



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0048-20

DAVID ASA VILLARREAL, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

KEEL, J., filed a concurring opinion in which MCCLURE, J., joined.

CONCURRING OPINION

A defendant has no right to consult with his attorney while he is testifying, and a trial court may forbid such discussion during a short break taken during the defendant's testimony. *Perry v. Leeke*, 488 U.S. 272, 284 (1989). But during an overnight break, a defendant has a right to unrestricted access to his attorney, even if his testimony is ongoing; forbidding his attorneys from talking with him about anything overnight—even

his testimony—violates the Sixth Amendment right to counsel. *Id.*; *Geders v. U.S.*, 425 U.S. 80, 91 (1976). We face the latter scenario in this case. The majority, however, misreads *Perry*, and that misreading may lead trial courts into constitutional error, so I do not join the Court’s opinion.

I. *Geders* and *Perry*

“[A]n order preventing [a defendant] from consulting his counsel ‘about anything’ during a 17-hour overnight recess between direct- and cross-examination impinged” on his Sixth Amendment right to counsel. *Geders*, 425 U.S. at 91. Overnight recesses “are often times of intensive work, with tactical decisions to be made and strategies to be reviewed.” *Id.* at 88. “At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day’s events.” *Id.*

Normal consultation overnight includes discussions about various trial-related topics, including those made relevant by the defendant’s testimony. *Id.*; *Perry*, 488 U.S. at 284. The defendant has a right to “unrestricted access to his lawyer for advice” on these matters during an overnight recess. *Perry*, 488 U.S. at 284. That unrestricted access includes the right to discuss the defendant’s ongoing testimony: “The fact that such discussions will inevitably include some consideration of the defendant’s ongoing testimony does not compromise that basic right.” *Id.*

The majority misreads the latter sentence to mean that, although attorneys may give “some consideration” to the defendant’s testimony, they may be forbidden from overnight discussion of that testimony with him. But the sentence says the overnight

discussions will include consideration of the defendant's testimony; it does not mention the attorneys' consideration. The most natural reading of the passage is that effective assistance of counsel may require overnight discussions of the defendant's ongoing testimony, and the Sixth Amendment guarantees access to such discussion.

The majority also misreads *Perry* by downplaying the temporally based nature of its holding and rationale. *Perry* noted that “the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial *for a few minutes.*” *Id.* at 284-85 (emphasis added). It said that “when a defendant becomes a witness, he has no right to consult with his lawyer *while* he is testifying” and “no right to have the testimony *interrupted* in order to give him the benefit of his counsel's advice.” *Id.* at 282 (emphasis added). It pointed out, “The interruption in *Geders* was of a different character”—i.e., it was “a long recess.” *Id.* at 284. And in that context, the defendant's “right to unrestricted access to his lawyer for advice on a variety of trial related matters” is “controlling.” *Id.* Fear of unethical coaching was immaterial to the *Perry* decision. *Id.* at 280-81. All that mattered was the length of the recess. *See id.* at 284. Short recess—no right. Overnight recess—unrestricted right.

The majority's failure to recognize these simple, clear rules may encourage trial courts to enter orders that force attorneys to choose between effective and candid consultation about the case on trial, on the one hand, and censored consultation, on the other. In the majority's example, the attorney in an overnight recess who wants to advise

his badly testifying client to change course and plead guilty could not detail how and why his testimony was so faulty that his advice had changed. The attorney would have to choose between giving his advice effectively by explaining its rationale—and violating the court’s order—or giving the advice without explanation and forcing his client into an uninformed choice. The conflict would undermine the Sixth Amendment right to assistance of counsel.

The majority’s justifications for its holding are peculiar. It claims, for example, that the order complied with *Perry*, but it did not. The majority points to the order’s *sua sponte* origin and one attorney’s claim that he understood it, but those circumstances would not redeem an unconstitutional order. And the majority says that the record does not show any harm—an irrelevant consideration in assessing error and an inversion of the constitutional harm standard, to boot.

The majority claims that other state supreme courts “generally agree” with its conclusion and cites three cases for that contention. While the majority places a “*see e.g.*” before that list—implying there are other cases that support its holding—I find no other examples. And one of the cases is inapplicable because it involved a break of only a few minutes. *Beckham v. Commonwealth*, 248 S.W.3d 547, 553 (Ky. 2008). As far as I can tell, one case decided since *Perry* agrees with the majority—*State v. Conway*, 842 N.E.2d 996, 1021 (Oh. 2006)—and two disagree—*Petty v. US*, 2024 D.C. App. LEXIS 228 (D.C. 2024) (per curiam); *People v. Joseph*, 646 N.E.2d 807 (N.Y. 1994).

Accordingly, state courts that have confronted the issue since *Perry* do not “generally agree” with the majority’s conclusion.

Meanwhile, the majority downplays the true consensus—that of federal circuit courts against such an order. It says that those courts “mostly” disagree with the majority’s approach, but it seems they all do. The majority cites one federal case that upheld such an order, but the order was rescinded after three hours, and the trial court granted the defendant extra time to consult with his lawyer before beginning the next day’s testimony. *U.S. v. Triumph Cap. Group, Inc.*, 487 F.3d 124, 137 (2nd. Cir. 2007). That court agreed that a restriction on communication during a long recess may be unconstitutional “even if the restriction bars discussion only of the defendant’s testimony.” *Id.*

II. Conclusion

The trial court erred to enter the order. I agree with the State, however, that the error was not structural. Unlike the *Geders* order, this one did not forbid all consultation overnight, and its prohibition against conferring about one topic during one overnight recess near the end of guilt-phase testimony did not pervade the entire proceeding. *See Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). I also agree that the error was harmless beyond a reasonable doubt. *See* Tex. R. App. P. 44.2(a). The only contested issue in this murder trial was self-defense; Appellant testified on that issue before the overnight recess; his version of events was weak; any effort to change his testimony overnight would have further damaged his credibility; and the State’s case against him was

overwhelming and included Appellant’s damning, spontaneous expressions of regret and claims that the victim “didn’t deserve it” and was “innocent.” As the State sums it up, the victim’s murder was “the inevitable conclusion to a days-long, meth-induced rampage, spurred on by [Appellant’s] bizarre paranoid delusions[.]” Depriving him of the ability to discuss his testimony over one night near the end of this trial was error but harmless beyond a reasonable doubt. I concur in the Court’s judgment.

Filed: October 9, 2024

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