

Right to Counsel Issues

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1

Ineffective Assistance Claims

- ☐ *Strickland* attorney error claims
- ☐ *Harbison* Claims
- ☐ Denial of counsel claims
- ☐ Conflict of interest claims
- ☐ *Faretta* issues



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2

Question # 1

- Defendant is on trial for PWISD cocaine, Sale of cocaine, PDP, and Habitual Felon. During closing argument, defense counsel says:

"D. could get four months on the paraphernalia. I agree you can find him guilty of that one; it's open and shut. But there was no proof of sale or intent to distribute, and you should find him not guilty of those."

DA: Objection! I want to be heard at the bench.

Answer # 1

St. v. King, 218 N.C. App. 384 (2012)

- Though clearly a strategic decision, such a statement concedes defendant's guilt to the charge of possession of drug paraphernalia

Harbison Claims

Alleges that counsel admitted the defendant's guilt to the jury, without the defendant's consent, in violation of the defendant's right to effective assistance. *State v. Harbison*, 315 N.C. 175 (1985)

Harbison Claims

- NC courts have held that when counsel admits defendant's guilt to the jury without defendant's consent, it is **per se IAC**. *State v. Harbison*, 315 N.C. 175 (1985)
- The only inquiries are whether there was an unauthorized admission of guilt or whether defense counsel exceeded the scope of the defendant's consent

Harbison Claims

Best practices at trial

- Ask—before opening & closing statements--whether counsel plans to admit guilt to any offense or a lesser-included
- If yes, determine, on the record, whether defendant consents to the strategy

Harbison Claims

Best practices at trial

- Defense counsel can't proceed unless defendant gives explicit consent on the record
- If counsel unexpectedly admits guilt, excuse jury & determine whether defendant consents to the admission; if not may → **mistrial**

Question # 2

- Defendant is on trial for 2d degree Rape, 2d degree Sex Offense, Assault by Strangulation, and AOF. During closing argument, defense counsel argues:
 - "You heard (the D.) admit things got physical. He admitted he did wrong. God knows he did...Put aside your feelings about the violence that occurred. You can't convict him of the rape and sexual assault and strangulation based on the evidence. Find him not guilty those."

DA: Objection! I want to be heard at the bench.

Answer # 2

St. v. McAllister, 375 N.C. 455 (2020)
 Implied Admission of Guilt = Harbison Error

Question # 3

- Defendant is on trial for first-degree statutory sex offense, crime against nature, and indecent liberties. During closing argument, defense counsel states:

"The minor was 15 and was in high school. The defendant didn't know that. The minor lied. The defendant told the officer the truth about what happened. He gave the minor oral. The defendant didn't lie to the police. He told police what happened between them. I ask you to find him not guilty."

DA: Objection! I want to be heard at the bench.

Answer # 3

St. v. Cholon, 284 N.C. App. 152 (2022)

Implied admission of guilt  Harbison error

Harbison Claims

What is not (necessarily) a *Harbison* Error:

- Admission to one element of an offense
- Admission of guilt to another crime that is not a lesser-included offense
- Admitting guilt in a capital case after informing the client of that strategy and the client will not respond (?)

Question # 4

- During jury selection, defense counsel approaches and explains that he and the defendant are unable to agree about accepting a certain juror. The defendant is asking to personally address the court about the issue.

What should you do?

Absolute Impasse



Answer # 4

- When defense counsel & a fully informed criminal defendant reach an **absolute impasse** as to tactical decisions, the client's wishes must control. *State v. Ali*, 329 N.C. 394, 404 (1991) (noting principal-agent nature of the attorney-client relationship)

Absolute Impasse

What's an Absolute Impasse? Defendant and counsel must be locked in controversy regarding a matter of trial strategy.

- ✓ Jury selection
- ✓ Whether to testify or present evidence
- ✓ Examination of witnesses
- ✓ Defenses
- ✓ Whether to move for mistrial
- ✓ Jury instructions
- ✓ Whether to plead guilty
- ✓ Whether to appeal

Absolute Impasse

Your Duties. If brought to your attention that such an impasse exists, you must require defense counsel to abide by defendant's wishes

Defense Counsel's Duties. Make a record of the circumstances, advice to the defendant, the reasons for the advice, the defendant's decision, and the conclusion reached. The better practice is to do this on the record in open court

Absolute Impasse



Question # 5

- Two of the defendant's prior attorneys were allowed to withdraw due to breakdown of the relationship. The defendant then waives all counsel and is appt'd. standby counsel. After expressing problems researching the law and investigating his case from jail several times, D. states on the day of trial his desire to have full representation. Standby counsel needs a continuance to do.

What should you do?

Answer # 5

St. v. Harvin, 382 N.C. 566 (2022)

[T]he defendant's behavior in requesting the removal of two counsel, seeking to proceed pro se, and then deciding that he needed the help of counsel to vindicate his rights at trial—while remaining polite, cooperative, and constructively engaged in the proceedings—was not “the type or level of obstructive and dilatory behavior which [would] allow the trial court . . . to conclude that [the] defendant had forfeited the right to counsel

Waiver vs. Forfeiture

Waiver of Counsel

Knowing, intelligent,
and voluntary
relinquishment of the
right to counsel

Forfeiture of Counsel

Involuntary
relinquishment
relinquishment of the
right to counsel due to
egregious misconduct

Forfeiture of Counsel

Involuntary relinquishment
relinquishment of right to
counsel



Serious
obstruction of
the proceeding
or assaulting
their attorney

Forfeiture of Counsel

- Use advance warnings when possible
- Document the reasons for withdrawal of prior counsel or D's inability to retain counsel
- Tread cautiously!



Forfeiture of Counsel

- Must be a clear record of D.'s misconduct
- Make findings of fact and legal conclusions
- Age of case and # of attys. is not dispositive



Question # 6

- D.'s motion to remove his first atty. was allowed. Her second atty. withdrew. The third atty. withdrew shortly after that. A fourth atty. was appointed and withdrew 1.5 months later. Six months later, the fifth attorney withdrew. There were multiple waivers of counsel signed and D. also attempted to hire her own atty., without success. She asks for a sixth appt'd. atty.

What should you do?

Answer # 6

State v. Atwell, 383 N.C. 437 (2022)

Defendant's behavior did not rise to the level of egregious misconduct which could justify the trial court's determination that she had involuntarily surrendered her right to counsel. Defendant never engaged in aggressive, profane, or threatening behavior, show[ed] any contempt for the trial court's authority.

Forfeiture of Counsel

Forfeiture

- Making representation physically dangerous for atty by assault, threats, harassment
- Profane or threatening behavior that disrupts the proceedings
- Repeated refusal to answer whether he wants an attorney
- Refusing to participate in the case
- Hiring/firing multiple attys. or refusing to retain one after multiple opportunities*

No Forfeiture

- Having attorneys withdraw (even multiple ones)
- Being unable to retain an attorney after good faith effort*
- Being frustrating, dense, or slow
- Challenging the court's jurisdiction, conspiracy theories or other unfounded beliefs
- Speaking out of turn
- Arguing with and questioning the court or counsel

Question # 7

- D. waives appointed counsel and hires a private lawyer. The week of trial, D. wishes to fire that lawyer and hire different private counsel. The trial court allows the withdrawal but warns D. that the trial will proceed that week. D. ultimately cannot hire the second private lawyer. D. asks for new counsel to be appointed. The trial court declines to do so and requires D. to proceed pro se.

Problem?

Answer # 7

***State v. Blakeney*, 245 N.C. App. 452 (2016)**

Waiver of Appointed Counsel **≠** Waiver of all Counsel

Waiver of Counsel

Knowing, voluntary
relinquishment
relinquishment of
right to counsel



15A-1242 Colloquy

- 1) Advised of right to counsel
- 2) Understands and appreciates consequences of decision
- 3) Understands nature of charges and possible punishments

(a "thorough inquiry")

Waiver of Counsel Colloquy – G.S. 15A-1242

Are you able to hear and understand me?

Are you under the influence of any substances?

Age, education, literacy?

Any handicaps or disabilities?

Do you understand you have the right to a lawyer, including at the State's expense?

Understand the court will not give you advice on defenses, jury instructions, objections, or other legal issues?

Understand the court will treat you as if you were a lawyer?

Understand the nature of charges and the possible punishments?

Do you have any questions?

Do you now waive the right to the assistance of a lawyer and voluntarily and intelligently decide to represent yourself?

Question # 8

- Local police charge the D. and he is on trial. Officers from that department testify against D. At the charge conference, D. explains he is concerned that his lawyer isn't acting in his best interests, because his lawyer also represents the police in his capacity as a part-time city attorney. D. admits he's known about this for a year and doesn't wish to question his lawyer about it.

What should you do?

Question # 8

***St. v. Lynch*, 271 N.C. App. 532 (2020)**

If defense counsel advises the police, that is an unwaivable conflict

The trial court erred in failing to further investigate the issue

Conflict of Interest

Standard. The standard for evaluating a conflict of interest claim depends on when the claim was raised

Conflict raised before or during trial. Trial court either must appoint separate counsel or take adequate steps to ascertain that the risk of conflict is too remote to warrant separate counsel

- Defendant might be able to waive the conflict

Conflict of Interest

Conflict after trial. Defendant must show an actual conflict negatively affected defense counsel's performance

Conflict of Interest

Standard. The standard for evaluating a conflict of interest claim depends on when the claim was raised

Conflict raised later. Defendant must show that an actual conflict of interest adversely affected counsel's performance

Faretta Issues

- ☐ D. may represent himself or may be represented by counsel. No right to hybrid representation.
- ☐ Trial court may, but need not, rule on pro se motions filed by a represented person
- ☐ Right to self-representation may be waived, forfeited, or denied

Faretta Issues

- ❑ May be waived by serious misconduct or failure to raise the issue
- ❑ Invocation of right must be clear and unequivocal
- ❑ No IAC of pro se defendant

Faretta Issues

- G.S. 7A-457(a) requires waiver of all counsel be in writing
- TC must make a finding that D. is doing so with "full awareness of his rights and of the consequences of waiver."
- Waiver form is insufficient; TC must conduct full colloquy under G.S. 15A-1242

"A Thorough Inquiry" G.S. 15A-1242

- - Are you able to hear and understand me?
- Are you now under the influence of any alcoholic beverages, drugs, narcotics, or other pills?
- How old are you?
- Have you completed high school? College? If not, what is the last grade you completed?
- Do you know how to read? Write?
- Do you suffer from any mental handicap? Physical handicap?
- Do you understand that you have a right to be represented by a lawyer?
- Do you understand that you may request that a lawyer be appointed for you if you are unable to hire a lawyer; and one will be appointed if you cannot afford to pay for one?
- Do you understand that, if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer appearing in this court must follow?
- Do you understand that, if you decide to represent yourself, the court will not give you legal advice concerning defenses, jury instructions or other legal issues that may be raised in the trial?
- Do you understand that I must act as an impartial judge in this case, that I will not be able to offer you legal advice, and that I must treat you just as I would treat a lawyer?
- Do you understand that you are charged with _____, and that if you are convicted of this [these] charge[s], you could be imprisoned for a maximum of _____ and that the minimum sentence is _____? [Add fine or restitution if necessary.]
- With all these things in mind, do you now wish to ask me any questions about what I have just said to you?
- Do you now waive your right to assistance of a lawyer, and voluntarily and intelligently decide to represent yourself in this case?

"Gray-area" Defendants

Indiana v. Edwards, 554 U.S. 164 (2008)

TC may limit a D's right to self representation by insisting on representation by counsel when D is competent to stand trial but lacks the mental capacity to conduct the defense unless represented

"Gray-area" Defendants

***St. v. Cureton* (NCA 2012):**

The constitution does not prohibit self-representation by a "gray-area" defendant

Capable to proceed is judged by the same standard as capable of proceeding pro se