[Cite as *Toledo v. Johnson*, 2014-Ohio-1553.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo — Court of Appeals No. L-12-1277

Appellee — Trial Court No. CRB-12-01787-0202

v.

Gregory Johnson — **DECISION AND JUDGMENT**

Appellant — Decided: April 11, 2014

* * * * *

David Toska, City of Toledo Chief Prosecutor, and
Jimmie Jones, Assistant Prosecutor, for appellee.

David A. Baker, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Gregory Johnson, appeals his conviction in the Toledo Municipal Court for assault, a violation of Toledo Municipal Code 537.03(A). For the reasons that follow, we affirm.

{¶ 2} On February 1, 2012, appellant was charged with two counts of assault. He was arraigned the next day where he was found indigent. A public defender was appointed to his case. Appellant entered not guilty pleas to both charges.

{¶ 3} On February 27, 2012, he changed his pleas to not guilty by reason of insanity. He was referred to the Court Diagnostic and Treatment Center for a competency evaluation. The center found that appellant was not suffering from a mental illness at the time of the alleged incident.

{¶ 4} On August 28, 2012, appellant appeared for his scheduled bench trial, with his public defender, and asked for permission to represent himself. The judge informed him of his right to an attorney and warned him that either way, the trial would begin as scheduled. Appellant explained that he needed discovery and that he was not prepared to go to trial in "two or three minutes." The judge, noting that the case had been pending for a while, denied appellant's request for a continuance.

{¶ 5} Appellant signed a written waiver of counsel. The trial began with a public defender present as an advisor. Appellant was found guilty on one of the assault counts and acquitted of the other one. He was sentenced to serve 180 days in jail with 135 of those days suspended. He now appeals setting forth the following assignments of error:

> I. Defendant's 6th amendment right to assistance of counsel was violated when the trial court denied defendant the right to have the attorney of his choice.

II. Defendant's 6th amendment right to compulsory process was violated when he was denied the right to subpoena witnesses.

{¶ 6} The Sixth Amendment to the United States Constitution, and Section 10, Article 1 of the Ohio Constitution guarantee the right to assistance of counsel in all criminal prosecutions that may result in jail sentences. *State v. Wellman,* 37 Ohio St.2d 162, 171, 309 N.E.2d 915 (1974), citing *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). "The constitutionally protected right to the assistance of counsel is absolute [and] 'absent a knowing and intelligent waiver, no person may be imprisoned for any offense * * * unless he was represented by counsel at his trial.'" *State v. Tymcio*, 42 Ohio St.2d 39, 43, 325 N.E.2d 556 (1975), quoting *Argersinger* at 37, and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

{¶ 7} In his first assignment of error, appellant contends that the court erred in denying him the right to an attorney of his choice.

{¶ 8} Appellant sought a continuance, on the day of trial, arguing that he had not received discovery. The prosecutor explained that discovery documents, consisting of appellant's criminal record and the original police report, had previously been given to appellant's attorney of record, the public defender he had just "fired." The judge then gave appellant an opportunity to review the documents. When asked if there was anything in the documents that would assist in his defense, appellant did not answer. He instead insisted that he needed to subpoena witnesses though he could give no specific

names. He also requested a copy of his competency evaluation. In response, the judge addressed the defendant:

> Even though you [were] represented by the public defender, you filed certain things on your own many times. For example, you filed a motion for continuance, you filed a motion for discovery, and that was way back in May and in June. And today, you also at the trial date made a motion to relieve your public defender. I guess my point is this sir, you were aware of your witnesses and aware of today's trial date. It's been pending for quite some time, and if you knew there were witnesses that you wanted to call, you should have subpoenaed them.

The judge further added that nothing in the competency evaluation would aid him in his defense as his competency was not relevant to the current proceedings.

{¶ 9} Appellant continued to insist that he needed the competency report so he could plead not guilty by reason of insanity, again. Pointing out that such a plea was not available to him since he was already found competent, the judge entered not guilty pleas on appellant's behalf. Appellant then asked to revoke his waiver of counsel so he could get a "paid attorney." The judge denied his request.

{¶ 10} Appellant continued to argue with the judge regarding his right to hire counsel. The judge warned appellant that he was dangerously close to being placed in the obstreperous defendant's room where he would have to watch the proceedings behind glass. Appellant continued to argue with the judge. The judge then reinstated the public

defender and attempted to begin the trial. Appellant continued to disrupt the proceedings as opening arguments were waived. When the prosecutor called his first witness, appellant attempted to leave the courtroom. At that juncture, the judge had appellant placed in the obstreperous defendant's room.

{¶ 11} Recently, the Tenth District Court of Appeals addressed the same issue of a defendant's right to counsel of choice in *State v. Griffin*, 10th Dist. Franklin No. 12AP-798, 2013-Ohio-5389. The court aptly summarized the relevant law below.

> In general, "[t]he right to counsel of one's choice is an essential element of the Sixth Amendment right to have the assistance of counsel for one's defense." *State v. Frazier*, 8th Dist. No. 97178, 2012-Ohio-1198, ¶ 26, citing *State v. Keenan*, 8th Dist. No. 89554, 2008-Ohio-807. This includes the right, when a defendant has the ability to retain his own attorney, to be represented by counsel of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). However, the right to retained counsel of choice "is not absolute, * * * and courts have 'wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar.'" *Frazier* at ¶ 26, citing *Gonzalez-Lopez* at 152. In this respect, a trial court's "difficult responsibility of assembling witnesses, lawyers and jurors for trial 'counsels against continuances except for compelling reasons.'" *State v. Howard*, 5th Dist. No.2012CA00061, 2013-Ohio-2884, ¶ 40, quoting *Morris v. Slappy*, 461

U.S. 1, 11 (1983). Accordingly, "decisions relating to the substitution of counsel are within the sound discretion of the trial court." *Frazier* at ¶ 26, citing *Wheat v. United States*, 486 U.S. 153, 159 (1988). Further, "when the timing of a request for new counsel is an issue, a trial court may make a determination as to whether the appellant's request for new counsel was made in bad faith." *Frazier* at ¶ 27, citing *State v. Graves*, 9th Dist. No. 98CA007029 (Dec. 15, 1999). It has been held that "[a] motion for new counsel made on the day of trial 'intimates such motion is made in bad faith for the purposes of delay.'" *Id*., quoting *State v. Haberek*, 47 Ohio App.3d 35, 41 (8th Dist.1988). *Griffin, supra*, at ¶ 9.

{¶ 12} Here, we find no abuse of discretion in the court's denial of appellant's request to retain his own counsel. First, appellant had already been declared indigent and there was no evidence that his status had changed. Second, his case had been continued numerous times and third, his request was made on the day of trial. It can be assumed that the judge believed appellant's request to be in bad faith as she accused him of "gaming the court." Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 13} In his second assignment of error, appellant contends that the court erred in denying him his right to subpoena witnesses. We, however, fail to see how this was error as appellant had plenty of time to assemble his witnesses yet, he could identify no specific witnesses to subpoena on the day of trial. Most likely, appellant's request to

subpoena witnesses was yet another delay tactic rather than a good faith request. Appellant's second assignment of error is found not well-taken.

{¶ 14} The judgment of the Toledo Municipal Court is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE