

SUPREME COURT OF OHIO

State v. Brunson

2022-Ohio-4299 (Ohio 2022) · No. 2020-1505 · Decided December 5, 2022

SUMMARY

The Supreme Court of Ohio affirmed Nigel J. Brunson’s convictions and sentence for offenses arising from a robbery and shooting at the Cooley Lounge. The court held that a codefendant did not voluntarily waive attorney-client privilege by participating in a conversation with counsel that was unknowingly recorded and disseminated by the state, and that the codefendant’s suppression-hearing testimony did not reveal the substance of privileged communications. The court further held that the trial court erred by considering Brunson’s silence at sentencing as evidence of lack of remorse, but found the error nonprejudicial.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Fischer, J.; Donnelly, J.; Stewart, J.; Brunner, J.; O'Connor, C.J.; Kennedy, J.; DeWine, J.
JURISDICTION	Ohio
DECIDED	December 5, 2022
DOCKET	2020-1505
DISPOSITION	affirmed
PROCEDURAL POSTURE	Brunson appealed to the Supreme Court of Ohio from the Eighth District Court of Appeals' judgment affirming his convictions and sentence. The Supreme Court accepted three propositions of law concerning attorney-client privilege, the Confrontation Clause, and the consideration of silence at sentencing.
STANDARD OF REVIEW	De novo review applied to whether the recorded statement was protected by attorney-client privilege. Plain-error review applied to the forfeited evidentiary, Confrontation Clause, and sentencing challenges. The court also recognized that sentencing claims based on impermissible considerations may be reviewed under R.C. 2953.08(G) (2)(b).
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of Ohio

PARTIES

Nigel J. Brunson v. State of Ohio

TOPICS

attorney client privilege

sixth amendment

fifth amendment

sentencing

criminal procedure

PRACTICE AREAS

criminal law

criminal procedure

evidence

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sentencing

QUESTIONS PRESENTED

1. Whether Lake waived the attorney-client privilege by participating in a recorded private conversation with his attorney in a police-station interview room.
2. Whether Lake waived the attorney-client privilege through testimony at a suppression hearing.
3. Whether Brunson's Sixth Amendment right to confrontation required that he be allowed to cross-examine Lake using the recorded privileged communication.
4. Whether the trial court erred under the Fifth Amendment by considering Brunson's silence and waiver of allocution at sentencing as evidence of lack of remorse under R.C. 2929.12(D)(5).
5. Whether any sentencing error required resentencing.

HOLDINGS

1. Lake did not voluntarily waive the attorney-client privilege because he and his counsel believed they were having a private conversation in an interview room after police left at counsel's request, even though the recording continued without their knowledge.
2. Lake did not waive the attorney-client privilege through his suppression-hearing testimony because, although the testimony was voluntarily given, it did not reveal the substance of the recorded privileged communication.
3. The attorney-client privilege did not yield to Brunson's Sixth Amendment confrontation right on these facts, and Brunson failed to show a reasonable probability that the trial result would have been different without use of the recording.
4. When a defendant has pleaded not guilty, maintained innocence, and taken the case to trial, a sentencing court errs under the Fifth Amendment when it considers the defendant's silence and waiver of allocution as evidence of lack of remorse under R.C. 2929.12(D)(5).
5. The sentencing error was harmless and did not require resentencing because Brunson's sentence would have been the same based on the other recidivism and seriousness factors considered by the trial court.

KEY QUOTATIONS

"Thus, under this court's decision in Jackson, R.C. 2317.02(A) applies to all direct communications between a client and his or her attorney, and the attorney-client privilege can be waived only when (1) the client has provided express consent to waive the privilege or (2) the client has voluntarily revealed the substance of the

attorney-client communications in a nonprivileged context, such as by voluntarily testifying on the same subject.” (¶ 29)

“For the attorney-client privilege to have meaning in our society, “the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected.”” (¶ 58)

“For these reasons, we conclude that when a defendant has maintained his or her innocence by pleading not guilty and has taken the case to trial, the trial court errs when it considers the defendant’s silence to be a demonstration of that defendant’s lack of remorse for purposes of sentencing under R.C. 2929.12(D)(5).” (¶ 83)

“Additionally, we hold that a trial court errs when it considers a defendant’s decision to waive allocution and remain silent at sentencing as demonstrating that defendant’s lack of remorse when the defendant pleaded not guilty and took the case to trial.” (¶ 90)

FACTUAL BACKGROUND

Brunson and four codefendants were prosecuted for a robbery and shooting at the Cooley Lounge in Cleveland that killed a bartender. Codefendant Garry Lake accepted a plea agreement, gave a proffer statement identifying participants, and was recorded having a private conversation with his attorney and the attorney’s investigator in a police-station interview room; the State later disclosed the recording to the defendants. Brunson was convicted after evidence including jail calls implicating him, DNA from a discarded cup, surveillance evidence, and Lake’s testimony. At sentencing, Brunson pleaded not guilty, had exercised his right to a jury trial, remained silent, and waived allocution; the trial court treated that conduct as evidence of lack of remorse.

PROCEDURAL HISTORY

Brunson was convicted after a joint jury trial of 22 felony counts arising from a robbery and shooting at the Cooley Lounge. The trial court imposed life imprisonment without parole for aggravated murder, together with additional firearm, robbery, felonious-assault, and kidnapping sentences. The Eighth District affirmed, and the Supreme Court of Ohio affirmed the appellate judgment, concluding that Lake had not waived his attorney-client privilege, that Brunson failed to establish a Confrontation Clause violation or resulting prejudice, and that although the sentencing court erred in considering Brunson’s silence as evidence of lack of remorse, the error did not affect the sentence.

DISPOSITION

affirmed

CASES CITED

- Jackson v. Greger, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487
- State v. McDermott, 72 Ohio St.3d 570, 651 N.E.2d 985 (1995)
- State ex rel. Leslie v. Ohio Hous. Fin. Agency, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990
- State v. Quarterman, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900
- State v. Grubb, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986)

- State v. West, 2022-Ohio-1556
- State v. Myers, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138
- Rigby v. Lake Cty., 58 Ohio St.3d 269, 569 N.E.2d 1056 (1991)
- State v. Hartman, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651
- Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp., 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533
- Swidler & Berlin v. United States, 524 U.S. 399 (1998)
- Upjohn Co. v. United States, 449 U.S. 383 (1981)
- State v. Doe, 101 Ohio St.3d 170, 2004-Ohio-705, 803 N.E.2d 777
- Davis v. Alaska, 415 U.S. 308 (1974)
- Delaware v. Van Arsdall, 475 U.S. 673 (1986)
- Brady v. Maryland, 373 U.S. 83 (1963)
- Mitchell v. United States, 526 U.S. 314 (1999)
- Estelle v. Smith, 451 U.S. 454 (1981)
- State v. Jones, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649
- State v. Bryant, 2022-Ohio-1878
- State v. Green, 90 Ohio St.3d 352, 738 N.E.2d 1208 (2000)
- State v. Beasley, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028
- State v. Campbell, 90 Ohio St.3d 320, 738 N.E.2d 1178 (2000)
- Malloy v. Hogan, 378 U.S. 1 (1964)
- State v. Leach, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335