

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-724-2015
 :
 PHILIP A. SAILOR, :
 Defendant : Motion to Withdraw as Counsel

OPINION AND ORDER

Before the court is a Motion by the Lycoming County Public Defender (PD) to Withdraw as Counsel for Defendant. The hearing on the motion was held on January 16, 2018. The PD claims that Defendant no longer meets the financial eligibility requirements for PD services. The PD claims that Defendant is employed and that his income is above the PD's eligibility criteria.

Defendant agrees that he is employed by Eagle River Homes, LLC making \$17.00 an hour and time and a half for overtime. His gross pay for the week between November 18, 2017 and November 24, 2017, was \$762.75 with a net pay of \$500.86. Using this weekly amount, Defendant would net approximately \$26,000.00 annually.

Defendant lives with his wife and one child. The eligibility guidelines for the PD for a family of three are \$20,750.00. Defendant's annual net salary takes him above this eligibility guideline. Further, the PD argues that it will need to incur significant expenses related to obtaining expert review, reports and testimony. The PD claims that it will need a accident reconstructionist, a toxicologist and a psychologist. The PD estimates these expert fees to be in the range of \$7,500 to \$10,000.00.

Defendant argues, however, that he does not have the money to hire a private

attorney or pay for the expenses of trial. Specifically, Defendant argues that after considering all of his other expenses, which include rent to his parents, utilities on past due bills, transportation, food, medical bills, educational loans and credit card debt, he has no extra available monthly income. Defendant further argues that it would be impossible for him to afford to hire any experts.

Defendant has indicated that he wishes to “keep the PD.” While he has not attempted to hire private counsel, he was informed by “an attorney” that changing counsel at this time could “harm his case” and be “inefficient.”

Defendant’s wife does not work. Defendant claims it is because of a mental health problem and his wife not taking her medications. The court contacted defendant’s wife, however, and she testified that prior to moving she worked in Behavioral Health Support providing care for children in daycare, preschools, and elementary schools. She indicated that she does not work now because she has not been able to find a job that fits with her child’s school schedule.

The Commonwealth does not object to the PD’s request expressing that it is “appropriate.”

This case has been pending for years. Defendant is charged with aggravated assault by a vehicle while under the influence of alcohol, and related charges regarding an incident that allegedly occurred on November 21, 2014, on Northway Road in Loyalsock Township. Defendant is alleged to have been operating a vehicle which struck a 15 year old pedestrian while she was crossing the roadway. Defendant is alleged to have been driving

under the influence of marijuana.

The criminal complaint was filed on February 11, 2015. The PD represented Defendant at his preliminary hearing on April 27, 2015. Defendant waived his arraignment scheduled for May 26, 2015, and the case was placed on a trial list with a status conference scheduled for June 26, 2015, and a pretrial conference scheduled for August 4, 2015.

At the status conference on June 26, 2015, the case was continued from the August pretrial to the December 8, 2015 pretrial with trial potentially scheduled for January 2016. During the fall of 2015, the parties filed and, in part, litigated discovery motions.

On December 17, 2015, Defendant filed additional motions for formal discovery. The argument on said motions was held before the court on December 28, 2015.

On or about December 9, 2015, Defendant filed a motion to continue the January 2016 trial in that the defense was “awaiting expert reports.” The Commonwealth opposed the request. The request was granted and the case was continued to the Call of the List on February 16, 2016.

On or about February 3, 2016, Defendant requested a continuance of the trial on the basis that counsel was still waiting for “their expert report.” The Commonwealth again opposed the continuance request. The continuance request was granted continuing the case to the Call of the List on March 22, 2016.

On February 23, 2016, the PD filed a motion to continue the trial as a result of obligations in a different case. The PD specifically requested that the trial be scheduled “after August.” Again, over the objection of the Commonwealth, the court continued the trial to the

August 30, 2016 Call of the List.

In February and March of 2016, Defendant filed additional discovery motions. A hearing and argument were held on March 2, 2016. On April 4, 2016, a conference was held with counsel. A hearing and argument were scheduled for April 21, 2016 and another conference was held before the Court on April 19, 2016. Eventually, the parties reached an agreement, and the argument and hearing scheduled for April 21, 2016 was cancelled.

On June 7, 2016, Defendant filed yet another discovery motion. Because the hearing on this motion was not scheduled until August 25, 2016, Defendant again requested a continuance and the case was continued to the Call of the List on October 18, 2016.

The court cannot determine whether the case was not reached during the October/November trial term or whether it was continued. It was, however, placed on the January 24, 2017 Call of the List.

The case was never reached in the early to mid-part of 2017 and, by Order of Court dated June 1, 2017, the court reserved November 2, 2017 as the date for a hearing and argument on any motions in limine or other trial motions. The case was scheduled for jury selection on October 18, 2017 with a jury trial to take place between November 14, 2017 and November 16, 2017.

The jury was selected on October 18, 2017. A member of the PD filed a petition to withdraw as counsel and requested a continuance of the trial. The Court heard argument on November 6, 2017 and denied both requests.

The jury trial began on November 14, 2017, but a mistrial was granted on that

same date. The case was placed on the next trial list with Call of the List scheduled for January 9, 2018. The case was not reached in January and is now set for a March 2018 pretrial with Call of the List scheduled for March 20, 2018.

Pennsylvania's Public Defender Act, P.L. 1144, No. 358, Act of December 2, 1968, directed that Pennsylvania counties establish the office of a public defender to be responsible for furnishing legal counsel in certain types of cases including criminal cases, to any person who "for lack of sufficient funds is unable to obtain legal counsel." 16 P.S. § 9960.6. Upon being satisfied of the person's inability to procure sufficient funds to obtain legal counsel for representation, the public defender must provide such counsel. 16 P.S. § 9960.6 (b). The Act was created to allow a public defender to determine whom it would represent based on a defendant's finances and his or her inability to obtain legal counsel otherwise. *Dauphin County Public Defender's Office. v. Court of Common Pleas of Dauphin County*, 578 Pa. 59, 849 A.2d 1145, 1149 (2004); 16 P.S. § 9960.1-.13.

However, the public defender is not the final authority with respect to declining representation when the interests of justice require appointment. *Public Defender's Office v. Venango County Court of Common Pleas*, 586 Pa. 317, 893 A.2d 1275, 1282 (2006). In other words, a court cannot preclude a public defender from representing a defendant or set the financial guidelines that the public defender utilizes to determine eligibility, but the court may compel a public defender to represent a defendant when required in the interests of justice. Additionally, Rule 120(B) does not permit counsel for a defendant to withdraw except by leave of court. Pa. R. Crim. P. 120(B). As the comment to

Rule 120 specifically notes:

The court must make a determination of the status of the case before permitting counsel to withdraw. Although, there are many factors considered by the court in determining whether there is good cause to permit the withdrawal of counsel, when granting leave, the court should determine whether new counsel will be stepping in or the defendant is proceeding without counsel, and that the change in attorneys will not delay the proceedings or prejudice the defendant, particularly concerning time limits.

Pa. R. Crim. P. 120, cmt.

In this particular case, the Court finds that the interests of justice require that the PD remain as counsel and that the reasons for withdraw are not in the interests of justice. The PD's office has been litigating this case on defendant's behalf for years. It is familiar with the facts of the case, the defenses that defendant intends on utilizing, and the applicable legal principles. It is familiar with all of the evidence, the witnesses, and experts. It has a planned trial strategy and planned trial course of action. But for the mistrial, it would have executed that plan of action. A significant amount of time has passed since the alleged incident and since the filing of the charges. To replace counsel at this time would only further delay the proceedings, perhaps significantly. There are no attorneys "waiting in line" to represent Defendant nor would the court expect any attorney to be prepared to either try this case in March or accept the only sort of payment that Defendant could pay, that being partial payments. Moreover, and as the PD recognized during the hearing in this matter, while Defendant might be able to pay for counsel over time, Defendant clearly has no means to pay for necessary experts including those experts who have already been consulted and retained by the PD. To require Defendant to obtain counsel at this point would certainly

prejudice Defendant and delay the proceedings. Such delay would also prejudice the Commonwealth and the alleged victim. Finally, if Defendant was forced to obtain counsel, which the court doubts he can afford, said counsel would likely need to not only review the entire procedural history of this case but would arguably be entitled to file new motions and make new arguments on Defendant's behalf. To allow such would be irresponsible of this court and result in the significant waste of judicial time and resources.

ORDER

AND NOW, this ___ day of January 2018, following hearing and argument, the Public Defender's Petition to Withdraw as Counsel is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
William Miele, Esquire (PD)
Work file
Gary Weber, Lycoming Reporter