

NO. 74538-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SAID FARZAD,

Appellant.

FILED
Nov 04, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

FARZAD'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN HIS COERCED STATEMENTS WERE RULED ADMISSIBLE.

Appellant Said Farzad knew that if he did not satisfactorily explain what had happened to the Department of Health, he would lose his medical license and his livelihood. In this appeal, Farzad argues his statements at the hearing were, therefore, involuntary, and the court erred in finding them admissible to impeach him if he testified at trial.

The State responds to this argument on two main fronts. First, it argues Farzad's statements at the hearing were not coerced by an extreme penalty such that his Fifth Amendment privilege was self-executing. Brief of Respondent (BoR) at 6-11. Second, the State argues, in contravention of well-established Washington precedent, that even if the statements were involuntary and inadmissible even for impeachment, he cannot raise this issue on appeal without having first run the risk of testifying at trial. BoR at 11-20. This Court should reject both of these arguments and reverse Farzad's conviction.

a. Farzad's Fifth Amendment Privilege Was Self-Executing Because He Was Implicitly Threatened with the Loss of his Livelihood.

Farzad's Fifth Amendment privilege was self-executing. He was not required to have actually refused to answer questions at the Department of

Health hearing because he was threatened with a severe sanction, namely the loss of not just his employment but also his entire livelihood. The State's argument amounts to an assertion that there was no explicit threat. But case law is clear that the penalty exception applies, and the privilege is self-executing, when the threat is even implied. State v. Post, 118 Wn.2d 596, 610, 826 P.2d 172, as amended, 118 Wn.2d 596 (1992). The court in Post declared that the penalty exception applies when "the State makes express or implied assertions that exercise of the Fifth Amendment privilege will result in the imposition of a penalty, be it economic loss or deprivation of liberty." Id. (emphasis added).

The State suggests Farzad's statements at the hearing were voluntary because he wanted to clarify what had happened. BoR at 8. This argument overlooks the coercive nature of the circumstances. Farzad wanted to clarify because he was fully aware that if he did not explain himself to the satisfaction of the Department of Health, he would lose his medical license. The mere use of the word "want" does not render a statement voluntary. In determining voluntariness, courts look at the totality of the circumstances. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (citing Fare v. Michael C., 442 U.S. 707, 724-25, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); Miranda v. Arizona, 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L.

Ed. 2d 694 (1966)). Farzad believed he would be sanctioned if he did not give a full account of himself, and that belief was objectively reasonable.

The State argues that, to assert his Fifth Amendment rights, Farzad would have to simply bear the risk of saying nothing at his hearing. BoR at 8 (citing United States v. Taylor, 975 F.2d 402, 404 (7th Cir. 1992)). But Taylor is inapposite. That case involved Taylor's demand for return of property, namely a firearm, used in a crime. Id. at 402-03. Loss of a single firearm is not the kind of severe and coercive sanction that would give rise to the penalty exception to the rule requiring express assertion of Fifth Amendment rights. Baker v. United States, 722 F.2d 517, 518-19 (9th Cir. 1983), cited in Taylor, also involved mere forfeiture of personal property.

By contrast, Farzad was facing the loss of his medical license, his lifelong livelihood, and his vocation. Under the Fifth Amendment, a criminal defendant may not be forced into a choice that involves "such pain, danger, or severity that a defendant inevitably will be forced to prefer confession." City of Seattle v. Stalsbrot, 138 Wn.2d 227, 235, 978 P.2d 1059 (1999) (citing Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)). Taylor and Baker did not involve such a choice. This case does.

b. Farzad Need Not Run the Risk of Testifying to Obtain this Court's Review.

It has long been the rule in Washington that the defendant need not testify and risk actual use of his coerced statements against him, before obtaining appellate review of an erroneous ruling permitting that use. State v. Borsheim, 140 Wn. App. 357, 371 n. 5, 165 P.3d 417 (2007); State v. Greve, 67 Wn. App. 166, 169, 834 P.2d 656 (1992). The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (citing In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

The State urges this Court to abandon Washington's longstanding rule, but makes no attempt to show that it is incorrect or harmful. Instead, the State argues that a number of other jurisdictions have determined differently. This Court should adhere to its own precedent and reject the State's argument.

First, the State has overlooked several additional jurisdictions whose precedent supports Washington's rule. In addition to the Ninth Circuit in United States v. Chischilly, 30 F.3d 1144, 1150-51 (9th Cir. 1994) overruled on other grounds by United States v. Preston, 751 F.3d 1008 (9th Cir. 2014), the Seventh Circuit has also held that a defendant need not testify to preserve

for appeal an error in admitting an involuntary confession for impeachment. United States ex rel. Adkins v. Greer, 791 F.2d 590, 593-94 (7th Cir. 1986). The Second Circuit has also strongly suggested it would fall on the side of the Seventh and Ninth Circuits. See Biller v. Lopes, 834 F.2d 41, 43-44 (2d Cir. 1987) (finding it would likely be inappropriate to require the defendant to testify to preserve an error involving a legal issue on a motion in limine).

In terms of other states, in addition to California and Vermont, the State has overlooked Hawai'i, Colorado, South Dakota, and North Carolina. Hawaii's highest court has determined that "it would be unwise" to compel the defendant to choose between testifying and being impeached or being silent, depriving the jury of his testimony and losing all chance of appeal. State v. Schnabel, 127 Haw. 432, 463-64, 279 P.3d 1237 (2012) (citing 28 Charles Alan Wright, et al., Federal Practice and Procedure: Evidence § 6119 at 123 n.49 (1st ed. 1993)). Colorado and South Dakota have similarly rejected a requirement that the defendant testify to preserve a constitutional error for appeal. People v. Henderson, 745 P.2d 265, 266 (Colo. App. 1987); State v. Brings Plenty, 459 N.W.2d 390, 394-95 (S.D. 1990).

Even with non-constitutional errors, North Carolina has concluded the defendant should not be required to testify to preserve the error because "The requirement that a defendant must testify to preserve reviewability of rulings renders motions *in limine* ineffective." State v. Lamb, 84 N.C. App.

569, 581, 353 S.E.2d 857, (1987), aff'd, 321 N.C. 633 (1988). The court explained,

If the threatened use of inadmissible evidence can prevent the defendant from testifying altogether and also deny her the opportunity to appeal an erroneous ruling on the admissibility of the evidence, the State would have multiple illegitimate opportunities to silence defendants, and the very purpose of the motion *in limine* would be lost.

Id. at 583. A review of case law from around the country does reveal a split of opinions, but many of those opinions support Washington's longstanding rule.

Second, the practical considerations cited by the State do not requiring abandoning this Court's precedent. On the contrary, the distinction relieving defendants of the obligation to testify to preserve constitutional errors, while requiring testimony to preserve mere evidentiary errors is both practical and consistent with precedent and other state law. The State is correct that this controversy arises from the rule announced in Luce v. United States, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), that the defendant must testify to preserve an error in admitting a prior conviction for impeachment. However, the Court expressly distinguished Luce, which involved improper impeachment via admission of prior convictions under the federal version of ER 609, from New Jersey v. Portash, 440 U.S. 450, 99 S. Ct. 1292, 59 L. Ed. 2d 501 (1979), and Brooks v. Tennessee, 406 U.S.

605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972), which involved constitutional, rather than merely evidentiary errors. Luce, 469 U.S. at 42-43.

This distinction between constitutional and evidentiary errors is consistent with RAP 2.5 permitting consideration for the first time on appeal of manifest constitutional errors. Involuntary statements are never admissible, for impeachment or otherwise. State v. Tim S., 41 Wn. App. 60, 62, 701 P.2d 1120 (1985) (citing Harris v. New York, 401 U.S. 222, 224, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)). The constitutional error, here, is, therefore manifest. Nothing precludes this Court's review.

The Luce rule requiring testimony to preserve error makes sense when there is a non-constitutional issue requiring a subtle balancing test. People v. Boyd, 470 Mich. 363, 382, 682 N.W.2d 459 (2004) (Kelly, J., dissenting). It does not make sense when applied to constitutional errors. As the State acknowledges, the constitutional issue of whether Farzad's statements at the Department of Health hearing were admissible is largely a legal and constitutional issue. BoR at 14 (acknowledging this error could likely be reviewed under California law permitting review despite lack of testimony when the defendant raises a pure question of law). Unlike the ER 609 issues in Luce and in People v. Brown, 42 Cal. App. 4th, 461, 49 Cal. Rptr. 652, 658-59 (1996), this Court does not have to balance probative

value and the danger of unfair prejudice to determine whether there was a constitutional violation.

Similarly, it makes sense to permit review without testimony in constitutional cases where the error, if any, is presumed prejudicial on appeal. The State points out that to courts require additional facts (obtained when the defendant actually testifies) in order to assess prejudice. BoR at 17. It therefore, makes sense to require the entire scenario be played out for non-constitutional issues, where the defendant bears the burden on appeal of demonstrating prejudice that likely affected the outcome of the trial. It makes no sense to impose such a requirement when the defendant has no such burden. The admission of an involuntary statement is constitutional error that is presumed prejudicial. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State bears the burden of showing it could not have impacted the outcome of the trial. Id. at 242.

This Court should follow Washington and United States Supreme Court precedent, and continue to distinguish constitutional from non-constitutional errors in this area. Luce, 469 U.S. at 42-43; Borsheim, 140 Wn. App. at 371 n. 5; Greve, 67 Wn. App. at 169. This Court's precedent is in good company among numerous states and federal circuits and has not been shown to be incorrect or harmful.

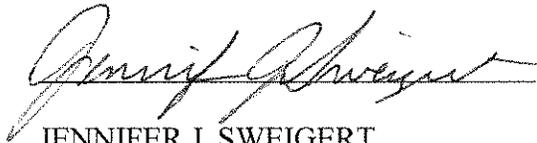
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Farzad requests this Court reverse his conviction.

DATED this 4th day of November, 2016.

Respectfully submitted,

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