SUPREME COURT OF CANADA

CITATION: R. *v.* White, 2022 SCC 7

APPEAL HEARD: March 18, 2022
JUDGMENT RENDERED: March 18, 2022
DOCKET: 39785

BETWEEN:

Her Majesty The Queen
Appellant

and

Trent White
Respondent

CORAM: Karakatsanis, Rowe, Martin, Kasirer and Jamal JJ.

UNANIMOUS JUDGMENT READ BY: Karakatsanis J.
(paras. 1 to 11)

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Her Majesty The Queen *Appellant*

v.

Trent White *Respondent*

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Present: Karakatsanis, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Criminal law — Trial — Ineffective assistance of counsel — Election as to mode of trial — Accused convicted of several offences at trial before provincial court judge — Accused appealing convictions on basis that representation by trial counsel was ineffective as counsel failed to obtain accused's informed instructions regarding election as to mode of trial — Majority of Court of Appeal holding that failure of trial counsel to obtain informed instructions regarding mode of trial undermined fairness of proceedings and resulted in miscarriage of justice — Court of Appeal setting aside convictions and ordering new trial — No miscarriage of justice.

Cases Cited

Referred to: *R. v. Stark*, 2017 ONCA 148, 347 C.C.C. (3d) 73; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828; *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222; *R. v. Esseghaier*, 2021 SCC 9.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 536(2), 686(1)(b)(iv).

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Welsh, White and Hoegg JJ.A.), 2021 NLCA 39, 467 D.L.R. (4th) 29, [2021] N.J. No. 188 (QL), 2021 CarswellNfld 221 (WL), setting aside the convictions entered by Gorman Prov. Ct. J., 2018 CanLII 105266, [2018] N.J. No. 335 (QL), 2018 CarswellNfld 415 (WL), and ordering a new trial. Appeal allowed.

Dana E. Sullivan, for the appellant.

Jason Edwards, for the respondent.

The judgment of the Court was delivered orally by

[1] KARAKATSANIS J. — This appeal as of right comes to us based on the dissent of Hoegg J.A. in the Court of Appeal of Newfoundland and Labrador. For the following reasons, we are all agreed to allow the appeal.

[2] The respondent, Trent White, was charged with several offences following an incident on a fishing vessel off the coast of Labrador in 2017. The charges included aggravated assault, an offence for which Mr. White had a right to choose between a trial in the Provincial Court, a trial in the Supreme Court before a judge alone, and a trial in the Supreme Court before a judge and jury (*Criminal Code*, R.S.C. 1985, c. C-46, s. 536(2)). His trial counsel told the court that Mr. White was electing for a trial in Provincial Court. He was later convicted of assault, aggravated assault, and mischief.

[3] Mr. White appealed, seeking a new trial on the basis of ineffective assistance of counsel. According to him, his trial counsel had failed to advise him of his choices and had elected for a Provincial Court trial on his behalf without discussion or instructions. Mr. White did not indicate, however, that he would have considered a different election, or that he would elect differently on a retrial.

[4] A majority of the Court of Appeal of Newfoundland and Labrador accepted Mr. White's uncontradicted evidence, allowed his appeal, and ordered a new trial. Reasoning that an election is one of the important rights of an accused, the majority concluded that his counsel's failure to advise his client, or to seek his instructions on the choice, undermined trial fairness and resulted in a miscarriage of justice, satisfying the test for ineffective assistance of counsel (para. 23 (CanLII)). Citing the Ontario Court of Appeal's decision in *R. v. Stark*, 2017 ONCA 148, 347 C.C.C. (3d) 73, it explained that Mr. White was "not required to establish further prejudice" (para. 12).

[5] We agree that the right to elect the mode of trial is an important right that should be exercised by the accused. But we do not agree that Mr. White has shown that the circumstances of this case resulted in a miscarriage of justice.

[6] Rather, we agree with Hoegg J.A., in dissent, that ineffective assistance of counsel was not made out. Ineffective assistance has a "performance component" and a "prejudice component": for such a claim to succeed, the appellant must establish that (1) counsel's acts or omissions constituted incompetence; and (2) that a miscarriage of justice resulted (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 26). Here, Mr. White failed to state that he would have chosen differently had counsel informed him of his right to elect his mode of trial. Even accepting Mr. White's evidence that there was no discussion or consultation regarding his right of election, it did not rise to a miscarriage of justice in this case.

[7] In *G.D.B.*, the Court explained that counsel's failure to discuss and obtain instructions on fundamental decisions relating to an accused's defence "may in some circumstances raise questions of procedural fairness and the reliability of the result leading to a miscarriage of justice" (para. 34). *Stark* itself recognizes this at para. 32. However, the Court has never provided that the loss of those decisions alone warrants a new trial on ineffective assistance grounds. To the extent that *Stark* suggests otherwise, it is incorrect. The accused must, in most cases, demonstrate more than the loss of choice.

[8] Although it did not address ineffective assistance of counsel, the Court in *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, explained that to withdraw a guilty plea on the basis that the accused was unaware of legally relevant consequences, an accused must show subjective

prejudice. Subjective prejudice demanded that an accused demonstrate there was a "reasonable possibility" they would have acted differently (para. 6). The Court was unanimous that a mere failure to exercise an informed choice was insufficient. In our view, these principles also apply to an accused's election of the mode of trial.

[9] Further, Mr. White's request for a new trial cannot succeed on the basis of an appearance of unfairness. The standard for establishing a miscarriage of justice on this basis is high; the defect must be "so serious that it shakes public confidence in the administration of justice" (*R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 51, quoting *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89). While the loss of his right to elect was serious, the facts of this appeal do not rise to that standard. Indeed, if Mr. White's convictions were set aside, and he proceeded with the same election on retrial, that could undermine public confidence in the administration of justice.

[10] Finally, even if Mr. White's loss of his election amounted to a procedural error under s. 536(2) of the *Criminal Code*, the Provincial Court retained jurisdiction to hear the matter, since the court had jurisdiction "over the class of offence" under s. 686(1)(b)(iv) of the *Criminal Code* (*R. v. Esseghaier*, 2021 SCC 9, at para. 48, fn. 2).

[11] For these reasons, we would allow the appeal and remand the matter to the Court of Appeal to address Mr. White's remaining grounds of appeal, which were not addressed below.

Judgment accordingly.

Solicitor for the appellant: Special Prosecutions Office, St. John's.

Solicitor for the respondent: Newfoundland and Labrador Legal Aid Commission, St. John's.