

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0323, State of New Hampshire v. John Dolbeare, the court on September 10, 2007, issued the following order:

The defendant, John Dolbeare, appeals his conviction on possession with intent to distribute cocaine. He contends that essentially two structural errors occurred during the course of trial, and that he did not offer a valid personal waiver. We affirm.

A structural defect affects the very framework in which a trial proceeds. Arizona v. Fulminante, 499 U.S. 279, 308-12 (1991); State v. Ayer, 150 N.H. 14, 24 (2003), cert. denied, 541 U.S. 942 (2004). Such defects arise from errors that deprive a criminal defendant of the constitutional safeguards providing a fair trial. Ayer, 150 N.H. at 24. Therefore, if the trial proceeds after such an error occurs, justice will not be done. Id. After a structural error occurs, a trial can validly continue if the trial court obtains an affirmative personal waiver from the defendant for the violation of his rights. Id. at 29.

Here, the trial court told the defendant that “while [defense counsel] didn’t say directly that the evidence would satisfy a finding by the jury that you [committed the lesser-included offense of] possess[ing] a drug, cocaine, he said things that were close to that [during closing argument]” Thus, the trial court concluded that the defendant would have to offer an Anaya waiver in order for the trial to proceed. In Anaya, we held that under certain circumstances, when defense counsel concedes a defendant’s guilt to a lesser-included offense, he commits ineffective assistance of counsel and a new trial is required. State v. Anaya, 134 N.H. 346, 354 (1991).

Even if we assume, without deciding, that defense counsel’s closing arguments violated Anaya, and that this violation constituted a “structural error,” the defendant validly waived his right to appeal this issue. State v. Foote, 149 N.H. 323, 325 (2003) (when waiving a constitutional right, one must do so voluntarily, knowingly, and intelligently with sufficient awareness of the relevant circumstances and likely consequences). After identifying the potential error, the trial court gave the defendant an opportunity to consult with defense counsel during a recess. When court resumed, the trial judge asked the defendant how he wished to proceed, and the defendant invoked his rights under Anaya by replying that he wanted the court to declare a mistrial on the basis of ineffective assistance of counsel. The State objected, and made argument to the court. Immediately after the prosecutor finished her argument, the defendant

apparently changed his mind and stated, “I wouldn’t have any problem with this at all if you weren’t going to instruct the jury to that, they can convict me of a lesser crime of possession.” Later, the following exchange occurred:

THE COURT: All right. You’re telling me that you don’t have a problem with that, and that to the extent there’s any issue about [defense counsel’s] argument to the jury, you waive that. You don’t make an issue of that any further. You withdraw your request for a mistrial. Is that clear?

THE DEFENDANT: Right.

THE COURT: You’re clear on what you’re doing?

THE DEFENDANT: Um – so that there would be no lesser charge.

THE COURT: I will not instruct the jury on lesser included offenses.

THE DEFENDANT: That’s fine, Your Honor.

The defendant agreed that he was making this choice based upon his discussion with the court and with defense counsel.

The defendant argues that even if he executed a waiver during the course of the above-quoted exchange, see Ayer, 150 N.H. at 29, another structural error occurred, such that “under the extraordinary circumstances of this case, [his] purported withdrawal of his request for mistrial was ineffectual” The defendant claims that this second structural error occurred due to the following confluence of events: (1) defense counsel made an allegedly erroneous representation that if the defendant did not allow him to rectify his alleged mistake by making an additional closing argument to the jury, the defendant would waive any claim of ineffective assistance of counsel; (2) the trial court did not correct this allegedly erroneous statement; and (3) defense counsel “labored under a personal conflict of interest, as his personal interest in defending his own actions potentially conflicted with his client’s interest in having a trial untainted by Anaya error.” We disagree.

To determine whether a defendant has established a conflict of interest entitling him to a new trial, a trial court must conduct an inquiry on the record to investigate the extent of any conflict. State v. Gonzalez, 143 N.H. 693, 706 (1999). Here, the trial court did not conduct this type of inquiry. However, because such an inquiry is prophylactic in nature and is not constitutionally

mandated, the court's failure to conduct an inquiry does not demand automatic reversal. Id. Instead, it requires this court to address the defendant's claim that he was denied the effective assistance of counsel because of a conflict of interest. Id. To obtain relief, the defendant must establish that an actual conflict of interest adversely affected his lawyer's performance, although he need not demonstrate prejudice. Id. He has not.

Significantly, after the defendant conferred with counsel, he requested a mistrial. This is precisely what Anaya authorized him to do. Moreover, he requested it on the basis of ineffective assistance of counsel, which tends to undermine any argument that an actual conflict existed or that defense counsel self-interestedly persuaded the defendant to make strategic decisions that would conceal any perceived deficiency in the closing argument. While the defendant did state that he was making his decision based, in part, upon his conversation with his attorney, that statement was simply an acknowledgement of the obvious: that the two had conferred during a recess. We have no way of knowing the particulars of that conversation. The defendant may, in hindsight, view his ultimate decision to abandon the mistrial request as unwise, but we have no basis upon which to conclude that this change in plans was due to self-interested, erroneous or even poor legal advice from defense counsel. Neither the mistrial nor the decision not to give the lesser included offense instruction was consistent with attorney self-interest or conflict-of-interest-type behavior.

Furthermore, it bears noting that it was only after the prosecutor stated her position that the defendant decided that he would waive his argument and opt for a different course of action. Nothing in the record indicates that the defendant spoke with counsel during or after the prosecutor's argument. Nothing in the record demonstrates that counsel failed to discuss with the defendant the consequences of this course of action or provided incorrect legal advice concerning it.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**