State of Washington v. Mario Humphries
No. 66556-1-I

Dwyer, J. (dissenting) — As the majority correctly notes at the outset of its analysis, this case requires "us to review whether the trial court commits reversible error when it accepts defense counsel's strategic decision to stipulate to elemental facts over his client's objection"—an issue characterized by the majority as a significant question of constitutional law. Despite this promising beginning, the majority then avoids this "core question" at each subsequent stage of its analysis, wrongly relying on a host of avoidance doctrines along the way. Because the relevant case law makes clear that a stipulation to elements of a crime is not properly accepted by a trial court over the defendant's personal, voiced objection, the stipulation in this case—proffered to the trial court over defendant Mario Humphries' personal, voiced objection—was improperly accepted. Because I do not agree with the majority that Humphries later waived either his objection or his constitutional rights or that the error was harmless, I respectfully dissent.

I

The relevant facts may be succinctly summarized. Mario Humphries was charged with the crimes of assault in the second degree, assault in the third degree (in the alternative), and unlawful possession of a firearm in the first

degree based upon an incident in which he fired a gun at a police officer. At trial, defense counsel determined that the defense would stipulate that Humphries had been previous convicted of a serious offense—an element of the crime of unlawful possession of a firearm. Humphries expressly disagreed with the decision to stipulate and initially refused to sign the written document encompassing the stipulation. The trial court—after voicing its agreement with defense counsel that Humphries' consent was unnecessary—accepted the stipulation. The stipulation was then read to the jury. At the end of the case, following the conclusion of closing arguments, Humphries was induced to sign a document purporting to stipulate to the fact of his previous conviction. This document was not introduced into evidence, nor was it presented to the jury during deliberations. The jury convicted Humphries as charged.[1]

II

The majority relies upon the doctrine of constitutional avoidance in declining to determine whether a defendant's constitutional rights are violated by the entry of a stipulation to which the defendant has voiced a personal objection. Indeed, what constitutional rights (if any) the majority believes to be implicated by a stipulation to facts constituting an element of a charged offense remains an open question. However, because an understanding of the particular constitutional rights at issue is essential to any analysis of waiver—the doctrine upon which the majority grounds its decision—I do not agree that this issue may

[1] Humphries' conviction of assault in the third degree was later vacated.

be properly avoided. Accordingly, I begin by discussing and identifying the constitutional rights implicated by the entry of such a stipulation.

"Once a criminal defendant enters a plea of not guilty, the Fifth and Sixth Amendments to the Constitution entitle that defendant to at least two trial-related rights." United States v. Ayoub, 498 F.3d 532, 544 (6th Cir. 2007); see also United States v. Hardin, 139 F.3d 813, 815 (11th Cir. 1998). First, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). Second, the "simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged." Mathews v. United States, 485 U.S. 58, 64-65, 108 S. Ct. 883, 99 L. Ed. 2d 54 (1988); see also Sullivan v. Louisiana, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993) (discussing the interrelated "Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict"). Humphries invoked both of these constitutional rights when he pleaded not guilty to the charges against him.

What, then, is the effect of defense counsel's stipulation to Humphries' prior conviction of a serious offense—an element of the crime with which he was charged? "It is well settled that a defendant, by entering into a stipulation, waives his right to assert the government's duty to present evidence to the jury

on the stipulated element." United States v. Harrison, 204 F.3d 236, 240 (D.C. Cir. 2000); see also United States v. Meade, 175 F.3d 215, 223 (1st Cir.1999); United States v. Melina, 101 F.3d 567, 572 (8th Cir.1996); United States v. Keck, 773 F.2d 759, 769-70 (7th Cir.1985); United States v. Houston, 547 F.2d 104, 107 (9th Cir.1976) (per curiam). As this court has previously explained, where a defendant stipulates in writing to the fact of a previous conviction, the defendant waives "the right to put the State to its burden of proof on [that] element." State v. Wolf, 134 Wn. App. 196, 199, 139 P.3d 414 (2006); see also State v. Stevens, 137 Wn. App. 460, 466, 153 P.3d 903 (2007). As a result of such a waiver, the government is relieved of its obligation to introduce any evidence on that element—including the stipulation itself. Wolf, 134 Wn. App. at 203.[2]

Indeed, because "the jury need not resolve the existence of an element when the parties have stipulated to the facts which establish that element," a stipulation to such facts also constitutes a waiver of the "right to a jury trial on that element." United States v. Mason, 85 F.3d 471, 472 (10th Cir. 1996).[3]

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[2] The Fourth Circuit has disagreed that a stipulation relieves the prosecution of its obligation to prove the elements of a crime beyond a reasonable doubt. United States v. Muse, 83 F.3d 672, 679-80 (4th Cir. 1996). "Although a fact stipulation may have the effect of providing proof beyond a reasonable doubt of the existence of the facts that make up an element, a conviction is not valid unless a *jury* considers the stipulation and returns a guilty verdict based on its finding that the government proved the elements of the crime beyond a reasonable doubt." Muse, 83 F.3d at 679-80. As a result of this analysis, the court noted that the government must produce the stipulation at trial in order to carry its burden. Muse, 83 F.3d at 678. In Wolf, however, this court chose not to follow Muse, holding instead that a stipulation need not be read to the jury in order to support a conviction. 134 Wn. App. at 201.

[3] The Washington Supreme Court Committee on Jury Instructions has explained that, where a defendant stipulates to an element of a charged offense, such a stipulation also "amounts to a partial waiver of the right to trial by jury." 11 Washington Practice, Washington Pattern Jury Instructions: Criminal 4.77, at 165 (3d ed. 2008) (noting that, because stipulation is partial waiver of defendant's right to jury trial, "the best practice is to have the defendant sign a written stipulation and have it reviewed and acknowledged in open court").

Thus, where a defendant stipulates to facts constituting an element of the offense with which he or she is charged, the defendant relinquishes not only the "Fifth Amendment requirement of proof beyond a reasonable doubt" but also the interrelated "Sixth Amendment requirement of a jury verdict" on that element. Sullivan, 508 U.S. at 278.

Here, Humphries was charged with unlawful possession of a firearm in the first degree. A person is guilty of this crime "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense." RCW 9.41.040(1)(a). Defense counsel stipulated to the fact that, at the time of his arrest, Humphries "had previously been convicted of a serious offense." The stipulation established the fact of Humphries' prior conviction—an element of the crime of unlawful possession of a firearm in the first degree. Accordingly, this stipulation waived Humphries' interrelated Fifth and Sixth Amendment rights that required the jury—in order to find him guilty of the crime charged—to determine that the prosecution had met its burden of proof on every element of the crime alleged.

The question presented, then, is whether a waiver of these rights can be validly accomplished by a stipulation agreed to by defense counsel over a defendant's personal, voiced objection. This issue has not been previously addressed in Washington. It is, however, well settled that a waiver of

constitutional rights must be knowing, intelligent, and voluntary. See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." United States v. Olano, 507 U.S. 725, 733-34, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

The constitutional rights requiring a jury to determine, beyond a reasonable doubt, that the State has proved every element of the crime charged are of fundamental importance. See In re Winship, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ("[P]roof of a criminal charge beyond a reasonable doubt is constitutionally required."); Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (the right to trial by jury in serious criminal cases is "fundamental to the American scheme of justice"). Our Supreme Court has characterized a defendant's right to put the prosecution to its proof as an "important right to due process of law." State v. Murdock, 91 Wn.2d 336, 341, 588 P.2d 1143 (1979). In Murdock, the court determined that the State must introduce competent evidence of a defendant's prior convictions even where the defendant has admitted to pleading guilty to those crimes in his offer of proof. 91 Wn.2d at 340-41. Because a court must "'indulge every reasonable presumption against waiver of fundamental constitutional rights,'" Murdock, 91

Wn.2d at 341 (internal quotation marks omitted) (quoting Zerbst, 304 U.S. at 464), the Supreme Court was unwilling to "presume appellant waived this important right to due process of law." 91 Wn.2d at 341.

Nevertheless, as the majority correctly points out, a stipulation to facts is generally not the equivalent of a guilty plea, and "due process [does] not require the trial court to ensure that a defendant understands the rights waived by a factual stipulation." In re Det. of Moore, 167 Wn.2d 113, 120, 216 P.3d 1015 (2009). Accordingly, a trial court has no obligation to determine on the record whether a defendant voluntarily and intelligently waived his right against compulsory self-incrimination, his right to be tried by a jury, and his right to confront his accusers, as is required where a defendant enters a guilty plea. Adams v. Peterson, 968 F.2d 835, 839 (9th Cir. 1992); cf. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (setting forth standard to be applied in determining if guilty plea is voluntarily made). Instead, a trial court may *presume* that a defendant has agreed to his counsel's stipulation to a "crucial fact" where it "is entered into the record in open court in the presence of the defendant." United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir. 1980).

This presumption, however, is not an irrebuttable one. As the Ninth Circuit has explained, although a trial court is entitled to presume that a defendant consents to his counsel's decision to stipulate to facts constituting an

element of the charged offense, where the accused expressly objects to that decision, the court cannot rely on this presumption to accept the stipulation. Ferreboeuf, 632 F.2d at 836. A defendant's "convictions are valid only if he voluntarily and knowingly agreed to the stipulation," Adams, 968 F.2d at 843, and a defendant is not bound by a stipulation where the "defendant indicates objection." Ferreboeuf, 632 F.2d at 836. Because the stipulation to an element of a charged crime constitutes a waiver of the constitutional rights that require a jury to determine whether the State has proved each element of the charged crime beyond a reasonable doubt, such a stipulation is invalid where the accused expressly disagrees with the decision to stipulate.[4]

Here, the stipulation was accepted by the trial court and read to the jury over Humphries' voiced objection. At the time that the stipulation was offered to the court, defense counsel explained that Humphries had refused to sign the document because he was not "in agreement" with counsel's decision regarding the stipulation. In these circumstances, the trial court was no longer entitled to

[4] As the majority correctly notes, a stipulation to a prior conviction is certainly a matter of trial strategy. Indeed, because the admission of the name and nature of a prior offense carries with it the risk of unfair prejudice to a defendant, where a defendant offers to stipulate to the existence of an unnamed prior conviction that is an element of the charged offense, a trial court violates ER 403 by not accepting the stipulation. Old Chief v. United States, 519 U.S. 172, 191, 117 S. Ct. 644,136 L. Ed. 2d 574 (1997). Moreover, it is true that "the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Nevertheless, the waiver of a constitutional right—even where strategic considerations inform that choice—cannot be involuntary. See, e.g., State v. Woods, 143 Wn.2d 561, 608-09, 23 P.3d 1046 (2001) (holding that waiver of capital defendant's constitutional right to present relevant evidence in mitigation for the purposes of sentencing must be "knowing, intelligent, and voluntary" but that, because decision "is one that is influenced by trial strategy," a judge may presume a knowing waiver from the defendant's conduct).

presume the voluntariness of the waiver of Humphries' rights—by objecting to the stipulation, Humphries made clear that he had no desire to relinquish the interrelated trial rights that required the prosecution prove to the jury every element of the charge against him.[5] Because the stipulation was not voluntary, it was not a valid waiver. Accordingly, the trial court erred by accepting this stipulation and permitting it to be read to the jury.

III

The majority does not voice disagreement with the foregoing discussion. Instead, it relies upon Humphries' subsequent decision to sign a written document purporting to stipulate to the fact of a prior conviction in order to hold that this error has not been preserved for appellate review. By signing this document, the majority reasons, Humphries either validly waived his constitutional rights (thus rendering the trial court's initial error in accepting the stipulation a nullity) or, in the alternative, abandoned his prior objection to the stipulation (thus failing to preserve the issue for appeal). Neither line of reasoning withstands scrutiny.

The majority's reliance on the doctrine of waiver is misplaced in the circumstances presented here. Indeed, as an initial matter, it must be asked what it is that the majority believed happened as result of Humphries' "waiver." It is unquestioned that, over his personal, voiced objection, the stipulation was

[5] Of course, it is rare for a defendant to object, on the record, to defense counsel's decision to stipulate to the fact of a prior conviction. Accordingly, in the vast majority of cases, the defendant's consent to the stipulation may properly be presumed, Ferreboeuf, 632 F.2d at 836, and a trial court will not err by accepting the stipulation.

accepted by the court and read to the jury, that the jury was later read its instructions from the court, and that closing arguments were delivered to a set of jurors who were aware of the stipulation. Accordingly, the case was essentially over by the time defense counsel told the court that Humphries had changed his mind and would sign the document. All the evidence was already in. The jury had been instructed. The jury had already heard closing arguments. Indeed, the jury had already been sent back to the jury room to have lunch and then begin its deliberations. The game was over, and Humphries' signature on the document changed exactly nothing.

Moreover, Humphries' signature on the document conforms to none of the standards governing the waiver of important constitutional rights. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). As the majority itself notes, the validity of a waiver depends upon the circumstances of each case. See State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994) (citing Zerbst, 304 U.S. at 464).

Here, over Humphries' objection and in his presence, the initial stipulation was accepted by the trial court and read to the jury. Counsel explicitly informed the trial court that Humphries did not agree to the stipulation. In response, the trial court stated that Humphries' assent was not required and accepted the

stipulation. Nothing about these events would give Humphries knowledge of his right to refuse to agree to the stipulation. Instead, Humphries would naturally believe—as he had been incorrectly informed by both the trial court and defense counsel—that his consent to the stipulation was immaterial.

Accordingly, it cannot be simply presumed—as the majority would have it—that Humphries' signature on the document constituted a knowing and intelligent waiver of his constitutional rights. The record reflects that Humphries had been told only that his consent to the stipulation was irrelevant. There is no indication that Humphries had somehow come to understand the consequences of his signature by the time that he affixed it to the stipulation at the conclusion of the trial. By signing the document, Humphries did no more than acquiesce to the unanimous (and incorrect) opinion of his counsel and the trial court. Because the record makes clear that this act was done without "sufficient awareness of the relevant circumstances and likely consequences," Brady, 397 U.S. at 748, it was neither knowing nor intelligent. Thus, there was no waiver, and certainly no valid waiver, of Humphries' constitutional rights.

Nor I do agree that Humphries' eventual decision to sign a document following closing arguments constituted an abandonment of his initial objection, serving to preclude appellate review of this issue. By signing this document, so the argument goes, Humphries withdrew his initial objection to the stipulation, thus failing to preserve the issue for appeal.

The majority first cites to RAP 2.5(a) for the proposition that Humphries is not entitled to appellate review of his claim. Pursuant to this rule, an appellate court may refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a). Although an exception to this rule permits a party to raise, for the first time on appeal, a "manifest error affecting a constitutional right," RAP 2.5(a)(3), in this case, the majority informs us, the trial court's error, even if constitutional in magnitude, was not "manifest" because this error did not have "'practical and identifiable consequences in the trial of the case.'" State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotation marks omitted) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

RAP 2.5(a), however, applies only in circumstances wherein the defendant *did not object at trial*, thus depriving the trial court of the opportunity to make a ruling to correct the error. There is no need to determine if an exception applies where the rule itself is inapplicable. Here, Humphries himself lodged a timely objection to the trial court's acceptance of the stipulation—an objection that the trial court promptly overruled, opining that Humphries' view on the issue was irrelevant. Because the trial court was fully apprised of Humphries' objection at the time of its ruling, RAP 2.5(a) is inapplicable and the majority's reliance upon it improper.[6]

[6] Indeed, the majority's analysis fails even on its own terms. Given that the stipulation was the only evidence presented at trial of Humphries' previous conviction, it would strain credulity to accept the majority's suggestion that the trial court's error in accepting the stipulation had no practical and identifiable consequences in the case.

Nor can Humphries' signature on the document be viewed as an abandonment of a request to exclude evidence of the stipulation. The majority relies on State v. Valladares, 99 Wn.2d 663, 664 P.2d 508 (1983), for the principle that a defendant may waive constitutional rights by affirmatively withdrawing an objection. Of course, as discussed above, Humphries' acquiescence to the trial court's incorrect ruling was neither knowing nor intelligent and, accordingly, does not constitute a valid waiver of constitutional rights.

In addition, however, the principles set forth in Valladares are inapplicable for yet another reason. In Valladares, the defendant initially objected to the admission of evidence but then affirmatively withdrew the objection by withdrawing his motion to suppress. 99 Wn.2d at 672. The trial court then ruled the evidence admissible. Critically, however, the trial court took no action prior to the withdrawal of the objection. Accordingly, the admission of the evidence—the alleged constitutional error—took place only *after* all objection to it had been abandoned. See also State v. Hayes, 165 Wn. App. 507, 516, 520, 265 P.3d 982 (2011) (relying on Valladares to find waiver of Sixth Amendment right to confrontation where defendant deliberately declined to interpose objection prior to ruling admitting out-of-court statements).

By contrast, in this case the trial court admitted the evidence over Humphries' personal, voiced objection. Unlike the situation in Valladares and

Hayes, there was no decision to abandon the objection prior to the final ruling of the trial court. There was no waiver.

VI

The majority seeks refuge in the harmless error doctrine as an alternative ground for upholding Humphries' conviction. However, because there is no basis in the record to support a finding of harmless constitutional error, I must again disagree.

A constitutional error will be deemed harmless only where an appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). This determination is made by utilizing the "overwhelming untainted evidence" test. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The reviewing court must determine whether—after the erroneously admitted evidence is excluded from consideration—the untainted evidence admitted at trial was nevertheless so overwhelming that it necessarily leads to a finding of guilt. Smith, 148 Wn.2d at 139.

Here, the prosecution offered absolutely no evidence of Humphries' previous conviction of a serious offense other than the stipulation itself. It is immaterial that the State "was fully prepared to present evidence" of a prior conviction, as the majority hypothesizes—the only proper appellate focus is on the evidence that was actually "admitted at trial."[7] Smith, 148 Wn.2d at 139.

[7] Similarly, it makes no difference that such evidence was offered at sentencing.

Because there was absolutely no untainted evidence of a previous conviction adduced at trial, the trial court's error in accepting the stipulation was not harmless.

For all of the reasons set forth above, I respectfully dissent.