[Cite as *State v. Fentress*, 2002-Ohio-2477.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Hon. William B. Hoffman, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2001CA00155
CORNELL FENTRESS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2001CR0033
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 22, 2002

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
RONALD MARK CALDWELL ASSISTANT PROSECUTOR P.O. Box 20049 Canton, Ohio 44701-0049	G.M. GOINS 925 Euclid Avenue Suite 1025 Cleveland, Ohio 44115

Gwin, J.

{¶1} Defendant-appellant Cornell Fentress appeals the May 8, 2001 Judgment Entry of the Stark County Court of Common Pleas which found him guilty of one count of failure to comply and one count of driving under the influence of alcohol and/or a drug of abuse, and sentenced him accordingly. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 2, 2001, the Stark County Grand Jury indicted appellant with one count of failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331, a felony of the third degree; and one count of driving under the influence of alcohol and/or a drug of abuse, in violation of R.C. 4511.19(A)(1), a felony of the fourth degree.

{¶3} Appellant retained Attorney Rick Pitinii as trial counsel. At his February 23, 2001 arraignment, appellant pled not guilty to the charges. The trial court set a trial date of April 30, 2001. On April 11, 2001, Attorney Pitinii filed a Motion to Withdraw from the case. Attorney Pitinii alleged he and his client were no longer able to effectively communicate or cooperate.

{¶4} On April 23, 2001, appellant appeared with Attorney Pitinii and withdrew his previous plea of not guilty and entered pleas of guilty to both charges. The record in the instant case shows appellant originally pled guilty as part of a plea bargain. At sentencing, however, the court realized under the present sentencing statutes the negotiated sentence was contrary to law. The court vacated the guilty plea and explained the proper sentence would not involve any additional jail time. Appellant refused to re-enter his guilty plea, and proceeded to trial. He stated his reasoning several times on the record: he believed the principles of double jeopardy gave him a complete defense to the charges. The next document in the record is a Judgment Entry filed April 25, 2001, which notes the trial date is set for May 1, 2001.

{¶5} On the morning of trial, appellant appeared with Attorney Pitinii, and asked the court for a continuance so he could obtain different counsel. Appellant admitted at the present time he had not found a new attorney, but asserted several times he did not want Petinnii for his lawyer.

{¶6} The court overruled the motion for continuance and instructed appellant he could defend himself, with Petinii present to assist him if necessary. Appellant declined Petinii's help and informed the court he did not want Petinii in the court room at all. Appellant also refused to act *pro se*, asserting he was not able to do so.

{¶7} Upon further dialogue, it emerged that Petinii had attempted to discuss trial strategy with appellant. Appellant became angry because Petinii suggested arguing for a lesser included offense. Appellant asserted his belief that the principles of double jeopardy required he be acquitted.

{¶8} The trial court informed appellant it would only grant the continuance if he agreed to sign a time waiver. Appellant refused.

{¶9} Thereafter, the matter proceeded to a jury trial. At the close of all evidence, the jury returned verdicts of guilty on each charge.

{¶10} In a May 8, 2001 Judgment Entry, the trial court found appellant guilty of each charge and sentenced him to two years of prison on the charge of failure to comply, and one year in prison for the charge of driving while under the influence of alcohol. The trial court ordered appellant to serve these sentences consecutively. Appellant prosecutes this appeals, assigning the following errors:

{¶11} "I. THE BELOW COURT ABUSED IT'S DISCRETION, WHEN IT DENIED THE DEFENDANT'S-APPELLANT'S MOTION FOR CONTINUANCE, WHERE SAID MOTION WAS NOT ESTABLISHED TO BE WITHOUT LEGITIMATE REASON, DELATORIOUS [SIC], PURPOSEFUL OR CONTRIEVED [SIC], AND DEFENDANT-

APPELLANT DID NOT CONTRIBUTED TO CIRCUMSTANCE GIVING RISE TO THE NEED FOR CONTINUANCE.

{¶12} "II. DEFENDANT-APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL, THAT IS WHERE THE DEFENDANT-APPELLANT IS FORCED TO REPRESENT HIMSELF AND INFORMED THE COURT THAT HE WAS NOT QUALIFIED TO DO SO.

{¶13} "III. DEFENDANT-APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL, WHERE DEFENDANT'S-APPELLANT'S COUNSEL, FORCED OR OTHERWISE, PROVIDED WHOLLY INEFFECTIVE ASSISTANCE."

I

{¶14} In his first assignment of error, appellant maintains the trial court erred in denying his motion for a continuance based upon appellant's refusal to sign a waiver of his constitutional right to a speedy trial.

{¶15} The decision whether to grant or deny a continuance rests in the sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078. An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When determining whether the court's discretion to grant a continuance has been abused, a reviewing court must balance the interests of judicial economy and justice against any potential prejudice to the moving party. *State v. Scott* (Dec. 28, 2001), Stark App. No. 2001CA 00004, unreported.

{¶16} In *Unger,* the Supreme Court of Ohio pronounced an objective test which "balances the court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice against any potential prejudice to the defendant * * * " to determine whether a motion for continuance should be granted. *In re Kriest* (Aug. 6, 1999),

Trumbull App. No. 98-T-0093, unreported, 1999 WL 607379, at 3, citing *Under* at 67, 423 N.E.2d 1078. The factors a court should consider include:

{¶17} "* * * the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case."

{¶18} We find there was evidence in the record upon which the trial court could base a valid decision not to continue the trial. Appellant's original trial counsel noted he was fired because of a disagreement over trial strategy. For the purposes of evaluating the denial of a motion to continue, we find such a reason illegitimate, and potentially contrived. It demonstrates appellant contributed to the circumstance giving rise to the respective continuance.

{¶19} Appellant here did not state good cause to fire his attorney. The record shows appellant became angry when his lawyer attempted to discuss trial strategy and risks on the eve of trial. In *State v. Cowans* (1999), 87 Ohio St. 3d 68, the Supreme Court discussed a similar situation:

{¶20} "Cowans's chief complaint was that his attorneys thought he was guilty. [717 N.E. 2d 305] However, counsel deny ever expressing such a belief to Cowans. Even if counsel had explored plea options based on a belief that Cowans might be guilty, counsel's belief in their client's guilt is not good cause for substitution. " 'A lawyer has a duty to give the accused an honest appraisal of his case. * * * Counsel has a duty to be candid; he has no duty to be optimistic when the facts do not warrant optimism.' " *Brown v. United States* (C.A.D.C.1959), 264 F. 2d 363, 369 (*en banc*), quoted in *McKee v. Harris* (C.A.2,

1981), 649 F. 2d 927, 932. " 'If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice.' " *McKee*, 649 F. 2d at 932, quoting *McKee v. Harris* (S.D.N.Y.1980), 485 F.Supp. 866, 869.

{¶21} "[4] For the same reasons, counsel's discussion of the palm print with Cowans was not good cause for substitution of counsel. Counsel would have rendered ineffective assistance had they not tried to discuss such important evidence with their client." *Cowans* at 73.

{¶22} The *Cowans* court also discussed when substitution of counsel is appropriate. Authority exists for the proposition that a "complete breakdown in communication" between the defendant and appointed counsel can constitute "good cause" for substitution. In a similar vein, in the case of *State v. Jones* (2001), 91 Ohio St. 3d 335, the court found:

{¶23} " '[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate * * * rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.' *Wheat v. United States* (1988), 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140, 148. Thus, '[a] defendant has only a presumptive right to employ his own chosen counsel.' (Emphasis sic.) *State v. Keenan* (1998), 81 Ohio St. 3d 133, 137, 689 N.E. 2d 929, 937. Factors to consider in deciding whether a trial court erred in denying a defendant's motion to substitute counsel include 'the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense.' *United States v. Jennings* (C.A.6, 1996), 83 F. 3d 145, 148. In addition, courts should 'balanc[e] the accused's right to counsel of his choice and the public's interest in the prompt and efficient

administration of justice.' *Id*. Decisions relating to the substitution of counsel are within the sound discretion of the trial court. *Wheat*, 486 U.S. at 164, 108 S.Ct. at 1700, 100 L.Ed. 2d at 152." *Jones* at 342.

{¶24} Likewise in *State v. Henness* (1997), 79 Ohio St. 3d 53, the court said:

{¶25} "However, '[t]o discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel.' *State v*. *Coleman* (1988), 37 Ohio St.3d 286, 525 N.E. 2d 792, paragraph four of the syllabus. The term of art 'actual conflict' refers not to a personality conflict but to a conflict of interest. *Strickland v. Washington* (1984), 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed. 2d 674, 696. The Sixth Amendment does not guarantee 'rapport' or a 'meaningful relationship' between client and counsel. *Morris v. Slappy* (1983), 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621." *Henness* at 342.

{¶26} While the above-cited cases dealt primarily with court-appointed counsel, I believe they indicate the approach courts should take even in cases involving retained counsel.

{¶27} The *Jones* court reiterated the long-standing rule:

{¶28} " 'The grant or denial of a continuance is a matter [that] is entrusted to the broad, sound discretion of the trial judge. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion.' *State v. Unger* (1981), 67 Ohio St. 2d 65, 67, 21 O.O. 3d 41, 43, 423 N.E.2d 1078, 1080. In evaluating a motion for a continuance, a trial court should consider, *inter alia*, the length of the delay requested; the inconvenience to the litigants, witnesses, opposing counsel, and the court; and whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived. *Id*. at 67-68, 21 O.O. 3d at 43, 423 N.E. 2d at 1080." *Jones* at 342.

{¶29} The record shows there was not a complete breakdown of communications between appellant and his counsel, and appellant's true motivation was to delay and manipulate the system.

{¶30} The record indicates appellant had extensive familiarity with the justice system. Likewise, his subsequent actions in refusing to sign a time waiver or to proceed *pro se* supports a finding appellant was trying to force the court to grant him a continuance.

{¶31} Even though the court erroneously stated a time waiver was necessary, the record contains ample evidence justifying the court's decision.

{¶32} For theses reasons, we find the trial court did not err in denying appellant's motion for a continuance.

{¶33} Appellant's first assignment of error is overruled.

II

{¶34} In his second assignment of error, appellant argues his *pro se* representation constituted ineffective assistance of counsel. Appellant notes he entered no objections, did not cross-examine witnesses, did not make an opening statement, and essentially confessed to the crimes on closing statement, by telling the jury he had already pled guilty and was sentenced.

{¶35} We find appellant's arguments without merit, for a number of reasons. First, the Sixth Amendment guarantee of effective counsel refers to attorney representation, not *pro se* appearances. Additionally, the conduct of which appellant complains is his own conduct, and thus amounts to invited error.

{¶36} The second assignment of error is overruled.

III

{¶37} In his third assignment of error, appellant claims Petinii was ineffective in failing to properly represent him at trial. Appellant refused to allow Petinii to act on is

behalf, even going to the lengths of asking the court to bar Petinii from the courtroom. The court refused to do so, but appellant did not take advantage of Petinii presence in the courtroom.

{¶38} If this were error, it is invited error. Appellant chose to refuse legal advice and pursue his own defense strategy. He must abide by the result.

{¶39} The third assignment of error is overruled.

{¶40} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed, and the cause is remanded to that court execution of sentence.

By Gwin, J.,

Edwards, J., concur

Hoffman, P.J., dissents.

Hoffman, P.J., dissenting

{¶41} I respectfully dissent from the majority opinion. I would sustain appellant's first assignment of error.

{¶42} The majority has correctly stated the standard of review for an appellate court's review of the denial of a motion for a continuance. I find the trial court abused its discretion in denying the continuance based solely on a faulty legal premise.

{¶43} At the opening of trial, the following exchange took place on record:

{¶44} "THE COURT: Mr. Fentress, do you have something to tell the Court?

{¶45} "DEFENDANT FENTRESS: Yes, I need time to get an attorney.

{¶46} "THE COURT: Pardon?

{¶47} "DEFENDANT FENTRESS: I need time to get an attorney.

{¶48} "THE COURT: Why is that, sir?

{¶49} "DEFENDANT FENTRESS: Because Mr. Pitinii is not representing me.

{¶50} "THE COURT: This is ready to go to trial, Mr. Fentress. There will be no continuance at all. Mr. Pitinii is your lawyer.

{¶51} "DEFENDANT FENTRESS: I fired Mr. Pitinii last night. I don't feel that he represented me right.

{¶52} "THE COURT: Do you have another lawyer?

{¶53} "DEFENDANT FENTRESS: I am getting one now.

{¶54} "THE COURT: Who is he?

{¶55} "DEFENDANT FENTRESS: My people is trying to get one.

{¶56} "THE COURT: Pardon me?

{¶57} "DEFENDANT FENTRESS: I am trying to get one.

{¶58} "THE COURT: No; if you don't have another one here this morning, we are going forward. This will not be continued. All right, sir?

{¶59} "DEFENDANT FENTRESS: No, it is not all right.

{¶60} "THE COURT: We are going to go forward, I tell you that right now.

{¶61} "DEFENDANT FENTRESS: For the record, I do not want Mr. Pitinii for my attorney.

{¶62} "THE COURT: Mr. Fentress, this case has been pending here since, when, sometime now.

{¶63} "I believe Judge Reinbold had some conversation with you, this case was set for trial. I believe you were informed this was set for trial at nine a.m. Is that correct, sir?

{¶64} "DEFENDANT FENTRESS: Yes.

{¶65} "THE COURT: Then we are going to go forward now.

{¶66} "DEFENDANT FENTRESS: Like I said, for the record I don't want Mr. Pitinii for my attorney.

{¶67} "MR. MARAGAS: If I could respond to that. If Mr. Fentress does not want Mr.

Pitinii to represent him, what I would suggest to the Court is that Mr. Pitinii sit second chair and that Mr. Fentress represent himself, that he has a constitutional right to do so if he chooses.

{¶68} Mr. Pitinii I'm sure would sit second chair willing to help him at any time should he decide that he wants an attorney at any time during the proceeding.

{¶69} "THE COURT: I will permit Mr. Fentress [sic] to help conduct the trial. If he wants to ask questions, he can do so. Do you understand?

{¶70} "DEFENDANT FENTRESS: For the record, I am not equipped to represent myself and Mr. Pitinii is no longer my attorney. I do not want him helping me at all.

{¶71} "MR. PITINII: Do you not even want me in the courtroom?

{¶72} "DEFENDANT FENTRESS: No, I don't want his help at all.

{¶73} "THE COURT: Pardon?

{¶74} "DEFENDANT FENTRESS: I do not want his help at all, and I am not equipped to represent myself.

{¶75} "THE COURT: Well, Mr. Fentress, you just don't come into Court the morning of the trial and tell the Court that you want another lawyer, that you are not going to go forward. If you wanted to get another lawyer, you have had, what, this happened back in December, I believe it was.

{¶76} "MR. MARAGAS: Christmas Day.

{¶77} "THE COURT: Almost five months now.

{¶78} "DEFENDANT FENTRESS: This just happened last night. I just discarded Mr. Pitinii last night.

{¶79} "THE COURT: How long has he been representing you, Mr. Fentress?

{¶80} "DEFENDANT FENTRESS: I would say from December 27.

{¶81} "THE COURT: All right. You hired him, right?

{¶82} “DEFENDANT FENTRESS: Yes.

{¶83} “THE COURT: He is not Court appointed?

{¶84} “DEFENDANT FENTRESS: No, he is not.

{¶85} “THE COURT: And you selected Mr. Pitinii of your own free will, right, sir?

{¶86} “DEFENDANT FENTRESS: Yes.

{¶87} “THE COURT: The Court did not select Mr. Pitinii?

{¶88} “DEFENDANT FENTRESS: Right.

{¶89} “THE COURT: You wait until the night before trial before you fired him?

{¶90} “DEFENDANT FENTRESS: He said things that I know he is not for me.

{¶91} “THE COURT: What do you mean he is not for you, Sir?

{¶92} “DEFENDANT FENTRESS: He is going to defend me guilty. He is going to say something like that to me? You are not supposed to say something like that.

{¶93} “THE COURT: He is a well qualified lawyer, and he will do his utmost to present the facts given to him, Sir. That will be guaranteed by this Court.

{¶94} “DEFENDANT FENTRESS: Represent me guilty?

{¶95} “THE COURT: No, he is not going to represent you guilty.

{¶96} “DEFENDANT FENTRESS: That's what he said.

{¶97} “MR. PITINII: May I respond?

{¶98} “THE COURT: Yes, Sir, Mr. Pitinii.

{¶99} “MR. PITINII: Yes, Sir. Might as well say it now, the cat is out of the bag. I discussed with him last night -- just for the record, Mr. Fentress and I had gone through a turbulent relationship, attorney-client relationship, up and down.

{¶100} At one point I asked to withdraw because we weren't speaking. He and I began speaking and tried to work things out.

{¶101} Mr. Fentress, I don't want to speak for him, I believe he believes that he has

already been tried on this. He has pled and that it's double jeopardy to try him again.

{¶102} Last night I informed him about that. I asked him if it was okay if -- I planned on arguing at trial that if he were guilty of anything, it would be a misdemeanor fleeing and alluding, not a Felony 3 fleeing and alluding.

{¶103} My theory was to give the jury something else to attach to as opposed to a Felony 3.

{¶104} He got visibly upset and that is still upsetting today and fired me and said I don't want you to show up, I don't want you in the courtroom, I don't want you sitting anywhere near me; and he walked away, and I got up from the jail and I left last night.

{¶105} "THE COURT: Thank you, Mr. Pitinii. Do you have anything further you want to tell the Court, Mr. Fentress?

{¶106} "DEFENDANT FENTRESS: No.

{¶107} "THE COURT: Okay. Is Judge Reinbold in?

{¶108} "MR. PITINII: Yes.

{¶109} "THE COURT: Take about a ten minute recess.

{¶110} "THE COURT: Mr. Pitinii, I believe you had some conversation with your client.

{¶111} "MR. PITINII: Your Honor, I had gone downstairs to ask Mr. Fentress if he would be willing to sign a time waiver to waive his speedy trial time in order to obtain new counsel.

{¶112} He informed me that he would not, that I believe he is going to represent himself. He is prepared to go to trial right now.

{¶113} "DEFENDANT FENTRESS: No, I am not, Your Honor.

{¶114} "MR. PITINII: Okay, please, I would ask that you inquire of the Defendant.

{¶115} "THE COURT: What's that?

{¶116} "MR. PITINII: I would ask that you inquire of the Defendant.

{¶117} "THE COURT: Yeah, I will. Mr. Fentress, did Mr. Pitinii explain to you about signing the time waiver?

{¶118} "DEFENDANT FENTRESS: Yes, sir.

{¶119} "THE COURT: Do you understand the reason why you have to sign a time waiver is because this case has to be brought to trial in a certain length of time.

{¶120} If you sign a time waiver, you could hire another lawyer if you wanted to.

{¶121} "DEFENDANT FENTRESS: I am not understand; but you might later on.

{¶122} "DEFENDANT FENTRESS: I am not going to represent myself because I can't. For the record, I can't represent myself; but I am not going to try.

{¶123} "THE COURT: You are not going to try to represent yourself?

{¶124} "DEFENDANT FENTRESS: No, I am not, Your Honor.

{¶125} "THE COURT: Well, you won't sign a time waiver?

{¶126} "DEFENDANT FENTRESS: No, I won't.

{¶127} "THE COURT: You understand if you sign a time waiver - -

{¶128} "DEFENDANT FENTRESS: Your Honor, - -

{¶129} "THE COURT: This has to be tried today or a time waiver signed. If you sign a time waiver, I will be able to continue the matter and you can hire a new lawyer.

{¶130} "DEFENDANT FENTRESS: Your Honor, I am not going to sign a time waiver.

{¶131} "THE COURT: Then we are going to forward.

{¶132} "MR. PITINII: Now I am confused. We are going forward. Am I sitting second chair?

{¶133} "THE COURT: Yep. You can be in the courtroom anyhow. You can sit wherever you want to sit. Move the chair if you want to.

{¶134} "MR. PITINII: Do you want me to sit back there?

{¶135} "DEFENDANT FENTRESS: I want him to get out. I want him to leave.

{¶136} "THE COURT: He is an Officer of the Court. He is going to stay in the courtroom.

{¶137} "MR. PITINII: I will just sit in the back of the courtroom then.

{¶138} "THE COURT: All right."[1]

{¶139} I find this excerpt demonstrates the trial court's only reason for denying appellant's motion for a continuance was appellant's decision not to sign a time waiver.

{¶140} In *State v. Unger*[2], the Supreme Court of Ohio pronounced an objective test which "balances the court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice against any potential prejudice to the defendant * * * " to determine whether a motion for continuance should be granted.[3] The factors a court should consider include:

{¶141} "* * * the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case."

{¶142} The record demonstrates the trial court's decision was based solely on appellant's refusal to sign a speedy trial waiver. Not only was this not one of the factors set forth by the Supreme Court in *Unger, supra*, I would find it put appellant in an untenable

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[1]Tr. at 5-16.

[2]*State v. Unger* (1983), 5 Ohio St.3d 217.

[3]*In re Kriest* (Aug. 6, 1999), Trumbull App. No. 98-T-0093, unreported, 1999 WL 607379, at 3, citing *Unger* at 67, 423 N.E.2d 1078.

position. In essence, the trial court told appellant he had one of two choices: sign a waiver of his right to a speedy trial, or proceed without an attorney. Appellant was presented with a Hobson's choice. Either waive his right to a speedy trial or waive his right to counsel. It is clear the instruction was erroneous. A defendant's motion to continue on the day of trial would have tolled the speedy trial time rendering a speedy trial waiver unnecessary. Because the trial court's option to waive his speedy trial rights was unnecessary, it resulted in prejudice to appellant by forcing him to go to trial without the benefit of counsel.

{¶143} I agree the record contains evidence upon which the trial court could have based a valid decision to deny appellant's continuance. Appellant's original trial counsel noted he was fired because of a disagreement over trial strategy. Like the majority, I would find such a reason illegitimate for the purposes of a motion to continue. I would also agree this reason would, arguably, demonstrate appellant contributed to the circumstance giving rise to the requested continuance. However, as set forth above, the trial court's decision was not based upon this reason. Instead, it was based solely upon appellant's refusal to sign a time waiver.[4]

{¶144} While overlooking the reason stated on the record, the majority concludes the other evidence, namely appellant's illegitimate and potentially contrived decision to fire his attorney on the day of trial without good cause, was sufficient to demonstrate the trial court did not abuse its discretion in overruling appellant's motion to continue. The majority cites a number of cases regarding the grant of a motion for substitution of counsel close to trial.[5]

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[4]We note the record does not indicate appellant requested or received any other continuance, the length of the requested delay, or that the delay would cause an unusual inconvenience to litigants, witnesses, opposing counsel or the court.

[5]*State v. Cowans* 91999), 87 Ohio St.3d 68; *State v. Jones* (2001), 91 Ohio St.3d 335; *State v. Henness* 91997), 79 Ohio St.3d 53. These cases involved appointed counsel, not privately retained counsel.

I find cases analyzing a trial court's decision to grant or deny a motion for new counsel on the day of trial are not germane to an analysis of whether the trial court abused its discretion in denying a motion for a continuance after the appellant's privately retained counsel was no longer authorized to represent him. Had appellant requested the appointment or substitution of counsel on the day of trial, these cases would be relevant. However, the test for the motion at issue is set forth in *Unger*, *supra*.

{¶145} Because I find the trial court's decision was wholly unsupported by any of the factors contained in *Unger, supra*, and because the decision was also based on an incorrect legal premise, I would find the trial court abused its discretion in denying appellant's motion for a continuance.

JUDGE WILLIAM B. HOFFMAN