

ADVISING THE DENDANT ABOUT
RIGHT TO TESTIFY

People v. Smith, Illinois Supreme Court, 1997

Additionally, a majority of jurisdictions, and our own appellate court, have found that a trial court has no duty to advise a defendant, represented by counsel, of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred. Although such procedures are required to establish a valid jury waiver or a voluntary guilty plea, there is no need for a comparable requirement that the trial court set of record defendant's decision on this matter.

As the *Martinez* court stated:

“At least seven reasons have been given for this conclusion: First, the right to testify is seen as the kind of right that must be asserted in order to be recognized. Second, it is important that the decision to testify be made at the time of trial and that the failure to testify not be raised as an afterthought after conviction. Third, by advising the defendant of his right to testify, the court could influence the defendant to waive his right *not to testify*, ‘thus threatening the exercise of this other, converse, constitutionally explicit and more fragile right.’ Fourth, a court so advising a defendant might improperly intrude on the attorney-client relation, protected by the Sixth Amendment. Fifth, there is danger that the judge's admonition would introduce error into the trial. Sixth, it is hard to say when the judge should appropriately advise the defendant-the judge does not know the defendant is not testifying until the defense rests, not an opportune moment to conduct a colloquy. Seventh, the judge should not interfere with defense strategy.

For all these reasons, we join the majority of states in concluding that the trial court is not required to advise a defendant of his right to testify, to inquire whether he knowingly and intelligently waived that right, or to set of record defendant's decision on this matter.

People v. Smith, 176 Ill. 2d 217, 234–35, 680 N.E.2d 291, (1997)

The Supreme Courts decision in People v. Smith, 176 Ill. 2d 217, was “distinguished” in the below Second District Appellate Court case in 2006(People v. Whiting):

In our assessment, we have considered the benefits of a trial court's clarification of whether a defendant has knowingly waived this important constitutional right to testify, either by an admonishment by the court on the record, or on-the-record questioning of the defendant regarding the defendant's knowing waiver of that right, against the court's failure to do so. We are cognizant of cases which indicate that a trial court has no duty to admonish a defendant or ensure an on-the-record waiver on this issue.

However, when the minimal burden on the trial court in taking the time to place the matter on the record is weighed against the assurance that the constitutional right of a defendant has not been lost, it is clear the most reliable, judicially economical procedure would be to simply inquire of the defendant. If the defendant is not going to testify, the record should reflect that the defendant is aware that the right to testify belongs to the defendant; that it is neither a matter of strategy nor the prerogative of counsel. We believe it is preferable for the court to admonish or otherwise act regarding this specific constitutional right, even if there is no fixed formula of recitation or obligation to do so.

People v. Whiting, 365 Ill. App. 3d 402, 410, 849 N.E.2d 125, 132–33 (2006)