03/22/02 "See News Release 24 for Dissents and Concurrences"

SUPREME COURT OF LOUISIANA

NO. 00-KP-0522

STATE OF LOUISIANA

versus

JOSEPH HAMPTON

KNOLL, Justice, dissenting.[*]

Although I agree with our holding in State v. Dauzart, 99-3477 (La. 11/3/00), 769 So. 2d 1206, I find it factually distinguishable. Unlike the defendant in Dauzart whose right to testify was denied by the trial court, the defendant in the present case contends that it was his trial counsel who would not let him testify. Under these facts, I find that the appropriate procedural vehicle to test a defendant's claim that his defense counsel violated his right to testify is a claim in post-conviction relief for ineffective assistance of counsel subject to the two-prong analysis enunciated in Strickland v. Washington, 466 U.S. 668 (1984). See United States v. Teague, 953 F.2d 1525 (11th Cir. 1992), cert. denied, 506 U.S. 842 (1992).

In Strickland, the U. S. Supreme Court delineated two requirements for a claim of ineffective assistance of counsel: First, the defendant must show that trial counsel's performance was deficient. This requires a showing that counsel erred so seriously that counsel was not functioning as the "counsel" which the Sixth Amendment guarantees. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's error(s) were so serious as to deprive the defendant of a fair trial -- a trial whose result is reliable.

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[*] Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, participating in the decision.

Unlike the situation in Dauzart, I find that the decision of whether the defendant will testify is essentially strategic and is best delegated to defense counsel. See Wright v. Estelle, 572 F.2d 1071, 1073 (5th Cir.), cert. denied, 439 U.S. 1004 (1978) (Thornberry, Clark, Roney, Gee, Hill, J.J., specially concurring). Although the record indicates that the defense counsel in some way abridged the defendant's right to testify,[1] I am not convinced that this deficiency resulted in a trial which produced unreliable results, the second essential prong of Strickland.

In its adoption of a rationale that the denial of the accused's right to testify, even under the present facts, is not amenable to harmless error analysis, I find that the majority opens a Pandora's box that will invariably lead to Monday morning quarterbacking on strategic decisions not to have the defendant testify. It is well recognized that significant legal risks are raised when a defendant chooses to testify. See United States v. Sharif, 893 F.2d 1212, 1214 (11th Cir. 1990) (holding that "[w]hen the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth"); State v. Bennett, 848 F.2d 1134, 1139 (11th Cir. 1988) (finding that the jury may view the defendant's false explanatory statement as substantive evidence proving guilt); United States v. Eley, 723 F.2d 1522, 1525 (11th Cir. 1984) (same). Moreover, the majority opinion ignores the well established principle that "[judicial scrutiny of counsel's performance

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[1] Although historically criminal defendants were prohibited from testifying because of their interest in the outcome of the trial, that view has long been abandoned. See Faretta v. California, 422 U.S. 806, 819 n15 (1975) (holding that "it is now accepted . . . that an accused has a right ... to testify on his own behalf."); see also TIMOTHY P. O'NEIL, VINDICATING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO TESTIFY AT CRIMINAL TRIAL: THE NEED FOR AN ON-THE-RECORD WAIVER, 51 U.PITT.L.REV. 809 (1990). Pursuant to that right to testify, the American Bar Association's Standards for Criminal Justice provide that three decisions relating to the conduct of the case are to be made by the accused after full consultation with counsel, namely, what plea to enter, whether to waive a jury trial, and whether to testify on his or her own behalf. 1 Standards of Criminal Justice Standard 4-5.2(a) (2d edition 1980). As noted in Strickland, the "prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable" representation by an attorney. Strickland, 466 U.S. at 688.

must be highly deferential." Strickland, 466 U.S. at 694. When this principle is applied to the strategic trial decision on who will or will not be called to testify, I find that the majority errs when it inappropriately extends our holding in Dauzart to a factual scenario that was never intended.

For these reasons, I respectfully dissent from the majority opinion.