Defense Counsel Can't Present an Insanity Defense without the Defendant's Consent

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The court of appeals recently addressed an issue that has divided courts elsewhere: whether defense counsel may present an insanity defense without the defendant's consent. The court ruled that defense counsel may not do so, stating that "because the decision of whether to plead not guilty by reason of insanity is part of the decision of what plea to enter, the right to make that decision is a substantial right belonging to the defendant."

The case is State v. Payne.

Facts. The defendant pointed a gun at her daughter, who screamed for her brother. The brother came running and a scuffle ensued in which the defendant shot both her daughter and her son. The defendant then ran outside, tried to get hit by a car, and began cutting her wrists with a knife. She was arrested and charged with attempted first-degree murder and other crimes.

Mental health assessments. A forensic nurse practitioner evaluated the defendant the next day and determined that she was suffering from psychosis at the time of the shooting. Later, the defense retained a mental health expert, and the defendant was committed to Central Regional Hospital for a competency evaluation by a state-employed expert.

Competency. The court initially ruled that the defendant was not competent to stand trial, but months later revisited the issue and found her competent.

Sanity. Defense counsel sought a pretrial determination of whether the defendant was not guilty by reason of insanity, pursuant to G.S. 15A-959(c), which provides:

Upon motion of the defendant and with the consent of the State the court may conduct a hearing prior to the trial with regard to the defense of insanity at the time of the offense. If the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge, with prejudice, upon making a finding to that effect. The court's denial of relief under this subsection is without prejudice to the defendant's right to rely on the defense at trial. If the motion is denied, no reference to the hearing may be made at the trial, and recorded testimony or evidence taken at the hearing is not admissible as evidence at the trial.

The court agreed to hear the matter pretrial. The only evidence came from the defense expert, who testified that, at the time of the shooting, the defendant was suffering from schizophrenia and understood what she was doing but not the wrongfulness of her actions. This evidence was sufficient to satisfy "[t]he test of legal insanity [which is] whether, at the time the accused committed the act, he was . . . incapable of knowing the nature and quality of his act or, if he did know this, incapable of distinguishing between right and wrong in relation to such act." *State v. Willard,* 292 N.C. 567 (1977).

The defendant then made some remarks to the court, the gist of which was that her lawyer had not obtained her consent to seek the pretrial determination and that she did not want the issue of sanity determined pretrial. Based on

statements that she had made at previous hearings, it appears that the defendant wanted to present the defense that the gun discharged by accident during the scuffle.

Defense counsel and the prosecutor asked the court to rule that the defendant was insane at the time of the shooting and to dismiss the case. The court dismissed the charges "with leave" and committed the defendant pursuant to G.S. 15A-1321, which provides for the automatic civil commitment of defendants found not guilty by reason of insanity. The defendant appealed. It isn't every day that a murder defendant appeals from a dismissal, but as the defendant pointed out, indefinite civil commitment isn't necessarily a walk in the park.

Appeal. On appeal, the defendant argued that "the trial court erred and denied [her] constitutional right to the assistance of counsel when it allowed her lawyer to pursue a pre-trial insanity defense against her wishes." The court of appeals unanimously agreed.

The court noted that the issue was one of first impression in North Carolina and that it "has not always been decided consistently in other jurisdictions." However, the court viewed as persuasive *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991), which held that a defendant's right to "direct his own defense" includes the right to refuse to pursue a claim of insanity. Furthermore, the court saw the decision to assert an insanity defense as, in essence, a decision about how to plead – a decision that belongs to the defendant, not defense counsel. *See, e.g., State v. Harbison,* 315 N.C. 175 (1985) (ruling that defense counsel may not admit the defendant's guilt to a lesser offense without the defendant's consent because doing so is the functional equivalent of pleading guilty and the defendant is entitled to decide how to plead). Supporting the idea that raising an affirmative defense is similar to entering a plea, the court noted that "a pretrial determination of NGRI . . . eliminates a defendant's ability to demand the constitutional rights associated with a trial in the same manner as does a guilty plea."

Questions about the scope of the ruling. *Payne* is in keeping with North Carolina's tradition of allowing defendants to captain their metaphorical ships. *See, e.g., State v. Ali*, 329 N.C. 394 (1991) (ruling that the authority to exercise a peremptory challenge to a prospective juror ultimately rests with the defendant rather than defense counsel). But changing some facts might push the limits of that tradition. Consider the following issues, none of which I see as clearly resolved by *Payne*:

- *What if the defendant is borderline competent?* By the time the NGRI issue was addressed in *Payne*, it seems that the defendant was completely competent, and the court of appeals operated "under the legal presumption" that the defendant was competent. But the Supreme Court of the United States has recognized that some defendants are borderline competent, and that these defendants may be denied the right to represent themselves. *See Indiana v. Edwards*, 554 U.S. 164 (2008). May they also be denied the right to decide whether to pursue an insanity defense?
- *What if the defense is raised at trial rather than pretrial?* In *Payne*, the court was concerned about the fact that the defendant was deprived of the procedural protections associated with a trial – such as the state being required to prove the defendant's guilt beyond a reasonable doubt – and yet ended up being involuntarily committed. Suppose that defense counsel presented the defense at trial, rather than pretrial, so that the panoply of rights associated with a trial were in place. Would the outcome be the same?
- *What if this were a capital case?* In *Florida v. Nixon*, 543 U.S. 175 (2004), the Supreme Court of the United States ruled that it was not per se ineffective assistance of counsel for a defense lawyer in a capital case to concede the defendant's guilt without the defendant's express consent, where that was a strategy designed to preserve counsel's credibility for the penalty phase. ~~I~~ Jessie Smith discussed the relationship between that case and *Harbison* in this prior blog post, but suffice it to say that courts sometimes give more leeway to lawyers in capital cases. Would *Payne* have come out the same way if the defendant had been facing the death penalty?
- *Does the same principle apply to other affirmative defenses?* For example, may a defendant order defense counsel not to assert a defense of entrapment? Duress? Self-defense? In a misdemeanor case, the statute of limitations? A defendant who is acquitted on the basis of duress isn't involuntarily committed, so one could

argue that there is little or no cost to the defendant in allowing defense counsel to raise defenses of this type.

Payne also left me with a procedural question. Must the court ask whether the defendant consents each time a defense lawyer seeks to raise a defense? The *Harbison* hearing is a familiar procedure by now, but I'm not sure that something similar needs to take place every time a lawyer presents an affirmative defense. Perhaps there should be a presumption that the defendant consents unless and until there is a reason to do otherwise. But I would be interested in thoughts from readers on this point.

Further reading. Those interested in further reading may wish to review the out-of-state cases cited in *Payne,* as well as secondary sources like David Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 Hastings Const. L.Q. 295 (1988) (noting the split of authority on the issue and concluding that the "right to select one's defenses personally is . . . a fundamental and inherent right, implicit in the Anglo-American concept of criminal justice"), and *Competent Client May Waive Insanity Defense – Courts Split*, 8 No. 4 Crim. Prac. Guide 21 (July/Aug. 2007) (collecting authorities on both sides of the issue and concluding that "[a] majority of courts have held that a trial court may not impose an insanity defense over the defendant's objection").

Double jeopardy. Although it isn't the focus of this post, for completeness I thought that I should mention the defendant's argument that double jeopardy prohibited retrial. In the defendant's view, the trial judge had found her not guilty, and a defendant cannot be retried after an erroneous acquittal. But the court of appeals noted that courts in other jurisdictions have held that "an erroneous NGRI determination" is not really an acquittal and so "does not implicate double jeopardy." Further, it noted that the trial judge had dismissed with case with leave to reinstate, which may not have been proper under the statute, but which nonetheless signaled that the ruling was "more akin to a 'procedural dismissal' than a 'substantive ruling.'" Accordingly, the court found that double jeopardy did not bar retrial, and the case was remanded for further proceedings.