State v. Myers

581 S.W.3d 173

No. M2015-01855-SC-R11-CD

Attorney Contributor: Dustin Faeder

Journal Member: Brett Windrow

This case started on March 13, 2014, from an inspection initiated due to repeated complaints based on an alleged illegal automobile repair shop in Goodlettsville, Tennessee.[1] This was the second occasion that the inspector, Ms. Sandra Custode, had visited the premises, and this time she intended to collect photographs of the house for evidence.[2] Ms. Custode never entered the property, but the owner/defendant, Leroy Myers, Jr., saw the inspector and angrily screamed at her with clenched fists before he ultimately returned to his garage.[3] Custode left the property when Myers entered the garage, but almost immediately upon driving away she heard "several" shots and turned around to see Myers lowering a gun as one of the people with him laughed.[4] Upon reaching a safe distance, Ms. Custode called the Metro Nashville Police Department, who then arrested Myers and found a shotgun at the residence.[5]

The State charged Myers with the Class C felony of aggravated assault, with no reference to reckless endangerment.[6] The defense's primary argument was that Myers did shoot the gun, but that he was merely scaring a hawk away from his chickens rather than threatening Ms. Custode.[7] At closing of the bench trial, the defense argued that because several Tennessee cases[8] have held that actions similar to Mr. Myers's did not meet the standard of reckless endangerment, a Class E felony, Mr. Myers's actions could not meet the standard of the Class C aggravated assault charge at issue here.[9] The Trial Court concluded that, by making this argument, the defense counsel had

essentially allowed the charge of reckless endangerment to be added to the indictment, under which the Court found Mr. Myers guilty.[10] The Tennessee Court of Criminal Appeals subsequently affirmed the trial court's ruling, remanded, and affirmed the ruling upon its second appeal, at which point Mr. Myers appealed to the Tennessee Supreme Court.[11]

The Tennessee Supreme Court presented this issue of first impression as "whether and under what circumstances an 'effective amendment' to an indictment in a bench trial by other than affirmative means" can be valid.[12] The Court noted that "effective amendment" has generally been used in the context of a defendant "*actively requesting* an instruction on an otherwise improper lesser offense.[13]" The Court used *State v. Stokes*,[14] where the Court reversed a finding by the trial court that the failure to object to an improperly included lesser charge did not constitute effective amendment, to support the proposition that something more than mere passivity is required.[15]

From there, the Court dealt with the issue of whether the defendant here did, in fact, affirmatively amend the indictment.[16] The State argued that the defense did so argue on two bases: one, the closing argument statements, and two, off-the-record conversations.[17] For the former, the Court concluded that a mere trial strategy, such as saying the actions at bar would not even satisfy a similar element in a lesser charge, is not so affirmative as to create an effective amendment.[18] For the off-the-record conversations, the Court essentially said that, if the conversation affected the outcome, it should have been part of the record.[19] After quickly disposing of the idea that the defendant waived his ability to appeal, the Court reversed and remanded the case.[20]

While the Tennessee Supreme Court here was right to limit the reach of the Doctrine of Effective Amendment, the Court had an opportunity to set down a clear rule implicit in the case itself and failed to do so, implicating more appeals and the potential for violation of constitutional rights in the future. While there is a point at which a defendant should be made to face the

consequences of their request for or acquiescence in an amendment, there must be clear evidence they did so, and the Court here said as much. In being faced with a judge finding amendment based on a strained reading of a closing argument and a supposed off-the-record waiver, the Court had a chance to lay down that a waiver requires a waiver on the record (a classification which would encompass a charge conference), i.e., something "clear from the record." That the Court did not do so implies either a willingness to allow amendment based on questionable evidence of acquiescence or an unwillingness to come out and state what their decisions are leading to.

The Tennessee Supreme Court last spoke on the doctrine in 2007 in *Demonbreun v. Bell*,[21] where they held that an amendment to add a charge that the defendant mistakenly thought was a lesser included charge is an effective amendment.[22] Tennessee appellate courts, by contrast, have heard cases involving the "effective amendment" issue ten times,[23] all of which involved juries rather than bench trials (besides, of course, the prior *Myers* appeals).[24] This is likely because, as *State v. Myers* hints at in a footnote,[25] the jury instruction system implemented in jury trials provides a convenient means of determining consent or lack thereof. All this is to say that this is a case of first impression of grafting the rules of Effective Amendment from jury to bench trial, and thus an opportunity to lay a firm groundwork for bench trials going forward.

Unfortunately, while the case's top line conclusion is undoubtedly the best outcome from a Due Process perspective, *Myers* leaves much to be desired as far as actual guidance is concerned. Obviously, the facts relied on here, off-the-record conversations and bare reference to legal concepts, are not sufficient to amend an indictment. What is less clear is what else is and is not sufficient. The Court attempts to create a rule, stating that an amendment must be "affirmative,[26]" that the amendment be "*clear* from the record,"[27] and a strong suggestion in a footnote that trial

judges start performing "charge conferences."[28] Yet, in this very appeal, the appellate court seemed to implicitly think that this appeal met those standards.

On that note, the appeals that resulted from this case demonstrate exactly why guidance on this issue is necessary. To reiterate, this is a case where the State argued that an analogy from a closing argument and an off-record conversation were enough to effectively amend a criminal indictment.[29] Yet, despite these facts and explicit reference to the idea that a court should not "presume consent merely from the accused's silence," the appellate court twice ruled this enough to amend the indictment.[30] The appellate court believed that an analogy in a closing argument was "affirmative"[31] and that such an analogy plus reference to an off-the-record conversation is "clear from the record."[32] This is to say, despite fairly clear judicial language, there has been a tendency for lower courts to construe it more broadly than is justifiable under the case law.

The question, then, is what is the rule that is necessary or, indeed, what rule does the Tennessee Supreme Court seem to be leaning towards? The Court's clear preference seems to be making charge conferences the norm in bench trials, as this is the only direct procedural suggestion anywhere in the entire opinion. The issue is that this statement clearly is not phrased as a direct command (for one thing, it is relegated to a footnote), and trial judges may be resistant to voluntarily doing so for reasons of judicial economy and preferring the flexibility of establishing charges without resort to scheduling a formal conference. Thus, absent such a clear command, the issue becomes defining what qualities the Court finds beneficial about such conferences that those would be the Court's only firm suggestion. In the case at bar, the Court finds such a practice beneficial because it makes clear "whether a defendant has actively pursued an instruction on an offense."[33] The question, then, is what evidence "clear from the record" outside of a record from a charges conference would achieve this?

The type of evidence that would reach this same level of clarity seems to be an on-the-record waiver of any argument against the charge they are convicted under. Such a writing or statement would simultaneously leave a similar kind of "paper trail" the results of a conference would while allowing much of the same flexibility trial courts currently have in establishing charges, short of requiring the scheduling of a formal conference. Furthermore, having a defense attorney describe exactly what the defendant is consenting to or signing would provide a direct explanation of a defendant's Due Process rights absent under the current ad hoc scheme. Finally, connecting this method to the case at hand, this rule would prevent trial judges from interpreting ambiguous statements or situations as a defendant's waiver of their right to be informed of the charges against them.

Furthermore, the Tennessee Supreme Court has shown itself able to produce such cases in the past. One of the best cases to analogize to *Myers* is *Momon v. State*,[34] which established the fundamental state constitutional right for a criminal defendant to testify in their own defense.[35] In expounding this fundamental right, the Court spent about nine reporter pages[36] describing the exact parameters of the right, including, analogous to *Myers*, a discussion as to what specifically constitutes a waiver of the right.[37] For the Effective Amendment issue, it is at least conceivable that the Court could have gone into a similar level of detail, especially considering the issue here is more narrowly focused on the waiver issue than *Momon*'s establishment of a constitutional right. Furthermore, the rule the Court there laid down is nearly completely analogous to this situation. Under *Momon*, a waiver of the right to testify must be performed by the defendant either in writing or orally on the record. There is no obvious reason why the Court is unable to establish a near-identical rule here.

In this Due Process case stemming from, of all places, an unauthorized pastoral car repair shop, the Tennessee Supreme Court clearly came to the right determination of the defendant's rights. However, the Court's broader guidance for future cases is flawed. Besides a suggestion in a footnote that trial courts are completely free to ignore, the Court, to a significant degree, restates the exact same law that resulted in the erroneous determination in the first place. As a result, while legally correct, the Court missed an opportunity to settle the issue presented once and for all by requiring a waiver on the record, and has thus set itself up for these issues to continue into the future.

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[1] *State v. Myers*, 581 S.W.3d 173, 175-76 (Tenn. 2019).
[2] *Id.* at 176.
[3] *Id.*.
[4] *Id.*.
[5] *Myers* at 176.
[6] *Id.* at 175.
[7] *Id.* at 178.
[8] Specifically, *State v. Payne*, 7 S.W.3d 25 (Tenn. 1999), *State v. Terrence Shaw*, 2011 Tenn. Crim. App. LEXIS 390.
[9] *Myers* at 178.
[10] *Id.* at 178-79.
[11] *Id.* at 179. For the two appellate level rulings, see *State v. Myers*, 2016 Tenn. Crim. App. LEXIS 826 ("*Myers* Appeal I"); *State v. Myers*, 2018 Tenn. Crim. App. LEXIS 286 ("*Myers* Appeal II").
[12] *Id.* at 182.
[13] *Id.* at 183 (citing *State v. Williams*, 558 S.W.3d 633, 637 & n.1 (Tenn. 2018))(emphasis in original).
[14] 24 S.W.3d 303 (Tenn. 2000).
[15] *Myers* at 183-84.
[16] *Id.* at 184.
[17] *Id.*.
[18] *Id.* at 184-85.
[19] *Id.* at 185.
[20] *Id.* at 186-88.
[21] 226 S.W.3d 321 (Tenn. 2007). One other reported Supreme Court case, *State v. Williams*, 558 S.W.3d 663 (Tenn. 2018), referenced the Doctrine, but only as an aside in a footnote. *Id.* at 537, n.1.
[22] *Demonbreun v. Belle,* 226 S.W.3d 321*,* 326-27 (Tenn. 2007).
[23] Including two appeals of the current case.
[24] These include the two aforementioned *Myers* appeals, *State v. Chapman*, 2013 Tenn. Crim. App. LEXIS 228, *Chapman v. Shepard*, 2013 Tenn. Crim. App. LEXIS 606, *State v. Spraggins*, 2010 Tenn. Crim. App. LEXIS 365, *State v. Grey*, 2007 Tenn. Crim. App. LEXIS 990, *State v. Campbell*, 2015 Tenn. Crim. App. LEXIS 860, *State v. Austin*, 2015 Tenn. Crim. App. LEXIS 343, *State v. Collins*, 2017 Tenn. Crim. App. LEXIS 981, *State v. Ortega*, 2015 Tenn. Crim. App. LEXIS 295.
[25] *Myers* at 187, n.5.
[26] *Id.* at 184.
[27] *Id.* at 186 (emphasis in the original).
[28] *Id.* at 187, n.5.

[29] *Id.* at 183.
[30] *Myers* Appeal I at *13, *Myers* Appeal II at *12-*13.
[31] *Myers* Appeal II at *12-*13.
[32] *Id.*
[33] *Myers* at 187, n.5.
[34] 18 S.W.3d 152 (Tenn. 1999).
[35] *Id.* at 161.
[36] *Id.* at 157-69.
[37] *Id.* at 161-63.