

SUPREME COURT OF LOUISIANA

No. 00-KP-0522

STATE OF LOUISIANA

Versus

JOSEPH HAMPTON

LOBRANO, Justice Pro Tempore, Dissenting

At best, the holding of State v. Dazart, 99-3471 (La. 11/3/00), 769 So. 2d 1206 should be limited to its particular facts. The very broad statement that "[t]he right [to testify] is either respected or denied; its deprivation cannot be harmless error," *id.* at 1210-11 (citing McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)), should not be applied to this case and the majority's reliance on that statement is error regardless of whether the issue is considered one of ineffective counsel or deprivation of the right to testify.

In Dazart, the trial judge refused to reopen the case so that defendant could testify after defendant had rested despite the protestations of both defendant and his attorney. In the present case, defendant's attorney made the strategic decision to not allow defendant to testify. On defendant's post conviction application, he argues both ineffective assistance of counsel and denial of his personal right to testify. At the post conviction hearing, his former trial attorney testified as to the reasons why he made the decision not to allow defendant to testify and admitted that he made a mistake by telling defendant that "I controlled that decision." Undoubtedly, counsel's statement to his client was incorrect and amounts to a deficient performance under the first prong of Strickland v. Washington, 466 U.S. 668 (1984). However, after considering what defendant would have said had he

testified, the court of appeal determined that his testimony would have been cumulative and would not have affected the outcome of the trial. I believe that analysis is correct and the majority's reliance on the "blanket statement" in Dauzart is inappropriate within the context of this case.