Roger Williams University Law Review

Volume 27
Issue 3 *Vol 27, Iss. 3 (Summer 2022)*

Article 20

Summer 2022

State v. Smith, 243 A.3d 1045 (R.I. 2021)

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Criminal Procedure. *State v. Smith,* 243 A.3d 1045 (R.I. 2021). A trial justice has the duty to thoroughly inquire into what evidence the defendant intends to present before deciding to grant or deny them a chance to present an opening statement. This is an automatic duty; it is not triggered by the defendant, but rather, the burden is always on the trial justice to ask multiple questions until they have enough information to make this decision.

FACTS AND TRAVEL

In August 2013, the FBI seized a "significant cache" of child pornography in Peoria, Arizona.[1] After determining the pornography was distributed via email to people across the country, the FBI began an extensive investigation to unearth who the recipients were.[2] Multiple search warrants served on Craigslist, Google, and Cox Communications exposed an email and IP address belonging to the defendant, Mr. Andrew Smith of Cranston, as one of the recipients.[3]

Smith was tried for one count of possession of child pornography and appeared *pro se* at his trial in 2017.[4] The day before the start of the trial, the trial justice met with Smith and the prosecutor to explain how the trial would proceed.[5] At the meeting, the justice asked Smith if he was planning on testifying and stated, "You don't have any witnesses you're going to call, right?"[6] Smith responded he did not think he would testify and that he would not be calling any witnesses of his own.[7] In response, the trial judge said, "What I'm going to do is, I'm going to let the State open, but if you don't

1. State v. Smith, 243 A.3d 1045, 1047 (R.I. 2021).
2. *Id.*
3. *Id.* at 1047–48.
4. *Id.* at 1048.
5. *Id.*
6. *Id.*
7. *Id.* Smith intended to call the same witnesses the state planned to call. *Id.*

have any evidence, I'm going to instruct—and, by the way, you will get a copy of the instructions along with [the state]."[8] The record is devoid of any further discussion about opening statements before the trial.[9]

The following day, after the state delivered its opening statement, Smith also attempted to deliver an opening statement.[10] The trial justice denied Smith the opportunity to give an opening statement, stating they had "talked about this yesterday" and Smith had to "wait until it [was his] time to make a case."[11] Smith attempted to raise his objection again a few hours later during a break in the state's first witness testimony, only to be told by the trial justice "[i]f you made it known to me yesterday that you were going to testify . . . I would have allowed you an opening statement."[12] Smith sought clarification by asking "If I don't testify, I can't make an opening statement?"[13] The trial justice responded, "That's correct."[14]

Smith appealed his conviction on three grounds: the trial justice wrongly prevented him from delivering an opening statement; the trial justice misinformed the jury that the parties had stipulated the images in question met the definition of child pornography; and the findings from the search warrant should have been suppressed because the officer who signed the warrant was not authorized to do so.[15] Only his first argument, the trial justice wrongly prevented him from delivering an opening statement, was considered by the Rhode Island Supreme Court.

ANALYSIS AND HOLDING

The Supreme Court's primary concern was whether or not Smith was improperly denied a chance to make an opening statement.[16] Under Rule 26.2 of the Superior Court Rules of Criminal Procedure, a defendant is allowed to make an opening statement

8. *Id.*
9. *Id.* at 1048 & n.4.
10. *Id.* at 1048.
11. *Id.* at 1049.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1048.
16. *Id.* at 1049.

"either before the state introduces its evidence or before a defendant presents his own case."[17] However, Rule 26.2 does not allow a defendant to speak about whatever they desire.[18] A defendant's opening statement must be limited in scope to a "summation of the evidence that the parties intend to introduce," including evidence from the defendant's case-in-chief argument and the state's argument.[19] This limited scope means a defendant may be denied a chance to make an opening statement if they fail to specify what evidence they will present in their own defense or what affirmative evidence they expect to obtain on cross-examination.[20] In defining affirmative evidence that could be elicited on cross, the Court held that evidence exposing missing elements of a charge against the defendant qualified.[21] For example, in the current case, evidence or testimony brought out on cross determining that the photographs alleged by the state to be child pornography were actually *not* child pornography could be considered affirmative evidence.[22]

The Court affirmed that whether a defendant has stated with certainty what evidence they will present or expect to uncover is a decision that must be made by trial justices.[23] Citing its 2016 *State v. Martinez* decision,[24] the Court noted that when a defendant would like to make an opening statement but has not stated with certainty what evidence they will discuss, a trial justice must further inquire with the defendant to determine what evidence they expect to solicit.[25] Such questioning allows the trial justice to learn the full scope of the defendant's defense, and gives the justice reasonable grounds to make a decision regarding if the defendant is entitled to an opening statement.[26]

The state attempted to argue *Martinez* held the defendant must "attempt" to offer specific evidence before the trial justice's

17. *Id*; *see also* R.I. SUPER. R. CRIM. P. 26.2.
18. *Smith*, 243 A.3d at 1049.
19. *Id.* (quoting State v. Martinez, 139 A.3d 550, 554 (R.I. 2016)).
20. *Id.*
21. *Id.* at 1051.
22. *Id.*
23. *Id.* at 1050.
24. *Martinez*, 139 A.3d at 554.
25. *Smith*, 243 A.3d at 1049; *see Martinez*, 139 A.3d at 555.
26. *Smith*, 243 A.3d at 1050.

duty to inquire is triggered.[27] The Court clarified that while a defendant should attempt to state precisely what evidence he will use or elicit on cross, a defendant who fails to be precise "must be given an opportunity to provide a more detailed explanation of such evidence before he is precluded from making an opening statement."[28] In other words, a trial justice must *always* further inquire into what evidence a defendant expects to uncover when a defendant has not been specific enough in their statements before a trial justice can deny a defendant an opportunity to make an opening statement.[29]

In the case at bar, the Court found the trial justice did not engage in such an inquiry.[30] In the pre-trial conference, the trial justice asked Smith, "You don't have any witnesses you're going to call, right?"[31] The Court ruled this was not a sufficient inquiry, as it did not give Smith the opportunity to provide "a more detailed explanation of what evidence, if any, he anticipated eliciting," on cross.[32] Additionally, Smith was never asked at the pre-trial conference if he wanted to present an opening statement; rather, Smith was simply asked if he intended to testify or call any witnesses.[33] These two questions did not uncover what evidence Smith planned to present; therefore, the trial justice was under the legal duty to ask additional questions.[34] Further questioning would have given Smith an adequate opportunity to explain the theory of his defense and would have given the trial justice the necessary basis to determine if Smith could offer an opening statement.[35]

Since the Court vacated the conviction based on Smith's first argument, they did not consider Smith's other two arguments.[36]

Standing as the lone dissenter, Justice Goldberg focused extensively on Smith's disruptive behavior throughout the trial and argued the majority wrongly interpreted *Martinez*.[37] Justice

27. *Id.*
28. *Id.* at 1051.
29. *Id.*
30. *Id.* at 1050.
31. *Id.* at 1048.
32. *Id.* at 1050.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 1051.
37. *Id.* at 1052 (Goldberg, J., dissenting).

Goldberg pointed out that Smith interrupted the trial justice so often throughout the proceeding that he received a contempt warning.[38] Smith also tested the trial justice's patience with "uncontrollable" outbursts in front of the jury and inappropriate questioning on cross examination.[39] Given his behavior, Justice Goldberg found "[q]uite understandably, the trial justice was wary as to what defendant would do or say in front of the jury."[40]

Justice Goldberg then stressed that a defendant has no absolute right to make an opening statement; rather, a defendant has the burden to persuade the court they qualify to give an opening statement by pointing to specific, affirmative evidence they intend to uncover on cross-examination.[41] In her view, *Martinez* does not place an automatic duty on a trial justice to inquire into this specific evidence.[42] The duty is triggered only if the defendant offers up proof regarding the information they intend to elicit on cross-examination.[43] In this instance, Smith never offered to the justice what evidence, if any, he intended to produce on cross.[44] Smith also specifically said he was not going to call witnesses or testify in the case.[45] The lack of information from Smith meant the trial justices duty to inquire was not triggered; therefore, the trial justice did not err in denying Smith an opening statement.[46] Justice Goldberg ended her dissent by stating due to Smith's behavior, the trial justice was under no obligation to discover what evidence Smith intended to elicit on cross.[47]

COMMENTARY

The Rhode Island Supreme Court reaffirmed the importance and depth of the justice's fact-finding duties in this decision. Justice Goldberg in her dissent wrote, "The trial justice could not, nor was he under any obligation to, divine what evidence defendant

38. *Id.* (Goldberg, J., dissenting).
39. *Id.* at 1052–53 (Goldberg, J., dissenting).
40. *Id.* at 1053 (Goldberg, J., dissenting).
41. *Id.* (Goldberg, J., dissenting).
42. *Id.* (Goldberg, J., dissenting).
43. *Id.* at 1054 (Goldberg, J., dissenting).
44. *Id.* at 1055 (Goldberg, J., dissenting).
45. *Id.* (Goldberg, J., dissenting).
46. *Id.* (Goldberg, J., dissenting).
47. *Id.* (Goldberg, J., dissenting).

intended to elicit through cross-examination."[48] "[C]ould not" is a strong statement; it implies there was no hope, and the trial justice exhausted all efforts to understand what evidence Smith planned on presenting in trial.[49] The record shows the trial justice asked two questions—one phrased initially a statement, and neither hinted to Smith the answers could deny him an opening statement.[50] The majority correctly realized that there was room for the trial justice to further inquire with Smith. It does not appear this is a hefty burden to place on the justices; it is simply asking them to be thorough in their fact-finding duties before the trial begins. Given in this case the trial justice made a bare-minimum inquiry, a few more questions might have been enough to reach the necessary threshold. Without being inconvenient, the Court has found a way to make sure trial justices dig a bit deeper into all the evidence before making a trial-altering decision such as denying a defendant an opening statement.

Additionally, further inquiry from the trial justice would help the trial as a whole run smoother. Further questioning would have determined if Smith was entitled to an opening statement, given the trial justice and the state insight into where Smith was going with his questioning, and forced Smith to think in-depth about the questions and responses he wanted to elicit during cross. This could have prevented some of the outbursts and off-the-rail questioning that occurred during the trial. The entire process could have gone more seamlessly if the justice took the time to ask these additional questions.

By spending a good portion of her dissent discussing Smith's outbursts and difficulty as a *pro se* party,[51] Justice Goldberg's opinion reads more as a critique on a demanding defendant than a difference in law. Her disagreement with the majority's interpretation of *Martinez* is lost between paragraphs detailing the "remarkable degree of patience" from the trial judge[52] and the erratic behavior of the defendant.[53] Undoubtably, Smith's behavior was

48. *Id.* at 1055 (Goldberg, J., dissenting).
49. *Id.* (Goldberg, J., dissenting).
50. *Id.* at 1049.
51. *Id.* at 1052–53 (Goldberg, J., dissenting).
52. *Id.* at 1052 (Goldberg, J., dissenting).
53. *Id.* at 1052–53 (Goldberg, J., dissenting).

challenging; however, this should not be enough to deny him the right to an opening statement. Justice Goldberg states, "Irrespective of his pro se status, defendant was 'expected to familiarize himself with the law as well as the rules of procedure.' As such, it was incumbent upon defendant to request a sidebar conference and set forth the affirmative evidence he planned to present."[54] While this is true, *pro se* parties are often more difficult to work with and often do require a more thorough consideration from a trial judge in order to achieve equal justice. A defense attorney in a criminal case ensures the defendant has a fair trial by holding the state to their burden and works as a check on the entire judicial system. When a defendant chooses not to have an attorney present, that check on the system is missing, at which point the judge must be extra careful to fulfill his or her neutral obligations. In this decision, the majority simply asks judges to inquire in depth what defense the *pro se* party will present at trial before deciding if the defendant is entitled to an opening statement. This seems like a fair, low-burdensome method to ensure that all defendants receive equal justice as they would in cases where an attorney is present.

CONCLUSION

The Rhode Island Supreme Court expanded off their previous holding in *Martinez* by establishing a trial justice has a duty to complete a thorough investigation into a defendant's evidence, including testimony or any evidence a defendant wishes to elicit on cross examination, before denying a defendant the opportunity to present an opening statement. The trial justice must inquire about the evidence regardless of how non-specific the defendant answers initially, as a defendant must be given a chance to provide a detailed explanation of their evidence before they are prevented from giving an opening statement.

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54. *Id.* at 1055 (Goldberg, J., dissenting).