

SUPREME COURT OF NEW HAMPSHIRE

State v. Ayer

150 N.H. 14 (2003) · Decided September 26, 2003

SUMMARY

The New Hampshire Supreme Court reviews Daniel Ayer’s conviction for first-degree murder after the trial court denied his request to represent himself and proceeded with appointed counsel during the first two days of trial. The court holds that denial of the defendant’s properly invoked right of self-representation was a structural defect requiring reversal and a new trial. The opinion also addresses preservation of the mistrial issue and identifies additional appellate arguments concerning the defendant’s recorded statement, jury selection, judicial recusal, juror compensation, and ineffective assistance.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Nadeau, J.; Brock, C.J.; Gray, J.; Smukler, J., specially assigned; T. Nadeau, J., specially assigned
JURISDICTION	New Hampshire
DECIDED	September 26, 2003
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Defendant appealed his first-degree murder conviction and mandatory sentence of life imprisonment without parole following a jury trial. The Supreme Court accepted an interlocutory appeal concerning the denial of self-representation, summarily reversed and remanded during the trial, and then reviewed the resulting conviction and related appellate issues.
STANDARD OF REVIEW	The court reviewed the denial of a mistrial for an unsustainable exercise of discretion. Constitutional issues were reviewed under the New Hampshire Constitution, with federal law used as an aid to analysis. The court applied the fair-cross-section test to the jury-selection challenge and an objective reasonable-observer standard to recusal.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Daniel Ayer, Sr. v. State of New Hampshire

TOPICS

right to counsel

criminal procedure

double jeopardy

jury selection

suppression of evidence

PRACTICE AREAS

criminal law

criminal procedure

constitutional law

appellate procedure

evidence

QUESTIONS PRESENTED

1. Whether the denial of the defendant's timely, knowing, intelligent, and voluntary request for self-representation during the first two days of trial was a structural constitutional error requiring a mistrial without prejudice and a new trial.
2. Whether the issue of a mistrial without prejudice was preserved when the defendant requested only dismissal with prejudice and objected to both a mistrial and continuation of the trial.
3. Whether the incomplete recording of the defendant's post-Miranda interrogation was admissible under *State v. Barnett*.
4. Whether excusing prospective jurors because of asserted economic hardship violated the constitutional fair-cross-section requirement or New Hampshire's jury-selection statutes.
5. Whether the juror-compensation scheme violated the State or Federal Constitution.
6. Whether the trial court was required to recuse itself because the defendant threatened court personnel.

HOLDINGS

1. A defendant preserves a constitutional challenge to the continuation of trial after a trial court's error when the trial court directly addresses the appropriate remedies and the defendant states his objections on the record; the defendant need not request a mistrial without prejudice or waive double-jeopardy protections to preserve the issue.
2. Once a defendant clearly and unequivocally, knowingly, intelligently, and voluntarily waives counsel and timely invokes the right of self-representation, that right must be scrupulously respected through all critical stages unless the defendant affirmatively rescinds the waiver. Forcing appointed counsel to conduct the first two days of trial over the defendant's objection created a structural error that could not be cured by voir dire or jury instructions and required reversal and a new trial.
3. When a defendant successfully appeals a conviction on constitutional grounds, double jeopardy does not bar a new trial.
4. Under *State v. Barnett*, an incomplete recording of a post-Miranda interrogation may not be admitted as a taped recording, although evidence from the interrogation may be admitted in alternative forms subject to ordinary evidentiary rules. The *Barnett* rule applies because the defendant's case was not final and would be retried.
5. The defendant failed to establish a prima facie fair-cross-section violation because prospective jurors excused for economic hardship were not shown to constitute a distinctive group, and the record did not establish systematic underrepresentation.

6. The defendant did not demonstrate substantial noncompliance with RSA chapter 500-A or prejudice resulting from the excusal of prospective jurors for hardship.
7. The trial court did not violate due process or the right to an impartial judge by refusing to recuse itself where the record did not show that the alleged threats were credible, were taken seriously, or altered the court's procedures.

KEY QUOTATIONS

“The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.” (27)

“The right of self-representation “is either respected or denied; its deprivation cannot be harmless.”” (27)

“In this case, the way to do so is to order a new trial where the defendant can proceed pro se in absentia, if he still wishes to do so, and where society receives a fair trial with a jury untainted by the prior proceedings.” (30)

FACTUAL BACKGROUND

Daniel Ayer was charged with first-degree murder after shooting and killing Nashua social worker Mark Rowland at Ayer's home. After receiving and waiving Miranda rights, Ayer gave an incriminating statement that was recorded only in part. During jury selection, Ayer knowingly, intelligently, and voluntarily requested to represent himself and to proceed pro se in absentia, but the trial court required appointed counsel to represent him during the first two days of trial before allowing him to proceed without counsel for the remainder. The jury convicted Ayer, and the court imposed the mandatory sentence of life imprisonment without parole.

PROCEDURAL HISTORY

After the trial court initially granted the defendant's request to represent himself, it reconsidered and denied the request because he intended to proceed pro se in absentia. The court allowed trial to proceed with appointed counsel for two days, after which the Supreme Court ordered a stay and summarily reversed based on *State v. Davis*. On remand, the trial court declined to declare a mistrial without prejudice, conducted individual voir dire of the jurors, continued with the existing jury, and entered a guilty verdict and mandatory life-without-parole sentence. The Supreme Court reversed the conviction and remanded for a new trial.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The trial court must conduct a new trial with a newly empaneled, untainted jury. The defendant may proceed pro se in absentia if he still wishes to do so. On remand, the trial court must apply *State v. Barnett* to the motion concerning the partially recorded interrogation; the incomplete recording itself may not be admitted, although interrogation evidence may be admissible in alternative forms under ordinary evidentiary rules.

CASES CITED

- *Miranda v. Arizona*, 384 U.S. 436 (1966)
- *State v. Davis*, 139 N.H. 185 (1994)
- *State v. Barnett*, 147 N.H. 334, 337-38 (2001)
- *State v. Fortier*, 146 N.H. 784, 788 (2001)
- *State v. Bain*, 145 N.H. 367, 370 (2000)
- *State v. Tucker*, 145 N.H. 723, 726 (2001)
- *State v. Bertrand*, 133 N.H. 843, 849, 852-54 (1991)
- *State v. Kerwin*, 144 N.H. 357, 358-59 (1999)
- *State v. Hall*, 148 N.H. 671, 674 (2002)
- *State v. Panzera*, 139 N.H. 235, 237-38 (1994)
- *State v. Williams*, 133 N.H. 631, 634 (1990)
- *Arizona v. Fulminante*, 499 U.S. 279, 307-12 (1991)
- *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)
- *Illinois v. Somerville*, 410 U.S. 458, 464, 470-71 (1973)
- *McKaskle v. Wiggins*, 465 U.S. 168, 176-85 (1984)
- *Sherwood v. State*, 717 N.E.2d 131, 133, 135, 137 (Ind. 1999)
- *Faretta v. California*, 422 U.S. 806, 817, 820-21, 832-36 (1975)
- *State v. Barham*, 126 N.H. 631, 638-39 (1985)
- *State v. Enright*, 108 N.H. 227, 232 (1967)
- *United States v. Morrison*, 449 U.S. 361, 365-66 (1981)
- *Mickens v. Taylor*, 535 U.S. 162, 194-95 (2002) (Souter, J., dissenting)
- *State v. Gould*, 144 N.H. 415, 417-18 (1999)
- *State v. Beaupre*, 129 N.H. 486, 487 (1987)
- *United States v. Scott*, 437 U.S. 82, 91-94 (1978)
- *State v. Hamel*, 138 N.H. 392, 394 (1994)
- *Duren v. Missouri*, 439 U.S. 357, 364 (1979)
- *State v. Elbert*, 121 N.H. 43, 45 (1981)
- *State v. Martel*, 141 N.H. 599, 600-03 (1997)
- *State v. Blackmer*, 149 N.H. 47, 49 (2003)
- *State v. Chick*, 141 N.H. 503, 504 (1996)
- *State v. Whittey*, 149 N.H. 463, 465 (2003)
- *United States v. Yu-Leung*, 51 F.3d 1116, 1119-20 (2d Cir. 1995)
- *United States v. Greenspan*, 26 F.3d 1001, 1006-07 (10th Cir. 1994)
- *Rivera v. United States*, No. 89 CR. 346(SWK) (S.D.N.Y. June 29, 2001)
- *United States v. Yousef*, No. 93 CR. 180 KTD-*3 (S.D.N.Y. Sept. 13, 1999)
- *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-22, 828 (1986)

