



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH DICKINSON,)
)
 Defendant Below -)
 Appellant,) Supreme Court No. 484, 2012
)
 v.) On appeal from Superior Court
) ID No. 0901009990
)
)
 THE STATE OF DELAWARE,)
 Plaintiff Below -)
 Appellee.)

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Table of Citations ii

Arguments

I. DEFENSE COUNSEL HAD A DUTY TO ADVISE DICKINSON OF HIS RIGHT TO A LEVEL OF LIABILITY INSTRUCTION AS AN OPTION TO CONSIDER DESPITE HIS INITIAL "ALL OR NOTHING" STRATEGY.

Conclusion 5

TABLE OF CITATIONS

Cooke v. State, 977 A.2d 803, 841 (Del. 2009).....	2
Emerson v. Gramley, 91 F.3 rd 898, 904 (7 th Cir. 1996).....	3
Rogers v. Zant, 13 F.3 rd 384 (11 th Cir. 1994).....	3
Weekly v. Jones, 56 F.3d 889, 896 (8 th Cir. 1009).....	3

SUMMARY OF REPLY ARGUMENT

I. DEFENSE COUNSEL HAD A DUTY TO ADVISE DICKINSON OF HIS RIGHT TO A LEVEL OF LIABILITY INSTRUCTION AS AN OPTION TO CONSIDER DESPITE HIS INITIAL "ALL OR NOTHING" STRATEGY.

REPLY ARGUMENT

I. DEFENSE COUNSEL HAD A DUTY TO ADVISE DICKINSON OF HIS RIGHT TO A LEVEL OF LIABILITY INSTRUCTION AS AN OPTION TO CONSIDER DESPITE HIS INITIAL "ALL OR NOTHING" STRATEGY.

MERITS

This Court has enunciated that representation of criminal defendants entail certain basic duties:

Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty; a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.¹

The fatal flaw in the lower court's decision, as well as the State's argument, is the assumption that once the "all or nothing" strategy was set, that defense counsel was relieved from considering other reasonable options once that strategy unraveled during the course of the trial. In other words, a strategy is not set in stone, and when circumstances indicate that it is unlikely to prevail, effective counsel should consult with a defendant concerning other options. The Court's direction that counsel "keep the defendant informed of important developments in the course of prosecution" suggests a continuing duty. That continuing duty requires counsel to advise a client when a strategy is failing and should be abandoned or modified.

¹ Cooke v. State, 977 A.2d 803, 841 (Del. 2009)

In this case, defense counsel was ineffective by failing to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of prosecution," namely, that the "all or nothing" strategy was unlikely to prevail and that a "level of liability" instruction should be considered to minimize the penalty Dickinson was facing.

Although questions of the deficient performance understandably involve some second-guessing, courts have a duty to closely examine the facts and context to determine whether counsel's decision was reasonable.² Although the reasonableness of counsel's actions may be determined or substantially influenced by a defendant's own statements or actions, it does not follow that an attorney may blindly follow a client's uncounseled wishes without first evaluating other potential avenues and advising the client of those options offering merit.³

In this case, it is likely that defendant's selection of an "all or nothing" defense was based upon a belief that his codefendants would not testify against him and/or that their testimony would be impeached. However, when that turned out not to be the case, the only way to advance the "all or nothing" defense was through the defendant's testimony. However, since it was clear that the defendant did not intend to testify in his defense, a persuasive "all or nothing" defense was completely obliterated. As the trial progressed,

²Rogers v. Zant, 13 F.3rd 384 (11th Cir. 1994).

³Weekly v. Jones, 56 F.3d 889, 896 (8th Cir. 1009). (Counsel's advice to withdraw insanity defense was unreasonable); Emerson v. Gramley, 91 F.3rd 898, 904 (7th Cir. 1996) (acceding to defendant's wish to call witness "turned out to be a disaster because he corroborated prosecutions testimony" but decision was not an effective).

it should have been clear to defense counsel that the "all or nothing" defense was illusory and the likelihood of conviction was almost certain. That reality required counsel to discuss other avenues advantageous to the defendant, one of which would have been a "level of liability" instruction to minimize the potential sentence that Dickinson would face. Defense counsel was ineffective by failing to consult with Dickinson regarding his option to pursue a "level of liability" instruction. Unfortunately, his ignorance of the law regarding defendant's right to such an instruction precluded him from presenting this option for consideration by the defendant. This lack of knowledge of the law violated the "skill and knowledge" component of counsel's duty to Dickinson.

Defense counsel's ineffectiveness relating to the "level of liability" instruction issue justifies relief because it so infected the entire trial that the resulting conviction is unreliable and violates due process. The lower court abused its discretion by denying Defendant's claim that his counsel was constitutionally ineffective and that his Fifth Amendment due process rights were violated.

CONCLUSION

Defendant contends that but for counsel's unprofessional errors set forth herein, the result of the trial would have been different, and that the prejudice caused by the errors (individually or cumulatively) deprived him of a fair trial.

WHEREFORE, Defendant asks that the Court grant him all relief to which he may be entitled in this proceeding. Defendant is seeking the following:

1. Order reversing his convictions and ordering a new trial.

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