Supreme Court of Ohio Clerk of Court - Filed November 23, 2015 - Case No. 2015-1892

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Appellee,	:	On Appeal from the Hamilton
	:	County Court of Appeals,
v.	:	First Appellate District
	:	
MALIK RAHAB,	:	Court of Appeals
	:	Case No. C-1500186
Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MALIK RAHAB

Raymond T. Faller (0013328)
Hamilton County Public Defender
Marguerite Slagle (0082217)
(Counsel of Record)
Demetra Stamatakos (0093803)
Law Office of the Hamilton County
Public Defender
230 East Ninth Street, Second Floor
Cincinnati, Ohio 45202
Phone: (513) 946-3838
Fax: (513) 946-3808
Email: mslagle@cms.hamilton-co.org

Counsel for Appellant, Malik Rahab

Joseph T. Deters (0012084)
Prosecuting Attorney
Scott Heenan (0075734)
(Counsel of Record)
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3000
Fax: (513) 946-3017
Email: scott.heenan@hcpros.org

Counsel for Appellee, State of Ohio

TABLE OF CONTENTS

This Case Involves a Substantial Constitutional Question and is a Case of Public or Great General Interest.....1

Statement of the Case and Facts.....5

Law and Argument.....6

Sole Proposition of Law: To overcome the inference a sentence is based on a trial tax, the sentencing court must unequivocally state the sentence was not based on the decision to go to trial.....6

Conclusion.....8

Certificate of Service.....8

Appendix Appx. Page

Judgment Entry of the Hamilton County Court of Appeals.....a-1

THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Malik Rahab was punished for exercising his constitutional right to a jury trial in violation of his federal and due process rights. The record of that fact is unequivocal. After a jury trial, Mr. Rahab was found guilty of burglary. While walking home one evening, he was tempted by a purse sitting on a table. He opened a window, reached in, and grabbed the purse. No weapons were involved, no property was damaged, and no one was hurt. Mr. Rahab admitted his guilt at the sentencing hearing and to the probation officer completing the presentence investigation. But the trial court was disturbed that Mr. Rahab refused a plea agreement and elected to go to trial. After extensive comments denigrating his decision to go to trial, the court sentenced him to six years. The trial court made the following remarks before sentencing Mr. Rahab:

> * * * [W]hy [wouldn't you] admit to that and plead to that, and you had to have a trial, or why you wouldn't take the three years because I can sentence you to eight. Makes no sense to me. So I don't know what you talked about with to your attorney, but – too late. You went to trial. You gambled, you lost. You had no defense. And you even admit that you did it, and yet you put this woman through this trial again. You traumatized her by breaking into her house. And then you had to traumatize her again to relive it and go to trial. I don't get it.
>
> I sure wish I would have heard that before trial.
>
> Own up now. Okay. Little Late.
>
> [D]id he admit it at trial? He did not. The state offered him three, and he didn't take it. He went to trial with a prove-it defense. He had absolutely no defense. They had his fingerprints. He gambled. He lost. I'm sorry, you know right from wrong, but it just does not – it's like yeah, now that it's all over, oh, I'm sorry I got caught, I'm sorry I got – I went to trial and I lost. Too late. Too late. To me, too late.
>
> But he knows right from wrong, and I'm one of the judges, you break into someone's house, you're going to prison. You don't do that. He has not-he went to trial. He lost, he gambled.

Well, guess what, you lost your gambling. You did this. You had no defense, and you wouldn't take responsibility. You wanted to go to trial. All right, big winner you are. Six years Ohio Department of Corrections.

The First District Court of Appeals acknowledged the sentencing court's comments were "not necessary" and "inappropriate." *State v. Rahab,* 1st Dist. Hamilton No. C-150186, p. 3 (1st Dist. 2015). And the court recognized the comments "could have been deemed to have crossed the line from permissible commentary to a punishment for exercising the constitutional right to a jury trial." *Id.* Yet, the First District erroneously concluded that "the record" established the sentence was not a punishment for exercising the right to trial because the sentencing court briefly referenced Mr. Rahab's juvenile history and his failure to take responsibility (i.e. refusal to plead guilty). *Id.* Absent an unequivocal statement the sentence was not based on the decision to go to trial, the sentence was an unconstitutional trial tax. *State v. Scalf*, 126 Ohio App.3d 614, 621, 710 N.E.2d 1206 (1998). *See also State v. Morris*, 159 Ohio App.3d 775, 825 N.E.2d 637, 2005-Ohio-962, ¶ 13 (4th Dist.) (holding when a trial curt creates an inference the sentence is a trial tax, the sentence must be vacated unless the record also contains an unequivocal statement that the defendant's decision to go to trial was not considered in imposing the sentence.). The unencumbered right to a jury trial involves a substantial constitutional issue of great public importance.

STATEMENT OF THE CASE AND FACTS

Malik Rahab was convicted of burglary for opening a window to a home, reaching inside, and taking a purse off of a table. He was offered a plea deal of three years, but he rejected the offer. At that time, the court explained that if Mr. Rahab were found guilty, the court would impose a greater sentence. The court explained it "does not look highly on cases where people

don't take responsibility and accept that they did something wrong if they're found guilty. You understand that? Meaning it would probably be more. I'm not going to fool you. You understand that?" Despite the warning, Mr. Rahab elected to go to trial and was convicted by a jury.

Afterward, Mr. Rahab met with a probation officer and admitted to stealing the purse. He also admitted it at the sentencing hearing. The court was "perplexed" as to why he "wouldn't admit to that and plead to that, and you had to have a trial, or why you wouldn't take the three years because I can sentence you to eight. Makes no sense to me." The court continued, "[s]o I don't know what you talked about with to your attorney, but – too late. You went to trial. You gambled, you lost. You had no defense. And you even admit that you did it, and yet you put this woman through this trial again. You traumatized her by breaking into her house. And then you had to traumatize her again to relive it and go to trial. I don't get it."

When Mr. Rahab tried to apologize and take responsibility several times, the court responded, "I sure wish I would have heard that before trial" and "[o]wn up now. Okay. Little late." Even when Mr. Rahab's brother spoke on his behalf, the court reiterated its displeasure that Mr. Rahab insisted on a trial. The court retorted: "He did not. The state offered him three, and he didn't take it. He went to trial with a prove-it defense. He had absolutely no defense. They had his fingerprints. He gambled. He lost. I'm sorry, you know right from wrong, but it just does not – it's like yeah, now that it's all over, oh, I'm sorry I got caught, I'm sorry I got – I went to trial and I lost. Too late. Too late. To me, too late."

The court's final words to Mr. Rahab before imposing sentence were: "You wanted to go to trial. All right, big winner you are. Six years Ohio Department of Corrections."

LAW AND ARGUMENT

Sole Proposition of Law: To overcome the inference a sentence is based on a trial tax, the sentencing court must unequivocally state the sentence was not based on the decision to go to trial.

The United States Supreme Court has repeatedly held that "penalizing those who choose to exercise constitutional rights 'would be patently unconstitutional.' " *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072 (1969) citing *United States v. Jackson*, 390 U.S. 570, 581 (1968). A defendant should never be penalized for refusing to enter a plea agreement and election a trial. *State v. O'Dell*, 45 Ohio St.3d 140, 142, 543 N.E.2d 1220, at paragraph two of the syllabus (1989). A trial court cannot enhance a sentence because a defendant elects to require the government to prove his guilt, 'no matter how overwhelming the evidence of [defendant's] guilt.'" *State v. Scalf*, 126 Ohio App.3d 614, 620, 710 N.E.2d 1206 (1998), quoting *United States v. Derrick*, 519 F.2d 1, 3 (6th Cir. 1975).

The imposition of a trial tax unconstitutionally impairs the right to trial. *State v. Scalf*, 126 Ohio App.3d 614, 621, 710 N.E.2d 1206 (1998) citing *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973). The *Scalf* court articulated a simple test to determine when a sentence is an unconstitutional trial tax: where such an appearance has been created, the appellate court must determine whether the sentencing court clearly stated the sentence was not based on the decision to go to trial. *Id.* "Absent an unequivocal statement, the sentence will be reversed and the matter remanded for resentencing." *Id.*

Here, the First District acknowledged that court's comments were "inappropriate" and "could have been deemed to have crossed the line from permissible commentary to a punishment for exercising the constitutional right to a jury trial." *Rahab* at p. 3. Yet the appellate court ignored the *Scalf* directive to determine whether the trial court unequivocally stated the sentence

was not based on the decision to go to trial. Instead, the court concluded "the record" supported the sentence because Mr. Rahab had an extensive juvenile history, discussed his trial counsel's recommendation to go to trial, and the trial court "could plausibly have found that Rahab's offered apology was disingenuous." *Id.* The First District is wrong. Absent an unequivocal statement the sentence was not based on the decision to go to trial, "the record" cannot overcome the overwhelming appearance that Mr. Rahab's sentence was a trial tax. *Scalf* at 621.

The First District completely ignored the test set forth in *Scalf.* The court was satisfied with the sentencing court's mere mention of Mr. Rahab's juvenile record and the trial court's perception that he failed to take responsibility. Whenever Mr. Rahab tried to take responsibility and apologize at his sentencing hearing, he was told it was too little, too late or that his apologies should have come before trial. The demands of the sentencing court that Mr. Rahab take responsibility before trial, and its refusal to accept a post-trial apology, directly conflict with a defendant's constitutional right to trial.

The court repeatedly questioned Mr. Rahab's decision to go to trial. It admonished him for his decision no less than 10 times in a short 20-page sentencing transcript. The sentencing court mentioned Mr. Rahab's juvenile record only once toward the end of the hearing. The court then followed up the comment on his record with another comment about him going to trial when he had no defense. The court also said he would not take responsibility and followed up that statement by saying he wanted to go to trial, then sarcastically referred to him as a "big winner" and sentenced him to 6 years. The court's two justifications for Mr. Rahab's sentence were preceded by and intertwined with comments about having no defense at trial, gambling and losing, and apologies that should have come before trial.

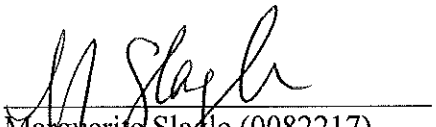
The statements by the court created an inference that Mr. Rahab was sentenced for exercising his right to a jury trial. To ensure that a defendant's choice to exercise his right to a jury trial is not impaired, there needs to be an unequivocal statement on the record that rebuts the inference. *Id.* Here, there is no such statement on the record. The First District's conclusion that the sentencing court cured the effect of its comments by merely mentioning two permissible sentencing factors was erroneous. *Id.* The court's comments fall far short of making an unequivocal statement on the record. The record shows a frustrated judge that sentenced a defendant for exercising his constitutional right to trial. This practice will undoubtedly have a chilling effect on future defendants considering exercising their right to a jury trial in the First District.

CONCLUSION

Because the record is clear that the sentencing court punished Malik Rahab for exercising his right to a jury trial, this Court should accept jurisdiction over this case, protect a defendant's decision to exercise his right to a jury trial without the fear of a trial tax, and reverse the First District Court of Appeals.

Respectfully submitted,

Raymond T. Faller (0013328)
Hamilton County Public Defender

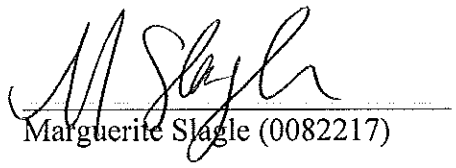


Marguerite Slagle (0082217)
(Counsel of Record)
Law Office of the Public Defender
230 East Ninth Street, Second Floor
Cincinnati, Ohio 45202
Phone: (513) 946-3838
Fax: (513) 946-3808
Email: mslagle@cms.hamilton-co.org

Counsel for Appellant, Malik Rahab

CERTIFICATE OF SERVICE

I certify that a copy of the Memorandum in Support of Jurisdiction was served on Scott Heenan via email to scott.heenan@hcpros.org on November 23, 2015.



Marguerite Slagle (0082217)