



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

YEARY, J., filed a concurring opinion.

I join the Court's opinion. Doing the best it can with what the United States Supreme Court has given it to work with, the Court concludes that the trial court's limitation on defense counsel's ability to confer with his testifying client during an overnight recess was constitutionally acceptable. It finds this limitation justified because,

while the trial court prohibited counsel from conferring with Appellant directly about the *substance* of his *testimony*, it did not otherwise “intrude upon the constitutionally protected communications between Appellant and counsel” during that interregnum. Majority Opinion at 12. This compromise seems the only acceptable choice given the Supreme Court’s precedents. See *Geders v. United States*, 425 U.S. 80, 91 (1976) (explaining that an order prohibiting an attorney from conferring with his client during an overnight recess violates the constitutional right to counsel); and compare *Perry v. Leeke*, 488 U.S. 272, 284–85 (1989) (explaining that an order prohibiting an attorney from conferring with his client during a 15-minute recess does not violate the Sixth Amendment right to counsel).

That does not mean it is an ideal choice. The line between defense counsel conferring with his client about the content and direction of his ongoing testimony and conferring “about the derivative effects of [that] ongoing testimony” is a nebulous one at best. Majority Opinion at 10, 13. I do not envy the defense lawyer who risks being held in contempt while trying to navigate this murky distinction. How is the most ethically compliant lawyer supposed to determine how to communicate with his client about “information made relevant by the day[']s testimony” or “the significance of the day’s events” or “trial tactics” or the advisability mid-trial of “negotiating a plea bargain” without some reference, however fleeting or indirect, to the substance or tenor of his client’s as-yet-unfinished appearance on the witness stand? Majority Opinion at 10. Perhaps it will not prove problematic in many if not most cases. Indeed, Appellant makes no showing in this case that his attorney found the

trial court's instruction in this case difficult to comply with or inhibitive of his ability to counsel his client as needed—*at all*. Thus, there exists in this case at least an argument that Appellant has also failed to demonstrate prejudice.

This case nonetheless presents what must be a common and likely intractable problem, it seems to me. The Supreme Court's precedents seem to force an examination of the length of time of the recess to know the answer to whether a defendant's right to counsel is violated. But the relationship between an attorney and his client cannot boil down only to how much time has ticked away on a clock. Either the Sixth Amendment requires a right of conferral in this circumstance, or it does not, and the answer cannot depend on some right to confer that kicks in somewhere between a fifteen minutes and an overnight recess. If it did, that would just be silly. Moreover, there is no textual basis in the language of the federal constitution on which to hang a temporal trigger for the right that is at stake.

Here, the Court's opinion strikes a balance found arguably outside, rather than in-between, the Supreme Court's precedents. It approves a non-conferral order that leaves it to a defendant's counsel to know the difference between discussing his client's testimony with him as opposed to discussing other distinguishable aspects of representation. It does strike me as almost impossible for a trial court to know how to articulate a clear enough instruction, or for counsel to fathom the scope of whatever necessarily indistinct guidance he is given. But I am convinced that the trial court did an adequate job here given the existing Supreme Court precedents on the topic.

As it stands, the Supreme Court’s guidance in this area is, in my view, no better than that offered by Justice Potter Stewart for identifying “hard-core pornography”: “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring). I believe at some point, if not here, it will behoove the Supreme Court to revisit this area of the law and draw a bright line rule. For evidence of why, just look at the varied opinions cited in footnotes 1 and 2 of the Court’s opinion. Majority Opinion at 2–3 nn. 1, 2. This is no way to navigate a right as important as the constitutional right to counsel.

Either the Sixth Amendment requires that a defendant be allowed to consult with his attorney during breaks of any duration, and about any topic, during his testimony; or else basic fairness requires that any consultation with counsel, about any topic, should be categorically banned throughout the course of his testimony, however long that may go on. After all, the defendant having opted to testify in his own behalf, “the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well.” *Perry*, 488 U.S. at 282.

Until such time as the Supreme Court should clarify matters, I join this Court’s opinion in muddling through.

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