

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0457-09T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

R.W.H.,

Defendant-Appellant.

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Submitted October 16, 2013 – Decided December 13, 2013

Before Judges Reisner and Alvarez.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FO-09-423-09.

Law Offices of Abdelhadi & Associates, LLC, attorneys for appellant (Abdelmageid Abdelhadi, on the brief).

Gaetano T. Gregory, Acting Hudson County Prosecutor, attorney for respondent (Peter J. Baker, Special Deputy Attorney General/ Acting Assistant Prosecutor, on the brief).

PER CURIAM

On August 5, 2009, defendant R.W.H. was convicted of disorderly persons contempt, N.J.S.A. 2C:29-9(b), and the petty

disorderly persons offense of harassment, N.J.S.A. 2C:33-4.<sup>1</sup> In his findings, the trial judge, while acknowledging that the complaint did not specify which section of the statute applied, stated:

After considering all of the testimony I'm satisfied that the State proved beyond a reasonable doubt that a phone call was made by [R.W.H.] on April 7th at approximately 9:05 p.m. to the home of [T.J.] in violation of the restraining order, telling her that now she was going to lose her Section 8. It's consistent with [defendant] attempting to show [T.J.] that she is not beyond his reach; [T.J.] merely wants to be left alone from [defendant]. Whether or not [T.J.] would lose her Section 8 is not material, the violation is that he made this phone call with the intention to annoy and alarm [T.J.]. Even though the phone call wasn't received by [T.J.] it was made to her house and I'm satisfied that that would constitute harassment and therefore a violation of the restraining order. A judgment of guilty would be entered on both counts.

Defendant was sentenced to two years' probation and sixty days in the Hudson County jail, thirty days more than requested by the State. For the reasons that follow, we vacate the convictions. We remand the matter for a new trial.

Defendant and T.J. have five children. Each has a final restraining order (FRO) against the other issued under the

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<sup>1</sup> The complaint lodged by the victim does not indicate which section of the statute was allegedly violated, (a) or (c).

Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35.

At the time of trial, T.J. was married to Z.B.

Z.B. testified that on the evening of the day custody of three of the five children was transferred from T.J. to defendant, April 7, 2009, he answered a call during which he alleged he heard defendant say "b-tch, you're going to lose your Section 8." The caller did not identify himself. Minutes earlier, T.J. had answered the telephone and heard nothing more than a tapping on the line. She hung up, and Z.B. answered the next call.

During his testimony, Z.B. acknowledged his extensive criminal record, use of aliases, and the fact that on an earlier occasion he, using an alias, had filed a complaint against defendant. The caller ID device associated with T.J.'s phone did not show defendant's number. It was later established the number displayed was that of a relative of Z.B.

Defendant did not testify on his own behalf. The trial, although quite brief, because of scheduling conflicts carried over into a second day. On that second day, court resumed in defendant's absence at 9:30 a.m. It was then that the court refused to allow defense counsel to present Z.B.'s relative, from whose home the call allegedly originated, to testify that defendant was not at his home on that date and time. The judge

barred the witness on the grounds that defendant had given inadequate notice of an alibi defense to the State. See R. 3:12-2.

As the proceedings came to a close the first day, defense counsel and the judge engaged in the following colloquy:

[Defense Counsel]: Your Honor, I just need to speak to my client for a moment --

Court: You can speak --

[Defense Counsel]: -- but before I do -  
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Court: You speak to him between now and 9:00 and tomorrow morning.

[Defense Counsel]: Your Honor, I have a trial in Weehawkin, but I'll come here tomorrow -- I'll come here tomorrow morning at 9:00.

Court: 9:30.

[Defense Counsel]: That's fine, Your Honor.

The next morning, before defendant arrived, the judge and counsel continued their discussion:

[Defense Counsel]: Your Honor, . . . I have no intention of calling my client but I . . . do have to advise him of his constitutional rights.

THE COURT: I told you to advise him of his constitutional rights last night before we broke.

[Defense Counsel]: Well, I told him . . . if I can reiterate to the Court that

. . . he doesn't have to go forward, nothing can be held against him.

THE COURT: I'm familiar with the . . . advisory notice that you have to give your client and I would normally voir dire him as to that effect. He is not here to be voir dire'd. You would rest?

[Defense Counsel]: Yes, Your Honor, I would rest.

THE COURT: You want to sum up? Do you want to sum up?

[Defense Counsel]: Yes I do, Your Honor.

Your Honor, essentially this case rises and falls on the testimony of [Z.B.] There is some degree of corroboration by [T.J.] but nevertheless . . . they both have a commonality of interest. I think it's safe to assume that at some point in time either before or after there was animosity between [Z.B.] and [defendant]. Clearly there was an issue with Section 8. Both of them testified and we played the tape from the landlord that there was some kind of Section 8 issue. They both testified that with the removal of three children to [defendant]'s custody, with the removal --

At that point, defendant arrived in the courtroom, and the judge interjected:

THE COURT: The record will reflect that [defendant] came in, it's now, according to the clock on the wall, 9:53.

[Defendant]: I apologize, Your Honor.

THE COURT: We started the case in your absence, [R.W.H.], we told you to be here --

[Defendant]: Yes, Your Honor.

THE COURT: You were told to be here at 9:30. I don't want any explanation, have a seat.

Defendant does not have prior convictions. Nonetheless, for reasons not explained on the record, the judge had been acquainted with him since approximately 1997, and repeatedly referred to defendant's chronic inability to appear timely in court.

After sentence was imposed, the judge granted defendant's request for a stay on the basis that he had:

suppressed the testimony of [the alibi witness]; two, I proceeded this morning in the absence of [defendant], he was told . . . the matter would be carried to nine o'clock this morning, I told counsel to be here at 9:30, he did not show up until . . . at least 9:50, so there is some merit to an appeal. Bail will be continued pending appeal.

On appeal, defendant raises the following points:

- I. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY COMMENCING TRIAL WITHOUT DEFENDANT PRESENT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.
- II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR FOR FAILING TO ADVISE DEFENDANT OF THE CONSEQUENCES OF DEFENDANT'S FAILURE TO APPEAR FOR TRIAL.

III. DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE MATTER SHOULD BE REMANDED FOR A NEW TRIAL BECAUSE THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

a. Failing to notify the State of Defendant's alibi witness.

b. Failing to advise Defendant of his constitutional right to testify at trial.

c. Counsel failed to diligently represent the Defendant.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING AN AUDIO RECORDING THAT WAS NOT PROPERLY AUTHENTICATED INTO EVIDENCE.

V. THE CUMULATIVE IMPACT ON TRIAL COUNSEL'S INEFFECTIVENESS AND THE TRIAL COURT'S ABUSE OF DISCRETION DENIED DEFENDANT THE RIGHT TO A FAIR TRIAL.

A trial judge is accorded wide discretion in the manner in which proceedings are conducted. D.G. ex rel. J.G. v. N. Plainfield Bd. of Educ., 400 N.J. Super. 1, 26 (App. Div.), certif. denied, 196 N.J. 346 (2008). That discretion, however, is subject to appellate review for abuse of discretion. State v. Castoran, 325 N.J. Super. 280, 285 (App. Div. 1999) (quoting Ryslik v. Krass, 279 N.J. Super. 293, 297 (App. Div. 1995)), certif. denied, 163 N.J. 78 (2000).

The trial judge in this case did not ask defendant to state the reason he was late to court. In fact, he summarily told

defendant to be seated and that he did not "want any explanation." The judge made no inquiry of defendant with regard to his right to testify. And unlike with a jury trial, the judge could have easily interrupted the proceedings. We understand the frustration caused by litigants who are habitually late to court. However, this defendant had just been awarded custody of three of his children. If convicted, he could have been sentenced to up to six months in county jail on the disorderly persons contempt alone. The judge should have given defendant a chance to explain why he was late and should have given defendant an opportunity to testify.


The right of an accused to testify at a criminal trial is rooted in the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Rock v. Arkansas, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 2709, 97 L. Ed. 2d 37, 46-47 (1987). The importance of that right cannot be minimized. In this trial, the proofs against defendant consisted of only one person's testimony, and that person may have had more than a passing interest in the outcome. Thus, the court should have afforded counsel the opportunity to confer with his client, then allowed defendant to state if he wished to testify. Had defendant expressed the desire to testify on his own behalf, the court would have been obliged to allow it. This failure amounted to a



prejudicial abuse of discretion in the manner in which the trial was conducted. Accordingly, we vacate the convictions and remand for a new trial. Since defendant will have an opportunity to present an alibi notice on remand, we need not address that issue or defendant's several other points.

Reversed and remanded for a new trial.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION