

IN THE COURT OF APPEALS OF MARYLAND

No. 64

September Term, 1994

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ANTHONY GRANDISON

v.

STATE OF MARYLAND

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Murphy, C.J.,  
Eldridge,  
Rodowsky,  
Karwacki  
Bell,  
Raker,  
Bloom, Theodore G.,  
Specially Assigned,

JJ.

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Dissenting Opinion by Bloom, J.,  
in which Bell, J., joins and  
Raker, J., joins as to Part IIIA only

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Filed: December 27, 1995



Although I disagree with the majority opinion's treatment of the circuit court's ruling that Grandison had not presented a meritorious reason to discharge counsel, I am not persuaded that that ruling was erroneous. But since I am convinced that Anthony Grandison was improperly deprived of his right to be represented by counsel in this death penalty proceeding and that irrelevant and prejudicial evidence admitted over his objection may have influenced the jury's verdict, I feel compelled to dissent.

Since I am in complete agreement with the majority opinion with respect to the other twenty-six issues raised by Grandison and his appellate counsel, however, it may not be inappropriate to preface this opinion by adopting the opening line of Justice Murphy's dissenting opinion in *Wolf v. Colorado*, 338 U.S. 25, 41, 93 L. Ed. 1782, 1792, 69 S. Ct. 1359, 1369 (1949):

It is disheartening to find so much that is right in an opinion which seems to me to be so fundamentally wrong.

## I

On 11 May 1994, just eight days before the scheduled trial to determine whether he was to be put to death for the murders of David Scott Piechowicz and Susan Kennedy, Grandison was brought into court for a hearing on his request to discharge or strike the appearances of William B. Purpura and Arcangelo M. Tuminelli

as his attorneys because he disagreed with their planned strategy for his defense. After a lengthy explanation by Grandison and counsel of their differences (the first part of which took place *in camera*, out of the presence of the prosecuting attorneys), the court concluded that Grandison had not presented a meritorious reason, within the meaning of Maryland Rule 4-215(e), to discharge counsel.

One of Grandison's complaints about his appointed counsel is that Mr. Purpura had interviewed a particular witness against his express instructions not to do so. Mr. Purpura explained, to the court's apparent satisfaction, why he deemed it in his client's best interest to interview the witness and denied that any prejudice to his client's case could have resulted from the interview. Nevertheless, some feeling of mistrust had been engendered by counsel's disregard of his client's instructions. The principal difference between Grandison and his attorneys, however, concerned an issue that the court apparently believed was a matter of trial tactics that must be left to the discretion of counsel, whereas Grandison regarded it as one involving the fundamental theory of the defense. Simply stated, counsels' theory of the defense was that it all hinged on motive or lack of motive: Grandison was aware that if Mr. and Mrs. Piechowicz, the intended murder victims, were unavailable to testify at his trial on federal narcotics charges their testimony at a prior hearing

could be used against him; therefore he certainly had no motive to hire Evans to kill them. Grandison, however, wanted his attorneys to conduct what might be termed a full court press defense — challenge and attack every fact put in issue by the State, including what counsel believed to be the foregone conclusion that Evans had done the actual killing.

The majority opinion, citing *Treece v. State*, 313 Md. 665, 674, 547 A.2d 1054, 1058-59 (1988), for the proposition that "the defendant [in a criminal case] ordinarily has the ultimate decision when the issue at hand involves a choice that will inevitably have important personal consequences for him," assumes arguendo that the differences between Grandison and counsel fall into that category. Nevertheless, the majority opinion affirms the trial court's ruling that Grandison had not presented a meritorious reason for discharging his counsel on the following bases:

1. Messrs. Purpura and Tuminelli, although acknowledging that Grandison's defense theories would cause them some problems, never refused to present Grandison's defense theory or abandon their own; and
2. the record supports the trial court's findings that the two defense theories were not irreconcilable and that Grandison tried to manufacture a conflict where none existed, in order to generate an appellate issue.

I find nothing in the record of the proceeding to support either of those conclusions.

The trial court never decided, ruled, or determined that Purpura and Tuminelli could or would adopt Grandison's defense theory and try the case his way. Indeed, the court's comment to Grandison indicates a contrary determination. After stating that it was satisfied that the representation of Grandison by those two attorneys had been very competent, the court added:

So, now where does that leave you? That leaves you with two options, as I see it. And that is to allow them to continue to represent you, with the understanding that perhaps you can mitigate some of the differences that the two of you have, the three of you have, some of which are not so great, or if I allow you to discharge your attorneys, then I need to make you aware that this court will not intercede on your behalf, will not request the appointment of additional counsel, and will not continue this case.

The suggestion that Grandison and counsel might, perhaps, mitigate some of their differences does not indicate that the trial court based its ruling on the assumption that Messrs. Purpura and Tuminelli *would* adopt Grandison's theory of the defense and try the case the way he wanted them to try it.

Moreover, the record of the 11 May 1994 proceeding does not indicate that the trial court found that the two defense theories were not irreconcilable. The court's comment, quoted above, that *some* of the differences between Grandison and counsel were "not so great" and might perhaps be "mitigated" is inconsistent with the majority's interpretation. And there is absolutely nothing in the transcript of that proceeding that would even remotely

suggest that the trial court found that Grandison had manufactured a conflict when none existed in order to generate an appellate issue. Certainly, the tenor of Mr. Purpura's and Mr. Tuminelli's remarks when explaining the difference between their defense theories and Grandison's evidenced their belief that the differences were genuine and understandable as well as substantial.

The basis of the trial court's determination that Grandison had not presented a meritorious reason for discharging his appointed counsel was that the differences between him and counsel concerned matters of trial tactics and strategy that were within counsel's discretion, and that Grandison could not require counsel to try the case his way. As the court explained to Grandison:

You certainly have a right, certainly, to confront your witnesses and to participate in the trial, but ... if you're going to be represented by counsel, then I think counsel will have to conduct the trial.

The proper question before us with respect to this issue, therefore, is whether the differences of opinion between Grandison and his then counsel as to how his defense should be conducted involved matters about which a defendant, rather than his attorneys, must have the ultimate choice. In *Treece v. State, supra*, this Court held that whether to plead not criminally responsible is a decision for the defendant to make, not his attorney. In arriving at that decision, the Court

recognized that certain decisions about the conduct of the trial are for counsel to make, whereas other decisions are of such fundamental importance to the defendant that only he can make them. Quoting from *Parren v. State*, 309 Md. 260, 265, 523 A.2d 597, 599 (1987), the Court said in *Treece*, at 671:

It is certainly true that "[w]hen a defendant is represented by counsel, it is counsel who is in charge of the defense and his say as to strategy and tactics is generally controlling." [Emphasis supplied by the Court in *Treece*.]

The Court also cited *Curtis v State*, 284 Md. 132, 145-48, 395 A.2d 464, 472-73 (1978), for the proposition that tactical decisions made by a competent attorney will bind a criminal defendant. That point was further emphasized by quoting Justice Harlan's concurring opinion in *Brookhart v. Janis*, 384 U.S. 1, 8, 86 S. Ct. 1245, 1249, 16 L. Ed. 2d 314, 319 (1966):

[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval.

313 Md. at 671-72.

Thus, as the Court noted in *Treece*,

decisions "to forgo cross-examining certain State's witnesses, to forgo confrontation by non-objection to hearsay, to forgo objection to illegally seized evidence or to involuntary confessions (provided some tactical benefit would be extracted from their admission into evidence)" have been said to be matters usually allocated to defense counsel alone.

*Id.* at 672.

On the other hand, "the defendant ordinarily has the ultimate decision when the issue at hand involves a choice that will inevitably have important personal consequences for him or her, and when the choice is one a competent defendant is capable of making." Examples of that type of decision include whether to testify on one's own behalf, whether to forego trial by way of a guilty plea, and waiver of right to trial by jury. *Treece*, 313 Md. at 674.

The trial court apparently concluded that the areas of dispute between Grandison and his appointed counsel were within the realm of trial strategy and tactics, telling Grandison, "[I]f you're going to be represented by counsel then I think counsel will have to conduct the trial." Grandison, however, maintains that the differences involved more than strategy and trial tactics, that they went to the heart of his defense — the essential facts of the case — and therefore the decision was his to make.

As the Court recognized in *Treece*, there is no clearly defined dividing line between trial strategy, which must be left to counsel, and other kinds of decisions that the defendant has the right to make. I am inclined to believe that the disagreement between Grandison and counsel as to what issues of fact were to be disputed or challenged was a matter of trial tactics that was within the lawyers' professional discretion. If it is within the lawyers' discretion, as a matter of trial

tactics, to decline to call a particular witness or to forego cross-examining certain State's witnesses, "even in the face of his client's incomprehension or even explicit disapproval," as Justice Harlan expressed it in his concurring opinion in *Brookhart v. Janis, supra*, then, for all practical purposes, the decision as to what factual issues are to be raised by the defense is within the range of "trial tactics" and "strategy."

The Supreme Court addressed the problem in *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The question before the Court in that case was whether refusal by appointed counsel to present and argue every nonfrivolous issue requested by the defendant constituted ineffective assistance. In a federal habeas corpus proceeding, the District Court for the Eastern District of New York denied the prisoner's petition, but the Court of Appeals for the Second Circuit reversed. The Supreme Court granted certiorari and held that defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. The accused has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to take an appeal; and, with some limitations, he may elect to act as his own advocate. An indigent defendant, however, has no constitutional right to compel appointed counsel to press nonfrivolous points if counsel,

as a matter of professional judgment, decides not to press those points.

Justice Brennan, joined by Justice Marshall, dissented. Disagreeing with the Court over what the Sixth Amendment right to "the assistance of counsel" means, the dissent stated that "the import of words like 'assistance' and 'counsel' seems inconsistent with a regime under which counsel appointed by the State to represent a criminal defendant can refuse to raise issues with arguable merit on appeal when his client, after hearing his assessment and his advice, has directed him to raise them."

Justice Blackmun, concurring with the majority, stated that he agreed with Justice Brennan and the ABA Standards for Criminal Justice 21-3.2, Comment p. 21.42 (2d ed. 1980):

[A]s an *ethical* matter, an attorney shall argue on appeal all nonfrivolous claims upon which his client insists. Whether or not one agrees with the Court's view of legal strategy, it seems to me that the lawyer, after giving his client his best opinion as to the course most likely to succeed, should acquiesce in the client's choice of which nonfrivolous claims to pursue.

*Jones*, 463 U.S. at 754, 103 S. Ct. at 3314, 77 L. Ed. 2d at 995.

Noting that the attorneys' usurpation of certain fundamental decisions can violate the Constitution, Justice Blackmun nevertheless agreed with the Court:

[N]either my view, nor the ABA's view, of the ideal allocation of decisionmaking authority between client and lawyer necessarily assumes

constitutional status where counsel's performance is "within the range of competence demanded of attorneys in criminal cases --- and assure[s] the indigent defendant of an adequate opportunity to present his claims fairly in the context of the State's appellate process." [Citations omitted.]

*Id.* at 755, 103 S. Ct. at 3314, 77 L. Ed. 2d at 995-96.

Perceiving no essential difference between the attorney client relationship on appeal and the relationship during trial, I am not persuaded that the trial court erred in ruling that Grandison's dispute with his appointed attorneys' proposed trial strategy did not give him a constitutional right to discharge counsel and require the court to appoint new counsel. Grandison was not constitutionally entitled to appointed counsel who would present his defense the way he wanted it presented; what he was constitutionally entitled to was appointed counsel whose efforts on his behalf would be "within the range of competence demanded of attorneys in criminal cases." The trial judge, having listened to Mr. Purpura and Mr. Tuminelli explain their theory and plan of defense and justify their actions as counsel for Grandison, concluded that they were competent attorneys who had represented Grandison competently to that point and whose theories of defense for their client made sense to him.

A defendant represented by appointed counsel whose theories of defense tactics and strategy differed from the client's is not without a remedy if the attorney's conduct of the trial,

including the choice of trial tactics or strategy, falls below "the range of competence" demanded of attorneys in criminal cases. "[T]he [Sixth Amendment] right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763, 773 (1970). Counsel can deprive a defendant of the right to effective assistance by simply failing to render adequate legal assistance. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L. Ed. 2d 674, 692-93 (1984). A petition for post-conviction relief, pursuant to Md. Code (1957, 1992 Repl. Vol.) Art. 27, § 645A, provides the appropriate vehicle for relief when a claim of ineffective assistance of counsel is made. *Trimble v. State*, 321 Md. 248, 257-58, 582 A.2d 794, 799 (1990); *Harris v. State*, 295 Md. 329, 337-38, 455 A.2d 979, 983 (1983).

## II

After the court below ruled that Grandison had not presented a meritorious reason for his request to discharge counsel, it dutifully informed Grandison, pursuant to Maryland Rule 4-215(e),

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that the trial would proceed as scheduled with Grandison unrepresented by counsel if he discharged Messrs. Purpura and Tuminelli and did not obtain new counsel without the assistance of the court. Then, as required by section (e) of Rule 4-215, the court complied with subsections (a)(1)-(4) of the Rule.

After insuring that the record reflected compliance with those subsections, the court repeatedly asked Grandison if he wished to discharge Messrs. Purpura and Tuminelli. Grandison adamantly refused to answer that question. Instead, he persisted in saying that he wanted "new" counsel or "different" counsel, assiduously avoiding saying that he wanted to discharge his then present counsel, because if he said that he would be waiving his right to counsel and under no circumstances did he intend to waive his right to counsel or any other right. The following colloquy between the court and Grandison is illustrative:

THE COURT: ... I can't imagine a man who is facing a death sentence, or two additional life sentences, would want to proceed without competent counsel, but if you persist in wanting to discharge them, I will allow you to discharge them, with the qualifications that I've already indicated.

Now tell me affirmatively do you wish to have Mr. Tuminelli and Mr. Purpura discharged as your counsel of record?

MR. GRANDISON: Your Honor...

THE COURT: A yes or no answer.

MR. GRANDISON: ...I'm saying, I don't see how I could answer that. I'm saying, you have to make the decision. I already stated my position. I'm saying that the court is taking, you know, whatever position you [sic] taking. I'm not going to waive my rights, you know what I'm saying, if this case has to go upstairs, then, you know, we have to deal with that situation.

THE COURT: I'm sure we will. I don't have to waive anything. You're the one who has to tell me whether...

MR. GRANDISON: Well, I'm, I...

THE COURT: ...you want to continue with Mr. Purpura and Mr. Tuminelli...

MR. GRANDISON: Well, I've stated my position.

THE COURT: ...and if you tell me you don't want, if you don't want to discharge them, then this case will proceed to trial with you represented by Mr. Purpura and Mr. Tuminelli. That's a very simple option.

MR. GRANDISON: I said I wanted new counsel.

THE COURT: Well, I didn't ask you that. Do you want to discharge Mr. Purpura and Mr. Tuminelli?

MR. GRANDISON: Well, Your Honor, that's the only way I can answer that in order to preserve my legal right, that I want different counsel. That's the only way I...

THE COURT: So you do not want to discharge.  
..

MR. GRANDISON: I'm not saying that. I'm saying to you that I want a different counsel...

THE COURT: And I have indicated to you...

MR. GRANDISON: ...and I explained the reason.

h)xENDRECORD xENDRECORD reover, even though the error now complained of was not properly preserved for appellate review, this Court has general discretionary authority to address the issue. As Judge Rodowsky stated, writing for this Court in *Rubin v. State*, 325 Md. 552, 587, 602 A.2d 677, 694 (1992),

quoting from *Dempsey v. State*, 277 Md. 134, 141-42, 335 A.2d 455, 459 (1976):

"However, as [former] Rule 756g [now Rule 4-325(e)] makes clear with respect to jury instructions, and as the cases hold with respect to errors of law generally, an appellate court may in its discretion in an exceptional case take cognizance of plain error even though the matter was not raised in the trial court."

This is a death penalty case, which makes it exceptional enough, in my opinion, for the Court to exercise its discretion to address appellant's contention that the trial court committed an error of law in admitting highly prejudicial evidence even though the precise error, *i.e.*, reason for inadmissibility, was not stated below. Certainly the error was *plain* enough to be recognized as such by this Court.

Since this Court does have the discretionary power to address the issue raised by Grandison on appeal - error by the trial court in admitting the testimony of FBI Agent Foley that he believed that a key witness against Grandison was telling the truth - the refusal to exercise that discretion under the extraordinary circumstances of this case is appalling.

#### IV

Stripped of all legal jargon, the message that the Court is sending to Anthony Grandison is this:

Even though you unequivocally articulated an unwillingness to waive your

constitutional right to be represented by counsel, we hold that you did waive that right. Having reached that conclusion, as illogical as it may seem, we also hold that, lacking counsel to speak for you, you uttered the wrong words (or failed to utter the right ones) when you objected to the introduction of clearly inadmissible testimony, and that colossal blunder will cost you your life.

Unwilling to be deemed to have endorsed that message, I dissent.

Judge Bell has authorized me to state that he joins in this opinion, and Judge Raker has authorized me to state that she joins in Part IIIA of this dissenting opinion.