DEPRIVING A CRIMINAL DEFENDANT OF HIS CHOICE OF PAID COUNSEL

United States v Gonzalez-Lopez
548 US 2006 No 05-352

1 Facts

Gonzalez-Lopez was charged in the Eastern District Court of Missouri on a federal drug charge. His family hired attorney John Fahle to represent him. After the

arraignment, the respondent contacted a Californian attorney, Joseph Low, with the aim of hiring him, either in addition to, or instead of Fahle. Low flew from California and met with the respondent, who hired him.

Both Low and Fahle represented the respondent at an evidentiary hearing before a United States magistrate. The magistrate provisionally allowed Low to participate in the hearing on the condition that he immediately file an application for admission *pro hac vice*. During the hearing the magistrate revoked the provisional participation by Low because Low, by passing notes to Fahle, had violated a court rule restricting the cross-examination of a witness to one counsel.

In the following week, the respondent notified Fahle that he wanted only Low to represent him. Low consequently filed an application for admission *pro hac vice*. The District Court denied his application without comment. One month later Low filed another application. The District Court again denied the application without explanation. Low applied for a writ of *mandamus* by way of an appeal to the United States Court of Appeals for the Eighth Circuit. The appeal was dismissed.

Fahle filed a motion to withdraw as counsel and for a show-cause hearing to consider sanctions against Low. Fahle asserted that Low violated Missouri Rule of Professional Conduct 4-4.2 (1993) which prohibited Low from communicating with the respondent about the subject of representation without his consent while the respondent was represented by him. Low filed a motion to strike Fahle's motion. The District Court granted Fahle's motion to withdraw and afforded the respondent time to retain new representation. The District Court denied Low's counter-motion and indicated, for the first time, that it had primarily denied Low's motions for admission *pro hac vice* because, in a separate case before it, Low had violated Rule 4-4.2 by communicating with a represented party.

Karl Dickhaus, a local attorney, represented the respondent at the trial. Low again applied for admission and was again denied admission. The court prevented the respondent from having contact with Low throughout the trial, except for once on the last night. The jury found the respondent guilty.

The respondent appealed and the Eighth Circuit set aside the conviction. The court held that the District Court erred in interpreting Rule 4-4.2 both by disallowing Low's admission in this case and in the other case on which the District Court based its denials. The District Court's denials of these motions were therefore erroneous and violated the respondent's Sixth Amendment right to paid counsel of his choice. The court concluded that this Sixth Amendment violation was not subject to harmless-error review.

2 Question before the Supreme Court of the United States

The Government did not dispute the finding of the Eighth Circuit that the District Court erroneously deprived respondent of his counsel of choice. The question was whether this erroneous deprivation of a criminal defendant's choice of counsel entitles the respondent to have his conviction set aside.

3 The Government's argument

The Government argued that the Sixth Amendment violation is not "complete" unless the substitute counsel's performance was deficient and the defendant was prejudiced by it (ineffective assistance as explained in *Strickland v Washington* 466 US 668 691–696 (1984)).

The Government contended, in the alternative, that the respondent must show that his counsel of first choice would have engaged in a different strategy creating a "reasonable probability that . . . the result of the proceedings would have been different" (prejudiced as required in *Strickland* but the performance was not constitutionally deficient).

In support of their arguments the Government contended that the right to counsel "has been accorded . . . not for its own sake, but for the effect it has on the ability of the accused to receive a fair trial" (*Mickens v Taylor* 535 US 162 166 (2002)). If the respondent is not prejudiced, the trial is fair and the right to legal counsel is not violated.

4 Judgment

The court held that the Government's contention understood the Sixth Amendment as a more detailed version of the Due Process clause. Even though the purpose of the rights in the Amendment is to ensure a fair trial it doesn't mean that the rights may be disregarded as long as the trial on the whole is fair. One cannot abstract from the right its purpose and then eliminate the right.

The right to counsel of choice does not decree that a trial be fair. It provides a specific guarantee of fairness, namely, to be defended by a counsel whom the defendant considers most suitable. The right at stake is not the Due Process Clause, which ensures a fair trial, but the right to a counsel of choice regardless of the quality of representation he received. This right was violated because the deprivation of counsel was erroneous. Prejudice does not have to be proved to show that the violation is "complete".

To argue otherwise would be to confuse the right to choose counsel with the right to effective assistance which sets a baseline requirement on competence, whichever counsel is chosen. The fact that a defendant must show prejudice in effective assistance cases stems from the very nature of the element in the right to counsel at issue, namely effective or mistake-free representation. Counsel cannot be "ineffective" unless his conduct prejudices the defendant.

A violation of the Sixth Amendment right to counsel of choice is not subject to harmless-error analysis. Violation of this right qualifies as a "structural error" (*Arizona v Fulminante* 499 US 279 (1991)). It "def[ies] analysis by 'harmless error' standards" because it "affect[s] the framework within which the trial proceeds" and is not "simply an error in the trial process itself". Different attorneys will pursue different strategies. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.

5 Discussion

The decision of the United States Supreme Court is relevant to South African lawyers because the South African Constitution, 1996 and the Criminal Procedure Act 51 of 1977 also provide a right to legal representation to someone confronted by the criminal justice system. Section 39(1)(c) of the Constitution furthermore provides that foreign law may be considered when interpreting the Bill of Rights. Of course the reference to foreign law will not be a safe guide unless the principles of comparative law are followed (see *S v Makwanyane* 1995 3 SA 391 (CC) para 37; *Bernstein v Bester NO* 1996 4 BCLR 449 (CC) para 133; *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC) para 26.)

A discussion of these principles falls outside the scope of this case note. Suffice to say that, in this instance, the comparison is extremely apposite.

The South African Constitution of 1996 provides as follows:

(a) Everyone who is detained has the right
- to choose, and to consult with, a legal practitioner, and to be informed of this right promptly (s 35(2)(b));
- to have a legal practitioner assigned to him by the State and at the State's expense if substantial injustice would otherwise result, and to be informed of this right promptly (s 35(2)(c)).

(b) Every accused person has the right to a fair trial, which includes the right:
- to choose, and be represented by, a legal practitioner, and to be informed of this right promptly (s 35(3)(f));
- to have a legal practitioner assigned to him by the State and at the State's expense if substantial injustice would otherwise result, and to be informed of this right promptly (s 35(3)(g)).

(c) Everyone also has the right to freedom and security of the person (s 12).

Section 73 of the Criminal Procedure Act 51 of 1977 provides as follows:

(a) An accused who is arrested with or without a warrant, shall subject to any law relating to the management of prisons, be entitled to assistance by his legal advisor as from the time of arrest (s 73(1)).

(b) The accused shall
- be entitled to be presented by his legal advisor at criminal proceedings, if such legal advisor is not in terms of any law prohibited from appearing at the proceedings in question (s 73(2));
- at the time of his arrest; (b) when he is served with a summons in terms of section 54; (c) when a written notice is handed to him in terms of section 56; (d) when an indictment is handed to him in terms of section 144(4)(a); (e) at his first appearance in court, be informed of his right to be represented at his own expense by a legal advisor of his own choice and if he cannot afford legal representation, that he may apply for legal aid and of the institutions which he may approach for assistance (s 73(2A)).

As explained in my note "Ineffective assistance of counsel during plea negotiations: An agreement lost" 2006 *THRHR* 484 with specific reference to plea agreements, unfortunate drafting of these provisions, and also foundational confusion by the Constitutional Court in erecting a conceptual wall between the right to freedom and security and the rights of persons once arrested, detained or accused, has brought dissimilarity in the approach towards those that come into contact with the criminal justice system.

The issue under discussion is the right to paid counsel of choice. Sections 35(2)(c) and (35)(3)(g) of the Constitution and the proviso to section 73(2A) of the Criminal Procedure Act are not relevant, as these sections concern individuals or legal entities (entities not in the instance of s 35(2)(c)) who require that a legal practitioner be assigned by the State at the State's expense. These sections do not provide for a choice and it has unsurprisingly been held that an accused cannot demand that the State assign the counsel of his choice. This does not mean that an

individual or legal entity cannot object to a representative, but the grounds are severely limited (*S v Halgryn* 2002 2 SACR 211 (SCA)).

Under American (*Wheat v United States* 486 US 153 159 (1988); *United States v Gonzalez-Lopez supra*) and South African law (*S v Halgryn supra*; s 36 of the Constitution) it is accepted that the right to counsel of choice is subject to reasonable limitations. Courts may, for example, establish criteria for allowing lawyers to appear before them. It also presupposes that the accused can afford the lawyer and that the lawyer is readily available to perform the mandate in view of case-management considerations and the court's calendar. None of these limitations is in issue in *Gonzales*. In this instance all the parties accepted that the accused was erroneously denied his counsel of first choice.

It can be argued that the focus of section 35(3)(f) of the Constitution is on the representation that an accused is entitled to receive rather than on the identity of counsel. In *United States v Ash* 413 US 300 309 (1973) the United States Supreme Court held that "the core purpose of the counsel guarantee was to assure 'Assistance' at trial". The assistance would "assure fairness in the adversary criminal process" (*United States v Morrison* 449 US 361 364 (1981)). It was not "the essential aim of the Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer he prefers" (*Wheat v United States supra*).

With the focus on assistance one may argue that if there is an identifiable difference in the quality of representation between the lawyer that represented the accused and the assistance that the accused would have received from his first choice lawyer, then the accused is entitled to assistance by the court (see also *Rodriguez v Chandler* 382 F 3d 670 (CA7 2004), cert denied, 543 US 1156 (2005)). In this instance the counsel's performance was not deficient even though the accused was prejudiced. For the reasons given by the court in *Gonzalez-Lopez* in finding that the issue is not susceptible to harmless-error analysis, I am of the opinion that this difference in the quality of representation will be extremely difficult if not impossible to determine. The choice of representation pervades the entire trial. For example, it determines whether and on what terms the accused enters into a plea agreement or whether the accused makes concessions or submits a plea explanation. It determines the style of cross-examination and choice of witnesses. It would be an exercise in speculation to determine what choices the first choice lawyer would have made.

Many legal scholars will probably point out that the purpose of section 35 of the Constitution is to ensure a fair trial. The right to a counsel of choice in subsection (3)(f) is one of many rights included in section 35 to ensure a fair trial (see the provisions of s 35 above). Therefore, even if there is shown to be a difference in the quality of representation as explained in the previous paragraph, if there is no deficiency in the conduct of the lawyer, the trial will be fair and the accused will not be entitled to have the conviction set aside.

However, on a reading of section 35(2)(b of the Constitution, the right "to choose, and to consult with, a legal practitioner" is not one of many rights included in section 35(2) to ensure fairness to a detained individual. Apart from the fact that in section 35(2)(b) the right is only to consult with a legal practitioner of choice, must the right be interpreted differently in this instance? Surely not.

6 Conclusion

Once again the unfortunate drafting of these sections and the foundational confusion in the interpreting and application of the right to freedom and security in the

Constitution is evident (see my note 2006 *THRHR* 484). I believe that the reference to "the right to a fair trial, which includes", in the introductory sentence in section 35(3) of the Constitution must be removed so that the right to counsel of choice in section 35(2)(b) and 35(3)(f) can be interpreted similarly insofar as the choice is concerned. (The reference to "consult" in section 35(2)(b) and "represent" in section 35(3)(f) must also be changed to "assistance" to avoid confusion.) The operation of section 12 of the Constitution as a general and due process right must also be substantiated. This would bring similarity in the analytical process.

The rights enumerated in section 35 of the Constitution are merely illustrative of the generic due process right in section 12 of the Constitution (see *Reference re section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486 502ff (Can)). The rights in section 35 are therefore specific instances of the basic tenets of fairness upon which our legal system is based. Section 35(3)(f) defines the extent and limit of the right to counsel of choice of an accused at trial. If the conduct of the second choice counsel is not shown to be deficient, the trial was fair. Some may conclude that the accused was therefore *ipso facto* not prejudiced.

If we accept, as all the parties in *Gonzalez-Lopez* above did, that the accused was erroneously denied his counsel of choice and there is therefore an inconsistency between the denial of counsel and the right to counsel of choice, a constitutional remedy must be given to the accused. In terms of section 38 of the Constitution a competent court may grant appropriate relief, including a declaration of rights. I believe that because the conduct of the accused's counsel of second choice had not been deficient, and therefore fair, the accused will not be entitled to relief.

WP DE VILLIERS
University of Pretoria