

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,)
)
Plaintiff,)
)
v.)
)
JEFF J. DAVIS,)
)
Defendant.)
_____)

CASE NO. ST-13-CR-F82

JURY TRIAL DEMANDED

EUGENE JAMES CONNOR, JR., ESQ.
Assistant Attorney General
U.S. Virgin Islands Department of Justice
34-38 Kronprindsens Gade
GERS Bldg., 2nd Floor
St. Thomas, VI 00802
Attorney for Plaintiff

FLORENCE KAHUGU, ESQ.
Assistant Territorial Public Defender
Office of the Territorial Public Defender
P.O. Box 6040
St. Thomas, VI 00804
Attorney for Defendant

CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: April 18, 2016)

Before the Court is the “Emergency Motion to be Relieved as Court Appointed Counsel” filed by Assistant Territorial Public Defender Florence Kahugu, Esquire, on behalf of herself and the Office of the Territorial Public Defender (“OTPD”). Without awaiting written input from the People of the Virgin Islands (the “People”), the Court convened a hearing on said motion.¹ Upon consideration of the written submission and the averments and arguments raised at the hearing, the Court will deny counsel’s request.

¹ See LRCi 7.1(e)(3) (“Nothing herein shall prohibit the Court from ruling without a response or reply when deemed appropriate.”). The Local Rules of Civil Procedure apply in criminal proceedings when there is no applicable local criminal rule. LRCr 1.2. Both the Local Rules of Civil Procedure and the Local Rules of Criminal Procedure apply to Superior Court proceedings where there is no pertinent rule of this tribunal. SUPER. CT. R. 7. Although the Superior Court should not automatically adopt the local rules promulgated by the District Court of the Virgin Islands, *Vanterpool v. Gov’t of the V.I.*, S.Ct. Civil No. 2013-0072, 2015 V.I. Supreme LEXIS 23 (V.I. Aug. 10, 2015), I elect to do so in this instance. The present motion was filed on April 11, 2016, at 4:23 p.m., and the trial is scheduled to commence on April 14, 2016, at 9:00 a.m. The issue of Defendant Davis’ legal representation for trial is extremely significant and must be addressed with as much lead time to trial as possible. This cannot be accomplished if the Court awaits a written response from the People, or directs one within a shortened response period.

I. PROCEDURAL BACKGROUND.

The OTPD was appointed to represent Defendant Jeff J. Davis on February 12, 2013, pursuant to an Order of this Court and Virgin Islands law.² The Court previously continued the trial of this matter on more than one occasion to allow the parties opportunities to negotiate a global plea agreement, because Defendant Davis faces criminal charges in other unrelated cases.³ On February 2, 2016, the Court conducted a pretrial conference, and set this case for jury selection on April 4, 2016, with the trial to commence on April 14, 2016. These directives, and others, were reduced to writing in an Order dated February 11, 2016. In accordance with the foregoing, on April 4, 2016, a jury of twelve persons, and two alternates, were selected to hear and decide the trial of this matter.

On April 11, 2016, Attorney Kahugu filed the instant motion. She asks this Court to release her and the OTPD from any further duties of representation for Defendant Davis because of: 1) an alleged conflict of interest has arisen between Defendant Davis and Attorney Kahugu and the OTPD; and 2) "...an irreparable breakdown of communication and irreconcilable differences..." between counsel and client. Attorney Kahugu asserts that her, and the OTPD's, continued representation of Defendant Davis would violate his Sixth Amendment right to counsel and her obligations under the pertinent rules of conduct governing attorneys. The Court held a hearing on the motion on April 13, 2016, at which Defendant Davis personally appeared, and was represented by Attorney Kahugu. The People were represented by Assistant Attorney General Eugene James Connor, Jr., Esquire. At the hearing, the People took no position on the motion, and Attorney Kahugu essentially reiterated the reasons set forth in her motion. Defendant Davis was placed under oath and gave his reasons for supporting this motion. For the reasons stated on the record, and as amplified below, the motion will be denied for several reasons.

II. LEGAL DISCUSSION.

a. The Movant Failed to Serve Defendant Davis with her Motion to Withdraw.

The Court first notes the absence of any indication that the instant motion was served on Defendant Davis, and it is not accompanied by an affidavit or certification that he has been advised of his attorney's request.⁴ The Local Rules of Civil Procedure provide, in pertinent part,

No attorney may withdraw an appearance except with leave of Court after notice to the attorney's client. All motions for withdrawal as counsel should include a verified statement as to contact with or attempts to contact the client concerning such withdrawal and an indication of service upon or efforts to serve the client with the moving papers.⁵

² See V.I. CODE ANN. tit. 5, § 3503(a).

³ Defendant Davis also faces a charge of grand larceny in Superior Court Case No. ST-15-CR-116.

⁴ On April 12, 2016, Attorney Kahugu filed an affidavit averring that she consulted with Defendant Davis about these issues on April 8, 2016. However, the affidavit does not state that Defendant Davis was served with the motion. Thus, compliance with LRCi 5.2 was not achieved with this submission.

⁵ LRCi. 5.2(b). The importance of giving notice to a client of an attorney's intention to terminate representation warrants this Court's adoption of this District Court local rule.

Plainly, this rule is intended to avoid a situation where a client is unwittingly left without an attorney in the midst of litigation. Indeed, the Virgin Islands Rules of Professional Conduct require that “[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”⁶ The failure of counsel to apprise Defendant Davis that this motion has been filed, or was forthcoming, as required by the rules of professional conduct and the local rules of procedure, is a sufficient ground by itself to deny the request. However, in light of Supreme Court precedent,⁷ and the importance of the pertinent issues, the Court will also address the substantive matters raised by Attorney Kahugu and the OTPD.

b. The Motion does not Present a Conflict of Interest Which Warrants the Withdrawal of Appointed Counsel.

At the outset, it is settled that in criminal cases, a request for a change of court-appointed counsel must be supported by good cause.⁸ Good cause can be demonstrated when a conflict of interest exists between the attorney and the client, or where there has been a significant breakdown in communication between them.⁹ Of course, the burden of showing good cause rests on the movant.¹⁰ In view of the importance of the right to counsel guaranteed by the Sixth Amendment,¹¹ a court should conduct a hearing to explore the positions, and the bases therefor, of counsel and/or client.¹² In this case, appointed counsel first contends that her withdrawal is warranted under the

⁶ V.I. S.Ct. R. 211.1.16(c). In her motion, counsel repeatedly cites to the Model Rules of Professional Conduct promulgated by the American Bar Association. However, as of February 1, 2014, the ABA Model Rules were supplanted by the Virgin Islands Rules of Professional Conduct. Counsel is advised to cite to the correct rules in the future.

⁷ Generally, this tribunal has an obligation to address all legal issues raised by litigants in their written submissions. *E.g.*, *Mahabir v. Heirs of George*, S.Ct. Civ. No. 2014-0075, 2015 V.I. Supreme LEXIS 29 at * 26 (V.I. Sept. 2, 2015) (citing *Gardiner v. Diaz*, 58 V.I. 199, 205 n. 5 (V.I. 2013)).

⁸ *E.g.*, *United States v. Tino*, No. 96-5470, 1997 U.S. App. LEXIS 10611 at * 5 (6th Cir. May 6, 1997) (citations omitted); *United States v. Wild*, 92 F.3d 304 (5th Cir. 1996) (citing *United States v. Hall*, 35 F.3d 310, 316 (7th Cir. 1994)), *cert. denied* 519 U.S. 1018 (1996).

⁹ *E.g.*, *United States v. Roperto-Perdomo*, 397 F. Appx. 603, 604-05 (11th Cir 2010); *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991) (citations omitted).

¹⁰ *See State v. Blue*, No. 91AP-1525, 1992 Ohio App. LEXIS 3854 at * 7-8 (Ohio Ct. App. July 21, 1992) (“Generally, an indigent defendant wishing to discharge his appointed attorney bears the burden of showing a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant’s right to effective assistance of counsel. Mere personality conflicts or disputes regarding trial strategy are insufficient to demonstrate a breakdown of that magnitude.”) (internal quotations and citations omitted); *Stevens v. State*, NO. 14-97-01191-CR, 2000 Tenn. App. LEXIS 778 at * 4 (Tenn. Ct. App. Feb. 3, 2000) (citation omitted). Although his attorney actually filed the motion, Defendant Davis’ behavior precipitated the submission, and he acknowledged his disagreement with Attorney Kahugu at the hearing. Under these circumstances, Defendant Davis is as much the movant as his counsel.

¹¹ The Sixth Amendment to the United States Constitution has been extended to the United States Virgin Islands. *See Revised Organic Act of the Virgin Islands 1954*, as amended, § 3, 48 U.S.C. § 1561, *reprinted in V.I. CODE ANN.*, Historical Documents, Organic Acts, and U.S. Constitution at 86-88 (1995) (preceding V.I. CODE ANN. tit. 1).

¹² *See, e.g., United States v. Goldberg*, 67 F. 3d 1092, 1098 (3d Cir. 1995) (“If the district court denies the request to substitute counsel and the defendant decides to proceed with unwanted counsel, we will not find a Sixth Amendment violation unless the district court’s ‘good cause’ determination was clearly erroneous or the district court made no inquiry into the reason for the defendant’s request to substitute counsel.”) (citation omitted) (emphasis added).

rules of professional conduct because a concurrent conflict of interest has arisen between her and Defendant Davis. She further argues that this conflict of interest is imputed to the entire OTPD, and asks that they all be absolved of their duties of representation to Defendant Davis, not only in this case, but in his other pending criminal cases. However, no concurrent conflict of interest is identified in the present motion. In the Virgin Islands,

A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.¹³

The present motion does not identify any client presently or previously represented by Attorney Kahugu and the OTPD who has interests in competition with those of Defendant Davis. Moreover, no third person to whom she or the office owe legal duties is mentioned. Attorney Kahugu and the OTPD also do not suggest that their representation of Defendant Davis is impeded by any personal interest. Ergo, there is no concurrent conflict of interest which warrants the withdrawal of appointed counsel in this matter.

c. No Irreconcilable Differences Exist Between Counsel and Client Which Require Withdrawal of Appointed Counsel.

Attorney Kahugu also asserts good cause exists because there are irreconcilable differences and an irreparable breakdown of communication between counsel and client. According to the motion, and reaffirmed at the hearing, Defendant Davis has not kept appointments with his attorney to discuss the defense of this case and has not provided the addresses for putative witnesses. Defendant Davis apparently believes that his case has “expired” based upon the statute of limitations, and, therefore, the trial cannot proceed as scheduled. Despite his attorney’s best efforts to properly advise him of the law on this subject, Defendant Davis refuses to be disabused of this notion. He explained at the hearing that, notwithstanding his attorney’s advice, he has “sources” who informed him that his trial should not occur because the limitations period has passed. This scenario does not present good cause for Attorney Kahugu’s withdrawal from representation for two reasons.

First, with certain exceptions not germane to this litigation, the statute of limitations in a criminal case begins to run on the date of the alleged crime, and requires that any criminal charges be leveled within the time frames set forth in the law. Herein, the underlying incident was alleged to have occurred on or about December 26, 2012, and Defendant Davis faces charges of first degree assault,¹⁴ third degree robbery,¹⁵ and grand larceny.¹⁶ All of these felony charges are subject to a three-year limitations period.¹⁷ The Information against Defendant Davis was filed in this Court

¹³ V.I. S.C.T. R. 211.1.7(a).

¹⁴ 14 V.I.C. § 295(3).

¹⁵ 14 V.I.C. §§ 1861, 1864.

¹⁶ 14 V.I.C. §§ 1081, 1083(1).

¹⁷ A criminal action shall be commenced within the following periods:

on February 26, 2013 – well within the statutory limitations period. Thus, the record reflects Defendant Davis is gravely mistaken in his position on this issue, and would be well-served to cooperate with his attorney's efforts to prepare his trial defense.

Second, while Defendant Davis has a Sixth Amendment right to legal representation in this case, counsel is incorrect that this newly-arisen dispute requires her withdrawal to preserve his constitutional right. The fact that Defendant Davis may have a disagreement, even a strong one, with Attorney Kahugu over the limitations issue, and perhaps other matters, does not mandate a separation of attorney and client as argued in the motion. The Sixth Amendment right to counsel focuses not on the quality of the interpersonal relationship between attorney and client, but on the attorney's competent representation of the client in court.¹⁸ Thus, it is expected that the relationship between an attorney and a client may not be ideal, or even cordial, at times. However, the idea that "...the Sixth Amendment right to counsel would be without substance if it did not include the right to a *meaningful attorney-client relationship*, is without basis in the law."¹⁹

Because an affable attorney-client association is not the *sine qua non* of the Sixth Amendment right to counsel in criminal cases, it follows that a defendant may not purposely engineer an unhealthy relationship with an appointed attorney, particularly on the eve of trial, in order to obtain another attorney he finds more suitable, or to postpone a scheduled trial. As aptly noted by the Supreme Court of California,

Defendant cannot simply refuse to cooperate with his appointed attorney and thereby compel the court to remove that attorney. If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.²⁰

Upon review of the present motion, the record of this case, and his sworn statements during the hearing, the Court concludes that Defendant Davis has belatedly engaged in his uncooperative behavior in order to avoid facing a jury of his peers on the charges leveled at him in this case. Several factors lead me to this determination. Although this case has been pending for over three years, before now, Defendant Davis has not placed on the record to date any animosity toward his appointed attorney or dissatisfaction with her representation of him. This is the first time that he has behaved in a fashion which prompted counsel to submit the present motion. Defendant Davis has appeared at several court hearings over the life of this case, and has not indicated any trepidation with the manner of the proceedings or his legal representation. In fact, after the April 4, 2016, jury selection, prior to being excused, the Court admonished Defendant Davis to abide

(2) For any felony other than specified [in subsection (1)], action shall be commenced with (sic) three years after its commission. 5 V.I.C. § 3541(a)(2) (insertion added).

¹⁸ See *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("We have further recognized that the purpose of providing assistance of counsel is simply to ensure that criminal defendants receive a fair trial, and that in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.") (citations and internal quotations omitted).

¹⁹ *Morris v. Slappy*, 461 U.S. 1, 13 (1983) (citations omitted, italics in original).

²⁰ *People v. Michaels*, 49 P.3d 1032, 1054 (Cal. 2002) (citations, insertions, and quotations marks omitted).

by his pretrial release conditions, maintain close contact with his attorney and to timely appear for the April 14, 2016, trial. He acknowledged, and agreed to follow, these warnings without any reservation whatsoever. At the hearing, in addition to the limitations issue, Defendant Davis contended that his case should not go forward because he has never been in trouble with the law,²¹ has four apparently well-behaved children, and buried an aunt last week. Taken together, the file demonstrates that on the eve of trial, Defendant Davis has developed a case of “cold feet” and seeks to delay his prosecution by forcing the appointment of a new attorney. While his anxiety about the upcoming trial is an understandable human emotion, Defendant Davis does not have any right to select an appointed counsel,²² and the Court will not capitulate to Defendant Davis’ last minute procrastination tactics.²³

Granting the instant motion also would require a continuance of the trial. The time and expense of the April 4, 2016, jury selection process would be wasted. This case, already aged over three years, would have to be rescheduled, resulting in the postponement of conferences, hearings, and trials in other civil and criminal cases. The record indicates that subpoenas were issued to witnesses, who have accommodated their personal schedules to meet the April 14, 2016, trial date. A continuance would certainly cause them, including the victim, the added inconvenience of re-adjusting their own obligations to meet their duties to the Court. Importantly, the victim and other witnesses have a statutory right to a resolution of this matter.²⁴ In view of my conclusion that Defendant Davis is attempting to force a delay in his trial by purposely straining his relationship with his attorney, and the other circumstances considered, the Court determines that it is inappropriate to grant counsel’s motion to withdraw and effectively continue this case.²⁵

²¹ Despite stating under oath that he has never had any trouble with the law, a review of the Court’s ENACT system reveals that Defendant Davis has been a defendant in eight cases going back to 2006, and has two misdemeanor convictions in Superior Case Nos. ST-13-CR-562 and ST-06-CR-312. In view of this blatant lack of honesty, the Court strongly doubts that Defendant Davis’ claimed dissatisfaction with counsel is made in good faith.

²² See *United States v. Benitez-Casas*, 439 F. Appx. 307, 308 (5th Cir. 2011) (“The Sixth Amendment guarantees the right to counsel at all critical stages of the prosecution. The right to choose an attorney does not extend to defendants who have appointed counsel.”) (internal quotations, insertions, and citations omitted); *United States v. Patterson*, 397 F. Appx. 209, 213 (7th Cir. 2010) (citations omitted).

²³ When considering whether good cause exists to support the withdrawal or substitution of appointed counsel, the timing of the motion may be considered. See *United States v. Sifford*, 330 F. Appx. 46, 47 (4th Cir. 2009) (citation omitted), *cert. denied*, 557 U.S. 945 (2009); *United States v. Alkazoff*, No. 90-2006, 1992 U.S. App. LEXIS 18509 at * 11-13 (6th Cir. July 29, 1992).

²⁴ 34 V.I.C. § 203(f)(3) (“A victim or witness has the right to a speedy disposition of the case so as to minimize the stress, cost and inconvenience resulting from his involvement in a prosecution.”).

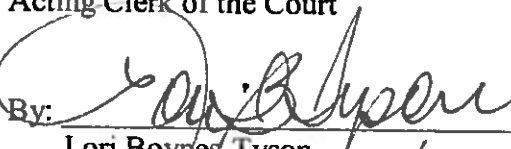
²⁵ See *United States v. Fowler*, 605 F.2d 181, 183 (5th Cir. 1979) (“The right to assistance of counsel, cherished and fundamental though it be, may not be put to service as a means of delaying or trifling with the court.”), *cert. denied*, 445 U.S. 950 (1980); *Cantley v. Bauman*, Case No. 2:10-cv-154, 2013 U.S. Dist. LEXIS 115619 at * 7-9 (W.D. Mich. Apr. 19, 2013) (“However, a defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel.”) (citations and internal quotations omitted); *Fox v. State*, No. 05-97-02217-CR, 2000 Tex. App. LEXIS 5766 at * 13-16 (Tex. App. Aug. 28, 2000) (“A criminal defendant’s right to counsel may not be manipulated to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.”).

III. CONCLUSION.

No cognizable conflicts of interests or irreconcilable differences between Defendant Davis and his appointed counsel are identified in the present motion to withdraw, and none were presented at the April 13, 2016, hearing. Further, Defendant Davis' present refusal to cooperate with counsel is an attempt to improperly delay the trial of this case. Finally, the movant failed to supply the requisite notice of this request to Defendant Davis. For all of these reasons, the Court exercises its discretion to deny appointed counsel's motion to withdraw. An appropriate order shall be issued herewith.

Dated: April 18, 2016

ATTEST:
Estrella George
Acting Clerk of the Court

By: 

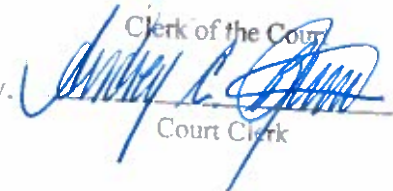
Lori Boynes-Tyson
Court Clerk Supervisor 4/18/16


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 4/19/16

Clerk of the Court

By: 

Court Clerk