. *Id.*

The clearest indication, in this case, that the postponement court did not consider appellant's reasons for his failure to retain counsel is that the judge ruled on appellant's motion to postpone before he heard those reasons. Before appellant was given a single opportunity to speak at the postponement hearing, the court had asserted "I am denying this postponement request . . . So, you will be at the American Legion Hall tomorrow morning at 9:00 AM." Facially, by the record, the court ruled on appellant's motion before hearing appellant's explanation, in direct contravention of Rule 4-215's requirement that the defendant be given an opportunity to explain his appearance without counsel.

The State would have us interpret the judge's later decision to permit appellant to explain himself as a decision to reverse his prior ruling, hear appellant out, and then rule again. But no such reasoning appears on the record. The judge does not indicate that the initial ruling does not stand, that he had changed his mind, that he believes he ruled prematurely, or anything of the sort. Based on the record before us, we conclude that the court ruled before hearing appellant's explanation.

Even were we to follow the State's reasoning and assume *arguendo* that the trial court did not rule on the motion until the end of the hearing when the judge reiterated "[s]o the postponement request is denied," we would hold that the court had not sufficiently complied with Rule 4-215(d). A court cannot simply hear a defendant out and then

doggedly insist that the time for trial has come. *Moore*, 331 Md. at 186. "Where the defendant has explained the appearance without counsel and that explanation is plausible, *i.e.*, it could be meritorious, further inquiry must be conducted by the trial court if the trial court is to exercise the discretion required by the Rule." *Gray v. State*, 338 Md. 106, 112 (1995).

A defendant who explains that he has diligently sought an attorney but has struggled to get the money together to pay the attorney has presented a facially plausible explanation for his lack of an attorney. *Id.* at 113. Here, the record before the court, as explained by both appellant and Lawyer 2, indicated that appellant had contacted several private attorneys months before the trial date. Indeed, he had secured two attorneys either of whom would be willing to represent him if he retained them. But he was unable to get the money together to retain them and unable to get them the proper discovery materials. Under our precedent, that is a facially plausible reason for his lack of an attorney. The court was required to consider those circumstances and to make sufficient further inquiry to determine whether they constituted a meritorious reason for postponement. *Id.* By requiring inquiry, we are not suggesting that every instance in which a defendant indicates that he wants to retain counsel but lacks funds requires a continuance. To be clear, the Rule mandates consideration of a defendant's reasons for appearing without counsel, and the court must at least consider those reasons before denying a continuance.

The court made no inquiry at all before denying the continuance. The court did not ask a single question about why appellant had been unable to get the money together, about what efforts he had made to obtain an attorney who was available in October of 2022, or

about when he had obtained the case file from Lawyer 1 relative to when he had sent it to Lawyer 2. Nor did the judge provide any reason for his decision to discount appellant and Lawyer 2's assertions that appellant had been working to get a new attorney for months, that he had begun contacting Lawyer 3 and Lawyer 2 over the summer, and that he had brought with him an attorney who was willing to represent him given a little more time.

Instead, the court doggedly asserted that appellant had "done almost nothing about getting an attorney" and that appellant was "playing games" with no analysis of or reference to what appellant had said whatsoever. In doing so, the court effectively ignored evidence and failed to "actually consider" the reasons offered. *Id.* at 114. The court violated Rule 4-215, and, as a result, appellant is entitled to a new trial. *Id.*

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