Commonwealth v. Barbosa

Appeals Court of Massachusetts

November 10, 2020, Argued; January 29, 2021, Decided

No. 19-P-435.

Reporter
99 Mass. App. Ct. 132 *; 162 N.E.3d 1257 **; 2021 Mass. App. LEXIS 10 ***; 2021 WL 298531

COMMONWEALTH *vs.* **RICARDO BARBOSA**.

Subsequent History: Appeal denied by Commonwealth v. Barbosa, 487 Mass. 1101, 2021 Mass. LEXIS 172, 165 N.E.3d 652 (Mass., Mar. 11, 2021)

Prior History: [***1] Norfolk. INDICTMENTS found and returned in the Superior Court Department on May 22, 2014.

An indictment charging rape was tried before *Thomas A. Connors*, J.; following conviction, a habitual criminal indictment was also tried before him.

Barbosa v. Commonwealth, 475 Mass. 1009, 2016 Mass. LEXIS 613, 56 N.E.3d 813 (Aug. 26, 2016)

Counsel: *William M. Driscoll* for the defendant.

Michael McGee, Assistant District Attorney, for the Commonwealth.

Judges: Present: KINDER, SHIN, & HAND, JJ.

Opinion by: KINDER

Opinion

[**1258] [*133] **KINDER**, J. A Superior Court jury convicted the defendant of rape in violation of G. L. c. 265, § 22 (*b*). Following a bifurcated trial before a second jury, the defendant was convicted of being a habitual criminal[1] and was sentenced to an enhanced penalty of twenty [**1259] years in State prison. On appeal, the

[1] The habitual criminal indictment alleged that the defendant qualified as a habitual criminal because he had twice previously been convicted of crimes for which he was sentenced to not less than three years in prison. See G. L. c. 279, § 25.

defendant claims that (1) the prosecutor's withdrawal of a plea offer was vindictive and violated due process, (2) the judge's refusal to give a so-called *Bowden* instruction[2] was an abuse of discretion, and (3) the denial of the defendant's request to represent himself in the habitual criminal trial was structural error.[3] We agree that the judge erred in denying the defendant his constitutional right to represent himself at the habitual criminal trial and remand [***2] the case for a new trial on that indictment. Otherwise, we affirm.

Discussion. 1. *Prosecutorial vindictiveness*. The defendant was indicted in May of 2014. By April of 2015, he was representing himself with the assistance of standby counsel.[4] At some time between April and August of 2015, the parties discussed a proposed plea agreement involving a joint sentencing recommendation of from four years to four years and one day in State prison on the rape charge in exchange for a dismissal of the habitual offender indictment. In August of 2015, the defendant appeared before a judge to plead guilty pursuant to that agreement. The plea was rejected after the defendant refused to admit his guilt.[5]

Eight months later, the defendant appeared with counsel at a pretrial hearing before a second judge and expressed a desire to plead guilty pursuant to the terms of the same agreement. That offer, however, had been withdrawn by the prosecutor. The Commonwealth's offer at the time of the pretrial hearing was a from five to seven-year sentence on the rape charge and a dismissal of [*134] the habitual offender indictment. The prosecutor explained to the judge that the original offer was withdrawn when the defendant [***3] refused to plead guilty, and that the new recommendation was based on the circumstances of the offense[6] and the defendant's criminal history.[7] At a subsequent status conference before the plea judge, the prosecutor stated that one of the reasons he had initially proposed the four-year sentence was because the defendant was representing himself at the time and “would be cross-examining his own victim” at trial.

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[2] See *Commonwealth* v. *Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482 (1980).

[3] The defendant filed a motion for a new trial that was denied by the trial judge. Although the defendant noticed an appeal from that order, he does not mention the order in his brief. We therefore do not address it. Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019).

[4] Standby counsel was appointed after the defendant's first attorney was permitted to withdraw due to an irreconcilable conflict with the defendant and the defendant expressed his desire to proceed pro se.

[5] The transcript of the plea hearing is not available and has not been reconstructed.

[6] The victim, who was thirty years old at the time of trial, testified that the defendant, whom she had known for approximately one week, grabbed her, pinned her down, and forcibly raped her.

[7] The defendant was convicted of rape of a child on March 25, 2005, and assault and battery on a correction officer on September 21, 2010.

Seizing on this last statement, the defendant claims on appeal that the prosecutor impermissibly changed his offer because the defendant exercised his right to counsel.[8] Specifically, he argues that "[t]he trial judge should have found prosecutorial vindictiveness, [**1260] permitted [the defendant] the benefit of his August 2015 bargain, and allowed [the defendant]'s *Alford* plea pursuant to the 2015 recommendation," see *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), and that his failure to do so was structural error.[9] We disagree.

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States* v. *Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982), quoting *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). However, a defendant seeking to establish a due process violation for prosecutorial vindictiveness has a heavy burden to demonstrate a high [***4] likelihood of actual vindictiveness that does not "unduly undermine normal prosecutorial discretion." *Commonwealth* v. *Rodriguez*, 476 Mass. 367, 374, 68 N.E.3d 635 (2017), quoting *Commonwealth* v. *Johnson*, 406 Mass. 533, 537, 548 N.E.2d 1251 (1990). No Massachusetts appellate court has found a due process violation based [*135] on prosecutorial vindictiveness in the context of plea bargaining. See *Commonwealth* v. *Damiano*, 14 Mass. App. Ct. 615, 623 n.14, 441 N.E.2d 1046 (1982). We decline to do so here, for two reasons. First, "decisions not to charge, [or] to offer a plea bargain … are executive, not judicial, decisions." *Commonwealth* v. *Bernardo B.*, 453 Mass. 158, 176, 900 N.E.2d 834 (2009) (Spina, J., dissenting). See *Commonwealth* v. *Mahar*, 442 Mass. 11, 27, 809 N.E.2d 989 (2004) (Sosman, J., concurring) ("courts do not order prosecutors to put the same offer back on the table or enforce an offer that has been withdrawn"). Second, "in the 'give-and-take' of plea bargaining, there is no … element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Commonwealth* v. *Tirrell*, 382 Mass. 502, 509, 416 N.E.2d 1357 (1981), quoting *Bordenkircher*, *supra*. Here, the defendant was free to, and did, reject the prosecutor's offer of from five to seven years. Accordingly, there was no element of punishment or retaliation, and, therefore, no prosecutorial vindictiveness. See *Commonwealth* v. *Souza*, 390 Mass. 813, 821, 461 N.E.2d

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[8] When the prosecutor offered the sentencing recommendation of from five to seven years, the defendant was no longer representing himself. Two months after the failed plea, the defendant's standby counsel informed the judge that his relationship with the defendant had "evolved" and that counsel was representing the defendant as his "full-time attorney."

[9] The defendant raised these claims of prosecutorial vindictiveness in various petitions to a single justice of the Supreme Judicial Court, who denied or dismissed those petitions. The full court affirmed a judgment of a single justice, reasoning that the defendant's claims could be addressed on direct appeal. See *Barbosa* v. *Commonwealth (No. 1)*, 481 Mass. 1016, 1016, 112 N.E.3d 1177 (2018).

166 (1984) (no evidence of vindictiveness where defendant was free to accept or reject plea offer and no charge was brought arbitrarily).

Moreover, we discern nothing improper in the prosecutor's withdrawal [***5] of his initial offer based on the defendant's refusal to admit his guilt at the aborted change of plea hearing. “A district attorney is vested with wide discretion in determining whether to prosecute an individual” (quotation and citation omitted), *Commonwealth* v. *Wilbur W.*, 479 Mass. 397, 409, 95 N.E.3d 259 (2018), “just as he has wide discretion in determining whether to discontinue a prosecution once commenced” (citation omitted), *Commonwealth* v. *Latimore*, 423 Mass. 129, 136, 667 N.E.2d 818 (1996). The defendant's refusal to admit guilt during the plea colloquy was objective information that justified an increased sentence recommendation.[10] Cf. *Goodwin*, 457 U.S. at 374.

[**1261] 2. *Bowden instruction*. At trial, the defendant argued that deficiencies in the police investigation justified giving a *Bowden* instruction to the jury.[11] See *Commonwealth* v. *Bowden*, 379 Mass. 472, 485-486, 399 N.E.2d 482 (1980). On appeal, the defendant claims that [*136] the trial judge's decision not to give the instruction was prejudicial error.

“As we have explained repeatedly, a judge is not required to instruct on the claimed inadequacy of a police investigation. *Bowden* simply holds that a judge may not remove the issue from the jury's consideration” (quotations and citations omitted). *Commonwealth* v. *Wilkerson*, 486 Mass. 159, 178, 156 N.E.3d 754 (2020). Here, the judge did not remove the issue from the jury. The defendant was allowed to, and did, argue to the jury that the investigation was inadequate. [***6] There was no error.

3. *Right of self-representation*. Immediately after the defendant was convicted of rape, the defendant's trial counsel[12] requested a continuance of the habitual criminal portion of the bifurcated trial because he was unprepared. The trial judge indicated that he was inclined to deny the request, because “[t]his is a case that's been before this [c]ourt many times” and it “had other trial dates scheduled.” The

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[10] We also see nothing impermissible in the prosecutor's attempt, through plea negotiation, to avoid a circumstance where the victim would be cross-examined at trial by the man who raped her.

[11] The *Bowden* instruction informs jurors in criminal trials that, if they find omissions in the police investigation, they may consider whether those omissions affect the reliability of the evidence presented by the Commonwealth. See Instruction 3.740 of the Criminal Model Jury Instructions for Use in the District Court (2009).

[12] Trial counsel was the defendant's third appointed attorney. As previously noted, the defendant's first attorney was allowed to withdraw due to an irreconcilable conflict with the defendant. The defendant's second attorney was permitted to withdraw after the defendant sent him a threatening letter. Trial counsel was appointed in July of 2016, three months before the trial commenced.

judge further noted that the question to be litigated "is a fairly straight forward one … it's the identity of [the defendant] as the person who has the requisite number of convictions." In the end, the judge allowed the continuance after the defendant stated that he wished to represent himself.

When the defendant appeared for trial on the habitual criminal indictment two months later, trial counsel again asked for a continuance, expressing confusion about the defense strategy that the defendant wanted him to employ. The defendant repeated his request to represent himself. Both requests were denied and the trial proceeded with the defendant represented by counsel. Ultimately, the jury convicted the defendant of being a habitual offender.

On appeal, the defendant [***7] claims that the denial of his right to represent himself in the habitual criminal trial was structural error. "The right to conduct one's own defense in a criminal case is guaranteed by both the Massachusetts Constitution and the United States Constitution" (footnotes and citation omitted). *Commonwealth* v. *Conefrey*, 410 Mass. 1, 10, 570 N.E.2d 1384 (1991). See *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Commonwealth* v. *Mott*, 2 [*137] Mass. App. Ct. 47, 50-52, 308 N.E.2d 557 (1974). A defendant is entitled to represent himself as long as his choice "is unequivocal, … voluntarily and knowingly made, … asserted in a timely manner, … and not sought for an improper purpose," *Conefrey*, *supra* at 11, such as delaying or disrupting the trial, see *Commonwealth* v. *Jackson*, 376 Mass. 790, 796, 383 N.E.2d 835 [**1262] (1978); *United States* v. *Dougherty*, 473 F.2d 1113, 1124, 154 U.S. App. D.C. 76 (D.C. Cir. 1972).

The judge appears to have concluded that the defendant's request was not timely because it came at the midpoint of a bifurcated trial. The judge told the defendant, "[W]e're in the middle of the trial, so I'm denying your right to proceed pro se." However, G. L. c. 278, § 11A, governing habitual criminal trials, provides that if a defendant pleads not guilty to an indictment alleging that he is a habitual criminal, "he shall be entitled to a trial by jury of the issue of conviction of a prior offense, *subject to all of the provisions of law governing criminal trials*" (emphasis added). The Supreme Judicial Court has held that this language entitles [***8] a defendant to counsel in the habitual criminal phase of a bifurcated trial, even when the defendant elected to represent himself at the trial of the underlying offense. *Commonwealth* v. *Kulesa*, 455 Mass. 447, 456-457, 917 N.E.2d 762 (2009). We see no principled reason why a defendant could not exercise his constitutional right to represent himself at the same point. Because the defendant had a constitutional right to represent himself in the habitual criminal trial, it was error for

the judge to deny the request because it came at the midpoint of a bifurcated trial.[13]

We are not persuaded by the Commonwealth's contention that the defendant's request to represent himself was properly denied because it was equivocal. When defense counsel asked for a continuance following the defendant's rape conviction, the defendant stated, “Your Honor, I'll proceed pro se. [M]y counsel, he can sit down and stand by, Your Honor. I'll proceed pro se. I know everything about a habitual offender enhancement, collateral offender law. I'll proceed pro se, and I'll represent myself.” Two months later, the defendant said, “Excuse me, Your Honor. With all due respect, I'm going to be pro se — pro se for the [*138] habitual criminal … part of the … trial.” There was nothing equivocal [***9] in the defendant's requests to represent himself.

We recognize that the experienced trial judge was attempting to resolve the habitual criminal trial in a way that was efficient and fair to the defendant. After a lengthy discussion with the defendant regarding the merits of his planned defense, the judge may well have concluded that the defendant's choice to represent himself was unwise and that the defendant's interests would be better served with professional representation.[14] Nevertheless, “even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open” (quotations and citation omitted). *Mott*, 2 Mass. App. Ct. at 52. On this record, where the defendant's assertion of his right to represent himself was timely and unequivocal, we are constrained to conclude that it was error to deny the defendant his right to represent himself without further inquiry.[15] [**1263] Because the error was structural, it requires automatic reversal. See *Commonwealth* v. *Francis*, 485 Mass. 86, 104, 147 N.E.3d 491 (2020), petition for cert. filed, U.S. Supreme Ct., No. 20-6731 (Dec. 24, 2020); *Conefrey*, 410 Mass. at 13.

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[13] We note that allowing the defendant's request to represent himself would not have caused additional delay, as the defendant did not request a continuance. Therefore, this case is unlike *Commonwealth* v. *Johnson*, 424 Mass. 338, 341, 676 N.E.2d 1123 (1997), cited by the Commonwealth for the proposition that a judge has the discretion to deny a last-minute change in representation that would necessitate delay.

[14] The defendant argued that he did not qualify as a habitual criminal because, although he had been sentenced to more than three years on each of his underlying convictions, he had never served more than three years in prison.

[15] Because the judge concluded that the defendant's request to represent himself was not timely, he did not reach the questions whether the defendant's decision was knowing, voluntary, and not for an improper purpose. On remand, if the defendant again elects to represent himself, the judge should address those questions in a colloquy with the defendant and make the required findings. See *Faretta*, 422 U.S. at 835; *Commonwealth* v. *Means*, 454 Mass. 81, 89-90, 907 N.E.2d 646 (2009).

Conclusion. The judgment of conviction [***10] of rape is affirmed. The judgment of conviction of being a habitual criminal is vacated, and the verdict on that indictment is set aside. Because the habitual criminal conviction was the basis for the sentence on the substantive rape conviction, we also vacate the sentence on that offense. The case is remanded to the Superior Court for a new trial on the habitual criminal indictment, and for resentencing on the rape conviction following resolution of the habitual criminal indictment.

So ordered.
