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SUMMARY
January 6, 2021

2022COA2

No. 19CA1713, *People v. Johnson* — Attorneys and Clients — Ineffective Assistance of Counsel; Constitutional Law — Sixth Amendment — Right to Counsel — Right to Self-Representation — Right to Decide the Objective of the Defense — Right to Forgo a Defense

As a matter of first impression, the division considers whether a competent defendant has the right to forgo a defense and, in so doing, effectively gives up his right to effective assistance of counsel during trial. In *McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500 (2018), the United States Supreme Court addressed the tension between Robert McCoy's autonomy to decide the object of the representation and his counsel's contrary actions admitting McCoy's guilt in a death penalty case, ultimately concluding that there was structural error mandating reversal where counsel overrode McCoy's autonomy. We see no principled reason why

McCoy's rationale does not apply outside of the death penalty context. Here, Shane Johnson unambiguously, voluntarily, intelligently, and knowingly, *People v. Bergerud*, 223 P.3d 686, 689 (Colo. 2010), instructed his counsel not to mount a defense. Like *McCoy's* decision to maintain his innocence, Johnson's right to not mount a defense is an objective of representation. Having exercised that right, he cannot now fault his counsel for respecting that wish by not mounting a defense.

Court of Appeals No. 19CA1713
Mesa County District Court No. 08CR1323
Honorable Richard T. Gurley, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Shane Johnson,

Defendant-Appellant.

ORDER AFFIRMED

Division A
Opinion by JUDGE FOX
Freyre and Lipinsky, JJ., concur

Announced January 6, 2022

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Leslie A. Goldstein, Alternate Defense Counsel, Steamboat Springs, Colorado, for Defendant-Appellant

¶ 1 Defendant, Shane Johnson, appeals the postconviction court's order denying his ineffective assistance of trial counsel claim based on his attorney's adherence to his instruction not to mount a defense. Although our reasoning differs from that of the postconviction court, we conclude that the postconviction court properly denied Johnson's ineffective assistance of counsel claim because (1) there was no suggestion that Johnson was incompetent or that his decision to forgo a defense was not voluntary and knowing and (2) he explicitly and unambiguously instructed trial counsel not to mount a defense.

I. Relevant Facts and Procedural History

A. Felony Escape Case

¶ 2 The prosecution presented evidence that, while housed at the Mesa County jail awaiting sentencing on felony charges, Johnson escaped from the facility with his wife's assistance. Johnson and his wife then fled to Mexico. They were apprehended about a year later and Johnson was charged with felony escape.¹

¹ Though Johnson was also charged with three habitual criminal counts, the prosecution later dismissed those counts.

¶ 3 Dissatisfied with the Department of Corrections' (DOC) alleged interference with his ability to communicate with counsel, Johnson asked, pro se, that the charges be dismissed. Later, Johnson indicated, through counsel, that he wanted to represent himself. When the court refused to dismiss, Johnson asked for a continuance so that he could locate a witness who allegedly would testify that Johnson was intoxicated when he escaped, thereby negating the requisite mental state for the escape charge. The court denied that request for a continuance and Johnson's renewed motion to continue the trial — reasserting the communication difficulties and the need to locate the witness — made on the first day of trial.

¶ 4 A frustrated Johnson instructed his counsel not to mount a defense. Counsel requested, and was granted, a closed session with the court. In that session, the court received assurances from Johnson that he made his decision voluntarily and knowingly and with counsel's advice about the consequences of his decision. Johnson also affirmed he wanted counsel to continue on the case. Significantly, there is no suggestion in the record that Johnson was

not competent to make the decision. At no time did Johnson's counsel suggest he lacked that competence.

¶ 5 Trial proceeded, but Johnson's counsel did not participate in voir dire, did not give an opening statement, and did not cross-examine witnesses. The prosecution presented evidence that, as he awaited sentencing on other convictions, Johnson used bed sheets to lower himself from the window of the detention facility and then used a hacksaw to cut the fence surrounding the facility. Video footage confirmed some of this evidence. Johnson's wife also testified that she picked up Johnson from the jail, as they had previously arranged, before they fled to Mexico.

B. Direct Appeal

¶ 6 On direct appeal, Johnson argued that the trial court erred by denying his motion to dismiss the escape charge because the DOC failed to promptly inform him of the detainer lodged against him. *See People v. Johnson*, (Colo. App. No. 11CA2219, Oct. 16, 2014) (not published pursuant to C.A.R. 35(f)). In that appeal, Johnson attempted to raise ineffective assistance of counsel claims based on counsel's alleged failure to investigate his case and failure to communicate with him. The division affirmed the trial court's order

denying his motion to dismiss and declined to address his ineffective assistance of counsel claims because a factual record had yet to be developed. *Id.*

C. Postconviction Proceeding

¶ 7 Johnson moved for postconviction relief under Crim. P. 35(c), alleging that trial counsel provided ineffective assistance by failing to subject the prosecution’s case to meaningful adversarial testing and that, under *United States v. Cronin*, 466 U.S. 648 (1984), prejudice was presumed.² The prosecution responded that *Strickland v. Washington*, 466 U.S. 668 (1984) — requiring a defendant to prove there is a reasonable probability that, but for his attorney’s deficient performance, the result of the proceeding would have been different — provided the operative legal framework and that, given the evidence presented at trial, Johnson could not establish prejudice.

² Because Johnson does not reassert the claims of ineffectiveness he tried to raise on direct appeal, we deem them abandoned. See *People v. Delgado*, 2019 COA 55, ¶ 9 n.3 (“We deem abandoned, and won’t address, the seven claims that defendant raised in his Rule 35(c) motion but didn’t discuss on appeal.”); *People v. Osorio*, 170 P.3d 796, 801 (Colo. App. 2007) (“[T]hose claims raised in defendant’s postconviction motion, but not reasserted here, have been abandoned on appeal.”).

¶ 8 The postconviction court held an evidentiary hearing on Johnson's ineffective assistance of counsel claim. Having considered the evidence and arguments presented, the postconviction court denied Johnson's ineffective assistance of counsel claim. While it assumed that counsel was ineffective, the court declined to apply *Cronic* and concluded that Johnson had not proved prejudice as required by *Strickland*.

II. Standard of Review and Legal Principles

A. Standard of Review

¶ 9 A claim of ineffective assistance of counsel presents a mixed question of fact and law. *Dunlap v. People*, 173 P.3d 1054, 1063 (Colo. 2007); *People v. Stovall*, 2012 COA 7M, ¶ 18. Though we defer to the trial court's findings of fact if they are supported by the record, we review the court's legal conclusions de novo. *Dunlap*, 173 P.3d at 1063.

¶ 10 Like a waiver of counsel or the denial of the right to present a defense, a defendant's decision to forgo a defense presents a mixed question of fact and law. See *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010) (waiver of counsel); *Bernal v. People*, 44 P.3d 184, 198 (Colo. 2002) (right to present a defense); see also *People v. Blehm*,

983 P.2d 779, 792 & n.9 (Colo. 1999) (waiver of the right to testify at trial).

B. Decision to Defend: Is it Counsel's or Defendant's to Make?

¶ 11 A criminal defendant has the right to make certain key decisions — if they are made voluntarily, intelligently, and knowingly — including whether to represent himself. Colo. Const. art. II, § 16. Indeed, some decisions are deemed “fundamental” — such as a decision whether to plead guilty or to appeal — where they relate directly to the objectives of the representation. *Bergerud*, 223 P.3d at 693-94 (decisions such as whether to plead guilty, testify, or waive a jury trial are so fundamental, they must be made by a defendant himself); *see also* Crim. P. 44(a) (“No lawyer need be appointed for a defendant who, after being advised, with full knowledge of his rights thereto, elects to proceed without counsel.”); Colo. RPC 1.2(a) (a lawyer must abide by a client’s decisions concerning the objectives of representation).

¶ 12 As we understand it, “objectives of the representation” means the client’s goal in the case. *McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500, 1505 (2018) (recognizing that “it is the Defendant’s prerogative, not counsel’s, to decide on the objective of his defense);

584 U.S. at ___, 138 S. Ct. at 1508 (“Autonomy to define that the objective of the defense is to assert innocence belongs in this latter category These are not strategic choices about how best to achieve a client’s objectives; they are choices about what the client’s objectives in fact are.”). For example, while the accused should receive full advice before entering a guilty plea, the defendant himself must ultimately make the decision. The lawyer can, and should, inform the client of the likely consequences of a plea decision, but only the defendant will bear those consequences or accept the ramifications of going to trial.

¶ 13 Other fundamental decisions, such as whether to forgo assistance of counsel, to waive a jury trial, or to testify on one’s own behalf, sound like strategic decisions because they relate to the means the defense invokes in seeking the primary object of the representation — namely, a favorable end result. But these decisions are so personal to the fate of an accused that they are as compelling as deciding the objectives of the representation. As the United States Supreme Court explained in *Faretta v. California*, 422 U.S. 806, 834 (1970), “although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of

“that respect for the individual which is the lifeblood of the law.” *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)); see also *Bergerud*, 223 P.3d at 693 (if Bergerud’s attorneys had prevented him from making fundamental choices, his choice between proceeding pro se and continuing with counsel would have been “constitutionally offensive”); *People v. Romero*, 694 P.2d 1256, 1264 (Colo. 1985) (because the right of self-representation furthers the basic value of personal autonomy, it is the defendant who must decide whether it is to his advantage to have counsel in his particular case).

¶ 14 As relevant here, while the United States Supreme Court has recognized that a defendant has a right to present a defense, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), it has not said whether a defendant’s right to autonomy includes a right to forgo a defense. Compare *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (noting that counsel has “ultimate responsibility” in determining “what defenses to develop”), with *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) (suggesting that a defendant would have the right to insist that his counsel forgo other

strategies more likely to produce a dismissal and rely exclusively on a claim of innocence).

¶ 15 In answering the question before us, it is useful to look at the United States Supreme Court's most recent pronouncement in a related context. In *McCoy*, the Supreme Court addressed the tension between McCoy's autonomy and his counsel's representation. Facing triple murder charges for the death of his estranged wife's mother, stepfather, and son, McCoy proclaimed his innocence throughout trial. Larry English, his attorney, employed a strategy contrary to his client's wishes: English conceded McCoy's guilt during the guilt phase of the capital trial in the hopes of establishing credibility with the jury to avoid a death sentence for McCoy during the penalty phase.

¶ 16 On appeal, the Louisiana Supreme Court affirmed McCoy's conviction, holding that the decision to concede guilt was within counsel's province. *State v. McCoy*, 2014-1449, p. 49-50 (La. 10/19/16). McCoy sought, and was granted, certiorari review by the United States Supreme Court. He argued that English violated his Sixth Amendment rights by conceding guilt over his objection. *McCoy*, 584 U.S. at ___, 138 S. Ct. at 1505. The Court reversed,

holding that McCoy’s insistent objection to conceding guilt should prevail even over counsel’s reasonable strategic decision. *Id.* at ___, 138 S. Ct. at 1508 (reasoning that among the rights guaranteed to a defendant by the Sixth Amendment is the “[a]utonomy to decide . . . the objective of [his] defense,” including whether the objective of that defense is to maintain an assertion of innocence even in the face of overwhelming evidence). By allowing English to override McCoy’s autonomy to decide the objective of his defense, the Court concluded, the trial court committed structural error mandating reversal and a new trial.³ *Id.* at ___, 138 S. Ct. at 1511. Thus, in death penalty cases, the defendant’s right to autonomy is weightier than his right to effective assistance of counsel. *Id.*; see also *Bell v. Cone*, 535 U.S. 685, 686 (2002) (a state appellate court correctly

³ Error is considered structural (1) when the right violated “‘is not designed to protect the defendant from erroneous conviction but instead protects some other interest,’ such as ‘the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty’”; (2) when the effects of the error “are too hard to measure, as is true of the right to counsel of choice”; and (3) when the error signals “fundamental unfairness,” as when a judge fails “to tell the jury that it may not convict unless it finds the defendant’s guilt beyond a reasonable doubt.” *McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500, 1511 (2018) (citations omitted).

used the *Strickland* performance-and-prejudice standard to evaluate a defendant's claim that his counsel had been ineffective during his sentencing hearing by failing to adduce mitigating evidence and waiving closing statement). *But see Florida v. Nixon*, 543 U.S. 175, 192 (2004) (where a capital defendant neither approved nor protested counsel's strategy to concede guilt, no "blanket rule demand[s] the defendant's explicit consent" to implementation of the strategy). The *McCoy* opinion, unfortunately, does not explain how the principle of autonomy, or the specific holding of the case, should be applied to other lawyer-client disagreements. Nor does the opinion address how counsel's withdrawal is a meaningful solution to the impasse.

¶ 17 The Ninth Circuit's decision in *Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993), a death penalty case, is also instructive. In his petition for habeas corpus, Jeffries alleged that his trial counsel had been ineffective by acquiescing in Jeffries' decision not to present mitigating evidence during the penalty phase of his trial. *Id.* at 1197. The lawyers responded that Jeffries had been "perfectly competent" and had made a "personal decision" not to present such evidence: "[w]hile we may not join in it, we believe that the decision

is personal enough and made knowingly, voluntarily and intelligently that, as his counsel, we have no choice but to adhere to his wishes.” *Id.*

¶ 18 The Ninth Circuit explained that counsel’s acquiescence in Jeffries’ decision was not ineffective assistance because Jeffries’ decision was “informed and knowing” and that, “when a defendant preempts his attorney’s strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made.” *Id.* at 1198 (quoting *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985)). The court concluded that “counsel for Jeffries had been prepared to present evidence in mitigation and had discussed with Jeffries the ramifications of failing to present the evidence. Accordingly, counsel did not deprive Jeffries of effective assistance in acquiescing in the [client’s] considered decision.” *Id.*; see also *State v. Thomas*, 625 S.W.2d 115, 124 (Mo. 1981) (counsel acted properly in deferring to the defendant’s decision not to call certain witnesses at trial because a defendant “may not be forced to accept major decisions of trial strategy if he is fully informed and voluntarily decides not to follow the advice of his lawyer,” and that “[i]t would be absurd to say that a defendant may waive the assistance of

counsel entirely and yet may not waive the benefit of counsel's advice with respect to a particular decision, such as whether or not to assert a particular defense").

¶ 19 It is true that the Supreme Court has not said whether its rationale in *McCoy* applies equally to non-capital cases. See, e.g., *United States v. Rosemond*, 322 F. Supp. 3d 482, 486 (S.D.N.Y. 2018) ("While the Court well understands Rosemond's contention that the narrow holding of *McCoy* should be extended beyond capital cases and that this question will be resolved in due course by appellate courts, there is no need to decide it here."), *aff'd*, 958 F.3d 111 (2d Cir. 2020). Until we have such guidance, we will uphold a competent defendant's autonomy even outside the death penalty context.

III. Analysis

¶ 20 At the Crim. P. 35(c) hearing, trial counsel was asked to explain why he handled the escape case in the manner it was handled. Counsel responded,

A. I consulted with my client and found out what his wishes were. . . .

Q. Which were what?

A. [H]e was upset that we weren't getting the continuance, because we hadn't had enough time to communicate. He'd been stuck in prison. It had been a nightmare trying to get the prisons to work with me[.] . . . [T]here was a witness that was really really important to present, and we couldn't get that guy. . . . [H]e didn't want to participate in a dog and pony show. That's what I wrote [in] my file.

¶ 21 Defense counsel's notes, which are in the record, are consistent with his testimony. Viewing Johnson's decision to forgo participating at trial as unreasonable — not to mention highly unusual — trial counsel contacted the state office of the Colorado State Public Defender the weekend before trial, and three colleagues advised against presenting no defense at trial.

¶ 22 The tension between Johnson's instruction to counsel during trial to forgo any defense and his current attack on trial counsel's performance is real.⁴ Cognizant of his duties to Johnson, trial

⁴ On top of that tension, we cannot ignore that counsel had ethical duties to the judicial process and to his client. See Colo. RPC 1.2(a) cmt. 2 (providing that the client decides the objectives of representation, and noting that a lawyer may withdraw from representation if he has a fundamental disagreement with a client). Counsel appeared willing to withdraw, but Johnson did not ask him to, so the court did not remove counsel. See Colo. RPC 1.16(a)(1) (recognizing that if a lawyer concludes that continued representation will result in a violation of the Rules of Professional Conduct, he must withdraw).

counsel was understandably distressed when his client unambiguously instructed him not to mount a defense. Johnson's decision not to lodge a defense is analogous to a defendant conceding guilt, *see Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (a defendant who pleads guilty effectively waives the privilege against self-incrimination, the right to confrontation, and the right to a jury trial), or deciding to forgo counsel's assistance, *Faretta*, 422 U.S. at 834 (in choosing to forgo counsel, the defendant is deemed to accept the consequences of his decision).

¶ 23 It is difficult to imagine why someone accused of a crime would not use all available resources, including his counsel's experience and expertise, to mount a defense. Nonetheless, as unsavory as the prospect of a one-sided presentation of evidence was here, Johnson's counsel risked violating his client's right to set the objective of the representation if he presented a defense. Even without the benefit of the *McCoy* decision, counsel knew that the decision was Johnson's to make.

¶ 24 In our view, like accepting a guilty plea or forgoing counsel's assistance, the decision to forgo a defense or to sit quietly while the prosecution makes its case is personal and, absent competency

issues, is one a defendant can elect to make. While Johnson’s counsel did not subject the prosecution’s case to the “crucible of meaningful adversarial testing,” *Cronic*, 466 U.S. at 656, that inaction was based on Johnson’s decision to forgo challenging the prosecution’s case.

¶ 25 The transcript of Johnson’s pretrial conference with the court shows that Johnson’s decision was made voluntarily, intelligently, and knowingly.⁵ See *Bergerud*, 223 P.3d at 693. So, even if unwise, the decision was Johnson’s to make.

¶ 26 While the parties invite us to address whether *Strickland*’s or *Cronic*’s standard applies here to assess prejudice, we need not decide the issue because we affirm the postconviction court’s order based on Johnson’s choice to forgo a defense. See *People v. Hamm*, 2019 COA 90, ¶ 8 (“[A]ppellate courts have the discretion to affirm decisions . . . on any basis for which there is a record sufficient to permit conclusions of law, even though they may be on grounds other than those relied upon by the trial court.” (quoting *Moody v. People*, 159 P.3d 611, 615 (Colo. 2007))).

⁵ This division issued an order to have the record supplemented with the June 2011 in camera hearing.

IV. Conclusion

¶ 27 The order is affirmed.

JUDGE FREYRE and JUDGE LIPINSKY concur.