The Burger Court Opinion Writing Database

Herring v. New York

422 U.S. 853 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 5, 1975

Re: No. 73-6587 - Herring v. New York

MEMORANDUM TO THE CONFERENCE:

The proposed disposition of this case is very disquieting to me, not so much in terms of the result -- although I believe the result demonstrates the weakness of the foundation upon which it must be built -- as what seems to me a too casual use of constitutional adjudication to exercise a de facto supervisory power over state courts. Were this a federal case, our supervisory powers would suffice, and I can hardly believe that we would see any need to reach for the Constitution to deal with the problem. For that matter, on the facts of this case I doubt any one of us would think this case an appropriate vehicle for the exercise of those powers due to the narrowness of the fact issue.

If we view the question in this case as that posed in Powell v. Alabama, 287 U.S. 45, 68 (1932), "What, then, does a hearing include?", we narrow the problem to the Due Process Clauses. If there is a constitutional right in a defendant in a non-jury trial to summarize the evidence,

I would, of course, agree that his counsel must be allowed to make that presentation for him. I would reject, however, the proposition that the right to the "guiding hand of counsel at every step in the proceedings," id., at 69, means that counsel must be afforded the opportunity to sum up in oral argument in every case, however simple the issues or brief the trial, in order to be "effective." If summation, why not discovery? If the right exists, it may be exercised by a defendant who is allowed to waive counsel. Moreover, I take it that the opportunity for oral summation is equally an essential part of the process due in civil proceedings. See Powell v. Alabama, 287 U.S., at 69; Aladdin Oil Burner Corp. v. Morton, 117 N.J.L. 269, 187 A.350 (1936).

Plainly, even a routine case often merits oral summation, and in most cases this is allowed by trial judges. Equally plain, for me, is the fact that there is a host of cases so simple in structure and content and so quickly tried that oral summation is superfluous, if not ridiculous. Two of the federal cases relied on by appellant adequately demonstrate the unseemliness of precipitous verdicts by short-tempered, hair-trigger trial judges. However, in each case the record showed other errors warranting reversal. Thomas v. District of Columbia, 90 F.2d 424 (CA DC 1937); United States v. Walls, 443 F.2d 1220 (CA 6 1971). See also Floyd v. State, 90 So.2d 105 (Fla. 1956). Here, it is true, the trial extended -- with interruptions -- over a five-day period, and there

was sharply conflicting testimony. On the other hand, the case was hardly complicated, and both the prosecutor and defense counsel made opening statements. See appx. at 4; N.Y. Crim.Pro.L. § 320.20(3)(a). In addition, appellant's counsel here was given an opportunity to, and did, argue motions to dismiss -- and succeeded in part. During his argument on those motions, in fact, appellant's counsel stated: "Of course the Court has copious notes on it, and I am sure it is very fresh in the Court's mind." Appx. at 66. Moreover, the transcript in the appendix provides ample evidence that the trial judge was most attentive to the proceedings. Thus, he reversed on Monday, the last day of trial, an evidentiary ruling made on the previous Friday. See appx. at 61 and 91. And he dismissed one count against appellant after argument on appellant's motions. Appx. at 68. He acquitted him on another. Id., at 93.

A reading of the transcript leaves me with the abiding impression that the trial judge was scrupulously fair. See, e.g., id., at 48-50. On the facts of this case, in other words, it is difficult indeed to argue that the right to summation is essential to a fair trial in a non-jury case, or to fashion a prophylactic rule for state courts in the guise of a constitutional holding. After all, the basic question is whether the trial lacked fundamental fairness.

This statute is unique and no comparable provision of any other state is cited to us. I would be prepared to assume that it was inspired by the crushing load of business in most of the New York courts and to give the judges an added tool to deal with long-winded lawyers. I confess that short-tempered judges gave me as much trouble in my practice as long-winded lawyers, for the latter can be suffered in silence with less impact on the blood pressure.

The idea underlying the statute is nothing new, however; it does no more than declare centuries of the practice leaving the submission of oral argument to the sound discretion of the trial judge. As such, it can be and has been dealt with by appellate review of that discretion. Knowing how appellate judges, not excluding ourselves, can and do "tailor" review for abuse of discretion to fit the needs, the problem can be seen as one that courts can deal with readily without invoking the Constitution of the United States against a state.

I confess that in this case it would be remarkable if any judge thought there was any abuse of discretion, so it is an easy case rather than the hard kind of case which normally tempts us to reach for any solution.

We have yet another prospect looming ahead. There seemed to be a consensus that a written summation would satisfy due process. We did not mention civil cases.

Will we grant a due process status to summation for criminal but not civil?

If so, will it apply to small claims courts -- to all courts?

Where do we draw the line?

How long a time must be allowed, or is the length left to review only for abuse of discretion?

I have suggested some of the fruit a due process holding in this case is likely to bear. Assuming the Court bases its holding on the Sixth Amendment, even more sweeping consequences can be envisioned. If a party in a case such as this has a constitutional right to have his counsel be heard orally in summation, how can an appellate court justify dispensing with oral argument in an appeal from a judgment, entered after a one-week or four-week trial, review of which is sought on a record or abridged record appendix? True, the lawyers have presumably been heard once. But a sole fact trier needs no record (especially when, as here, the trial judge kept "copious notes," appx. at 66) on a brief trial with simple issues. Since reviewing courts must depend on a record, is it not at least arguable that there is a greater need for oral argument even though it be confined to legal points? In any event, as suggested, I believe the conclusion is inescapable that any error as to appellant's Sixth Amendment rights was harmless beyond a reasonable doubt. Compare Milton v. Wainwright, 407 U.S. 371 (1972), with Chapman v. California, 386 U.S. 18, 23 with n. 8 (1967).

Whatever the basis of decision in this case, the proposed disposition uses a shotgun to kill a gnat. I have mentioned my impression that there seemed to be the consensus that a trial judge could dispense with oral argument if he allowed a memo to be filed. See Thomas v. District of Columbia, 90 F.2d, at 428. Perhaps an awareness of the appellate problems suggested above compels that conclusion.

I would avoid such overkill when, as here, it can only weaken our defenses against a swarm of pests. We ought to consider whether we are not making a trial so complex and lengthy that courts will simply grind down. Remember that King Philip so overloaded his ships of the Armada that they were topheavy with weaponry and could not maneuver when the English forced them to it. Quick turns and only modest winds capsized them.

Regards,

WRB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1975

Re: 73-6587 - Herring v. New York

Dear Bill:

Please join me in your dissenting opinion.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 16, 1974

Dear Byron:

Please join me in your dissent in 73-6587, CLIFFORD HERRING v. STATE OF NEW YORK.

WOD/Sandra

WILLIAM O. DOUGLAS

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 21, 1975

Re: No. 73-6587 - Herring v. New York

Dear Potter:

Please join me.

WILLIAM O. DOUGLAS

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 3, 1975

No. 73-6587 - Herring v. New York

Dear Chief:

I notice on the assignment sheet the above is to be assigned by me. I assigned it to Potter at conference following the vote.

Sincerely,

WJB

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 9, 1975

RE: No. 73-6587 Herring v. New York

Dear Potter:

Please join me in the opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 16, 1974

No. 63-6587 -- Herring v. New York

Dear Byron,

My conference notes indicate that there were four votes to note probable jurisdiction in this case. If this turns out to be incorrect, please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Mr. Justice Stewart, J.

Circulated: APR 5 1975

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 73-6587

Clifford Herring, Appellant, *v.* State of New York.	On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[April —, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

A New York law confers upon every judge in a non-jury criminal trial the power to deny counsel any opportunity to make a final argument or summation of the evidence before the rendition of judgment. N. Y. Crim. Proc. Laws § 320.20 (3)(c).[1] In the case before us we are called upon to assess the constitutional validity of that law.

I

The appellant was brought to trial in the Supreme Court of Richmond County, New York, upon charges of attempted robbery in the first and third degrees and possession of a dangerous instrument.[2] He waived a jury.

[1] Section 320.20 (3)(c) provides:

"The Court may in its discretion permit the parties to deliver summations. If the court grants permission to one party, it must grant it to the other also. If both parties deliver summations, the defendant's summation must be delivered first."

By contrast, New York law explicitly grants a right to make a "closing statement" in every civil case. N. Y. Civ. Prac. Rule 4016 (McKinney's 1963).

[2] New York Penal Law §§ 110.00/160.15; 110.00/160.05; 265.05.

STYLISTIC CHANGES THROUGHOUT.

5, 10-11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated:

3rd DRAFT

Recirculated: APR 9 1975

SUPREME COURT OF THE UNITED STATES

No. 73–6587

Clifford Herring, Appellant, *v.* State of New York.	On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

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p. 12

Justice Douglas
Justice Brennan
Justice Stewart
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist

Circulated: APR 25 1975

Recirculated:

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-6587

Clifford Herring, Appellant, *v.* State of New York.	On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[April —, 1975]

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[illegible]ce Powell
[illegible]tice Rehnquist

[illegible], J.

5th DRAFT [illegible]d: _____

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SUPREME COURT OF THE UNITED STATES

No. 73-6587

Clifford Herring, Appellant, *v.* State of New York.	On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[April —, 1975]

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

CLIFFORD HERRING *v.* STATE OF NEW YORK

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT

No. 73-6587. Decided October —, 1974

MR. JUSTICE WHITE, joined by MR. JUSTICE DOUGLAS, dissenting.

Appellant, after waiving a jury trial, was convicted by the trial court of attempted robbery in the third degree. At trial, appellant presented an alibi witness, his employer, and also testified in his own behalf, denying the allegations against him. At the close of the evidence, appellant's counsel requested the opportunity to be heard by the court in closing argument. This request was denied, the trial court stating: "Under the new statute, summation is discretionary, and I choose not to hear summation." Eight minutes later, the trial court found appellant guilty of attempted robbery and dismissed a charge of possession of a dangerous instrument which had been tried to the court with the robbery charge. Appellant appealed his conviction to the Appellate Division, contending, *inter alia,* that his Sixth and Fourteenth Amendment rights to effective assistance of counsel and due process had been denied by the refusal of trial court to permit closing argument. The Appellate Division affirmed the conviction, and leave to appeal to the New York Court of Appeals was denied. Appellant brought his appeal to this Court in due course.

Under New York Criminal Procedure Law § 320 (3)(c) (McKinney's 1971), the trial court in a nonjury criminal trial has apparently unfettered discretion to deny the state prosecutor and the defendant the opportunity for

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 8, 1975

Re: No. 73-6587 - Herring v. New York

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 7, 1975

Re: No. 73-6587 -- Clifford Herring v. State of New York

Dear Potter:

Please join me.

Sincerely,

T. M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 5, 1975

Re: No. 73-6587 - Herring v. New York

Dear Bill:

Please join me in your dissent.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

April 8, 1975

No. 73-6587 Herring v. New York

Dear Potter:

You will recall the concern expressed at the Conference to the effect that invalidating the New York statute might be construed as requiring judges to allow oral argument at various stages in the criminal process - e.g., on motions to suppress.

Although I think your opinion is clear, there may be some merit in adding a footnote on this point.

Sincerely,

Mr. Justice Stewart

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 8, 1975

No. 73-6587 Herring v. New York

Dear Potter:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 10, 1975

Re: No. 73-6587 - Herring v. New York

Dear Potter:

In due course I will circulate a dissent in this case.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-6587

Clifford Herring, Appellant, *v.* State of New York. | On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[May —, 1975]

MR. JUSTICE REHNQUIST, dissenting.

I

The Court has made of this a very curious case. What began as a constitutional challenge to a statute which gives trial courts discretion as to whether "parties" may deliver summations, has been transformed into an exploration of the right to counsel—although no one doubts that appellant was competently represented throughout the proceedings which resulted in his conviction. Today's opinion, in deriving from the right to counsel further rights relating to the conduct of a trial, expands the earlier holdings in *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), and *Brooks* v. *Tennessee*, 406 U. S. 605 (1972). In each of these three instances one must presume, in view of the Court's analytical approach, that regardless of the intrinsic importance of the rights involved, they are enforced only because the accused has a prior right to the assistance of a third party in the preparation and presentation of his defense.

I think that in each instance a statement from Mr. Justice Frankfurter's separate opinion in *Ferguson* is apropos: "This is not a right-to-counsel case." 365 U. S., at 599. In the present case, the crucial fact is not that *counsel* wishes to present a summation of the evidence, but that the *defendant*—whether through counsel or

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: _____

Recirculated: 5/12/75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-6587

Clifford Herring, Appellant, *v.* State of New York. | On Appeal from the Appellate Division of the Supreme Court of New York, Second Judicial Department.

[May —, 1975]

MR. JUSTICE REHNQUIST, dissenting.

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