In The

Supreme Court of Virginia

RECORD NO. 180191

MIGUEL ANTONIO REYES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

REPLY BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

I. The Court of Appeals erred by holding that the trial court did not abuse its discretion when it denied Mr. Reyes' Motion to Continue.

a. The Court of Appeals erred by finding that Mr. Reyes was required to show exceptional circumstances to warrant the continuance.

b. Even if there is a requirement for Mr. Reyes to show exceptional circumstances, the Court of Appeals erred by finding that Mr. Reyes did not present such exceptional circumstances.

ARGUMENT

A. *Mr. Reyes Properly Preserved this Issue for Appeal*

The Commonwealth incorrectly argues that Mr. Reyes waived any argument that he was entitled to a continuance because he agreed that it "would be fine" if he filed a motion to reconsider.[1] See CW's VSC Br. at 15-18. However, the Commonwealth conflates two different requests – the motion to continue the sentencing and the motion to substitute as counsel.

This Court has held that Code § 8.01-384(A) is controlling over Rule 5:25. Helms v. Manspile, 277 Va. 1, 7, 671 S.E.2d 127, 130 (2009). Code § 8.01-384(A) states, in part, that "No party after having made an objection or motion known to the court, shall be required to make such objection or

[1] Though the Commonwealth advanced the same waiver argument in the Court of Appeals, the Court of Appeals did not find that Mr. Reyes waived his continuance request. See CW's CAV Br. at 8-10.

motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling , order, or action of the court." VA. CODE ANN. § 8.01-384(A) (2018). Only if a party affirmatively abandons the position by express waiver is it not preserved. See Helms, 277 Va. at 6, 671 S.E.2d at 129.

"Waiver is the voluntary and intentional abandonment of a known legal right, advantage, or privilege." Chawla v. BurgerBusters, Inc., 255 Va. 616, 622, 499 S.E.2d 829, 833 (1998). "Waiver of a legal right will be implied only upon clear and unmistakable proof of the intention to waive such right for the essence of waiver is voluntary choice." Id. at 623, 499 S.E.2d 833. Moreover, "if a trial court is aware of a litigant's legal position, and the litigant did not expressly waive such arguments, the arguments remain preserved for appeal" under § 8.01-384(A). Brown v. Commonwealth, 279 Va. 210, 217, 688 S.E.2d 185, 189 (2010) (citation omitted).

Swedish separately filed two motions on July 14, 2016: a motion to substitute counsel, App. at 41-42, and a motion to continue, App. at 43-45. Swedish requested a substitution of counsel *only if* a reasonable continuance was granted. See App. at 41, 51. Swedish repeatedly made known to the court the action he desired the court to take. Not only did

Swedish file a written motion requesting a continuance under § 19.2-159.1, App. at 44, but Swedish orally moved for a continuance several times on July 15, 2016. App. at 51-53.

Though Swedish responded "That would be fine" when asked by the trial court "Why don't I just allow you to file a motion to reconsider…", that statement related to the second motion before the court – the substitution of counsel – and was not an abandonment of his request to continue the case. App. at 54. When Swedish stated "That would be fine" it was indicative of his ability to later substitute as counsel when the continuance was denied. This interpretation is consistent with Swedish's representation that "At this late date I wouldn't be doing Mr. Reyes any justice at all if I were to step in merely to do the sentencing today", App. at 51, and "If that's the case and we go forward today then Mr. Nord will be doing the sentencing and whatever happens, happens subsequent to today", App. at 55.

Likewise, it is clear from Swedish's response that he understood the trial court was denying the continuance ("If that's the case and we go forward today…") and was now addressing the trial court's concerns regarding the substitution of counsel. Therefore, this statement does not constitute "clear and unmistakable proof" of his intention to waive the right.

Accordingly, this case is not controlled by Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989) and Dickerson v. Commonwealth, Record No. 1095-02-1, 2003 Va. App. LEXIS 228 (Apr. 15, 2003).

Even the trial court acknowledged it was two separate issues: "Given the Commonwealth's objection the motion to continue is denied. I will certainly allow Mr. Swedish to represent the defendant along with Mr. Nord if he wishes to…You can enter your appearance in the case. I would never prevent that from occurring but the motion for continuance is denied." App. at 55. Therefore, Mr. Reyes preserved this issue for appeal because the trial court was aware of Mr. Reyes' legal position and Mr. Reyes did not expressly waive that argument.

B. *The Plain Language of Code § 19.2-159.1 Entitled Mr. Reyes to a Continuance*

1. Standard of Review

A question of statutory interpretation is a question of law that is reviewed *de novo* on appeal. Farrakhan v. Commonwealth, 273 Va. 177, 181, 639 S.E.2d 227, 229 (2007).

2. The Term "Trial" in Virginia Code § 19.2-159.1 Encompasses Both the Adjudication of Guilt and Adjudication of Sentence

The Commonwealth asks this Court to apply a narrow interpretation of "trial". See CW's VSC Br. at 29. However, "trial" in § 19.2-159.1 includes both the adjudication of guilt and the adjudication of sentence.[2]

The preceding sentence states that the "statement and oath" of the defendant's financial status "shall be filed with the papers in the case" and "shall follow and be in effect at *all stages of the proceedings against him* without further oath." VA. CODE ANN. § 19.2-159.1 (2018) (emphasis added). "[A]ll stages of the proceedings" necessarily includes the defendant's first appearance, or arraignment, through preliminary hearing, pre-trial motions, trial, and sentencing – stages where a change in indigence could occur any time. Furthermore, the statute provides that once private counsel has been retained, "appointed counsel shall forthwith be relieved of further responsibility…" Id. It is logical that private counsel would be entitled to a continuance at any stage of the proceedings in order to render effective assistance of counsel, particularly if the statute mandates that appointed counsel is "forthwith" relieved.

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[2] The Court of Appeals "assume[d] without deciding that 'trial' within Code § 19.2-159.1 applies to sentencing proceedings." Reyes, 68 Va. App. at 386 n.5, 808 S.E.2d at 841 n.5.

This interpretation is also consistent with the Court's definition of "during the trial" in Code § 19.2-259 which includes "every stage of the trial from [the accused's] arraignment to his sentence, when anything is to be done which can affect his interest." Jones v. Commonwealth, 227 Va. 425, 428, 317 S.E.2d 482, 483 (1984). The Commonwealth's narrow definition of "trial" leads to an absurd result. The General Assembly could not have intended that cases scheduled for contested hearings will result in mandatory continuances (though it would necessarily result in inconvenience to subpoenaed witnesses) but cases scheduled for non-contested hearings will not result in mandatory continuances (though it less likely that witnesses are subpoenaed).

Even if this Court finds that "trial" does not encompass "all stages of the proceedings against him", "trial" necessarily includes the sentencing. A "trial" is comprised of both the adjudication of guilt (i.e. "guilt phase of trial") and the adjudication of sentence (i.e. "sentencing phase" or "punishment phase" of "trial"). See Washington v. Commonwealth, 44 Va. App. 157, 162-164, 604 S.E.2d 94-96 (2004) (discussing bifurcation of trials and identifying the "guilt phase" versus "sentencing phase" of trial); see also VA. CODE ANN. § 19.2-295.1 (2018) (discussing requirements to introduce a defendant's prior record at trial during the "sentencing phase"); VA. CODE

ANN. § 19.2-307 (2018) ("The judgment order shall set forth the plea, the verdict or findings and the adjudication and sentence…"). For these reasons, the Court should find that "trial" includes the sentencing phase.

3. "Reasonable Continuance" Relates to the Length of the Continuance

The Commonwealth argues that "reasonable continuance" must not mean "reasonable in length" because the General Assembly did not use those specific words. See CW's VSC Br. at 20. However, the Commonwealth's strained interpretation of "reasonable" also fails.

As used in Code § 19.2-159.1, "reasonable" does not bestow the trial court with discretion to determine whether the circumstances of the case warrant a continuance. That interpretation results in absurdity because it ignores the mandatory directive immediately preceding it – "The court *shall* grant reasonable continuance …" and the purpose of the continuance – "to allow counsel *to be obtained* and *to prepare for trial*." VA. CODE ANN. § 19.2-159.1 (2018) (emphasis added). Instead, "reasonable" correctly refers to the *length* of the continuance.

The Commonwealth's argument improperly isolates the phrase "reasonable continuance" from the remainder of the sentence. Here, the General Assembly expressly stated the *purpose* of the continuance – to allow counsel to be obtained and to prepare. Both reasons relate to *timing*.

Accordingly, "reasonable" refers to the length of the continuance, not whether it is proper to grant the continuance. The Court of Appeals has similarly interpreted "reasonable continuance" to refer to timing. See London v. Commonwealth, 49 Va. App. 230, 239, 638 S.E.2d 721, 725 (2006) ("On this record, we find the circumstances required substitution of counsel retained in advance of the trial date, and a continuance of the trial date *for a reasonable period of time* to permit counsel to prepare."). Therefore, the rules of statutory construction require this Court to look no further than the plain language of the statute. Boynton v. Kilgore, 271 Va. 220, 227, 623 S.E.2d 922, 925-26 (2006) ("[The legislature's] intent is usually self-evident from the words used in the statute.") (citation omitted).

4. Mr. Reyes Has Demonstrated Prejudice if Required To by this Court

The Commonwealth argues that Mr. Reyes must demonstrate prejudice because the statutory provisions are directory rather than mandatory. CW's VSC Br. at 38-40. Mr. Reyes disputes that the failure to include no specific remedy renders it directory. Code § 19.2-159.1 must also be read in conjunction with Code § 19.2-162 which requires "Courts before which criminal proceedings are pending shall afford such continuances and take such other action as is necessary to comply with the provisions of this chapter." VA. CODE ANN. § 19.2-162 (2018).

If this Court concludes prejudice is necessary, then Mr. Reyes has met his burden. He suffered prejudice when the trial court prohibited him from proceeding with retained counsel. In the Sixth Amendment jurisprudence, the erroneous denial of counsel is structural error and requires no finding of prejudice. U.S. v. Gonzalez-Lopez, 548 U.S. 140, 150-51 (2006). The Supreme Court explained that erroneous deprivation of counsel comes "with consequences that are necessarily unquantifiable and indeterminate" so no demonstration of prejudice is required. Id.

Though this case involves a statutory challenge, the Supreme Court's logic is persuasive. Virginia's appellate courts have similarly adopted that rationale. In London v. Commonwealth, the Court of Appeals cited approvingly to Gonzalez-Lopez, noting that, among other reasons, "It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." London v. Commonwealth, 49 Va. App. 230, 238, 638 S.E.2d 721, 725 (2006) (citation omitted). That rationale is equally consistent in a statutory analysis. The denial of the continuance prevented Mr. Reyes from proceeding with counsel of his choice. That in and of itself should establish the requisite prejudice.

A forward-looking prejudice analysis is understandably difficult given the impossibility of knowing what Swedish would have done and the impact on the proceeding.[3] However, the Court of Appeals has concluded that prejudice may be established by evidence that the appointed attorney "conducted an inadequate investigation, was unprepared for trial, or failed to pursue a vigorous defense." Feigley v. Commonwealth, 16 Va. App. 717, 721, 432 S.E.2d 520, 523 (1993).

Mr. Reyes has demonstrated prejudice through Nord's concessions that his representation may qualify as ineffective assistance of counsel. App. at 118-119 (COURT: "Because Mr. Nord, will there be a habeas coming down the road?" NORD: "I do not know that, Your Honor. I think that there are some grounds that may justify such an action."). Nord also admitted that his investigation was inadequate, preventing him from pursuing a vigorous defense. App. at 118 (NORD: "Well, he told me that he was other places, but I could not verify with anyone else and that led us to make this considered [Alford] plea. He always maintained his innocence, but I could not trace any other witnesses and as I pointed out I do not have a staff investigator…"); App. at 108 ("4. … Counsel is a court-

[3] At the very least, Swedish proffered that Mr. Reyes may file a motion to withdraw the guilty plea. App. at 51-52.

appointed sole practitioner, who does not have the benefit of a paid investigator to find [the alibi witnesses].”). Nord neglected to inquire whether Swedish would represent Mr. Reyes for future proceedings and, as a result, filed a bereft “Motion To Reconsider, To Withdraw Alford Plea and To Set a Trial Date.” App. at 94-98. The motion was devoid of any legal argument or analysis as to why Mr. Reyes should be permitted to withdraw his plea, and therefore was properly denied by Judge Tran on September 20, 2016. App. at 105. Nord then filed a “Supplemental Motion to Reconsider, To Withdraw Alford Plea and to Set a Trial Date.” App. at 106-112.

The Commonwealth argues this second motion was insufficient in detail and argument to withdraw the guilty plea, but the question is not whether the trial court properly denied the motion.[4] The question is whether Mr. Reyes suffered prejudice from the denial of the continuance. Nord’s filings include concessions that he failed to conduct a proper investigation pre-sentencing and post-sentencing. Moreover, the first pleading post-sentencing had *no* legal authority or argument, and the second pleading post-sentencing was filed *after* the trial court lost the

[4] To the extent the motion requested the trial court permit Mr. Reyes to withdraw his plea, the motion was filed well outside the 21 day period prescribed by statute. See VA. CODE ANN. § 19.2-296 (2018).

authority to withdraw the plea. Given Nord's deficiency and incompetency as appointed counsel, this Court should conclude that Mr. Reyes has demonstrated prejudice.

CONCLUSION

WHEREFORE, Mr. Reyes respectfully requests this Honorable Court to reverse and remand his case to the trial court for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE

I, Kathryn C. Donoghue, certify as follows:

1. That on December 3, 2018, this Reply Brief of the Appellant complies with Va. Sup. Ct. R 5:6, 5:26, 5:29, and specifically this Reply Brief of the Appellant, not including the cover page, table of contents, table of authorities, and certificate, contains 2,621 words, in compliance with the 2,625 word count limitation imposed by Rule 5:26(h).

2. That on December 3, 2018, three copies of the same have been hand-delivered to the Clerk of the Supreme Court of Virginia at 100 North 9th Street, 5th Floor, Richmond, VA 23219.

3. That on December 3, 2018, an electronic copy of the Reply Brief of the Appellant was filed, via VACES.

4. Appellant desires to state orally, by counsel, the reasons why his conviction should be reversed.

5. That on December 3, 2018, an electronic copy of the Reply Brief of Appellant was served, via email, to:

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