

FILED
Court of Appeals
Division II
State of Washington
2/14/2020 9:22 AM

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of

DENNIS SOMERVILLE,

Petitioner.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

Jeffrey Erwin Ellis #17139
Attorney for Mr. Somerville

Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
503/222-9830 (o)
JeffreyErwinEllis@gmail.com

A. INTRODUCTION

Dennis Somerville claims that defense counsel improperly conceded that the evidence established Somerville sexually assaulted the store clerk. Considered the State's Response, this case appears to turn on whether *McCoy* is a new and retroactive rule. The State contends that it is not retroactive. The State is incorrect. *McCoy* is a "watershed" procedural change in the law and applies retroactively, as this reply demonstrates.

B. ARGUMENT

Mr. Somerville claims that he was denied his constitutional right to determine his defense, expressly relying on the recent decision in *McCoy v. Louisiana*, — U.S. —, 138 S. Ct. 1500, 1508 (2018).

In *McCoy*, defense counsel wanted the defendant to concede that he was the cause of the individuals' death in order to try to avoid the death penalty. Defendant clearly instructed his counsel not to do so, but his counsel nonetheless told the jury that defendant committed the killings. The Supreme Court held that the Sixth Amendment's guarantee of the right of the assistance of counsel precluded his lawyer from admitting the defendant's guilt of the acts alleged as the *actus reus* of a charge crime over his objections. *Id.* at 1509. It was the client's

role, not the lawyer's, to determine the objective of the client's defense, and defendant had a right to insist that he did not kill the victims. He was thus entitled to a lawyer who would represent and attempt to further the object of the defense that defendant had established. Defense counsel's actions amounted to structural error requiring a new trial, as the "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless error review." *Id.* at 1511.

Like in *McCoy*, against the wishes of his client, counsel in this case effectively conceded, in both opening and closing, the actus reus of the charged offense. A criminal defendant's decision whether to concede guilt implicates core principles and fundamental constitutional rights and is protected under the Fifth and Sixth Amendments. Accordingly, defense lawyers must honor a defendant's express decision to maintain his innocence and not concede guilt.

Under the rules governing retroactivity, a new procedural rule is applied retroactively if it establishes a watershed rule, *i.e.*, a rule "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This includes a rule "without which the likelihood of an accurate conviction is

seriously diminished.’” *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Teague*, 489 U.S. at 313).

McCoy satisfies these criteria.

Discussing the concept of watershed criminal procedure rules, the United States Supreme Court has repeatedly noted that another right-to-counsel case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), is “the only case that [this Court has] identified as qualifying under [the watershed procedural rule] exception ... [because] [w]hen a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high.” *Whorton v. Bockting*, 549 US. 406, 419 (2007).

Likewise, when counsel concedes both fundamental fairness and the accuracy of the conduct and outcome of a proceeding is greatly diminished. The right to counsel is the “great engine by which an innocent man can make the truth of his innocence visible.” Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643 (1996) (other citations omitted). The wrongful deprivation of the right to counsel is a structural error that so affects the framework within which the trial proceeds that courts may not even ask whether the error harmed the defendant. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

When counsel makes a concession over the client's objection that concession deprives the defendant of his fundamental right to plead not guilty. The plea decision is an indispensable choice for the defendant alone to make. And defense counsel is ethically required to follow the client's plea decision. ABA Model Rules of Prof'l Conduct, r. 1.2 (2016). Indeed, if defense counsel seeks to enter a guilty plea on behalf of a client, the record must be clear that the client has given informed consent to the guilty plea. *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

Through a plea of not guilty, the defendant requires the prosecution to carry its constitutional burden and prove his guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The decision to plead not guilty reflects the defendant's choice of his ultimate trial objective: to secure an acquittal. Regardless of the lawyer's view of the likelihood of success, a refusal to honor this particular wish of the defendant has been recognized as a severe infringement of the client's constitutionally protected decision to plead not guilty. Moreover, in defying the defendant through this unauthorized concession, counsel unfairly and irrevocably eliminates potential arguments otherwise available to a client choosing to plead not guilty.

The decision of a defendant to testify on his own behalf is a right essential to our adversary system. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992). Indeed, every criminal defendant is privileged to testify in his own defense, or to refuse to do so. *Rock v. Arkansas*, 483 U.S. 44, 53 (1987). Here too, however, defense counsel's decision to concede the *actus reus* of a crime over the defendant's objection effectively nullifies this right.

The right to testify and maintain one's innocence, or to remain silent in one's own defense, would be illusory if counsel could pursue a strategy to concede guilt despite the defendant's objection. Should a defendant testify to his innocence, his counsel's concession would effectively instruct the jury to ignore the defendant's statements. Moreover, where a defendant may want to remain silent, he may feel forced against his wishes to testify on his own behalf to defend against his own counsel's concession of his guilt. Such a result renders the client's individual right to decide whether to testify meaningless.

The decision whether to testify on one's own behalf is a fundamental choice reserved for defendants alone. To allow counsel to contradict the essence of the defendant's decision regarding testimony would make counsel the “master” rather than the “assistant” and thus

strip the defense of the personal character that the Constitution demands. *Faretta v. California*, 422 U.S. 806, 820 (1975).

Defense counsel may not employ a trial strategy that overrides a defendant's express decision to maintain innocence. Certainly, conceding particular factual issues at trial can sometimes be a useful trial tactic. Despite these potential strategic advantages, however, a defense lawyer's preferred approach on the core issue of guilt or innocence may not supersede the defendant's express, constitutionally protected decision to maintain innocence. *Faretta*, 422 U.S. at 834 (finding the right to self-representation at trial grounded in part in a respect for individual autonomy).

Our Constitution places this profound decision in the hands of the defendant. The choice of whether to maintain innocence is not a mere matter of trial strategy, but instead a fundamental individual right belonging to the defendant. As the Supreme Court has noted, “[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.” *Faretta*, 422 U.S. at 834. Even in the most dire of circumstances, the decision whether to concede full or partial guilt remains in the defendant's purview.

Simple alternatives to a concession exist. First, and perhaps most significantly, defense counsel can emphasize that the government must be put to its proof, with the formidable protection for the defendant of a requirement of proof beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Jackson v. Virginia*, 443 U.S. 307 (1979). This requirement can be emphasized by defense counsel in both opening statement and closing argument, and, of course, the court will instruct the jury regarding this burden. *Victor v. Nebraska*, 511 U.S. 1 (1994).

Second, during trial, defense counsel has many legitimate options for attacking the government's case, without conceding guilt. These may include challenges to the admissibility of evidence, challenges to the reliability of evidence, conduct of cross-examination, and vigorous advocacy on jury instructions and legal motions. There are many opportunities to act as an effective advocate while retaining credibility with the jury; but those otherwise effective measures are completely undermined when counsel concedes guilt contrary to a defendant's wishes. Permitting a defense lawyer to concede guilt against a defendant's express desire violates core, fundamental rights. Although such a concession may be viewed by a defense lawyer as in the client's strategic best interests, a defendant's express desire to maintain

innocence may not be overridden. Defense lawyers must honor that decision and zealously defend the accused with the full range of remaining strategic and tactical options.

CONCLUSION

Because Mr. Somerville's trial was conducted in violation of his Sixth Amendment rights, his conviction should be vacated.

DATED this 14th day of February 2020.

Respectfully Submitted:

/s/Jeffrey Erwin Ellis
Jeffrey Erwin Ellis #17139
Attorney for Mr. Somerville

Law Office of Alsept & Ellis
621 SW Morrison St. Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

ALSEPT & ELLIS

February 14, 2020 - 9:22 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53586-6
Appellate Court Case Title: Personal Restraint Petition of: Dennis Somerville
Superior Court Case Number: 02-1-00908-9

The following documents have been uploaded:

- 535866_Personal_Restraint_Petition_20200214092134D2305579_2486.pdf
This File Contains:
Personal Restraint Petition - Reply to Response to PRP/PSP
The Original File Name was SomervilleDPRPReply.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: jeffrey ellis - Email: jeffreyerwinellis@gmail.com

Address:

621 SW MORRISON ST STE 1025

PORTLAND, OR, 97205-3813

Phone: 503-222-9830

Note: The Filing Id is 20200214092134D2305579