NEW HAMPSHIRE SUPREME COURT

No. 2018-0606

State of New Hampshire

Appellee

v.

Jerry Newton

Appellant

ON APPEAL FROM JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR-NORTH COURT

REPLY BRIEF OF THE APPELLANT JERRY NEWTON

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I. THE TRIAL COURT CORRECTLY FOUND THAT TRIAL COUNSEL'S DISCLOSURE OF THE TEXTS WAS DEFICIENT, AND CORRECTLY FOUND STATE V. CANDELLO INAPPLICABLE.

A. Preliminary note on organization of the issues.

In its brief, the State presented its arguments in the same order that the trial court did in its Order. In Newton's brief, and in this reply brief, the arguments are presented in a different order, so that the arguments follow the chronological order of how the issues unfolded in the lower court: First, well before trial, trial counsel provided the text messages to the prosecutor. Second, during trial, former counsel called Marion Newton as a witness.

On appeal, the parties are grappling with issues that become difficult to follow when not presented in chronological order: Would the text messages have inevitably been disclosed, for one reason or another, such that pretrial disclosure of the texts inflicted no prejudice? Does former counsel's decision to disclose the texts, based on his ill-conceived belief that the texts on balance were exculpatory, provide further evidence that Newton's decision to call his wife as a witness could not possibly have been a fully informed decision?

These issues become obfuscated when the issues are presented in reverse chronological order, particularly when the State is arguing that a decision made by Mr. Newton

would have inevitably led to his attorney making certain other decisions, or the lower court making certain rulings. Newton is not faulting the State here, which is merely following the order of issues as laid out in the lower court's Order, but nevertheless, Newton submits that a chronological analysis leads to a more logical and orderly analysis of the issues.

B. The trial court correctly found that *State v. Candello* is inapplicable to the decision to disclose the texts.

The trial court correctly found that counsel made a strategic decision to disclose the messages based on his own judgment, and did not merely follow a directive from his client. Add. 18, 25-26.[1] In its brief, the State quibbles with the points from trial counsel's deposition that the lower court relied on and claims that its decision was not supported by the evidence. SB 40. But this passage from the deposition, which the State's brief truncates to only the first answer below, SB 42, leaves no doubt that former counsel exercised his own judgment in disclosing the text messages:

Q Who wanted to turn these messages over to the

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[1] References to the record are as follows**:**
"Add. #" refers to the Addendum to Newton's opening brief and page number.
"DB #" refers to Newton's opening brief and page number.
"SB #" refers to the State's brief and page number.
"App-V1. #" refers to the Appendix filed with Newton's brief and page number.
"T3. #" refers to the transcript from the third day of trial and page number.
"T-H. #" refers to the transcript from the 2/20/20 hearing on the motion for new trial and page number.

> prosecution?
> A Well, initially, I know Jerry did, and then we did.
> Q Okay. So, how did you arrive at a conclusion that you wanted to turn them over?
> A Because they contained -- other than the ones that you described, there were several very good messages and very -- other messages that supported our theory of this case.
> Q Like what?
> A Like, you know, things talking about the work that he was doing for them; that he was going there to do a good thing for them; that they needed his help.

App V-1. 290.

This exchange makes clear that trial counsel did not reluctantly disclose messages under the client's explicit direction and against his better judgment, but rather, trial counsel wanted to disclose the messages just like his client did. At its core, the *Candello* decision stands for the proposition that when a fully informed client insists that her lawyer pursue a course of action that the lawyer believes is not in the client's interest, the client may be barred from later claiming that the lawyer provided ineffective assistance of counsel. *State v. Candello*, 170 N.H. 220, 229 (2017) ("Accordingly, 'if [counsel] is *commanded* by his client to present a certain defense, *and if he does thoroughly explain the potential problems with the suggested approach*, then his ultimate decision to follow the client's will may not be lightly disturbed.")(*quoting Mulligan v. Kemp*, 771 F.2d 1436, 1442 (11th Cir. 1985)(Emphasis added).

But here, the State seeks to extend *Candello* to situations where client and defense counsel are of the same mind as to the strategy to pursue, even if the strategy is unreasonable. The State cites no authority in support of this proposition. Rather, the authorities it cites supports the opposite conclusion, that *Candello's* reach is limited to situations where the defense lawyer, against her better judgment, bends to her client's will, or when defense counsel presents reasonable options, and client chooses one. SB 34-35 ("'When a defendant *preempts* his attorney's strategy by *insisting* that a different [course] be followed, no claim of ineffectiveness can be made.'")(quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985)) (Emphasis added); SB 40 ("'Where a defendant, fully informed of the *reasonable options* before him, agrees to follow a particular strategy at trial, that strategy cannot later form the basis of a claim of ineffective assistance of counsel.'")(quoting *United States v. Weaver,* 882 F.2d 1128, 1140 (7th Cir. 1989)(Emphasis added)). Here, both trial counsel and client independently wanted to pursue an unreasonable strategy. Accordingly, the lower court correctly ruled that the *Candello* ruling is inapposite to trial counsel's decision to disclose the text messages.

C. The State is wrong that ethical obligations or reciprocal discovery obligations would have inevitably resulted in disclosure of the text messages.

The State argues that even if former counsel had not disclosed the texts well before trial, he would have had to disclose the incriminating ones eventually, either as reciprocal discovery based on the decision to call Marion Newton, or as a matter of candor to the tribunal during her testimony. SB 43-46. The State argues that Newton and Marion "each testified contrary to the messages." SB 44. The State provides examples and then asserts:

> The defendant's argument assumes he could have testified in his own defense, insisted that Marion testify, and an ethical trial counsel could have nonetheless withheld the texts. This is inconceivable.

SB 44. The State's argument does not cite to anything in the record, including Newton's opening brief, when asserting that the defendant's argument makes these assumptions.

It is the State, however, that is making unwarranted assumptions. The State's argument implicitly assumes that Newton made a fully informed decision to call Marion as a witness, made a fully informed decision to disclose the text messages, and made a fully informed decision to take the stand in his own defense. SB 36-33, 40-42, 44-45. Relying on those assumptions, the State concludes that any of these decisions standing alone would have inevitably resulted in disclosure of the texts, and thus Newton cannot show

prejudice on appeal. *E.g.*, SB 45 (The messages "directly contradicted aspects of the defendant's and Marion's testimony," such that "[t]he defendant's objection is… reduced to one of the timing of the disclosure….").

But the record shows that these assumptions are unwarranted. None of Newton's preferences as to handle his trial could be characterized as fully informed, when he was represented by an attorney whose assessment of the case was so distorted, he failed to perceive that the text messages were incriminating. Indeed, a single sentence in the State's brief gives away the game: "Trial counsel's views of the texts as helpful may have proven unreasonable, but this does not negate the defendant's fully informed choice to disclose them." SB 42-43. But if trial counsel's assessment of the texts was unreasonable, and trial counsel is the person advising and representing Newton, how could Newton have made a fully informed decision? Because the State's arguments rely on assumptions that are not warranted by the record, this Court should reject them.

The more reasonable reading of this record is that trial counsel's assessment of the impact of the texts on the trial was so off-base, he could not have provided effective counsel to his client on related decisions such as whether to call Marion and whether to testify in his own defense. Indeed, the State's argument makes more sense when it is flipped on its

head: Trial counsel's assessment of how to handle the text messages provided by his client was so objectively unreasonable, he could not have effectively discharged his duty to ensure that any of his client's preferences of how to handle the case were fully informed.

Accordingly, the lower court correctly held that former counsel provided ineffective assistance of counsel in disclosing the texts.

D. The disclosure of the text messages did inflict prejudice to the outcome of the trial, rather than merely to the outcome of the sentencing hearing.

In his opening brief, Newton briefed the issue of prejudice, DB 30-35, and will not repeat those arguments here. Newton merely responds to two points in the State's brief. First, the State argues that disclosure of the text messages did not inflict prejudice because "Marion's testimony also proved his guilt." SB 49. But this is just another example of the State's circular argument: 1) Because the disclosed text messages were incriminating, Marion's testimony inflicted no additional prejudice; and 2) Because Marion's testimony was a disaster, disclosure of the text messages inflicted no additional prejudice. The better view is that each of these decisions was catastrophic, and each was the result of trial counsel's ineffective representation.

Second, the State makes the strong and unwarranted accusation that Newton "by his own admission, … ignored his father's dying wish to care for his mother, and made that admission after lying about it under oath on the stand." SB 51. Concededly, if the record demonstrated that Newton had lied under oath during trial, that would make it more difficult for him to show prejudice resulting from his counsel's errors made before and during trial. But there is nothing in the record, including the record citations provided by the State, that supports the accusation that Newton lied under oath.

Newton testified that after following his father's instructions and relying on the advice of a financial planner to effectively change the IRA trust beneficiary to himself by moving funds into successor IRAs, he considered the funds to be his own. T3. 466-67, 484. He explained that legally he considered the money to be his own, but he considered himself to be under a moral obligation to use the funds for his mother's care. T3. 484. He went on to agree that he "did use a lot of that money on some of [his] own needs." T3. 485. While he may not have lived up to the moral commitment that he believed he had made, there is no basis to equate this with lying under oath as the State does it in its brief.

II. THE DECISION TO CALL MARION AS A WITNESS.

A. Newton did preserve the "fully informed" aspect of this issue for appellate review.

The State argues that Newton failed to preserve the fully informed issue with respect to Newton's insistence on calling Marion as a witness. SB 36. However, Newton did preserve this issue by arguing that the decision to disclose the text messages and decision to call Marion were intertwined. DB 19; T-H. 14. Thus, counsel argued: "If the prosecution's right that calling Marian gives rise to that obligation [to disclose the texts], then that just forecloses any reasonableness in calling Marion. You cannot call Marion as a witness." T-H. 21. Counsel further argued: "The choice to use [the text messages], and the choice to call Marion, was not an informed decision on Mr. Newton's part."[2] *Id.* at 25.

Newton again preserved the issue in further detail in his objection to the State's motion to reconsider. Therein, Newton argued:

> If counsel knew at the time that it would be ineffective assistance of counsel to disclose the messages, and believed that he would be required to do so if Marion or Newton testified inconsistently with the messages, he

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[2] While counsel's oratory was not fully informed by the basic rules of grammar, in that multiple subjects preceded a singular verb, "was," the use of the word "and" conveys counsel's intention to argue that neither choice was fully informed.

> would have had that conversation with his client prior to trial. He would have made clear that providing ineffective assistance of counsel is not an option, regardless of the client's wishes.... If former counsel had that conversation with his client prior to trial, his client may have formed a different view about whether Marion should testify. If he had that conversation with his client prior to trial, his client may have been more cautious to present his own testimony in a way that would be truthful without risking opening the door to an obligation to disclose the messages.

App. V1. 210-211.

Accordingly, this Court should reject the State's argument that counsel failed to preserve the issue.

B. Former counsel's misapprehension of the incriminating nature of the text messages did impact the decision to call Marion.

Multiple considerations support the conclusion that trial counsel failed to fully inform Newton with respect to the decision to call Marion as a witness. First and foremost, there is trial counsel's failure to perceive the incriminating impact of the messages. If he didn't perceive that the 09/01/15 "better than giving it to that whore" message sent by Marion was profoundly incriminating, how could he effectively advise Newton as to the decision to call Marion as a witness?

But beyond that, there are other problems with trial counsel's assessment or non-assessment of the risks entailed in disclosing the messages. In his deposition, trial counsel acknowledged that he did not recall contemplating the

possibility that the prosecution could introduce the incriminating text messages under the "statement of party opponent," exception to the definition of hearsay, N.H. Rules of Evid. 801(d)(2); but at the same time Newton could be barred by the basic hearsay rule from introducing the messages he perceived as helpful. App-V1. 293. It is axiomatic that the hearsay rule is asymmetrical, such that admissibility is often governed simply by which party is eliciting the out-of-court statement. But trial counsel could not recall having that critical conversation with his client: In a worse case scenario, only the incriminating and prejudicial messages would come in.

In conclusion, because counsel did not perceive the incriminating nature of the messages, did not have a plan for how to use them at trial as argued in Newton's opening brief, and did not inform Newton of the risk that rules of evidence could bar the 'helpful' messages while admitting the incriminating messages, he could not have fully informed Newton of the risks associated with calling Marion as a witness.

C. <u>The decision to call Marion as a witness did inflict prejudice.</u>

The lower court found that former counsel did not render ineffective assistance of counsel in calling Marion as a

witness, based solely on the *Candello* decision. Accordingly, the lower court did not address the issue of prejudice.

If this Court rules that the lower court erred in relying on *Candello* to reject the claim that calling Marion as a witness constituted ineffective assistance of counsel, this Court should find that the decision did inflict prejudice based on several considerations.

First, that the State did not preserve the argument it makes now in the lower court. It did not argue the prejudice prong of the *Strickland* standard, and "concede[d] that Marion's testimony was more inculpatory than exculpatory." App-V1. 128-144; Add. 22. Indeed, in the section of its brief discussing whether disclosure of the text messages inflicted prejudice, the State asserts: "[J]ust as trial counsel warned, Marion's testimony also proved his guilt." SB 49. The State's arguments should be rejected as unpreserved for appeal.

Second, as discussed in Newton's opening brief, the decision to call Marion provided the prosecution a platform to introduce or place additional emphasis on incriminating text messages no less than 38 times during her testimony. DB 33; T3. 326, 331, 332, 336, 348, 351, 352, 354, 355, 356, 357, 358, 359, 360, 361, 363, 364, 366.

Third, Marion's testimony inflicted constitutional prejudice because she was a poor witness, unable to follow the basic rules that all witnesses must follow, and unable to follow the

judge's instructions and admonitions. This resulted in no less than seventeen interruptions of her testimony, as described in Newton's opening brief. DB 36-37.

Because trial counsel disclosed incriminating and prejudicial messages, and then called a witness that, according to the State, "also proved his client's guilt," SB 49, he rendered ineffective assistance of counsel, which inflicted constitutional prejudice. This Court should reverse the lower court's Order and order a new trial.

CONCLUSION

WHEREFORE, Mr. Newton respectfully requests that this Court reverse and order a new trial. In the alternative, if this Court affirms the order denying the motion for new trial, Newton asks that this Court affirm the order granting a sentence review hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Reply Brief was electronically filed on May 5, 2021. Copies of this brief will be distributed to all registrants subscribed to this e-filing matter, including Bryan Townsend and Sean Gill, Esqs., New Hampshire Attorney General's Office, and one copy will be sent by first class mail to Jerry Newton.

Theodore Lothstein

CERTIFICATE OF WORD COUNT

I further certify pursuant to New Hampshire Supreme Court Rules 16(11) and 26(7), that the body of this reply brief, exclusive of pages containing the table of contents, tables of citations, and any addendum, contains 2864 words, which is less than the limit of 3,000 words.

Theodore Lothstein