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Defendant's 6th Amendment right to testify is entitled to more weight than the trial court's determination to move the trial along

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A recent opinion by the Superior Court of New Jersey, Appellate Division, reaffirms what most would think would be an uncontroversial proposition: The right of a criminal defendant to testify on his own behalf is entitled to more weight than the trial judge's desire to move the trial along. However, the fact that this case had to be resolved by an appellate court serves as a reminder that, for the sake of controlling their own calendars, trial courts sometimes make decisions that infringe upon important and fundamental rights. Hopefully, this opinion will serve as a reminder to all of the soldiers in the criminal justice trenches that a defendant's constitutional rights cannot be the victim of collateral damage in the war to clear cases off of the trial list.

In the case of *State v. Cullen*, the defendant stood trial for a burglary offense. The case was relatively uncomplicated, and during the first day of trial, the jury heard testimony from the victim and three police officers, after which the State had rested its case. After the State rested, the defense made customary motions for judgment of acquittal, and the court spent some time addressing the issue of whether a particular proposed defense witness might invoke the fifth amendment right to remain silent if called to testify. After that issue was addressed, the court inquired whether the defense would present any witnesses, including the defendant.

When the court addressed the defendant personally about whether the defendant wished to testify, he advised that he would not testify. The judge then informed the jury that the defense had rested. The jury was excused while the charge conference was held. The jury was then excused for the day, with summations to be held the following morning.

Then next morning, before the jury was brought into the courtroom, the defense attorney advised the trial judge that the defendant had advised that he had changed his mind, and would like to testify before the jury. The prosecutor argued that the defendant had waived his right to testify the previous day, and that the defense should not be permitted to open the record. The trial judge denied the defendant's request to testify, finding that he had been given "plenty of opportunity and time to make that decision" and that he had already announced the decision not to testify. The trial judge concluded that it was not permissible for the defendant to change his mind. Closing arguments then followed, and the defendant was convicted.

On appeal, the defendant argued that he had been denied his constitutional right to testify. New Jersey's Appellate Division agreed. The court noted that the trial judge:

did not suggest a presence of prejudice or confusion in denying the request. Instead, the judge erroneously gave greater weight to expedience in the brief delay that would result than he gave defendant's constitutional right to testify. These ephemeral grounds pale in comparison to defendant's constitutional right to testify on his own behalf.

The court aptly cited Justice Potter Stuart, writing an opinion while a Federal Circuit Court Judge, who observed that

the prompt and vigorous administration of the criminal law is to be commended and encouraged, but swift justice demands more than just swiftness.

Reaffirming this principle, the defendant in *Cullen* had his conviction reversed, and the case has been remanded for a new trial.

Unfortunately, procedural safeguards designed to protect the rights of the accused are sometimes swallowed by the desire to move cases along in the process. Trial judges are under enormous pressures to dispose of cases, and are called to task when cases are considered administratively "backlogged." The decision in *Cullen* should serve as a reminder to us all that justice cannot be sacrificed to satisfy administrative calendar goals.

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