No. 11-0816 - *David Ballard, Warden v. Davie Lee Hurt*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Ketchum, Chief Justice, dissenting:

I would affirm the order granting habeas relief. The undisputed evidence was that the defendant's trial lawyer failed to advise the defendant that he had the right *not* to testify at his trial. To make matters worse, there is no evidence that the lawyer told the defendant that, if he testified, the State would be able to cross-examine him with incriminating evidence. These failures made the lawyer, as a matter of law, ineffective. *See U.S. v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (a lawyer who fails to inform his client of a constitutional right relevant to his criminal trial has "neglected the vital professional responsibility of ensuring that the defendant's right . . . is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted 'within the range of competence demanded of attorneys in criminal cases,' and the defendant clearly has not received reasonably effective assistance of counsel.").

A defense lawyer's failure to advise his client of his testimonial constitutional rights is a failure that affects the very framework of the criminal trial. It is tantamount to having no lawyer at trial. Because it involves a fundamental constitutional right relevant to the framework of the criminal trial, such a failure amounts to a "structural constitutional violation." A structural constitutional violation requires the

automatic reversal of the conviction. *See Arizona v. Fulminate*, 499 U.S. 279 (1991); and *Neder v. U.S.*, 527 U.S. 1 (1999). *See also* David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U.Kan.L.Rev. 1401 (1996) (Discussing the "dichotomy between [constitutional] errors that are so serious that they are never amenable to harmless error analysis—and thus are reversible per se—and other [constitutional] errors, which are amenable to harmless error analysis." The first are "structural errors," and the latter "trial errors."); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. Kan. L. Rev. 309 (2002) (Examining the strengths and weaknesses of the harmless error and structural error tests, noting that "support for the different tests seems to vary depending on the precise nature of the error involved in each case on review [and that] the question cannot be regarded as settled."); and Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 Fordham L. Rev. 2027 (2008).

I would also overrule our case law requiring a trial judge to advise represented criminal defendants of their right to testify, or to not testify. This is the duty of the defendant's lawyer—not the trial judge. A majority of courts have rejected imposing this requirement on trial judges, a point we expressly noted in *State v. Salmons*, 203 W.Va. 561, 582 n. 37, 509 S.E.2d 842, 863 n. 37 (1998). *See also* Michele C. Kaminski, Annotation, *Requirement that Court Advise Accused of, and Make Inquiry with Respect to, Waiver of Right to Testify*, 72 A.L.R.5th 403 (1999).

During trial, judges are busy refereeing numerous complicated procedural and substantive matters. They should not be required to act as an additional defense lawyer and be required to advise defendants, represented by a lawyer, about their testimonial rights. Other reasons for not imposing this duty on trial judges was aptly noted by the Supreme Court of Iowa in *State v. Reynolds*, 670 N.W.2d 405 (2003):

> There are several reasons why a trial judge is not required to inform a defendant of his right to testify. First, a defendant's decision as to whether or not to testify is often made as the trial unfolds. By advising a defendant of his right to testify, a court could influence the defendant to waive his right not to testify, "thus threatening the exercise of this other, converse, constitutionally explicit and more fragile right."
>
> Second, a court could intrude upon the attorney-client relationship by advising a defendant of his right to testify. "A trial judge must take great care not to assume the functions of trial counsel." It is primarily the responsibility of defense counsel, not the trial judge, to advise a defendant as to whether or not he should testify *and to explain the tactical advantages and disadvantages of each option*. If a trial judge were to advise a defendant, *sua sponte*, of his right to testify, such an act could frustrate a decision on the matter made by the defendant and defense counsel who are designing trial strategy.
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> Finally, a trial judge is not required to inform a defendant of his right to testify because it is difficult for a judge to determine the appropriate time that he should advise a defendant concerning his right to testify, since "the judge cannot know that a defendant has not testified until the defense rests and such a moment is not an opportune time to engage in a discussion with defendant which might lead to a rupture with defense counsel . . . or might undo a trial strategy based on the defendant's not testifying."

State v. Reynolds, 670 N.W.2d at 412-413 (citations omitted) (emphasis added).

We should amend our *Rules of Criminal Procedure* to require defense lawyers to make a statement upon the record, before the presentation of the defendant's case-in-chief, that the defendant has been advised of his or her testimonial rights. The defendant would be allowed to alert the trial court if there is a disagreement with defense counsel regarding whether he or she should take the stand. If necessary, the trial court may conduct a hearing to inquire about any indicated disagreement.

I respectfully dissent. In addition, I would overrule Syllabus Point 7 of *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988), and related cases, which requires a trial judge to advise a represented defendant of his right to testify, or not testify, at his trial.