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ADVANCE SHEET HEADNOTE
January 22, 2024

2024 CO 3

No. 22SC562, *People v. Smith* – Post-Conviction Relief – Abandonment.

In this case, the supreme court considers whether (1) a division of the court of appeals reversibly erred in determining that the defendant preserved all of the claims that he had raised in a pro se Crim. P. 35(c) motion, despite his not pursuing some of those claims in the later briefing on his motion and at the postconviction hearing; (2) counsel may abandon some of a defendant's pro se Crim. P. 35(c) claims without first obtaining the defendant's informed consent; and (3) abandonment of individual postconviction claims requires a showing of intent to do so.

The court now concludes that the defendant abandoned the claims that he ceased pursuing and therefore the division erred in concluding that all of his pro se claims were preserved. The court further concludes that because the "captain of the ship" doctrine allocates to counsel the authority to make strategic decisions, including which claims to pursue, counsel may abandon some, although not all,

of a defendant's pro se Crim. P. 35(c) claims without the client's informed consent. Finally, the court notes that, on the facts before the court, the defendant intended to abandon the pro se claims that he had ceased pursuing, and, thus, the court need not decide whether the abandonment of individual postconviction claims requires a showing of intent to abandon such claims.

Accordingly, the court reverses the judgment of the division below.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 3

Supreme Court Case No. 22SC562
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA2359

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Anthony Robert Smith.

Judgment Reversed

en banc

January 22, 2024

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT, JUSTICE MÁRQUEZ, JUSTICE HOOD, JUSTICE HART, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 We granted certiorari to consider whether (1) a division of the court of appeals reversibly erred in determining that Anthony Robert Smith preserved all of the claims that he had raised in a pro se Crim. P. 35(c) motion, despite his not pursuing some of those claims in the later briefing on his motion and at the postconviction hearing; (2) counsel may abandon some of a defendant's pro se Crim. P. 35(c) claims without first obtaining the defendant's informed consent; and (3) abandonment of individual postconviction claims requires a showing of intent to do so.¹

¶2 We now conclude that Smith abandoned the claims that he ceased pursuing and therefore the division below erred in determining that all of Smith's pro se claims were preserved. We further conclude that because the "captain of the ship" doctrine allocates to counsel the authority to make strategic decisions, including

¹ Specifically, we granted certiorari on the following issues:

1. Whether the postconviction court correctly held that defendant waived his pro se claims where the claims were conclusory and defense counsel pursued other claims but not these.
2. Whether defense counsel, as captain of the ship, may decline to pursue and abandon individual pro se claims absent defendant's informed consent to such abandonment.
3. Whether abandonment of individual postconviction claims required a showing of an intent to abandon such claims.

which claims to pursue, counsel may abandon some, although not all, of a defendant's pro se Crim. P. 35(c) claims without the client's informed consent. Finally, we note that because the record in this case establishes that Smith intended to abandon the pro se claims that he had ceased pursuing, we need not decide whether the abandonment of individual postconviction claims requires a showing of intent to abandon such claims.

¶3 Accordingly, we reverse the judgment of the division below.

I. Facts and Procedural History

¶4 Smith was convicted of one count of sexual assault on a child by one in a position of trust as part of a pattern of sexual abuse; three counts of sexual assault on a child by one in a position of trust, victim under fifteen years old; and four counts of promotion of obscenity to a minor. He appealed his conviction, and a division of the court of appeals affirmed. *People v. Smith*, No. 14CA85 (Dec. 31, 2015).

¶5 Thereafter, Smith filed a pro se Crim. P. 35(c) motion, asserting ten specific claims of ineffective assistance of counsel, a placeholder ineffective assistance claim for any issue discovered by to-be-appointed postconviction counsel, a claim asserting newly discovered evidence, and a claim alleging prosecutorial misconduct. In this motion, Smith requested court-appointed counsel and a hearing on his claims.

¶6 Upon review of Smith’s pro se filing, the postconviction court ordered that a copy of Smith’s motion be served on the public defender’s office and that that office respond as to whether it intended to enter an appearance. The court further ordered that the public defender’s office identify whether any conflict existed, request any additional time needed to investigate, and “add any claims the Public Defender finds to have arguable merit.”

¶7 Several months later, counsel from outside the public defender’s office (“appointed counsel”) entered her appearance on Smith’s behalf, and appointed counsel subsequently filed a pleading that she titled, “Supplemental Motion for Post-Conviction Relief” (“counsel’s motion”). Counsel’s motion (1) developed two of Smith’s pro se ineffective assistance of counsel claims and asserted an additional ineffective assistance claim; (2) raised a new cumulative error claim, arguing that “the cumulative effect of all of the alleged errors by [Smith’s] trial and appellate counsel amount[ed] to ineffective assistance of counsel”; and (3) clarified that Smith was challenging only the effectiveness of the attorney who had represented him at trial and on appeal, and not that of any of the attorneys who had represented him at other times during the pendency of his case. Counsel’s motion did not present any argument regarding Smith’s remaining pro se claims. Nor did it indicate that Smith was continuing to pursue those claims.

¶8 The prosecution filed an answer to counsel's motion addressing only the claims raised in that motion. Smith then filed a reply, which likewise addressed only the claims raised in counsel's motion. Notably, the reply did not mention the omitted pro se claims or in any way indicate an intent to continue to pursue them. To the contrary, in arguing Smith's claim for cumulative error, the reply stated, "The cumulative effect of all of *these errors* by Mr. Smith's trial and appellate counsel [i.e., the errors previously discussed in the reply] amount to ineffective assistance of counsel." (Emphasis added.)

¶9 Thereafter, the postconviction court held an evidentiary hearing at which Smith's trial and appellate counsel and one other witness testified. During this hearing, the court and both parties focused exclusively on just one of the claims raised in counsel's motion. Smith did not elicit any testimony or make any argument regarding either the remaining claims in counsel's motion or the omitted pro se claims.

¶10 At the conclusion of the hearing, after the parties had completed their arguments and the court took the matter under advisement and wished counsel a good day, Smith's counsel asked, "Your Honor, could I clarify that we'll get a written ruling on all the claims?" The court replied, "Yes."

¶11 The postconviction court subsequently issued a written order addressing and denying all of the claims raised in counsel's motion, finding that Smith's trial

and appellate counsel's actions did not fall below an objective standard of reasonableness. In a footnote, the postconviction court also determined that because counsel's motion incorporated only some of the claims that Smith had made in his pro se motion—and the prosecution's answer and Smith's reply addressed only the claims asserted in counsel's motion—Smith had waived the omitted pro se claims.

¶12 Smith appealed, and in a published opinion, a division of the court of appeals reversed, concluding, in pertinent part, that appointed counsel did not waive any of Smith's pro se claims by omitting them from counsel's motion. *People v. Smith*, 2022 COA 56, ¶ 1, 516 P.3d 938, 940. In support of this conclusion, the division opined that counsel's motion was captioned a "supplemental motion" and thus merely added to, but did not replace, Smith's pro se claims. *Id.* at ¶ 15, 516 P.3d at 942. The division further observed that Crim. P. 35(c)(3)(V) allowed appointed counsel to "add any claims" that she believed had merit, and she was not required to reassert issues raised in Smith's pro se motion to preserve them. *Id.* at ¶¶ 13, 15, 516 P.3d at 942. And the division stated that although counsel is generally "captain of the ship" and may decide which issues to pursue on appeal, a postconviction court may not deny relief for lack of merit under the guise of granting a defense attorney's motion to dismiss a defendant's postconviction motion. *Id.* at ¶ 17, 516 P.3d at 942 (citing *Dooly v. People*, 2013 CO 34, ¶ 10,

302 P.3d 259, 263). Doing so, the division reasoned, would amount to allowing appointed counsel to serve as the court’s fact-finder, which would be improper, and “neither counsel nor the postconviction court may dismiss a defendant’s claims without informed consent.” *Id.* at ¶ 17, 516 P.3d at 942–43 (citing *Dooly*, ¶ 10, 302 P.3d at 263).

¶13 The division thus reversed the portion of the postconviction court’s order finding a waiver of some of Smith’s pro se claims and remanded the case for an independent evaluation of those claims. *Id.* at ¶ 18, 516 P.3d at 943.

¶14 Smith and the People cross-petitioned for certiorari review, and we granted the People’s petition.

II. Analysis

¶15 We begin by discussing the applicable standard of review. We then turn to the issues on which we granted certiorari.

A. Standard of Review

¶16 In Crim. P. 35(c) proceedings, we review the postconviction court’s legal conclusions de novo but defer to its factual findings if they are supported by the record. *Medina v. People*, 2023 CO 46, ¶ 15, 535 P.3d 82, 86; *People v. Corson*, 2016 CO 33, ¶ 25, 379 P.3d 288, 293–94; *see also People v. Thompson*, 2020 COA 117, ¶ 24, 485 P.3d 566, 571 (noting that an appellate court reviews a postconviction court’s factual findings for clear error and its legal conclusions de novo).

B. Abandonment of Pro Se Claims

¶17 The People first contend that the division erred in concluding that Smith did not waive his omitted pro se Crim. P. 35(c) claims. In the People's view, the postconviction court correctly found that Smith had waived those claims. We conclude that Smith abandoned them.

¶18 The terms "waiver" and "abandonment," although often used interchangeably, concern distinct forms of procedural default. We have defined "waiver" as "the intentional relinquishment of a known right or privilege." *People v. Rediger*, 2018 CO 32, ¶ 39, 416 P.3d 893, 902. Abandonment, in contrast, typically arises from a party's decision not to pursue or reassert a claim that the party had raised previously. *See, e.g., People v. Delgado*, 2019 COA 55, ¶ 9 n.3, 442 P.3d 1021, 1025 n.3 (deeming abandoned, and thus declining to address, claims that the defendant had raised in his Crim. P. 35(c) motion but then did not discuss on appeal); *see also People v. Rodriguez*, 914 P.2d 230, 249 (Colo. 1996) (concluding that the defendant's failure to reassert on appeal all of the claims on which the district court had ruled constituted a conscious relinquishment of those claims).

¶19 Here, the record establishes that Smith intended to abandon the omitted pro se claims. As noted above, Smith initially asserted twelve specific pro se claims (plus one placeholder ineffective assistance of counsel claim, for any claims that appointed counsel might subsequently discover). Smith's appointed counsel,

however, omitted ten of the specific pro se claims when she filed her motion, reasserting and developing only two of those claims and adding an additional ineffective assistance claim and a cumulative error claim that did not reference any of the omitted pro se claims. The People then filed an answer and Smith filed a reply, both of which addressed only the claims developed in counsel's motion and neither of which mentioned any of the omitted pro se claims. Indeed, as noted above, in addressing the cumulative error claim in his reply, Smith referred to "[t]he cumulative effect of all of *these errors* by Mr. Smith's trial and appellate counsel," referring to the three errors raised in counsel's motion and discussed in the reply brief. (Emphasis added.) Notably, neither counsel's motion nor her reply indicated an intention to continue to pursue the omitted pro se claims. And when the parties appeared for a hearing on Smith's motion, neither the parties nor the court addressed Smith's omitted pro se claims.

¶20 In our view, these undisputed facts demonstrate that Smith had made a conscious decision not to pursue the omitted pro se claims, and, by definition, this constitutes an abandonment of those claims. *See Rodriguez*, 914 P.2d at 249; *Delgado*, ¶ 9 n.3, 442 P.3d at 1025 n.3.

¶21 In so concluding, we are not persuaded that Smith preserved his omitted pro se claims when, at the end of the hearing, his counsel asked the postconviction court whether it would be ruling on "all" of the claims. This request came after

(1) Smith’s counsel had winnowed Smith’s Crim. P. 35(c) claims to the four claims presented in counsel’s motion; (2) the People and Smith had briefed only those four claims; (3) Smith had spent the hearing developing only one of the claims asserted in counsel’s motion; and (4) the hearing had concluded with the postconviction court’s taking the matter under advisement. We cannot say that in these circumstances, Smith’s counsel’s reference to “all” claims would have suggested to the court that she was referring to the never-mentioned, omitted pro se claims, as opposed to the four claims that she had briefed, only one of which she had argued.

¶22 We likewise are unpersuaded by Smith’s argument that a defendant’s pro se claims are automatically preserved—even if the claims are not pursued—because the language of Crim. P. 35(c)(3)(V) simply requires counsel “to add” to, not to replace or to winnow, the defendant’s pro se claims. If Smith were correct, then counsel would not have felt compelled to reassert the pro se claims that she was continuing to pursue and would simply have added the one new ineffective assistance claim and the cumulative error claim (while likely noting, in some fashion, that she was not abandoning any of the previously asserted pro se claims). Smith’s reading of Crim. P. 35(c)(3)(V) also overlooks the role of counsel, who, as we discuss more fully below, is tasked with determining which claims to raise on appeal.

¶23 For these reasons, we conclude that the division erred in determining that Smith’s omitted pro se claims were preserved.

C. Captain of the Ship and Informed Consent

¶24 The People next argue that the division erroneously rejected the “captain of the ship” doctrine when it purportedly read *Dooly* as requiring a defendant’s informed consent before counsel could abandon a Crim. P. 35(c) claim. Although we do not read the division’s opinion as going that far, to the extent that it may be read as the People do, we take this opportunity to clarify our ruling in *Dooly*.

¶25 Under settled law, “[s]ome trial decisions implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant.” *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008) (explaining that counsel must abide by their clients’ decisions regarding pleas to be entered, whether to waive a jury trial, and whether to testify). Only the defendant may make these kinds of decisions. *See id.*

¶26 Other decisions arising in the course of a case, however, “are regarded as strategic or tactical in nature.” *Id.* As to these decisions, defense counsel is deemed the “captain of the ship” and has the final authority to make such determinations. *Id.* Examples of such determinations include decisions as to the evidence to be offered, the strategy to be employed in defending a case, and the motions to be made. *Id.* Such decisions also include, as pertinent here, which appellate claims

to pursue. *People v. Liggett*, 2018 COA 94M, ¶ 29, 490 P.3d 405, 413. Counsel has the right to make these kinds of tactical decisions even if the client disagrees with them. *Arko*, 183 P.3d at 558.

¶27 *Dooly* is not inconsistent with these principles. In *Dooly*, ¶ 1, 302 P.3d at 261, the question presented was whether court-appointed counsel could properly dismiss a defendant’s Crim. P. 35(c) motion “altogether,” in contravention of the client’s wishes. We concluded that counsel could not do so. *Id.* at ¶ 10, 302 P.3d at 263.

¶28 In reaching this decision, we began by recognizing that “trial counsel is generally accepted to be the ‘captain of the ship’ with regard to tactics and matters of trial strategy,” including regarding “which issues to pursue on appeal.” *Id.* at ¶ 7, 302 P.3d at 262. We recognized a distinction, however, between deciding what claims to pursue and deciding to dismiss an appeal altogether. *Id.* In this regard, we observed that a defendant’s attorney “could no more dismiss his client’s *appeal* against the client’s wishes than he could confess his client’s guilt by entering a plea of guilty to the charges against him.” *Id.* (emphasis added). We viewed a motion by defense counsel to dismiss a defendant’s postconviction motion the same way: “A motion by counsel to dismiss his client’s application for postconviction relief for lack of merit can no more be considered a tactical decision in his client’s interest

than could pleading him guilty to the charges in the first place.” *Id.* We thus concluded:

It is clear . . . that a district court is not authorized to grant an attorney’s motion to dismiss his client’s application for postconviction relief without his client’s informed consent. To permit the denial of postconviction relief for lack of merit under the guise of granting the public defender’s motion to dismiss his client’s application would be little different from permitting the appointment of counsel to “serve as the court’s fact-finder,” precisely the procedure we rejected in [*People v.*] *Breaman*[, 939 P.2d 1348, 1351–52 (Colo. 1997)].

Dooly, ¶ 10, 302 P.3d at 263.

¶29 As the foregoing makes clear, although *Dooly* prohibits an attorney from moving to dismiss her client’s application for postconviction relief *in full* without obtaining the client’s informed consent, *id.*, it does not require an attorney to obtain her client’s informed consent regarding strategic or tactical decisions, including as to which individual claims to raise or to abandon in pursuing a Crim. P. 35(c) motion. As to these types of issues, an attorney has the authority to make tactical decisions with which the client disagrees. *Arko*, 183 P.3d at 558.

¶30 Applying the foregoing principles here, we conclude, first, that the “captain of the ship” doctrine applied to appointed counsel’s decisions as to which postconviction claims counsel wished to pursue. We further conclude that because Smith’s counsel did not move to dismiss Smith’s Crim. P. 35(c) motion in

full, counsel was not required to obtain Smith’s approval – much less his informed consent – to decide which postconviction claims to pursue and which to abandon.

¶31 In reaching this conclusion, we are unpersuaded by Smith’s argument that the postconviction court had somehow adopted Smith’s counsel’s “assumed representations regarding the merits of the omitted pro se claims” (i.e., that such claims had no arguable merit) and therefore disregarded its independent obligation to evaluate the merits of those omitted claims. In our view, the court did nothing more than recognize counsel’s authority under the “captain of the ship” doctrine to determine the claims to be pursued or abandoned.

¶32 Accordingly, we conclude that Smith’s counsel had the authority to abandon the omitted pro se claims without first obtaining Smith’s informed consent.

D. Intent to Abandon

¶33 Finally, the People ask us to decide whether a showing of intent (as opposed to voluntariness) is required to establish that a claim has been abandoned. We need not decide that issue in this case, however, because the facts presented here established that Smith had, in fact, intended to abandon the omitted pro se claims.

III. Conclusion

¶34 For these reasons, we conclude that (1) because Smith had abandoned the claims that he had ceased pursuing, the division erred in determining that Smith’s

omitted pro se claims were preserved; and (2) Smith's appointed postconviction counsel, as "captain of the ship," had the authority to abandon the omitted pro se claims without first obtaining Smith's informed consent.

¶35 Accordingly, we reverse the judgment of the division below.