S.S., a Juvenile *v.* STATE of Arkansas

04-933 204 S.W.3d 512

Supreme Court of Arkansas
Opinion delivered March 3, 2005

1. CRIMINAL PROCEDURE — OPENING STATEMENT & ORAL ARGUMENT AT CLOSE OF EVIDENTIARY HEARING — ACCUSED HAS NO CONSTITUTIONAL RIGHT TO EITHER. — An accused has no constitutional right to have oral argument by counsel at the conclusion of an evidentiary hearing on a motion to suppress evidence; nor does an accused have a constitutional right to make an opening statement.

2. CONSTITUTIONAL LAW — RIGHT TO CLOSING ARGUMENT — SUPREME COURT'S DETERMINATION. — The U.S. Supreme Court has held that a criminal defendant has a constitutional right to present a closing argument, even in a non-jury trial; the Sixth Amendment right to the assistance of counsel ensures the criminal defense the opportunity to participate fully and fairly in the adversary factfinding

process; closing argument helps to clarify the issues for resolution by the trier of fact in a criminal case for it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole; for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt; the Court also noted that "the counsel for the defense has a right to make a closing argument . . . , no matter how strong the case for the prosecution may appear to the presiding judge"; furthermore, a judge's belief that he or she would not benefit from closing argument is not a constitutionally sufficient reason for denying any summation at all; finally, the Court recognized that the right existed regardless of whether it was a bench trial or a jury trial.

3. CRIMINAL PROCEDURE — JUVENILE PROCEEDINGS — ASSISTANCE OF COUNSEL ESSENTIAL — The Supreme Court specifically addressed a juvenile's due process rights in *In re Gault*, 387 U.S. 1 (1967); the *Gault* court observed that, regarding the right to counsel, no material difference exists between adult criminal proceedings and juvenile proceedings in which adjudication of delinquency is sought; therefore, the Supreme Court held that the assistance of counsel is essential for the determination of delinquency.

4. CONSTITUTIONAL LAW — ALL CRIMINAL DEFENDANTS HAVE RIGHT TO MAKE CLOSING ARGUMENT — CLOSING ARGUMENT FUNDAMENTAL RIGHT EXTENDED TO DEFENDANT IN STATE CRIMINAL PROSECUTION — A criminal defendant, either juvenile or adult, in a jury or bench trial, has a fundamental right to make a closing argument; such a fundamental right is extended to a defendant in a state criminal prosecution through the Fourteenth Amendment.

5 CRIMINAL PROCEDURE — DENIAL OF DEFENDANT'S RIGHT TO MAKE CLOSING ARGUMENT NOT HARMLESS ERROR — CASE REVERSED & REMANDED — When a defendant has been denied the right to make a closing argument, there is no way to know whether an appropriate argument in summation may have affected the ultimate judgment in his case; thus, the trial judge's decision, which was made without affording the defendant the right to make a closing argument, could not be considered harmless, thus, the case was reversed and remanded.

Appeal from Benton Circuit Court; *Jay T. Finch*, Judge, reversed and remanded

Doug Norwood and *Susan Lusby*, for appellant.

Mike Beebe, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

TOM GLAZE, Justice. In a bench trial before the juvenile division of the Benton County Circuit Court, the judge found appellant S.S. guilty of possession of a controlled substance and placed him on probation. On appeal, S.S.'s only point for reversal is that the trial judge violated S.S.'s Sixth Amendment right to counsel by refusing his attorney the right to make a closing argument. The State concedes that the trial judge erred and that this case should be remanded for a new trial. We agree.

After the State and S.S. rested their cases, the trial judge promptly found S.S. guilty. Taken by surprise, S.S.'s counsel immediately objected to the judge's pronouncement of guilt without first allowing defense counsel to give a closing statement. The trial judge told counsel that he did not need to hear a closing statement; nonetheless, defense counsel persisted, stating "Your Honor, may I — Your Honor, I want to object. [S.S.] has a constitutional right to make a closing argument." When asked where he found authority in the Constitution for his objection, defense counsel replied that he believed it was under the Sixth Amendment and in Article II, Section 10, of the Arkansas Constitution. The judge responded, "I don't believe so," and proceeded to place S.S. on supervised probation.

[1] This court, in *Brenneman v. State*, 264 Ark. 460, 573 S.W.2d 47 (1978), *cert. denied*, 442 U.S. 931 (1979), has held that an accused has no constitutional right to have oral argument by counsel at the conclusion of an evidentiary hearing on a motion to suppress evidence. Also, in *Lamar v. State*, 347 Ark. 846, 68 S.W.3d 294 (2002), we held that an accused has no constitutional right to make an opening statement. However, the question of whether an accused in Arkansas has a constitutional right to make a closing argument has yet to be addressed.

[2] The Supreme Court has addressed this issue now before us and held that a criminal defendant has a constitutional right to present a closing argument, even in a non-jury trial. *See Herring v. New York*, 422 U.S. 853 (1975). In *Herring*, the court struck down a state statute which gave a circuit judge the power to deny closing argument to a defendant in a non-jury trial. The

Herring court reasoned that the Sixth Amendment right to the assistance of counsel ensures the criminal defense "the opportunity to participate fully and fairly in the adversary factfinding process." *Id.* at 858. Justice Stewart, writing for the Court, stated the following:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.

Id. 422 U.S. at 862. The Court also noted that "the counsel for the defense has a right to make a closing argument . . . , no matter how strong the case for the prosecution may appear to the presiding judge." *Id.* at 858-859. Furthermore, a judge's belief that he or she would not benefit from closing argument is not a constitutionally sufficient reason for denying any summation at all. *Id.* at 863. Finally, the court recognized that the right existed regardless of whether it was a bench trial or a jury trial. *Id.*

[3] Although decided before *Herring*, the Supreme Court specifically addressed a juvenile's due process rights in *In re Gault*, 387 U.S. 1 (1967). The *Gault* court observed that, regarding the right to counsel, no material difference exists between adult criminal proceedings and juvenile proceedings in which adjudication of delinquency is sought. *Id.* at 36. Therefore, the Supreme Court held that the assistance of counsel is essential for the determination of delinquency. *Id.*

[4] So too, we find that a criminal defendant, either juvenile or adult, in a jury or bench trial, has a fundamental right to make a closing argument. Such a fundamental right is extended to a defendant in a state criminal prosecution through the Fourteenth Amendment. Also, as the State further points out, when a defendant has been denied the right to make a closing argument, there is no way to know whether an appropriate argument in summation may have affected the ultimate judgment in his case; thus, the trial judge's decision cannot be considered harmless.

[5] For the above reasons, we reverse and remand; however, because S.S. fails to present any convincing reason or argument why the trial judge cannot be fair on remand, we deny his request for a new trial before a different judge

REVERSED and REMANDED.