*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-478

NOVEMBER TERM, 2004

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| State of Vermont | } | APPEALED FROM: |
| | } | |
| | } | |
| v. | } | District Court of Vermont, |
| | } | Unit No. 3, Caledonia Circuit |
| Stephen R. Carter | } | |
| | } | DOCKET NO. 988-10-02 CaCr |
| | | Trial Judge: Alan W. Cook |

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of driving while intoxicated (DWI), arguing that the trial court coerced him into testifying. We affirm.

Defendant initially pled not guilty to the DWI charge, then changed his plea to no contest, but eventually withdrew that plea. At his trial, the State presented two witnesses, the arresting officer and a state chemist. After the State rested, the trial court asked defense counsel if defendant was going to testify. When defense counsel informed the court that there would no additional defense evidence, the following colloquy ensued:

> **Court:** . . . I would like to make sure that we speak about the decision by Mr. Carter not to testify. Mr. Carter, I'm aware of the fact that in this case you have at some point pled guilty and then decided to withdraw your plea and have a trial and—and now we have had the trial and I'm told by your lawyer that you don't care to present any evidence? You don't care to testify on you own behalf?
>
> **Defendant:** That's correct, Your Honor. I have a panic disorder with psychotic features so I don't feel that I would be a competent witness in my own defense.
>
> **Court:** I want to make sure that you understand, however that—that if you don't testify and you don't present any witnesses, that there is no way that this jury is going to hear your side of this. Do you understand that?
>
> **Defendant:** I understand Your Honor.

> **Court:** Okay and you still don't wish to testify? I'm not trying to talk you out of your decision.
>
> **Defendant:** I understand Your Honor. That—that—those are my—my wishes. . . .

Defendant acknowledged that he had considered taking the stand in his defense and had thought of other witnesses who could help him, but concluded that it would not serve his legitimate interests. Moving away from the question of other witnesses, the colloquy continued:

> **Court:** Okay, well the—the main issue at hand here today is the decision by you apparently that you're not going to testify?
>
> **Defendant:** Correct Your Honor.
>
> **Court:** Okay and is that your personal decision?
>
> **Defendant:** Yes.
>
> **Court:** And nobody has put any pressure on you to get you to do that?
>
> **Defendant:** Correct.
>
> **Court:** Okay. Do you have anything that you would like to confer with you attorney about?
>
> **Defendant:** Yes.
>
> **Court:** All right, then I'll give you a few minutes to confer. I'm mindful of the fact that you once pled guilty and then changed your mind and wanted to withdraw your plea and we're in a fork in the road here and if you're going to testify, now, is the time to make that decision. If you're not going to, that's fine. I respect that but I want to give you every opportunity to confer with your lawyer about that decision. Okay?

At this point a recess was taken so that defendant could confer with his attorney. When trial was reconvened, defendant informed the court that he wanted to testify. Defense counsel stated that defendant had equivocated on a number of occasions as to whether he would testify. Another recess was taken so that defendant could review the questions on direct examination. At the conclusion of the recess, defendant took the stand and testified that he was extremely panicked and suffering from broken ribs on the night he was stopped. The State attempted to rebut this testimony by recalling the arresting officer, who testified that defendant appeared calm at the time of the stop. Following the close of evidence, the jury convicted defendant of DWI.

On appeal, defendant argues that the trial court improperly encouraged him to take the stand, thereby violating his constitutional right not to testify. We disagree. While the trial court may have

been more persistent than it needed to be in assuring that defendant was making a knowing and intelligent decision not to testify, we find no violation of defendant's constitutional rights. The court knew that defendant had vacillated on whether to go to trial on the charge, and thus it wanted to give defendant every opportunity to consider the consequences of his decision on whether to testify. See State v. Mumley, 153 Vt. 304, 306 (1989) (stating that, although trial court is not required to ascertain on record that defendant knowingly and intelligently waived his right to testify, "better practice" is for court "to discuss the decision not to testify in the defendant's presence"). Accordingly, the court made sure defendant understood that the jury would not hear his side of the story unless he testified. The court also stated, however, that it was not trying to talk defendant out of his decision to waive his right to testify. Given the circumstances, the colloquy between the court and defendant was not coercive in nature.

Defendant's reliance on United States v. Goodwin, 770 F.2d 631 (7th Cir. 1985) is unavailing. In that case, the trial court expressed its surprise when defendant indicated that she did not intend to testify in her defense, warning her that her chances of creating a reasonable doubt in the minds of the jurors rested almost entirely on her ability to persuade them of her innocence. Goodwin, 770 F.2d at 636. Following a recess, defense counsel told the trial court that his client had been left with the distinct impression that the court was advising her to take the stand. Id. The court denied this, but then reiterated "that the chances of the jury having a reasonable doubt as to the truth of the testimony they have heard are very small." Id. The Seventh Circuit Court of Appeals found "this colloquy disturbing," stating that the trial court had gone beyond its limited function of ensuring that the defendant was making a voluntary decision not to testify and instead had taken on the role of advocate by explaining to the defendant some of the pros and cons of testifying and strongly implying that her only chance of acquittal was to testify. Id. at 637. Nevertheless, the court concluded that the defendant's Fifth Amendment rights were not violated because her will was not overborne and her decision to testify was her own. Id. Here, the colloquy did not reach the level of advocacy engaged in by the trial court in Goodwin, and we see no evidence that defendant was coerced into testifying. Even if that were the case, we find no evidence that defendant was harmed by him decision to testify. See id. at 637-38 (noting that even if trial court's comments compelled defendant to testify, error was harmless beyond reasonable doubt because nothing in record indicated that defendant was prejudiced by her decision to testify).

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.),
Specially Assigned