COUNSEL COMMENTS, Cont.

R. v. Eroma, 2013 ONCA 194

Comments provided by Morgan Westgate, JD Candidate at Osgoode Hall Law School, and assistant to Philip Norton, Counsel for the Appellant

Morgan Westgate

"The Canadian approach to ineffective assistance of counsel appeals is highly protective of the independence of the legal profession, specifically the criminal defence bar. This is especially true with regard to tactical trial decisions. As evidenced by *R. v. Joanisse* (1995), 102 CCC (3d) 35 (Ont. C.A.) and its progeny, there is a strong presumption in favour of competence where allegations of ineffective trial assistance arise, and the judiciary takes a deferential approach to assessing trial counsel's conduct retrospectively. Thus, in the normal course, an appellant must displace the presumption that defence counsel was acting as a reasonable professional. This is the platform on which the legal test has been formulated - a perspective that has been consistently applied for nearly two decades. The reluctance of appellate courts to second-guess trial counsel's decisions is partly due to reasons associated with the incompatibility of hindsight with the necessary freedom to craft trial strategy. It also recognizes the complexities surrounding running a trial itself, an inherently unpredictable task. Courts are acutely aware of the need to protect the sanctity of the solicitor-client relationship, and to encourage fearless advocacy on behalf of an accused in a criminal trial, which could be substantially compromised if judicial scrutiny of counsel's actions became commonplace. Thus, the jurisprudence is clear that defence counsel are accorded a large amount of discretion in conducting a trial (*R. v. Qui*, 2010 ONCA 736 at para. 9 citing *R. v. Archer* (2005), O.J. No. 4348 (CA) at 139).

Although this principle is alive and well in Canada, *Eroma* illustrates the competency presumption's limitations when dealing with serious misconduct of

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defence counsel. The case represents an interesting shift in the Court's approach to ineffective assistance of counsel appeals in that it is judicial recognition of circumstances where the presumption of competence is substantially diminished. This is a significant distinguishing feature of this case, as it stands in contrast to basic principles of the *Joanisse* test: that the appellant has the burden of proving incompetence. The basis for this proposition is rooted in the fact that the goal of the inquiry is to maintain trial fairness, not evaluate counsel's performance. Indeed, the Supreme Court has maintained that without a miscarriage of justice, the issue of competence is a matter of professional ethics, and is not appropriate for appellate courts to entertain (*R v G.D.B.* (2000), 143 CCC (3d) 289 (SCC)).

Although *Eroma* does not change this standard *per se*, it certainly qualifies it by identifying circumstances where the nature of the conduct itself is so diametrically opposed to what may be considered legitimate professional discretion, that there is no reasonable basis to accord deference to trial counsel's decisions. This is of heightened importance when fundamental decisions (such as whether to plead guilty or testify), for which counsel are ethically bound to consult and receive client instructions, are the subject of the ineffective assistance claim. For example, it was accepted that if the record revealed that Mr. Eroma was deprived of the right to choose whether to testify, the miscarriage of justice test would be met (*G.D.B.*, at para. 34; *R. v. D.M.G.*, 2011 ONCA 343 at para. 109).

Of particular interest is the fact that Mr. Eroma's allegations were uncontested; the Court had the benefit of only one side of the argument. As trial counsel failed to respond to appellate counsel, crown counsel, and direct Orders from the Court of Appeal, Mr. Eroma's appeal ground went unanswered and therefore unchallenged. This, together with trial counsel's concurrent Law Society proceedings, established a factual context which enabled the Court to take a principled approach when dealing with presumption of competence. Although appellate counsel did not ask the Court to start with the presumption of *incompetence*, *Eroma* certainly opens the door to the possibility in the future. Even if is not explicitly accepted as such, given the facts and the way the Court dealt with this appeal, it is arguable that an unspoken presumption that counsel was not acting as a reasonable professional factored into the judgment.

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It will be interesting to see how post-*Eroma* jurisprudence develops, and whether the judiciary will be more willing to grant these appeals in the future. It may seem like a step towards a more lenient test, but in practicality it is unlikely to make a large difference in terms of actual outcomes. Even in *Eroma*, which was held to be "unique and most unfortunate circumstances" the appropriate remedy was deemed a new trial, and not a stay proceedings. Although there was a direction to the Crown to use its discretion as to whether to proceed with a second trial, the judgment reflects the Court's continued discomfort in dealing with these appeals. Thus, even though there is now an explicit recognition of the circumstances in which trial counsel will not be given the benefit of a strong presumption of competence, the actual recourse for an appellant will likely be having to face the stress, time-consumption, and costs of re-litigation. This is notwithstanding the fact that he has been held to be a victim of a miscarriage of justice, after being deprived his constitutionally protected right to exercise a fundamental decision at trial."