Counsel's Unconsented-To Admission is Reversible Error, Except When It's Not

Author : Jessica Smith

Categories : Procedure, Uncategorized

Tagged as : admission of guilt, effective assistance of counsel, harbison, ineffective assistance of counsel, wilson

Date : October 8, 2014

In *State v. Harbison*, 315 N.C. 175 (1985), the North Carolina Supreme Court held that when defense counsel admits the defendant's guilt to the jury without the defendant's consent per se ineffective assistance of counsel occurs. The *Harbison* Court reasoned that when counsel admits guilt without consent, it is essentially the same as entering a guilty plea on the defendant's behalf without the defendant's consent. It concluded: "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180.

Harbison claims differ from the more garden-variety attorney-error ineffective assistance of counsel claims, commonly called *Strickland* claims. Such a claim might allege, for example, that counsel's conduct was deficient by failing to interview a key witness or by failing to object to inadmissible evidence. *Strickland* claims are evaluated under a two-pronged test, requiring the defendant to show both deficient performance and prejudice. *See* Strickland v. Washington, 466 U.S. 668 (1984). A *Harbison* claim thus is easier to prove than a Strickland claim; for a Harbison claim the defense need only establish an admission of guilt; no showing of prejudice is required.

There are however two important limitations to a *Harbison* claim, both of which were addressed in a recent court of appeals case, *State v. Wilson*. In *Wilson,* the defendant was charged with and convicted of attempted first-degree murder. The case arose out of an incident where the victim was standing outside with a group of people. A car approached and stopped near the group. The defendant and three other men got out of the car. The defendant had a gun. The defendant testified that he pointed his gun at the group to get them to disperse. Although the victim's companions fled, the victim remained at the scene. The facts get messy after that. Several witnesses testified that the defendant pulled on the slide of his gun to cock it and then pointed the gun at the victim. One witness testified that the defendant tried to pull the trigger three or four times, but the gun jammed and did not fire. The defendant himself testified that he tried to cock the gun after the victim's companions began running, but the slide was jammed and did not move. The defendant also testified that he never pointed the gun at the victim or tried to pull the trigger after the others dispersed. In any event, the defendant left the scene, was apprehended by the police and was charged with attempted first-degree murder.

The case came on for trial and during closing argument, defense counsel stated, in part: "You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." The defendant was convicted and on appeal argued that counsel's statement was a *Harbison* error. The court rejected that argument, reasoning: "[A]ssault by pointing a gun is not a lesser-included offense of attempted first-degree murder. Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*." (citations omitted). The court continued, noting that at best, counsel admitted to an element, which does not constitute a *Harbison* error. On this last point, the court cited *State v. Fisher,* 318 N.C. 512 (1986), which it described as finding no *Harbison* error where defense counsel admitted an element of first-degree murder (malice) at trial but still maintained the defendant's innocence.

Thus, *Wilson* carves out two exceptions to the *Harbison* rule:

(1) An unconsented-to admission to an offense that is neither charged nor is a lesser-included offense of a charged offense does not constitute a *Harbison* error.

(2) An unconsented-to admission to an element does not constitute a *Harbison* error.

One final point: If you're wondering why we're still talking about *Harbison* after the U.S. Supreme Court's 2004 decision in *Florida v. Nixon* (holding that when a defendant alleges ineffective assistance of counsel due to an unconsented-to admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard), that's because the North Carolina courts have held that *Harbison* survives *Nixon.* For more on that, see my blog post here.