

# Franklin County Legal Journal

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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

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**Commonwealth of Pennsylvania**  
**v. Corey Alan Bennett, Defendant / Petitioner**  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, Criminal Action No. 1696-2020 and 1260-2020

**HOLDING:** Defendant's Motion for Dismissal of Appointed Counsel and Appointment of Conflict Counsel is DENIED.

**HEADNOTES**

*Criminal Law; Counsel; Right of Defendant to Counsel; Choice of Counsel; Choice of Appointed Counsel*

1. Right to appointed counsel does not include the right to counsel of the defendant's choice. *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 709 (1998)

*Criminal Law; Counsel; Adequacy of Representation; In General*

2. Whether to grant a defendant's petition to replace court appointed counsel is a decision which is left to the sound discretion of the trial court. *Commonwealth v. Grazier*, 391 Pa.Super. 202, 570 A.2d 1054, 1055 (1990); (citing *Commonwealth v. Neal*, 387 Pa.Super. 165, 563 A.2d 1236 (1989)).

*Criminal Law; Counsel; Right of Defendant to Counsel; Status and Competence of Accused Affecting Rights and Waiver; Indigence*

3. An indigent defendant does not have right to counsel of his own choosing, and mere difference of opinion concerning strategy or brevity of pretrial communications does not compel appointment of new counsel. *Commonwealth v. Chew*, 338 Pa.Super. 472, 487 A.2d 1379, 1384 (1985).

*Criminal Law; Counsel; Right of Defendant to Counsel; Choice of Counsel; Discharge by Accused; In General*

4. Merely articulating a lack of confidence in appointed counsel or a "strained" relationship between counsel and client, without any evidence to support a finding of counsel's incompetence or irreconcilable differences, is not a substantial reason to justify a change in counsel. See e.g. *Commonwealth v. Johnson*, 309 Pa.Super. 117, 454 A.2d 1111 (Pa.Super. 1983); *Commonwealth v. Knapp*, 374 Pa.Super. 160, 542 A.2d 546 (Pa. Super. 1988).

5. A mere difference of opinion regarding trial strategy is not sufficient to justify a change in counsel. *Commonwealth v. Floyd*, 937 A.2d 494, 2007 PA Super 353 (Pa. Super. 2007).

6. Defendant was not entitled to a change in trial counsel, though the defendant disagreed with the attorney's trial strategy; the trial court, after conducting extensive inquiry into the defendant's complaints regarding perceived deficits in the attorney's preparation, determined that the perceived deficits did not rise to the level of irreconcilable differences. *Commonwealth v. Floyd*, 937 A.2d 494, 2007 PA Super 353 (Pa. Super. 2007).

*Criminal Law; Counsel; Right of Defendant to Counsel; Conflict of Interest*

7. The filing of even a meritorious disciplinary complaint does not result in *per se* disqualification. See *State v. Robertson*, 30 Kan.App.2d 639, 44 P.3d 1283 (Kan. 2002); *State v. Sinclair*, 46 Wash. App. 433, 730 P.2d 742 (Wash. 1986); *State v. Wicks*, 1998 ND 76, 576 N.W.2d 518 (N.D. 1998).

8. Defense counsel's prior representation of a Commonwealth witness did not constitute grounds for a claim of ineffective assistance of counsel, where counsel's representation of the witness terminated before defendant retained him and the defense was not prejudiced by the prior representation. *Commonwealth v. Buehl*, 510 Pa. 363, 379, 508 A.2d 1167, 1175 (1986); *Commonwealth v. Smith*, 380 Pa. Super. 619, 552 A.2d 1053 (1988).

## **OPINION**

Before Sponseller, J.

Defendant is charged with two crimes under two separate dockets. In September of 2020, Defendant filed a complaint with the Disciplinary Board of the Supreme Court of Pennsylvania against the public defender representing him on both dockets. The Franklin County Public Defender's Office subsequently requested to withdraw as Defendant's counsel due to the conflict of interest created by the disciplinary complaint. This Court granted their request and Matthew N. Stewart, Esq., was appointed to represent Defendant in both cases.

On August 26, 2021, Defendant filed a *pro se Motion for Dismissal of Appointed Counsel and Appointment of Conflict Counsel* (hereafter "Motion for Dismissal"), citing his dissatisfaction with Attorney Stewart's representation. Defendant further indicated that he had also filed a complaint with the Disciplinary Board against Attorney Stewart. For the reasons set fully forth below, Defendant's *Motion* shall be denied.

### **I. FACTUAL AND PROCEDURAL HISTORY**

Defendant is charged under two dockets for two separate offenses. Under 1696-2020, Defendant is charged with seven offenses related to the forcible rape of a twelve year old girl. Under 1260-2020, Defendant is charged with failing to comply with sexual offender registration requirements. Defendant was represented on both cases by the Franklin County Public Defender's Office. On September 9, 2020, Casey Bogner, Esq., Chief Public Defender, filed a *Petition for Appointment of Conflict Counsel* under 1696-2020. Attorney Bogner filed an identical document

under 1260-2020 on September 14, 2020. The reason for the request to appoint conflict counsel was because Defendant had filed a complaint with the Disciplinary Board against his public defender. Attorney Bogner believed that the disciplinary complaint created a conflict of interest with her office and requested that Kulla, Barkdoll, & Stewart, P.C., be appointed to represent the Defendant in both matters. Matthew N. Stewart, Esq., then began representing Defendant on both cases.

Under 1696-2020, the Commonwealth filed a *Tender Years Motion* on September 10, 2020. A hearing was set for November 13, 2020. Attorney Stewart represented Defendant at that hearing. On December 14, 2020, Attorney Stewart filed a *Motion Requesting the Appointment of a Private Investigator* on behalf of Defendant. In the *Motion*, Attorney Stewart requested that a private investigator be appointed at a rate of \$50 per hour for a total of twenty (20) hours. On December 16, 2020, Attorney Stewart signed a waiver of arraignment on behalf of his client. This Court granted the *Motion Requesting the Appointment of a Private Investigator* on December 29, 2020.

Under 1260-2020, Attorney Stewart filed an application for a continuance on December 28, 2020, because the disposition of the more serious charges under 1696-2020 would affect the disposition of 1260-2020. Then, under both dockets, Attorney Stewart filed a *Motion for Modification of Bail* on January 29, 2020, which was set for a hearing. Attorney Stewart filed a continuance in both cases on February 22, 2021, indicating that the defense required more time to review phone records. On March 30, 2021, Attorney Stewart filed a *Motion to Continue Call of the List and List for Disposition*, indicating that he was working with the Commonwealth to reach a plea agreement on Defendant's behalf. The *Motion* was granted on March 31, 2021, and disposition was scheduled.

The hearing on Defendant's *Motion for Modification of Bail* in both cases occurred on April 23, 2021, at which Attorney Stewart ably represented Defendant. Nevertheless, the Court denied the *Motion* following the hearing. On June 28, 2021, Attorney Stewart again applied for a continuance in both cases, intending to negotiate plea agreements. On August 30, 2021, Attorney Stewart again continued the case until the November trial term.

Sometime in the months of June or July, it would appear that the relationship between Attorney Stewart and Defendant had soured, and Defendant began requesting copies of various documents relating to this case. On July 23, 2021, an untitled handwritten letter by Defendant was filed under both dockets requesting that the Franklin County Clerk of Courts mail Defendant a list of all pending criminal charges "ASAP." On August 10, 2021, another untitled handwritten request was filed under 1696-2020, this

time asking for a copy of Attorney Bogner’s September 9, 2020, *Petition for Appointment of Conflict Counsel*. The following day on August 11, 2021, a third untitled handwritten request was filed, requesting a copy of Attorney Stewart’s *Motion Requesting the Appointment of a Private Investigator*. The Franklin County Clerk of Courts complied with all requests and mailed the appropriate documents to Defendant.

Defendant filed the instant *Motion for Dismissal* under both dockets on August 26, 2021. Defendant requests that Attorney Stewart be dismissed as his attorney and that Defendant receive yet another Court-appointed Attorney. In his *Motion for Dismissal*, Defendant cites the following reasons<sup>1</sup>:

- 1.) Attorney Stewart is negligent for failing to correspond with Defendant or to respond to any letters mailed by Defendant.
- 2.) Attorney Stewart has failed to perform his duties and responsibilities in a competent and sufficient manner.
- 3.) Attorney Stewart has not represented Defendant with sufficient legal representation to afford Defendant the right to due process under the Sixth Amendment.
- 4.) Attorney Stewart has not helped Defendant prepare for trial despite representing Defendant for nearly a year.<sup>2</sup>
- 5.) Attorney Stewart has refused to use the private investigator to help Defendant prepare for trial in this case despite this Court granting and appointing a Private Investigator to Defendant over eight months ago.
- 6.) Attorney Stewart’s cumulative errors of ineffectiveness deprived the Defendant of adequate, competent, sufficient, and effective counsel.<sup>3</sup>

Lastly, written in a different-colored ink than the remainder of the document just below the final paragraph, apparently included by Defendant as an afterthought, Defendant wrote, “Also it should be noted I as of today have filed a complaint against Attorney Matt Stewart with the Disciplinary Board of Pennsylvania.” We are unsure whether Defendant intends to use this disciplinary complaint as grounds for dismissal. However, given that

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1 This Court notes that Defendant’s *Motion* is rife with grammatical errors. Rather than reproducing Defendant’s words verbatim, to aid in comprehension of this Opinion, we have reproduced Defendant’s reasoning with the errors corrected.

2 Defendant indicated that Attorney Stewart had been representing Defendant “for over a year now,” but the record reflects that, at the time of filing, Defendant had been represented by Attorney Stewart for just under a year.

3 Defendant includes two further paragraphs citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). These paragraphs constitute legal argument and do not indicate any grounds for dismissal of Attorney Stewart.

this is now the second disciplinary complaint Defendant has filed, and his first resulted in the appointment of Attorney Stewart, we find that it is important to address this matter as well.

Upon a thorough review of the record in both cases, we do not believe it necessary to order responses from Attorney Stewart or the Commonwealth. We also do not believe an evidentiary hearing is necessary, as our comprehensive review of the record has provided us with enough information to issue a decision. Therefore, this matter is now ripe for review.

## II. DISCUSSION

It is a longstanding rule in Pennsylvania that “the right to appointed counsel does not include the right to counsel of the defendant’s choice.” *Commonwealth v. Albrecht*, 554 Pa. 31, 720 A.2d 693, 709 (1998). Furthermore, Pa.R.Crim.P. Rule 122(C) also states that “a motion for change of counsel by a defendant for whom counsel has been appointed shall not be granted except for substantial reasons.”

Therefore, Defendant bears the burden of showing that substantial reasons exist to necessitate the replacement of Attorney Stewart. Whether to grant Defendant’s petition is left to our sound discretion. *Commonwealth v. Grazier*, 391 Pa.Super. 202, 570 A.2d 1054, 1055 (1990) (citations omitted). 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. *Id.*

In this case, Defendant has not established in his *Motion for Dismissal* that “substantial reasons” or “irreconcilable differences” exist such that Attorney Stewart should be dismissed.

### a. Responding to Correspondence

One of the most common complaints received from criminal defendants by this Court, usually from incarcerated defendants, includes an inability to correspond with counsel as they would like. The nature of being in a secure prison results in greater difficulty in corresponding with their attorneys than defendants would like, and many defendants have unrealistic expectations about how much time their attorney is able to take with them. While we sympathize with defendants who are unable to communicate with their attorneys as effectively as they might wish, brevity in pre-trial communications is not, itself, sufficient to justify appointment of new counsel. *Commonwealth v. Chew*, 338 Pa.Super. 472, 487 A.2d 1379 (1985).

Even if Attorney Stewart is completely ignoring correspondence from Defendant, we do not find that it would be a sufficient ground to warrant the appointment of new counsel in this case. Defendant does not allege that the lack of communication with his attorney has resulted in any prejudice or that his attorney is proceeding in his case against Defendant's wishes despite Defendant's correspondence to the contrary. Furthermore, the record disputes Defendant's relatively recent claim that Attorney Stewart has failed to communicate with him. In his March 30, 2021, *Motion to Continue Call of the List and List for Disposition*, Attorney Stewart indicated that he was pursuing Defendant's request to obtain a plea offer. Defendant does not indicate in his *Motion for Dismissal* that anything has changed. Defendant merely avers that he is not receiving the attention he believes he deserves. We do not find this to be a substantial reason to justify a change in counsel.

### **b. General Competency**

Three of Defendant's claims indicate Defendant's lack of confidence in Attorney Stewart's general competency and ability as an attorney. See *Motion*, Paragraphs 2, 3, and 6. Merely articulating a lack of confidence in appointed counsel or a "strained" relationship between counsel and client, without any evidence to support a finding of counsel's incompetence or irreconcilable differences, is not a substantial reason to justify a change in counsel. See e.g. *Commonwealth v. Johnson*, 309 Pa.Super. 117, 454 A.2d 1111 (Pa.Super. 1983); *Commonwealth v. Knapp*, 374 Pa.Super. 160, 542 A.2d 546 (Pa. Super. 1988).

Furthermore, the record belies any claim that Attorney Stewart acted incompetently. Since undertaking representation, Attorney Stewart has represented Defendant at two hearings, filed and argued two substantive motions on his behalf, and has filed numerous continuances in which he indicates his attempts at reviewing discovery or negotiating a plea deal at Defendant's request. The Court finds that all of the actions Attorney Stewart has taken were timely and appear to be an appropriate path down which these cases might tread. The Defendant has not raised any specific allegations of incompetence against Attorney Stewart for his handling of any of these motions or proceedings.

We also have no reason to doubt the stated reasons or averments made by Attorney Stewart in any of these motions or hearings. As noted above, Defendant has not attempted to challenge their credibility. Furthermore, because the breakdown in this attorney/client relationship does not appear to have begun until, at the earliest, March 30, 2021, Attorney Stewart has had no reason to misrepresent his reasoning for the actions he has taken in the case in any filings before that date. As such, we find that

Defendant's challenges to the skillfulness or competence of Attorney Stewart are without merit.

### **c. Trial Preparation and the Use of the Private Investigator**

A mere difference of opinion regarding trial strategy is not sufficient to justify a change in counsel. *Commonwealth v. Floyd*, 937 A.2d 494, 2007 PA Super 353 (Pa. Super. 2007). Rather, the Defendant must meet the substantial burden of showing that the differences between the attorney and client are irreconcilable.

The existence of a private investigator in a case is relatively unusual, and we note that Attorney Stewart would likely not have been ineffective had he chosen not to request a private investigator. However, in a move that appears to have been beyond what is ordinarily necessary, Attorney Stewart chose to move this Court to appoint a private investigator, and did his due diligence in explaining to the Court exactly what he wanted and why. As such, the Court granted his request.

However, the request was necessarily limited, given that the investigator would be paid for by the citizens of Pennsylvania. As such, Defendant was given what he asked for: a maximum of twenty (20) hours billed at \$50 per hour. How best to utilize the private investigator's limited time is a matter of trial preparation and strategy.

The same is true for Defendant's claim that Attorney Stewart has failed to appropriately prepare him for trial. Defendant's cases have not been scheduled for trial, and given Attorney Stewart's continued pursuit of a plea deal at Defendant's request, the cases are not likely to be scheduled for trial. If and when the time comes that Defendant needs to be prepared for trial, we have no doubt that Attorney Stewart will competently complete the necessary preparations. However, matters of trial preparation and strategy, including when and how to prepare witnesses, are properly in the wheelhouse of the attorney. Defendant has not indicated any irreconcilable differences of opinion regarding Attorney Stewart's trial strategy. Defendant avers only that Attorney Stewart has not properly prepared him for trial.

We also add that it is likely *because* Defendant has not been scheduled for trial that Attorney Stewart has chosen not to utilize the private investigator. With a very limited amount of time allotted for the private investigator, it is likely a prudent strategy to withhold the use of the investigator until Attorney Stewart can be sure as to exactly where the investigator is needed. Our review of the record on this matter only strengthens our faith in Attorney Stewart's skillfulness and competency as



discussed above.

Given that Defendant has not alleged irreconcilable differences regarding Attorney's trial strategy and the record reflects facially legitimate reasons for Attorney Stewart's decisions in these cases relating to trial preparation and strategy, we find that these reasons do not justify a change in counsel.

#### **d. The Disciplinary Board Complaint**

The matter of whether a Disciplinary Complaint triggers a *per se* conflict of interest between the client and counsel has not been previously raised in Pennsylvania courts. Pennsylvania Rule of Professional Conduct 1.8, which governs the rules regarding conflicts of interest between lawyers and clients, is silent on the matter of disciplinary complaints. However, numerous other states have held that the filing of even a meritorious disciplinary complaint does not result in *per se* disqualification. *See State v. Robertson*, 30 Kan.App.2d 639, 44 P.3d 1283 (Kan. 2002) (even non-frivolous complaint will only require disqualification if grounding of complaint creates an actual conflict with the current representation of the defendant); *State v. Sinclair*, 46 Wash. App. 433, 730 P.2d 742 (Wash. 1986) (disqualification cannot be obtained by filing such a complaint, "regardless of merit"); *see also State v. Wicks*, 1998 ND 76, 576 N.W.2d 518 (N.D. 1998).

Furthermore, the United States Supreme Court has made clear that, when evaluating conflict of interest claims, is necessary for a defendant to "demonstrate that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'" *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980). When the claim of ineffective assistance of counsel is based upon an alleged conflict of interest, however, prejudice will be presumed where counsel is shown to have been burdened by an actual conflict of interest. *Commonwealth v. Buehl*, 510 Pa. 363 at 379, 508 A.2d 1167 at 1175 (1986); *Commonwealth v. Smith*, 380 Pa. Super. 619, 552 A.2d 1053 (1988).

We find that the mere existence of a Disciplinary Board complaint against counsel does not create a *per se* conflict of interest between client and counsel. Although it is this Court's policy to grant broad leeway to the Public Defender's Office, particularly when they believe they have discovered a conflict of interest, this Court will not permit defendants to play attorney roulette. If a Disciplinary Board complaint automatically triggered a conflict of interest each time a defendant filed one, a defendant could infinitely file frivolous complaints and spin the wheel of conflict counsel until the ball

lands on an attorney the defendant finds satisfactory. This would result in an impermissible circumvention of the law.

This Court is unaware of the status of either of the Disciplinary Board complaints Defendant has filed and will not opine on whether or not they are meritorious. As noted above, whether the complaints have merit is irrelevant to whether a conflict of interest exists. Therefore, the mere fact that Defendant has filed a complaint against Attorney Stewart with the Disciplinary Board does not justify a change in counsel.

### III. CONCLUSION

In conclusion, we find that Petitioner has failed to meet his burden to show substantial reasons necessitating the dismissal and replacement of Matthew N. Stewart, Esq. as Defendant's attorney. Furthermore, a thorough review of the record indicates Attorney Stewart's competent and skillful representation of Defendant. For these reasons, Defendant's *Motion* is **DENIED**. Defendant is hereby notified that he may retain his court-appointed counsel Matthew N. Stewart, Esq., retain private counsel, or notify this Court of his intention to proceed *pro se* pursuant to *Commonwealth v. Grazier*, 552 Pa. 9, 713 A.2d 81 (Pa. 1998).

### ORDER OF COURT

**NOW THIS** 3rd day of September, 2021, in consideration of Defendant's *pro se Motion for Dismissal of Appointed Counsel and Appointment of Conflict Counsel*, filed August 26, 2021,

**IT IS HEREBY ORDERED** that Defendant's *Motion* is **DENIED**.

*Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.*