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Whitaker v. State, 199 A.3d 1021 (R.I. 2019)

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Criminal Law. *Whitaker v. State*, 199 A.3d 1021 (R.I. 2019). The Rhode Island Supreme Court made clear that the rule outlined in the United States Supreme Court case *Rosemond v. United States* does not apply retroactively.

FACTS AND TRAVEL

In 2006, Kendall Whitaker (Whitaker) was convicted of first degree murder, first degree robbery, assault with a dangerous weapon, carrying a handgun without a license, use of a firearm during the commission of a violent crime, discharging a firearm in the commission of a crime of violence, and committing a crime of violence while armed and having available a firearm.¹ Prior to these convictions, Whitaker and two friends, Brandon Robinson (Robinson) and Richard Isom (Isom), attended a party at a friend's apartment.² After spending the beginning of the evening socializing, Whitaker and some friends went into the hallway of the apartment building, where Whitaker expressed his interest in taking Joel Jackson's (Jackson) gold chain.³ Upon re-entering the party, Robinson and Jackson began to quarrel.⁴ At trial, Corissa Richardson (Richardson), also in attendance at the party, testified that she saw Whitaker remove a gun from his jacket and point it toward the scuffle.⁵ Isom and Robinson also testified against Whitaker at trial, recounting that Whitaker "drew his gun" after returning to the apartment.⁶ Shortly thereafter, three individuals were shot, including Jackson, who later died of his injuries.⁷ In addition, Robinson testified that he took the chain and a medallion

1. *Whitaker v. State*, 199 A.3d 1021, 1024 (R.I. 2019); *State v. Whitaker*, 79 A.3d 795, 800 (R.I. 2013).

2. *Whitaker*, 199 A.3d at 1024.

3. *Id.*

4. *Id.*

5. *Id.* at 1024–25.

6. *Id.* at 1025.

7. *Id.*

that Jackson had been wearing.⁸ Whitaker, Isom and Robinson were later arrested.⁹

After Whitaker was convicted of the aforementioned crimes, he filed a direct appeal with the Rhode Island Supreme Court (the Court) alleging that there was insufficient evidence to support the jury's conclusion that he was guilty of aiding and abetting.¹⁰ The Court held that, based on the testimony of Robinson, Isom, and Richardson, the jury had enough support to find Whitaker guilty beyond a reasonable doubt.¹¹

One year later, Whitaker filed an application for post-conviction relief, claiming that the jury was wrongly instructed pursuant to a newly decided United States Supreme Court case, *Rosemond v. United States*.¹² Whitaker argued that in order to be convicted under an aiding and abetting theory, the jury must find that Whitaker "actively participated in the underlying violent crime with advance knowledge that a confederate would use or carry a gun during the commission of the crime."¹³ Whitaker also alleged ineffective assistance of counsel because his attorney failed to object to the jury instructions provided at trial.¹⁴ The hearing justice granted his application, finding that the decision in *Rosemond* applied to Whitaker's case, and vacated several of his convictions.¹⁵ The hearing justice also found that although *Rosemond* was decided after Whitaker's conviction, it should nonetheless apply retroactively.¹⁶ Additionally, the trial justice held that in order to

8. *Id.*

9. *Id.*

10. *State v. Whitaker*, 79 A.3d 795, 805 (R.I. 2013). Whitaker argued that there was insufficient evidence for him to be convicted of aiding and abetting because the only evidence presented involved a conspiracy count for which Whitaker had already been acquitted. *Id.*

11. *Id.* at 807.

12. *Whitaker*, 199 A.3d at 1025. The Supreme Court held in *Rosemond* that for federal charges for using or carrying a firearm during and in relation to any crime of violence or drug trafficking, criminal liability for that offense on a theory of aiding and abetting requires the government to prove that the defendant knew about the presence of the gun in advance and knowingly participated in the criminal venture with the intent to aid an armed offense. *Id.* at 1022.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1026.

be convicted under an aiding and abetting theory by a preponderance of the evidence, Whitaker had to have known of and voluntarily participated in the crime; the hearing justice found he did not do so.¹⁷ Finally, applying the requirements laid out in *Strickland v. Washington*,¹⁸ the hearing justice found that Whitaker had successfully shown that his counsel's performance could not "be relied on as having produced a just result."¹⁹ The State petitioned the Court for a writ of certiorari to review the lower court's grant of Whitaker's application for post-conviction relief, which the Court granted.²⁰

ANALYSIS AND HOLDING

The Court reviewed the trial justice's decision to grant Whitaker's petition for post-conviction relief *de novo*, according "great deference" to the hearing justice's findings of fact.²¹ The Court first addressed the State's argument that Whitaker's trial counsel was not deficient for not requesting a jury instruction based on the ruling in *Rosemond*.²² The Court found that the ruling in *Rosemond* does not apply retroactively for two reasons: (1) *Rosemond* was decided nine years after Whitaker's trial and (2) the Supreme Court, in its holding, was silent on *Rosemond*'s retroactive applicability.²³ Even if this rule were to apply retroactively, however, the Court distinguished Whitaker's case because he was convicted pursuant to a Rhode Island law, where in *Rosemond*, a federal statute applied.²⁴ As the Court explained, the state and federal statutes have different standards of liability for aiding and

17. *Id.*

18. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). The two requirements used to determine whether counsel's conduct so undermined the proper functioning of the adversarial process are: (1) evidence showing counsel's performance was so deficient that counsel did not function at the level guaranteed by the Sixth Amendment and, (2) evidence that the deficient performance prejudiced the defense. *Id.*

19. *Whitaker*, 199 A.3d at 1027.

20. *Id.* at 1026.

21. *Id.* at 1027.

22. *Id.*

23. *Id.* at 1028.

24. *Id.* at 1029.

abetting,²⁵ and because Whitaker was not convicted under the federal statute, *Rosemond* did not apply.²⁶

Next, the court sought to determine *Rosemond*'s retroactive applicability on collateral review. Looking to the United States Supreme Court case *Teague v. Lane*,²⁷ where the Court held that new rules regarding criminal prosecutions should be applied retroactively to cases on collateral review, this Court held that the ruling in *Rosemond* was not a new rule and therefore did not apply retroactively.²⁸ This Court defined a new rule as groundbreaking: one that "imposes new obligation[s] on the States or the Federal Government."²⁹ Because the *Rosemond* court based its decision on precedent, "it did not create a new rule that was to be retroactive to cases on collateral review."³⁰ Furthermore, the Court emphasized, *Rosemond* applied to federal, not state law, which was not at issue.³¹

Finally, the Court reviewed whether Whitaker's defense counsel was so deficient in his performance as to "undermine[] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."³² The court again reviewed whether Whitaker had "advance knowledge that a weapon was going to be used," relying on testimony given by Jackson and Isom, which confirmed that Whitaker decided prior to attending the gathering that he would bring a gun.³³ The Court explained that even if *Rosemond* applied to the case at bar, the conviction would nonetheless stand because the defense's reliance on *Rosemond* was "misplaced."³⁴

25. *See id.* at 1029–30 (discussing different standards for aiding and abetting liability under Rhode Island law and federal law).

26. *Id.* at 1028–29.

27. *Teague v. Lane*, 489 U.S. 288, 301 (1989).

28. *Whitaker*, 199 A.3d at 1030.

29. *Id.*

30. *Id.* at 1031.

31. *Id.* at 1029.

32. *Id.* at 1027.

33. *Id.* at 1031.

34. *Id.* at 1032. The Court relied on the case of *Jimenez v. United States*, where the court held that *Rosemond* would only affect the outcome of a case if the defendant did not carry a weapon himself. *Id.* (citing *Jimenez v. United States*, 2015 WL 4507764, at *2 (S.D.N.Y. July 23, 2015)).

Whitaker's final challenge involved his trial counsel's "failure to raise a challenge to the sufficiency of the evidence to charge Whitaker under an aiding-and-abetting theory."³⁵ Upon review of the record, the court concluded that there was sufficient evidence to convict Whitaker in light of the testimony provided by Robinson and Isom.³⁶ Accordingly, the Court held that Whitaker failed to show that his trial counsel was deficient by a preponderance of the evidence.³⁷

COMMENTARY

Although the Court concluded that *Rosemond* does not apply retroactively, it nevertheless considered whether this rule would apply to Whitaker's case if it was found to apply retroactively.³⁸ The Court described how the *Rosemond* rule would not apply here because Whitaker was convicted under state law, as opposed to federal law.³⁹ Although the rule concerns federal law, the principle articulated in *Rosemond* should apply to state law as well.⁴⁰ The fundamental principle underlying the crime of aiding and abetting is the same in both federal and state law. Although the rule in *Rosemond* does not apply retroactively, the Court incorrectly based its inapplicability on the particular crime of aiding and abetting.⁴¹

The Court attempts to explain the reasons why *Rosemond* did not establish a new rule, basing this conclusion on the *Rosemond* Court's reliance on precedent.⁴² The Supreme Court often relies on precedent to craft new rules; for example, in *Miranda v. Arizona*, the Court established a new rule regarding arrest procedures.⁴³ The Supreme Court established this new rule while relying on precedent cases that discussed procedural safeguards to protect an individual's right against self-incrimination.⁴⁴ *Rosemond* is no different—the Supreme Court clearly crafted a new rule that was

35. *Whitaker*, 199 A.3d at 1032.

36. *Id.* at 1033.

37. *Id.* at 1032.

38. *Id.* at 1030.

39. *Id.*

40. *Id.* at 1029.

41. *Id.*

42. *Id.* at 1030.

43. *See Miranda v. Arizona*, 384 U.S. 436, 503 (1966).

44. *Id.* at 498.

based upon existing precedent.⁴⁵ The Court sets a nearly impossible standard for creating a new rule: the rule must be “groundbreaking.”⁴⁶ The Court’s reliance on this standard is misguided based on the reasoning in *Miranda* and cases like *Miranda* that articulate new legal rules despite relying on precedent.⁴⁷

CONCLUSION

Here, the Court established that the United States Supreme Court, in its holding in *Rosemond*, did not intend its ruling to apply retroactively. *Rosemond* was decided nine years after Whitaker’s initial trial.⁴⁸ The Court highlights that when a ruling is meant to be held retroactively, the result will not be based on precedent, but establish a new rule itself. Because *Rosemond* was based on precedent, the court holds that the case does not apply retroactively and therefore does not apply to Whitaker’s case.

The Rhode Island Supreme Court held that the United States Supreme Court case *Rosemond v. United States* did not apply retroactively, and in so holding, denied Whitaker’s request for post-conviction relief. In addition, the Court found that under the United States Supreme Court case *Strickland v. Washington*, defense counsel was not insufficient. The Rhode Island Supreme Court quashed the judgment granting post-conviction relief and reinstated Whitaker’s full conviction from the lower court.

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45. *Whitaker*, 199 A.3d at 1031.

46. *Id.* at 1030.

47. *See Miranda*, 384 U.S. at 503.

48. *Whitaker*, 199 A.3d at 1028.