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**SUPREME COURT OF NEW YORK
NEW YORK COUNTY**

People v. Diggins¹
(decided October 19, 2009)

Isaac Diggins “was convicted of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, and menacing in the second degree.”² Subsequently, Diggins moved to vacate the conviction pursuant to section 440.10(1)(h) of the New York Criminal Procedure Law, claiming that his attorney’s trial strategy violated his right to the effective assistance of counsel.³ Specifically, Diggins asserted that his right to the effective assistance of counsel under the United States Constitution⁴ and the New York Constitution⁵ was violated when his attorney failed to participate in a *Huntley* hearing⁶ and a jury trial held in absentia.⁷ The New York Supreme Court held that Diggins received the effective assistance of counsel despite this “strategy of

¹ No. 4637/03, 2009 WL 3461616 (N.Y. Sup. Ct. Oct. 19, 2009).

² *Id.* at *1.

³ *Id.*; N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2009), states, in relevant part:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . (h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

⁴ U.S. CONST. amend. VI, states, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

⁵ N.Y. CONST. art. I, § 6, states, in relevant part: “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.”

⁶ See *People v. Huntley*, 204 N.E.2d 179, 183 (N.Y. 1965) (requiring that a “[j]udge must find voluntariness beyond a reasonable doubt before [a] confession can be submitted to [a] trial jury”).

⁷ *Diggins*, 2009 WL 3461616, at *1. Diggins also claimed that this right was violated when his attorney failed to file a notice of appeal following his convictions. *Id.*

silence.”⁸ In making this decision, the court focused on factors such as counsel’s experience in criminal matters, the weight of the evidence against the defendant, the defendant’s absence from the hearing and trial, and counsel’s “conscious, strategic decision” to limit his participation and utilize a “strategy of silence.”⁹ Additionally, the court found that Diggins failed to meet his “burden of proving . . . every fact essential to support [his] motion[.]”¹⁰ and that the conduct of the defendant’s counsel did not prejudice the outcome of his trial.¹¹

In the early morning of August 17, 2003, Mrs. Diggins and her friend confronted the defendant, Isaac Diggins, after they caught him with his mistress.¹² Subsequently, he pointed a gun at his wife and ordered her to back up.¹³ After being approached by his wife’s friend, Diggins put his gun away and fled the scene.¹⁴ Mrs. Diggins reported the incident to the police and informed them that Diggins could most likely be found at his mistress’ apartment.¹⁵

The police located the defendant at the apartment, recovered a semi automatic handgun, and subsequently arrested him for criminal possession of a weapon and menacing.¹⁶ Following his arrest, Diggins made incriminating statements to the police in the hallway of the apartment building and at the precinct, stating that he had an argument with his wife earlier that day.¹⁷

Diggins’ attorney, Thomas Giovanni, was granted a *Huntley* hearing to suppress the statements made by the defendant to the law enforcement officials.¹⁸ However, the defendant failed to appear for this hearing and the subsequent trial.¹⁹ Mr. Giovanni requested an adjournment, arguing that Diggins’ appearance was essential to his defense.²⁰ On a number of occasions, Mr. Giovanni informed the

⁸ *Id.* at *8, 16.

⁹ *Id.* at *7-8, 10, 12-13.

¹⁰ *Id.* at *14-15.

¹¹ *Diggins*, 2009 WL 3461616, at *12.

¹² *Id.* at *5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Diggins*, 2009 WL 3461616, at *6.

¹⁷ *Id.*

¹⁸ *Id.* at *1.

¹⁹ *Id.*

²⁰ *Id.* at *1. In requesting an adjournment, Mr. Giovanni told the court that the “case is

court of his decision not to participate and explained the reasoning behind this decision.²¹ However, the court determined that “the defendant had willfully and voluntarily absented himself” and ordered that the *Huntley* hearing and trial proceed in absentia.²²

After repeated requests for an adjournment were denied, the court “proceeded to conduct the *Huntley* hearing in absentia.”²³ At the hearing, the police officer described the statements made by Diggins in the hallway of the apartment building and at the precinct.²⁴ Following this testimony, “Mr. Giovanni did not conduct any cross-examination of the [police] [o]fficer” or “make any arguments as to why either of defendant’s statements should be suppressed.”²⁵ Subsequently, the court denied the motion to suppress the statements.²⁶ Concluding the *Huntley* hearing, the court scheduled jury selection for the following day.²⁷ At this time, Mr. Giovanni expressed to the court that he felt he could not “ethically” represent his client under the circumstances and, as a result, requested to be withdrawn from the case; however, this application was denied.²⁸

At jury selection, Mr. Giovanni discussed his plan not to participate in the trial, requested that the court advise the jury of his decision, and reasoned that, without his client’s presence, the best defense strategy was not to participate.²⁹ Although Mr. Giovanni agreed to participate in jury selection and the trial if it would be advantageous to his client, he did not question any of the prospective jurors or make any challenges.³⁰

highly dependent on [Diggins’] help to defend himself” and that “he could not effectively represent [the] defendant unless the defendant was present for the proceedings.” *Diggins*, 2009 WL 3461616, at *1-2. Mr. Giovanni’s reasoning was based primarily on the fact that the case involved a domestic violence dispute. *Id.* at *2, 8.

²¹ *Id.* at *1-3. “At the outset of the proceedings . . . , there was additional and extensive discussion relative to [] Mr. Giovanni’s plan not to participate” *Id.* at *3.

²² *Id.* at *1.

²³ *Diggins*, 2009 WL 3461616, at *2 (emphasis omitted).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Diggins*, 2009 WL 3461616, at *2-3.

²⁹ *Id.* at *3. Mr. Giovanni stated to the court that this was “ ‘the best way to try a case in this situation.’ ” *Id.*

³⁰ *Id.* at *3-4.

At trial, Mr. Giovanni did not make an opening statement, cross-examine any of the prosecution's witnesses, make any motions, call any witnesses, interpose any objections, or make a closing statement.³¹ He did, however, request that the instructions to the jurors regarding his nonparticipation be repeated and that the jury be polled.³² Following a guilty verdict on all counts, sentencing proceeded in absentia where Mr. Giovanni "made a variety of arguments in support of his request that the Court sentence [Diggins] to the minimum term authorized by law."³³ Despite Mr. Giovanni's arguments, Diggins was sentenced to twenty years imprisonment.³⁴

Diggins sought to vacate his conviction, asserting that Mr. Giovanni's "strategy of silence" during the *Huntley* hearing and the trial was equivalent to the ineffective assistance of counsel in violation of the Federal and State Constitutions.³⁵ At the motion hearing, Mr. Giovanni, the only witness called, testified about his experience as a criminal defense attorney, his preparation of the case for trial, including "preparing motions, meeting with the defendants and engaging the services of an investigator," and his unsuccessful attempts to locate the defendant.³⁶ Mr. Giovanni stated that, at the time he represented Diggins, he "had been a staff attorney with [the Neighborhood Defender Services of Harlem] since 2001, and had done all aspects of criminal defense work, including felony and misdemeanor trials."³⁷ Furthermore, at the time the motion hearing was conducted, Mr. Giovanni was a supervising attorney with the Neighborhood Defender Services of Harlem.³⁸ Before making his "strategic" decision to remain silent during the trial, Mr. Giovanni discussed the matter with his supervisors.³⁹ Additionally, Mr.

³¹ *Id.* at *4.

³² *Diggins*, 2009 WL 3461616, at *4-5. Ultimately, Mr. Giovanni stated "that he was satisfied with the trial court's charge to the jury." *Id.* at *5.

³³ *Id.*

³⁴ *Id.* at *1.

³⁵ *Id.* at *1, 8. Diggins also based his claim on the fact that Mr. Giovanni did not file a notice of appeal, which, during his testimony, Mr. Giovanni described as an "oversight." *Diggins*, 2009 WL 3461616, at *1, 7. However, the court rejected this argument, holding that the failure to file a notice of appeal "does not provide a basis for relief" in a motion pursuant to section 440.10(1)(h) of the New York Criminal Procedure Law. *Id.* at *16.

³⁶ *Id.* at *7-8.

³⁷ *Id.* at *7.

³⁸ *Id.*

³⁹ *Diggins*, 2009 WL 3461616, at *3, 7.

Giovanni testified that he and Diggins had strategized a defense; however, without Diggins's presence at the trial, the defense would not have been effective.⁴⁰ Because the case involved a domestic violence dispute and the gun had been recovered, Mr. Giovanni "believed that without [the] defendant present to provide insight into the witnesses [sic] testimony, biases, background, ability to see and perceive the events and other information for cross-examination, it was virtually impossible for him to wage a vigorous defense."⁴¹ He stated that "his intent was to do his best for his client[;] [h]owever, faced with a powerful case and no client to assist him, [he] made a conscious and considered decision not to participate."⁴²

In denying Diggins's motion, the court based its decision on the fact that Mr. Giovanni "did not completely fail to participate" in the hearing and trial, "nor did he ever claim that he was unprepared or inexperienced."⁴³ Furthermore, the court reasoned that the defendant's action of absenting himself from the hearing and trial made it particularly difficult for Mr. Giovanni to present a successful defense.⁴⁴ Under the circumstances, Mr. Giovanni "made a conscious, strategic decision not to participate in the *Huntley* hearing and the trial in absentia."⁴⁵ The court was concerned with the consequences that would arise if a defendant was able to "forestall

⁴⁰ *Id.* at *7.

⁴¹ *Id.* at *8. Mr. Giovanni stated that "the chances of getting an acquittal of an empty chair [in a] domestic violence trial were very, very low and that the less said the better actually." *Id.* (internal citations omitted). He also stated "that he felt that attacking [Mrs. Diggins'] credibility would only serve to accentuate the negative inferences the jury would make regarding [Diggins'] absence." *Id.* at *7. His assessment of the case was "based on his experience and the discussions he had about the case with his supervisors." *Diggins*, 2009 WL 3461616, at *7.

⁴² *Id.* at *8. Mr. Giovanni "was aware throughout the trial that if only one juror had voted not to convict there would have been a hung jury and the defendant might have been picked up in time for a retrial." *Id.*

⁴³ *Id.* at *11-12, 16. Specifically, Mr. Giovanni participated in the following ways:

He repeatedly objected to the trial going forward *in absentia*, requested an instruction to the prospective jurors about his plan not to participate, requested the instruction be repeated in the court's final charge to the jury, indicated approval of the court's final charge to the jury and the court's proposed answer to a jury note, and had the jury polled after the verdict was rendered.

Id. at *12.

⁴⁴ *Diggins*, 2009 WL 3461616, at *10, 12.

⁴⁵ *Id.* at *13 (emphasis omitted) ("[T]he wisdom of Mr. Giovanni's decision does not constitute grounds for finding ineffective assistance . . .").

adjudication indefinitely by intentionally sabotaging his own defense.’ ”⁴⁶ “ ‘To reward such tactics would defy both the purposes of the Sixth [A]mendment and common sense.’ ”⁴⁷ The court also noted that the evidence against Diggins was compelling and he “ha[d] not demonstrated that ‘but for’ the attorney’s omissions, the outcome of the trial would have been any different.”⁴⁸ Moreover, Diggins did not identify an objection that should have been made, a juror Mr. Giovanni should have challenged, or a witness that should have been called to testify.⁴⁹ Essentially, Diggins failed to meet his burden of proof.⁵⁰

An individual’s right to the effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution.⁵¹ The purpose of the Counsel Clause of the Sixth Amendment is to ensure that every criminal defendant receives a fair trial.⁵² The right to counsel has been defined by the Court as “ ‘the right to the effective assistance of counsel.’ ”⁵³ A denial of this right can occur “simply by failing to render ‘adequate legal assistance.’ ”⁵⁴ In *Strickland v. Washington*,⁵⁵ the Supreme Court set forth the standard for determining whether an individual’s Sixth Amendment right to the effective assistance of counsel has been violated.⁵⁶ Under this standard, a defendant must demonstrate two elements of ineffective assistance in order to reverse a conviction.⁵⁷

First, the defendant must show that counsel’s

⁴⁶ *Id.* at *12 (“[D]efendant ‘may not by his absence effectively force his attorney into a strategy of silence and then complain that he was denied counsel’ ” (quoting *United States v. Sanchez*, 790 F.2d 245, 254 (2d Cir. 1986))).

⁴⁷ *Id.* (quoting *Sanchez*, 790 F.2d at 254).

⁴⁸ *Id.* at *12-13.

⁴⁹ *Diggins*, 2009 WL 3461616, at *14.

⁵⁰ *Id.* at *16. “At a hearing on a motion to vacate judgment, ‘the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.’ ” *Id.* at *14 (quoting N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2010)).

⁵¹ *See* U.S. CONST. amend. VI.

⁵² *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (“[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.”).

⁵³ *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

⁵⁴ *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980)).

⁵⁵ *Id.* at 668.

⁵⁶ *See id.* at 671, 684, 687.

⁵⁷ *Strickland*, 466 U.S. at 687 (“Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process . . .”).

performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.⁵⁸

In analyzing counsel’s performance, the court must be convinced that the representation the defendant received “fell below an objective standard of reasonableness.”⁵⁹ When making this evaluation, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ”⁶⁰ Notably, the reviewing court may be strongly persuaded by the defendant’s conduct when making a determination of counsel’s reasonableness.⁶¹

In analyzing the prejudice component, the court will not overturn a conviction where the error by counsel would not have altered the outcome of the defendant’s trial.⁶² Although in certain circumstances prejudice is presumed, “actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant must affirmatively prove prejudice.”⁶³

⁵⁸ *Id.*

⁵⁹ *Id.* at 687-88. In other words, “a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690. The Court further noted that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 688.

⁶⁰ *Strickland*, 466 U.S. at 689 (quoting *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)).

⁶¹ *Id.* at 691 (“The reasonableness of counsel’s conduct may be determined or substantially influenced by the defendant’s own statements or actions.”). “As *Strickland* makes clear, whether an attorney’s representation was reasonable or not must be based on a consideration of all the circumstances, including the actions and statements of the defendant.” *People v. Diggins*, No. 4637/03, 2009 WL 3461616, at *9 (N.Y. Sup. Ct. Oct. 19, 2009).

⁶² *Strickland*, 466 U.S. at 691 (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”).

⁶³ *Id.* at 692-93 (noting that “[a]ctual or constructive denial of the assistance of counsel,” state interference with the assistance of counsel, and actual conflicts of interest are presumed

Therefore, in most cases, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁶⁴

In *United States v. Sanchez*,⁶⁵ the Second Circuit Court of Appeals held that the defendant’s right to the effective assistance of counsel under the Sixth Amendment was not violated when his attorney failed to “make opening or closing statements or objections to the admission of evidence or to cross-examine witnesses” during trial.⁶⁶ Following Sanchez’s failure to appear for his trial for drug related crimes, the district court, over counsel’s objections, ordered that the trial proceed in absentia.⁶⁷ Other than moving for an acquittal and objecting to the jury instructions relating to Sanchez’s absence, Sanchez’s attorney remained silent during the trial.⁶⁸

In applying the performance prong of the *Strickland* standard, the court acknowledged that “[i]n some cases, a strategy of silence on defense counsel’s part may be quite appropriate.”⁶⁹ Where an uncooperative and unavailable client “precludes any reasonable basis for an active defense, the strategy of silence—perhaps in hopes that the government will produce insufficient evidence or that the government or court will commit reversible error—may actually constitute a defense strategy.”⁷⁰ In evaluating the reasonableness of counsel’s conduct, the reviewing court must be aware that

[T]he right to counsel does not impose upon a defense attorney a duty unilaterally to investigate and find evidence, or to pursue a fishing expedition by cross-examination, or to present opening or closing remarks on the basis of no helpful information, or to object without purpose, on behalf of an uncooperative and unavailable client.⁷¹

to be prejudicial to the defendant’s case).

⁶⁴ *Id.* at 694.

⁶⁵ 790 F.2d 245 (2d Cir. 1986).

⁶⁶ *Id.* at 247.

⁶⁷ *Id.* at 247-48.

⁶⁸ *Id.* at 248.

⁶⁹ *Id.* at 253 (citing *Warner v. Ford*, 752 F.2d 622, 625 (11th Cir. 1985)).

⁷⁰ *Sanchez*, 790 F.2d at 253. (noting that Sanchez did not attempt to communicate, cooperate, or consult with his counsel).

⁷¹ *Id.*

The court also found, as did the court in *Diggins*, that the defense attorney did not completely fail to participate in the trial.⁷² Moreover, Sanchez failed to establish the prejudice component of the *Strickland* standard.⁷³ Because the evidence presented during trial was “overwhelming evidence of Sanchez’ guilt,” the court was not convinced that counsel’s participation would have changed the outcome of the trial.⁷⁴

In *Warner v. Ford*,⁷⁵ the Eleventh Circuit Court of Appeals was presented with the issue of whether defense counsel’s “inactivity” violated the defendant’s right to the effective assistance of counsel under the Sixth Amendment.⁷⁶ Warner claimed that his Sixth Amendment right was violated when his attorney “played an inactive role” at his trial for theft and a weapons violation.⁷⁷ This inactivity consisted of his attorney’s failure to participate in voir dire and make peremptory challenges, pretrial motions, and an opening statement.⁷⁸ Furthermore, Warner’s counsel did not question on cross-examination, object to evidence presented against Warner, present character evidence, or make a closing argument.⁷⁹ He also failed to request jury instructions or that the jury be polled.⁸⁰ However, Warner’s counsel participated minimally by moving for a directed verdict, moving for a mistrial numerous times, giving legal advice to Warner, questioning a juror, and presenting an argument during sentencing.⁸¹

The court rejected Warner’s claim that he was denied the effective assistance of counsel.⁸² The actions of Warner’s attorney during trial “were based on trial strategy.”⁸³ “Silence can constitute

⁷² *Id.* (stating that Sanchez’s attorney participated by “objecting to the trial *in absentia* and to the flight instruction and by moving for a judgment of acquittal”).

⁷³ *Id.* at 253-54 (stating that Sanchez “ha[d] not demonstrated a ‘reasonable probability’ that but for [his attorney’s] silence Sanchez would not have been convicted”).

⁷⁴ *Id.* at 254.

⁷⁵ 752 F.2d 622 (11th Cir. 1985).

⁷⁶ *Id.* at 624.

⁷⁷ *Id.* at 623-24.

⁷⁸ *Id.* at 623.

⁷⁹ *Id.*

⁸⁰ *Warner*, 752 F.2d at 623-24.

⁸¹ *Id.* at 624.

⁸² *Id.* at 623.

⁸³ *Id.* at 624 (noting that defendant’s attorney “testified . . . that his silence reflected a trial strategy in the face of overwhelming evidence against his client”).

trial strategy” and “[w]hether that strategy is so defective as to . . . establish ineffective assistance of counsel must be judged on a case-by-case basis.”⁸⁴ The court applied the *Strickland* standard to the attorney’s strategy of silence and found that the “silent trial tactic was reasonable under the circumstances.”⁸⁵ In making this determination, the court focused on the fact that Warner’s attorney was prepared for the trial, had discussed his “silent strategy” with his client during the trial, and had successfully used the “silent strategy” in previous cases.⁸⁶ Furthermore, the prosecutor testified as to counsel’s competence as a criminal defense attorney.⁸⁷ Counsel’s decisions were based, in part, on Warner’s criminal record and the compelling evidence against Warner.⁸⁸ Under the circumstances, counsel’s “silent strategy” was reasonable and did not “entitle Warner to constitutional relief.”⁸⁹

Warner also failed to prove the prejudice prong of the *Strickland* standard.⁹⁰ Not only did Warner neglect to identify any specific conduct in which his attorney should have engaged during his trial, but the evidence against him was overwhelming.⁹¹

Distinguishable from *Sanchez* and *Warner* is the case of *Martin v. Rose*,⁹² where the Sixth Circuit Court of Appeals held that the defendant’s constitutional right to the effective assistance of counsel was violated when his attorney decided to “stand mute” during trial.⁹³ Martin was convicted of, among other things, criminal sexual conduct and incest after an alleged incident with his stepdaughters.⁹⁴ After his motion for a continuance was denied,

⁸⁴ *Id.* at 625.

⁸⁵ *Warner*, 752 F.2d at 625.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (“[V]irtual silence may well have been the best trial strategy available for the obviously guilty Warner.”).

⁹⁰ *Warner*, 752 F.2d at 625-26 (“[T]here is no reasonable probability that Warner would have been acquitted or received less than a fifteen-year sentence.”).

⁹¹ *Id.* Specifically, Warner did not identify an alternative defense that should have been presented, any question that should have been posed, or any witness that should have been called to testify. *Id.* at 626. Warner “admitted he could think of nothing his counsel should have done.” *Id.*

⁹² 744 F.2d 1245 (6th Cir. 1984).

⁹³ *Id.* at 1248-49, 1252.

⁹⁴ *Id.* at 1247.

which was filed because he was not prepared to try the case, Martin's counsel informed the court of his decision not to participate during the trial.⁹⁵ During the trial, Martin's counsel did not participate in the jury selection process, cross-examine or call any witnesses, make any objections, make a closing statement, or object to the jury charge.⁹⁶ In deciding Martin's claim, the court acknowledged that counsel's failure to participate was a trial tactic.⁹⁷ However, "even deliberate trial tactics may constitute ineffective assistance of counsel if they fall 'outside the wide range of professionally competent assistance.'" ⁹⁸ The strategy utilized by Martin's counsel was neither reasonable nor logical under the facts presented in this case.⁹⁹ Rather, it was "an unreasonable tactic since the attorney was aware of a strong defense that he could present without compromising his earlier motions."¹⁰⁰ The court's reasoning focused on the fact that Martin denied all charges, was available to provide testimony at trial, and had no prior criminal history.¹⁰¹ Because there were other available defense strategies to pursue, the decision of Martin's attorney to remain inactive during the trial cannot be considered an " 'exercise of reasonable professional judgment.' " ¹⁰² Accordingly, Martin was denied his right to the effective assistance of counsel guaranteed by the Sixth Amendment.¹⁰³

The New York Constitution also guarantees the right to the

⁹⁵ *Id.* Specifically, "Martin's counsel stated, 'We do wish to rely on our Motions, and I don't want to be disrespectful to the Court, but in going to trial today, the defendant won't put on any proof, and I won't cross-examine or participate in the trial.'" *Id.* Furthermore, "Martin's counsel testified that he had refused to participate in the trial because he was not ready." *Martin*, 744 F.2d at 1248.

⁹⁶ *Id.* at 1247.

⁹⁷ *Id.* at 1249 ("Unquestionably, the attorney's failure to participate was a deliberate trial tactic . . .").

⁹⁸ *Id.* (quoting *Strickland*, 466 U.S. at 690).

⁹⁹ *Id.* ("The decision by Martin's attorney not to participate cannot be considered 'sound trial strategy' or 'professionally competent assistance.'").

¹⁰⁰ *Martin*, 744 F.2d at 1250.

¹⁰¹ *Id.* The court also stated that "[t]he only direct evidence against Martin was the testimony of his stepdaughters." *Id.* If Martin was called to testify, the jury would have heard his denial as well as his theory behind the accusations of his stepdaughters. *Id.* The jury would then have been able to make a determination regarding his credibility. *Id.* The court noted that this defense "would have required no further preparation." *Martin*, 744 F.2d at 1250.

¹⁰² *Id.* at 1250 (quoting *Strickland*, 466 U.S. at 690).

¹⁰³ *Id.* at 1252.

effective assistance of counsel.¹⁰⁴ However, “[a] more flexible standard is applied to determine whether [a] defendant has been denied [this] right . . . under Article I § 6 of the New York State Constitution.”¹⁰⁵

In setting forth the standard to be utilized in claims of ineffective assistance under the New York Constitution, the New York Court of Appeals, in *People v. Baldi*,¹⁰⁶ sought to “avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis.”¹⁰⁷ Emphasizing that “trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness,” the court declared that “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided *meaningful representation*, the constitutional requirement will have been met.”¹⁰⁸ In determining claims under the meaningful representation standard, the reviewing court should not criticize counsel’s strategy by suggesting a potentially more successful defense.¹⁰⁹ Rather, “[c]ounsel’s performance should be ‘objectively evaluated’ to determine whether it was consistent with strategic decisions of a ‘reasonably competent attorney.’”¹¹⁰ The right to counsel is not violated where defense counsel’s performance, though unsuccessful, “reflects a reasonable and legitimate strategy under the circumstances and evidence presented.”¹¹¹

The meaningful representation standard set forth in *Baldi* differs from *Strickland*’s two-component standard.¹¹²

¹⁰⁴ See N.Y. CONST. art. I, § 6.

¹⁰⁵ *People v. Diggins*, No. 4637/03, 2009 WL 3461616, at *9 (N.Y. Sup. Ct. Oct. 19, 2009) (citing *People v. Benevento*, 697 N.E.2d 584, 587 (N.Y. 1998)).

¹⁰⁶ 429 N.E.2d 400 (N.Y. 1981).

¹⁰⁷ *Id.* at 405.

¹⁰⁸ *Id.* (emphasis added) (citing *People v. Jackson*, 420 N.E.2d 97, 98 (N.Y. 1981)). Put more simply, “[t]he core inquiry is whether the defendant has received ‘meaningful representation.’” *Diggins*, 2009 WL 3461616, at *9 (citing *Baldi*, 429 N.E.2d at 405).

¹⁰⁹ *Benevento*, 697 N.E.2d at 587 (“[C]ounsel’s efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective.” (citing *People v. Satterfield*, 488 N.E.2d 834, 836-37 (N.Y. 1985))).

¹¹⁰ *Id.* at 587 (quoting *People v. Angelakos*, 512 N.E.2d 305, 307 (N.Y. 1987)).

¹¹¹ *Id.*

¹¹² *Diggins*, 2009 WL 3461616, at *9. Though dissimilar, the second circuit has held that the “New York state standard for ineffective assistance of counsel is not contrary to *Strickland*.” *Rosario v. Ercole*, 601 F.3d 118, 126 (2d Cir. 2010).

Unlike the federal standard, New York Courts do not require a showing that a reasonable probability exists that the result of the proceeding would have been different, but instead adopt a more favorable rule that while prejudice to the defendant is a significant factor in the meaningful representation analysis, it is not an “indispensible element.”¹¹³

By not requiring a demonstration of prejudicial effect on the outcome, New York law focuses on “whether the error affected the ‘fairness of the process as a whole.’”¹¹⁴ Because of the omission of the prejudice requirement, the New York standard is considered to be the more flexible of the two.¹¹⁵

The New York Court of Appeals has also dealt with the specific situation of an absent defendant in the case of *People v. Aiken*.¹¹⁶ In *Aiken*, the court of appeals dealt with the issue of “whether [Warren Aiken], who voluntarily and willfully absented himself from trial, was denied the right to [the] effective assistance of counsel.”¹¹⁷ Aiken claimed that his right was violated because his attorney failed to make opening and closing statements, call or cross-examine any witnesses, and object to the introduction of certain evidence.¹¹⁸ In determining that Aiken was not denied the right to the effective assistance of counsel, the court emphasized that his absence from the trial was strongly considered.¹¹⁹ “[A] defendant’s absence from trial may severely hamper even the most diligent counsel’s ability to represent his client effectively.”¹²⁰ Therefore, “a defendant who absents himself from trial may not succeed on appeal

¹¹³ *Diggins*, 2009 WL 3461616, at *9 (citing *People v. Stultz*, 810 N.E.2d 883, 887 (N.Y. 2004)).

¹¹⁴ *Rosario*, 601 F.3d at 124 (quoting *Benevento*, 697 N.E.2d at 588).

¹¹⁵ *Diggins*, 2009 WL 3461616, at *9; *People v. Turner*, 840 N.E.2d 123, 125-26 (N.Y. 2005) (stating that New York “ineffective assistance cases have departed from the second (‘but for’) prong of *Strickland*, adopting a rule somewhat more favorable to defendants” (citing *People v. Caban*, 833 N.E.2d 213, 222 (N.Y. 2005))).

¹¹⁶ *People v. Aiken*, 380 N.E.2d 272, 273 (N.Y. 1978). Though decided prior to *Baldi*, *Aiken* sets forth important principles regarding the impact of a defendant’s absence on an ineffective assistance of counsel claim. *See id.* at 275.

¹¹⁷ *Id.* at 273.

¹¹⁸ *Id.* at 274.

¹¹⁹ *Id.* at 275 (stating that a defendant’s absence “must, of necessity, be taken into consideration on the issue of counsel’s effectiveness”).

¹²⁰ *Aiken*, 380 N.E.2d at 275.

by raising counsel's purported ineffectiveness where counsel affirmatively, as a matter of trial strategy, sought to obstruct the trial of his client."¹²¹

In *People v. Verdel*,¹²² the appellate division held that the defendant's right to effective assistance of counsel was not violated at a suppression hearing.¹²³ At the hearing, the defendant's counsel requested an adjournment to afford him more time to review material he received from the prosecution.¹²⁴ The trial court denied this request.¹²⁵ As a result, "counsel refused to cross-examine the People's witness, or to make any arguments for suppression."¹²⁶ Finding that this conduct was a "strategic decision, seeking to create delay or establish an appellate issue," the court rejected the defendant's claim.¹²⁷

¹²¹ *Id.* (finding that "counsel's conduct [is] indicative of a conscious strategic decision designed to pressure the trial court into declaring a mistrial").

¹²² 804 N.Y.S.2d 294 (App. Div. 1st Dep't 2005).

¹²³ *Id.* at 296.

¹²⁴ *Id.* at 295-96.

¹²⁵ *Id.*

¹²⁶ *Id.* at 296.

¹²⁷ *Verdel*, 804 N.Y.S.2d at 296. There are many New York cases where the court has denied a defendant's claim of ineffective assistance of counsel under the New York Constitution, despite the fact that counsel failed to participate in some way. *See, e.g.*, *People v. Fleming*, 2010 WL 3155308, at *1 (N.Y. App. Div. 2d Dep't Aug. 10, 2010) ("[C]ontrary to the defendant's contention, defense counsel's failure to object to the admission of certain evidence or certain remarks made by the prosecutor during summation, or to request unidentified procedural safeguards . . . , did not constitute ineffective assistance of counsel."); *People v. Daniels*, 891 N.Y.S.2d 815, 816 (App. Div. 4th Dep't 2009) ("There is no merit to the . . . contention of defendant that he received ineffective assistance of counsel based on defense counsel's failure to object to the admission of the evidence at the suppression hearing."); *People v. Lacey*, 887 N.Y.S.2d 158, 161 (App. Div. 2d Dep't 2009) ("[C]ounsel's strategy not to call a witness at the hearing . . . does not amount to ineffective assistance of counsel."). However, the New York courts have held that certain egregious failures and omissions on the part of counsel cannot be considered sound trial tactics. Rather, in these situations, the courts have found these errors to be completely unreasonable thereby violating the defendant's right to the effective assistance of counsel. *See, e.g.*, *People v. Trait*, 527 N.Y.S.2d 920, 921 (App. Div. 4th Dep't 1988) (finding ineffective assistance where, among other things, "[c]ounsel's trial preparation was inadequate to the extent that his direct and cross-examination of witnesses was rendered largely ineffective"); *People v. Wagner*, 479 N.Y.S.2d 66, 67-69 (App. Div. 2d Dep't 1984) (finding ineffective assistance where "there were so many errors;" in particular, counsel "displayed a forgetfulness of basic principles of criminal law and procedure" and failed to request a pretrial hearing, challenge prospective jurors, and object to inadmissible evidence); *People v. Riley*, 475 N.Y.S.2d 691, 692 (App. Div. 4th Dep't 1984) ("[C]ounsel demonstrated an obvious lack of pretrial preparation and a marked unfamiliarity with the earlier proceedings . . ."); *People v. Angellilo*, 457 N.Y.S.2d 118, 119 (App. Div. 2d Dep't 1982) (stating that

Though the standards for measuring the effectiveness of counsel are different, both the Federal and State Constitutions guarantee this essential right. Under both standards, Mr. Giovanni's conduct clearly fell within the "wide range of reasonable professional assistance."¹²⁸ His conduct reflected a "reasonable and legitimate trial strategy under the circumstances" with which he was presented.¹²⁹ In deciding ineffectiveness claims, courts give great weight to a defendant's conduct during trial, especially when the defendant fails to be present for his trial.¹³⁰ This is because a defendant's absence from trial can significantly affect how counsel will proceed at trial.¹³¹ Because of Diggins's absence, Mr. Giovanni could not present a reasonable alternative defense that would have been successful.¹³² Without Diggins present to assist him during the trial, Mr. Giovanni was restricted to the "strategy of silence."¹³³ In determining that Mr. Giovanni's strategy was reasonable, the court focused on factors such as Mr. Giovanni's experience and preparedness, the fact that Mr. Giovanni did not completely fail to participate, and the compelling evidence against Diggins.¹³⁴ The outcome in *Diggins* might have been different if Diggins was present at trial and Mr. Giovanni's strategic decisions were not altered. This reasoning is based on the fact that Mr. Giovanni could have presented a reasonable alternative defense if Diggins attended the hearing and trial.

When considering the experience and preparedness of an attorney, courts look to see how long the attorney has been practicing in the area of criminal law, if the attorney has ever used the "silent

"the record persuasively demonstrates that counsel was so completely unprepared and unfamiliar with either the facts or the law bearing on defendant's case").

¹²⁸ See *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¹²⁹ See *People v. Diggins*, No. 4637/03, 2009 WL 3461616, at *9 (N.Y. Sup. Ct. Oct. 19, 2009).

¹³⁰ *Strickland*, 466 U.S. at 691. See, e.g., *Sanchez*, 790 F.2d at 254.

¹³¹ *Diggins*, 2009 WL 3461616, at *10.

¹³² Compare *id.* at *7-8 (holding that defendant's right to the effective assistance of counsel was not violated where counsel testified that it would have been difficult to present an alternative defense), with *Martin v. Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984) (holding that defendant's right to the effective assistance of counsel was violated when his attorney "was aware of a strong defense that he could present").

¹³³ *Diggins*, 2009 WL 3461616, at *7-8 (noting that Mr. Giovanni testified that any other defense strategy would have proved futile).

¹³⁴ *Id.* at *12-13.

strategy” in prior matters, and whether the attorney has prepared for the hearing or trial in the matter before it. If an attorney appears to be using the “silent strategy” due to a lack of experience, a court will most likely use this to the defendant’s benefit. Similarly, if an attorney fails to participate in a trial or hearing merely because he is not prepared to defend his client, a court will find that the use of the “silent strategy” in this situation is unacceptable, especially where the attorney had ample time to prepare a defense. However, if the attorney has extensive experience in criminal matters and has used the “silent strategy” successfully, a court will find that the attorney’s decision was that of a “reasonably competent attorney” who made a “conscious, strategic decision.”

Moreover, a court will strongly consider the fact that an attorney participates in some aspects of the trial rather than remaining silent the entire time. When an attorney uses the silent strategy but participates to a limited extent, it shows that the attorney is in fact making a tactical decision to remain silent and, at the same time, is looking out for the best interests of his client by participating where appropriate. On the other hand, if an attorney did not participate where it was appropriate and, instead, remained silent for the entire trial, a court would most likely find this unreasonable and deem this conduct a violation of the defendant’s constitutional right.

Additionally, a court will consider the weight of the evidence against a defendant on trial. If the prosecution has a strong case against the defendant and it appears that the defendant will not prevail, the defendant’s attorney may not have any other reasonable choice but to remain silent. This is especially true where an active defense, as opposed to a silent defense, would not add anything of significance or, more importantly, would harm the defense’s case.

In evaluating the reasonableness of counsel’s conduct, both the federal and New York courts seem to focus on the same above-mentioned factors. A difference in the federal and state standards arises, however, when determining whether counsel’s conduct prejudiced the outcome of the defendant’s trial. Under the federal standard, the reviewing court must determine that counsel’s conduct was prejudicial to the outcome of the trial before finding that the defendant’s right to the effective assistance of counsel was violated. Under the New York standard, prejudice to the outcome of the defendant’s trial is not determinative; rather, it is a factor to be

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considered in the overall evaluation of counsel's conduct and the fairness of the proceeding.

Because this issue is decided on a case-by-case basis and is very fact specific, it may be difficult to determine at what point counsel's assistance would be rendered ineffective. However, it is important that counsel be aware of the aforementioned factors that courts consider when evaluating the reasonableness of an attorney's conduct.

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