



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARLON THOMAS,)
)
Defendant Below,)
Appellant,)
) No. 397, 2021
v.)
)
STATE OF DELAWARE,)
)
Plaintiff Below,)
Appellee.)

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR
SUSSEX COUNTY

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DATE: May 31, 2022

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NATURE AND STAGE OF THE PROCEEDINGS

Marlon Thomas ("Thomas") was indicted on charges of one count of rape second degree, one count of unlawful sexual contact third degree, two counts of tampering with a witness, one count of tampering with physical evidence, two counts of non-compliance with bond conditions and one count of conspiracy second degree. (indictment).

Thomas waived his right to a jury trial and a two-day bench trial commenced on October 11, 2021. Thomas was convicted on all counts. (D.I. #15).

On December 10, 2021, Thomas was sentenced to thirty-two years imprisonment at Level 5 followed by various levels of probation. (*See* Sentence Order, attached as Ex. A).

Thomas filed a timely notice of appeal. This is his opening brief in support of that appeal.

SUMMARY OF THE ARGUMENT

1. The trial court committed fundamental error in failing to question the defendant on whether or not he wished to give up his Constitutional rights to testify in his own defense. The appellant respectfully suggests to this Honorable Court that an on-the-record waiver is necessary in regard to whether the defendant is knowingly and voluntarily giving up his right to testify in a criminal trial. A defendant can never give up a personal, Constitutional right by silence. Because such a colloquy did not take place in this case, this matter should be reversed and remanded for a new trial.

STATEMENT OF FACTS

On October 25, 2020, Geosha Thomas ("complainant"), aged 23 at the time, returned home after her shift ended at Taco Bell at approximately 11.30 p.m. (10/11, 16). The complainant lived with her aunt Sandy and her cousin Thomas in Georgetown, Delaware. (10/11, 15). Upon arriving home, the complainant and Thomas had a short conversation regarding \$20 that she owed him. (10/11, 17). Later that evening Thomas responded to the complainant's bedroom to socialize and drink alcohol. (10/11, 19). After a period of time hanging out, a sexual encounter ensued. The complainant testified that Thomas engaged in sexual intercourse with her, using a condom, without consent. (10/11, 21). According to the complainant, Thomas had made advances towards her which she rejected, giving the explanation that they were cousins. (10/11, 20).

Following the encounter, the complainant texted her friend about the incident that had just occurred. (10/11, 26). The complainant gathered her things, including the used condom and left with her friend to the Georgetown Police Department. (10/11, 30). After speaking with the complainant, Georgetown Police proceeded to the residence at 107 Cedar Street and arrested Thomas in conjunction with the

investigation. (10/11, 81). After providing her report to police, the complainant was taken to Nanticoke Hospital, here she was examined by a Sexual Assault Nurse Examiner ("SANE"). (10/11, 92). The SANE report indicated no physical injury. (10/11, 117). DNA swabs were taken from the complainant and Thomas and a DNA report in connection in this case indicated the presence of Thomas's DNA on the condom collected by the complainant and her breast. (10/12, 66, 76). In an interview with detectives, Thomas denied any sexual activity and later maintained that any sexual contact was consensual. (10/11, 150).

After Thomas' arrest, a no contact order with the complainant was issued. (10/12, 95). Subsequently, Thomas attempted to contact the complainant via letter and telephone which formed a basis for the tampering and non-compliance with bond charges in this case. (10/11, 32).

I. THE SUPERIOR COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO HOLD A COLLOQUY WITH THE DEFENDANT ABOUT WHETHER OR NOT HE WANTED TO WAIVE HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND §§4, 7 OF ARTICLE I OF THE DELAWARE CONSTITUTION.

Question Presented

Whether the trial court committed fundamental error when it failed to hold a colloquy with Thomas about whether or not he wanted to waive his constitutional right to testify in his own defense? Supreme Court Rule 8.

Standard and Scope of Review

This Court reviews structural error and issues of a constitutional dimension *de novo*. *Hartman v. State*, 918 A.2d 1138, 1140 (Del. 2007).

Argument

Criminal defendants generally possess two categories of Constitutional rights: those which are able to be waived by defense counsel and those which are “fundamental” and are personal to the defendant and can only be waived by the defendant. *Henry v. Mississippi*, 379 U.S. 443 (1965). Objections, trial strategy, entering into stipulations, and other such decisions, although fundamental to a fair trial and to the defendant, are

routinely exercised by counsel on the defendant's behalf. Whether or not to plead guilty, whether or not to waive a trial by jury, whether or not to pursue an appeal are considered rights personal and fundamental to only the defendant. *Boykin v. Alabama*, 395 U.S. 238 (1969).

“Even more fundamental to a personal defense than the right of self-representation, . . . is an accused right to present his own version of the events in his own words.” *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992). “It is well established that the defendant has the right to testify in his own behalf, a right we have found essential to our adversary system.” *Cooke v. State*, 977 A.2d 803, 844 (Del. 2009) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)).

A defendant has to knowingly, voluntarily and intelligently waive their right to testify. *Reyes v. State*, 155 A.3d 331, 342 (Del. 2017). The determination of whether there has been a knowing, voluntary and intelligent waiver of a Constitutional right depends on the totality of the circumstances surrounding each particular case. *Mealey v. State*, 347 A.2d 651, 652 (Del. 1975) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). “The waiver of a Constitutional right will be intelligent and voluntary if the defendant is aware of the right in question and the likely consequences of deciding to forego that right.” *Davis v. State*, 809 A.2d 565, 569 (Del. 2002).

A review of the trial transcript reveals no colloquy conducted on the record in regard to Thomas's right to testify. On the second day of trial, the State rested with their case-in-chief. (10/12, 99). After the defense followed, the trial judge merely went into planning closing arguments and how the court would be considering the evidence as the fact finder. (10/12, 100). The court never questioned Thomas as to whether or not he agreed to defense counsel's decision or whether or not he wanted to take the stand. Moreover, the trial court did not inquire as to whether Thomas and defense counsel had discussed and considered the issue amongst themselves. It should be pointed out that even if the court had engaged in the latter, the inquiry should not have ended there as the Superior Court should have advised Thomas that he had an absolute right to testify if he chose to do so, and that it was Thomas' decision, even if his attorney advised him not to testify. This would have demonstrated Thomas knowingly, voluntarily and intelligently waived his right to testify.

Certainly, not having an on-the-record colloquy with Thomas, in regard to whether he wanted to testify or not, violates the most precious of his Constitutional and fundamental rights. It is unfair to assume that Thomas, who is uneducated in the ways of the law, would have any idea that he had waived his most precious right to testify without so much as a

consultation on the record with him or an announcement on-the-record to the court. Here, a colloquy on the record would have made it clear to the Court and Thomas that the waiver of the right to testify was in fact express and intelligent. Because the right to testify in one's defense is a fundamental, personal Constitutional right which cannot be waived in the absence of an on-the-record inquiry by the court, the judgment of conviction must be reversed.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Marlon Thomas' convictions and sentences must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti
Santino Ceccotti, Esquire

DATED: May 31, 2022