IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1284

Filed: 18 December 2018

Gaston County, Nos. 15CRS001557, 15CRS002945, 15CRS5353

STATE OF NORTH CAROLINA

v.

ERIC WILSON TAYLOR, Defendant.

Appeal by Defendant from Judgment entered 16 February 2017 by Judge Yvonne Mims Evans in Gaston County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Sarah Holladay for Defendant-Appellant.

INMAN, Judge.

Defendant Eric Wilson Taylor ("Defendant") appeals from a judgment following a jury trial finding him guilty of second-degree murder and felony death by motor vehicle, and after pleading guilty to violent habitual felon and repeat felony death by vehicle offender. Defendant asserts that he is entitled to a new trial due to the actions of his counsel constituting *per se* ineffective assistance of counsel under

State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), arguing, among other things, that he did not knowingly and voluntarily consent to counsel's conceding his guilt to two lesser-included offenses. This Court, *ex mero motu*, remanded Defendant's appeal to the trial court for an evidentiary hearing on this issue. Following the introduction of evidence and sworn testimony at the evidentiary hearing on 6 August 2018, the trial court made findings of fact and concluded as a matter of law that Defendant did not knowingly and voluntarily consent as required by *Harbison* and *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). Upon certification of that order to this Court, we hold that Defendant is entitled to a new trial.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant's case came on for trial on 13 February 2017 following indictments for felony death by vehicle, repeat felony death by vehicle, second-degree murder, violent habitual felon, and habitual felon. In closing arguments, defense counsel made the following statements to the jury:

> On the charge of second degree murder, after she tells you what is necessary to find that, she will say if you don't find all those elements beyond a reasonable doubt, you should consider whether he is guilty of the offense of involuntary manslaughter, which would be the unintentional killing of somebody by violating a traffic law essentially that approximately results in his death. *I would have to concede the State's evidence has shown that beyond a reasonable doubt.*
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> On the charge of felony death by vehicle, she will instruct you the elements necessary for that . . . . The judge is going

> to instruct you if you don't find him guilty of felony death by vehicle then you should consider whether he is guilty of misdemeanor death by vehicle. . . . *I would have to concede as well that the State's evidence has shown he is guilty of misdemeanor death by vehicle.*
>
> *So I think those would be your appropriate verdicts after hearing all of the evidence.*

(emphasis added).

Following defense counsel's closing arguments, the trial judge excused the jury and, at the request of the prosecutor, made the following inquiry of Defendant:

> THE COURT: . . . Mr. Taylor, your attorney told the jury that he concedes that the State has proven misdemeanor death by vehicle. Do you have a problem with him having made that concession?
>
> THE DEFENDANT: No ma'am.
>
> THE COURT: Thank you.
>
> [DEFENSE COUNSEL]: And involuntary manslaughter.
>
> THE COURT: As well as involuntary manslaughter?
>
> THE DEFENDANT: No ma'am.

Once called back in, and after instruction and deliberations, the jury returned guilty verdicts on the charges of felony death by vehicle and second-degree murder. Defendant pled guilty to his status as a violent habitual felon and repeat felony death by vehicle offender, and he was sentenced to concurrent sentences of life imprisonment and life without the possibility of parole. Defendant gave oral notice of appeal in open court. A week later, the trial court struck the original judgments

ex mero motu, arrested judgment on the felony death by vehicle charge, and consolidated the remaining charges into a single life sentence.

Prior to hearing this appeal, this Court entered an order on 17 May 2018 remanding the action to the trial court to hold an evidentiary hearing "for the limited purpose of determining whether after being fully appraised of the consequences, defendant knowingly and voluntarily consented to defense counsel conceding defendant's guilt (to involuntary manslaughter and misdemeanor death by vehicle) to the jury."

The trial court proceeded with that evidentiary hearing on 6 August 2018 and received testimony from both Defendant and his trial counsel. Trial counsel testified that: (1) he never intended to concede Defendant's guilt as to those crimes; (2) he did not ask permission from Defendant to make such concessions; and (3) he did not discuss the waiver of constitutional rights through concessions of guilt with Defendant. Defendant, for his part, testified that: (1) he was never asked for consent to concede guilt to any charges by trial counsel; (2) he did not instruct trial counsel to make any such concessions; and (3) he was not informed that his constitutional rights would be waived if he conceded guilt as to a charge. He further testified that he told the court at trial that he did not have a problem with his counsel's concessions because he "didn't know not to. [He] didn't know anything—that [he] was doing anything wrong." From findings on this testimony, the trial court concluded that

"Defendant did not knowingly and voluntarily consent to defense counsel conceding the Defendant's guilt to involuntary manslaughter and misdemeanor death by motor vehicle to the jury in the trial of the above-captioned matters."

Following certification of the trial court's order from the evidentiary hearing, this Court ordered the parties to provide supplemental briefing on the effect of the order on Defendant's ineffective assistance of counsel argument. Defendant filed and served his supplemental brief on 31 October 2018. The State submitted a supplemental brief on 27 November 2018.[1]

II. ANALYSIS

When a criminal defendant's counsel concedes guilt on a charge without his client's consent, "[c]ounsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 (citation omitted). "[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands[,]" *id.* at 180, 337 S.E.2d at 507, and "a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences[,]" *id.* (citations omitted). This is no less true of concessions of guilt to lesser-included offenses. *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540-41. A concession of guilt by counsel without the knowing and voluntary

[1] Although the State's supplemental brief was not filed within the time allowed by this Court's order, the State submitted a motion to deem its brief timely filed. We allow the motion in our discretion and consider its argument below.

consent of the defendant, therefore, constitutes ineffective assistance of counsel necessitating a new trial without any showing of specific prejudice. Harbison, 315 N.C. at 179, 337 S.E.2d at 507. When a trial court has entered an order setting forth findings of fact and conclusions of law concerning the issue of ineffective assistance of counsel, the reviewing court "determine[s] whether the findings of fact are supported by the evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Matthews*, 358 N.C. at 105-06, 591 S.E.2d at 538 (internal quotation marks and citation omitted).

A review of the evidence introduced at the evidentiary hearing discloses that the trial court's findings of fact are supported by competent evidence. The evidence shows that, while Defendant and his counsel decided, as a matter of strategy, not to expressly contest the lesser-included offenses at closing argument in favor of focusing on the weaknesses in the State's evidence concerning second-degree murder, the two never discussed conceding any charges.[2] The evidence also shows that Defendant did not understand the gravity or effect of those concessions when asked about his

[2] While the State does challenge certain findings of fact in the trial court's order on remand, it does not challenge Finding of Fact 9, which states, in pertinent part, "the subject of the Defendant giving up important constitutional rights by Defense counsel making these concessions never came up" in their discussions.

counsel's statement by the trial court at closing argument.[3] We hold that the findings of fact made in the trial court's evidentiary order are adequately supported by the evidence.

In its order on remand, the trial court concluded as a matter of law that the concessions by Defendant's counsel were made "without the Defendant[] freely, voluntarily, knowingly and understandingly giving consent." This conclusion is supported by the binding findings of fact made below; a concession without a defendant's consent is *per se* ineffective assistance of counsel warranting a new trial, *Harbison*, 315 N.C. at 180-81, 337 S.E.2d at 507-08, and the defendant must have knowledge of the concession prior to its occurrence. *See Matthews*, 358 N.C. at 109, 591 S.E.2d at 540 ("For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession." (emphasis in original)). Furthermore, consent is only validly given if it is "made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507 (citations omitted).[4]

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[3] Although the trial court inquired of Defendant at the time of the concessions, that colloquy was limited to asking whether he "had a problem" with the concessions. No inquiry was made concerning prior knowledge of the concessions or his understanding of their consequences.

[4] The State argues in its supplemental brief that *Harbison* is no longer good law in light of *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565 (2004) and *State v. Al-Bayyinah*, 359 N.C. 741, 616 S.E.2d 500 (2005). This Court previously rejected this precise argument in *State v. Maready*, 205 N.C. App. 1, 695 S.E.2d 771 (2010), *writ of supersedeas denied, disc. rev. denied*, 364 N.C. 329, 701 S.E.2d

III. CONCLUSION

The trial court's unchallenged findings following an evidentiary hearing demonstrate that Defendant: (1) did not know his counsel was going to make any concessions of his guilt to lesser-included offenses; and (2) was unaware of the consequences of those concessions. Defendant has demonstrated ineffective assistance of counsel *per se* and is thus entitled to a new trial. *Harbison*, 315 N.C. at 180-81, 337 S.E.2d at 507-08; *Matthews*, 358 N.C. at 112, 591 S.E.2d at 542; *Maready*, 205 N.C. App. at 13-14, 695 S.E.2d at 780.

NEW TRIAL.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).

247, which recognized that the Supreme Court of North Carolina has applied the *Harbison* test after both *Nixon* and *Al-Bayyinah* were decided, thus controlling our decision in that case. 205 N.C. App. at 9-10, 695 S.E.2d at 777-78. We also acknowledged that "[o]ur Court has continued to apply the *Harbison* analysis since the *Nixon* opinion was filed[,]" *id.* at 10, 695 S.E.2d at 778 (citations omitted), and we were therefore bound to apply it under *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Until instructed otherwise by a higher authority, we are no less bound by those strictures today than we were at the time *Maready* was decided; as a result, we reject the State's argument on this point.