

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-724-2015
 :
 PHILIP A. SAILOR, : Petition to Withdraw as Counsel &
 Defendant : Continuance for Trial

OPINION AND ORDER

Before the court is a petition to withdraw as counsel and a continuance for trial that was filed by defense counsel, Joshua Bower, on Friday, November 3, 2017.

Unfortunately, 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.

William Miele, Esquire, Chief Public Defender represented Defendant at Defendant's 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.

On May 15, 2015, Mr. Bower entered his appearance on behalf of Defendant. Mr. Miele continued to represent Defendant along with Joshua Bower. Mr. Miele never sought nor received leave to withdraw. At the status conference on June 26, 2015, the case was continued from the August pretrial to the December 8, 2015 pretrial list.

During the fall of 2015, the parties filed and in part litigated discovery motions.

On December 17, 2015, Mr. Miele filed an additional motion for formal discovery on behalf of Defendant. On that same date, Mr. Miele filed another motion for formal discovery. The argument on said motions was held before the court on December 28, 2015. Mr. Miele attended the argument and represented Defendant.

On or about December 9, 2015, Mr. Miele, on behalf of 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 by President Judge Butts and the case was continued to Call of the List on February 16, 2016.

On January 19, 2016, a hearing was held before the court regarding the discovery of cell phone information with respect to the alleged victim. Mr. Miele represented Defendant at the January 19, 2016 hearing.

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

On February 12, 2016, Defendant, through Mr. Miele filed a motion in limine.

On or about February 23, 2016, Mr. Miele, again on behalf of Defendant, filed a motion to continue the trial as a result of obligations in a different case. Mr. Miele specifically requested that the trial be scheduled “after August.” Again, over the opposition

of the Commonwealth, President Judge Butts continued the trial to the August 30, 2016 Call of the List. On February 24, 2016, Mr. Miele again on behalf of Defendant filed a “supplemental motion for formal discovery.”

On March 2, 2016, a hearing and argument were held on Defendant’s motion in limine. Mr. Miele and Mr. Bower litigated the motion on behalf of Defendant.

On March 16, 2016, Mr. Miele, again on behalf of Defendant, filed yet another supplemental motion for formal discovery. On April 4, 2016, a conference was held with counsel. Mr. Miele attended on behalf of Defendant. A hearing and argument were scheduled for April 21, 2016. A conference, however, was held before the court on April 19, 2016. Mr. Miele again attended the conference on behalf of Defendant. In light of an agreement reached between the parties, the argument and hearing scheduled for April 21, 2016 were cancelled.

On June 7, 2016, Mr. Miele, on behalf of Defendant, yet again filed another supplemental motion for formal discovery. Because the hearing on this motion was not scheduled until August 25, 2016, at Mr. Miele’s request again, the trial was continued by President Judge Butts to Call of the List on October 18, 2016. Mr. Miele represented Defendant at the August 25, 2016 hearing.

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. Mr. Bower requested a continuance on or about January 23, 2017 for the purpose of potentially reaching a plea.

The case was never reached in the early to mid-part of 2017. By Order 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 the jury trial to take place between November 14, 2017 and November 16, 2017.

On October 26, 2017, Mr. Bower entered his appearance on behalf of Defendant. This entry of appearance was superfluous given his prior entry of appearance on May 15, 2015.

The jury was selected on October 18, 2017. Mr. Bower represented Defendant at jury selection.

On or about Thursday, November 2, 2017, Mr. Miele and Mr. Bower approached the court with the court's permission ex parte to discuss a potential ethical concern of Mr. Bower. Following the conference, the court directed that Mr. Bower file an appropriate motion.

Mr. Bower filed a petition to withdraw as counsel and continuance for trial on November 3, 2017. The court heard argument on November 6, 2017. Mr. Bower avers that an irreconcilable conflict has arisen between him and Defendant that has caused a breakdown in the attorney/client relationship. Mr. Bower avers that he does not believe that he can zealously represent Defendant. In addition, Defendant requests that because "trial is less than two weeks away" that there is not adequate time for a new attorney to prepare for trial.

Mr. Bower claims that an irreconcilable conflict has arisen between him and

Defendant. He further avers that this conflict has caused such a breakdown in the attorney/client relationship that counsel does not believe he can zealously represent the defendant for his upcoming trial.

A motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons. Pa. R. Cr. P. 122(C). The decision whether to grant such a motion is left to the sound discretion of the trial court. As a general rule, a defendant must show irreconcilable differences between himself and his court-appointed counsel before a trial court will be reversed for abuse of discretion in refusing to appoint new counsel. The defendant does not establish substantial reasons or irreconcilable differences where he merely alleges a strained relationship with counsel, or there is a difference of opinion in trial strategy, or the defendant lacks confidence in counsel's ability or where there is a brevity of pretrial communications. *Commonwealth v. Floyd*, 937 A.2d 494, 497 (Pa. Super. 2007); *Commonwealth v. Grazier*, 391 Pa. Super. 202, 570 A.2d 1054, 1055 (1990).

Rule 1.16 of the Pennsylvania Rules of Professional Conduct requires that a lawyer withdraw from representation of a client if, among other things, the representation will result in violation of the Rules of Professional Conduct or other law. Pa. R.P.C. 1.16 (a) (1). As well, the rule permits a lawyer to withdraw if, among other things, the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement, or other good cause for

withdrawal exists. Pa. R.P.C. 1.16 (b) (2), (4), (7).

Noting an irreconcilable conflict offers little if any information for the court to exercise its discretion. The court is not willing to accept conclusory language as “code words” or a “telegraph” for a different meaning.

Rule 1.16 provides that a lawyer may reveal confidential information if he reasonably believes it is necessary “to prevent...a client’s criminal or fraudulent act in the commission of which the lawyer’s services are being...used.” Further, Rule 1.16 provides that a lawyer “shall reveal such information as is necessary to comply with Rule 3.3.” Rule 3.3 provides that “a lawyer shall not knowingly...offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.” Pa. R.P.C 3.3 (a) (4), (c) (1987).

The court is entirely sympathetic with defense counsel’s position. Defendant wishes to testify as to facts that counsel knows are false. Nonetheless, counsel’s withdrawal only solves the problem for counsel. The problem remains for both the court and the next attorney. Moreover, Defendant has been essentially tipped off and educated to as to how to best promote any potential criminal or fraudulent conduct.

A criminal defense attorney may not legally or ethically cooperate with his client in concealing the truth. If an attorney reasonably knows that his client’s proposed testimony will be false, the court cannot endorse what has been known as a narrative/stand mute approach. On the other hand, a lawyer in this court’s opinion may not refuse to put his

client on the stand and deprive Defendant of his right to testify on his own behalf.

Mr. Bower is certainly walking a tightrope. As the United States Supreme Court held in *Nix v. Whiteside*, “Under no circumstances may a lawyer either advocate or possibly tolerate a client’s giving false testimony.” 106 S. Ct. 988, 996 (1986).

It appears in this case that Attorney Bower is certain about the proposed testimony, this certainty has arisen prior to trial, and Mr. Bower has attempted to dissuade his client with respect to such. This court is extremely sensitive to any unwarranted intrusion into a defendant’s right to testify on his own behalf. However, in light of the representations by Mr. Bower, the court will not place Mr. Bower in such a dilemma.

On the other hand, the case has been in the system since early 2015 and continued numerous times. The victim has a right to her day in court and to closure in her life. Furthermore, while Mr. Miele asserts that he cannot be prepared to conduct Defendant’s trial next week, he disagrees with Mr. Bower’s assessment regarding his ability to call Defendant as a witness in this case. When the possible compromise of Mr. Miele conducting any examination of Defendant and giving the closing argument was discussed, Mr. Miele was willing to proceed in that manner.

Accordingly, the court will deny the motion to withdraw and the request for continuance, but it will relieve Mr. Bower of any obligation to call Defendant as a witness or argue his credibility. Mr. Miele has been representing the defendant from the very beginning and is certainly capable enough to handle the examination of Defendant and the closing arguments in this case.

ORDER

AND NOW, this ___ day of November 2017, following hearing and argument, the motion to withdraw as counsel and the continuance request are **DENIED**; however, Mr. Miele will conduct any examination of Defendant and will give the closing argument in this case.

By The Court,

Marc F. Lovecchio, Judge

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