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Court of Appeals of New York, People v. Abar

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20 (1)

COURT OF APPEALS OF NEW YORK

People v. Abar[1]

(decided February 18, 2003)

In April 1999, Christopher Abar was indicted for driving while intoxicated and aggravated unlicensed operation of a motor vehicle; four months later, he was indicted on two counts of criminal contempt for violating an unrelated protective order.[2] After negotiating with the District Attorney's office, Abar pled guilty to one count of criminal contempt in the first degree, driving while intoxicated, and unlicensed operation of a motor vehicle, thereby satisfying both indictments plus other pending charges.[3] The court sentenced Abar to three concurrent terms of probation in February 2000.[4] In November, he was arrested for failure to comply with probation and later re-sentenced to one-to-three years on the contempt charge and time served on all other charges.[5] Abar appealed his conviction, alleging ineffective assistance of

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[1] 786 N.E.2d 1255 (N.Y. 2003).

[2] *Id.* at 1256. The protective order was issued to Abar's ex-girlfriend, though the details of the incidents warranting such an order are not explained.

[3] *Id.*

[4] *Id.*

[5] *Id.*

counsel under the United States Constitution[6] and the New York State Constitution.[7]

The attorney who represented Abar during his second arraignment, negotiated plea, sentencing, and re-sentencing worked as an Assistant District Attorney before joining the office of the Public Defender.[8] While working for the district attorney's office, counsel had limited involvement with Abar's April 1999 indictment. She wrote a letter to the city court suggesting a plea with Abar on an aggravated harassment charge and an order of protection for his alleged victim.[9] It is undisputed that defense counsel and Abar had a conversation about her prior employment with the district attorney's office.[10] Abar advised the court during his first plea proceeding that he was satisfied with her services.[11]

After re-sentencing, Abar directly appealed and filed a motion with the county court to vacate his conviction, which was denied.[12] "The Appellate Division granted [Abar] permission to appeal from the order denying his [motion to vacate], joined it with his direct appeal and affirmed in all respects."[13] The Court of Appeals granted Abar leave to appeal and affirmed.[14]

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[6] U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defence."

[7] N.Y. CONST. Art. I, §6 states in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel."

[8] *Abar*, 786 N.E.2d at 1256.

[9] *Id.* at 1257.

[10] *Id.* at 1258.

[11] *Id.*

[12] *Id.* at 1256-57.

[13] *Abar*, 786 N.E.2d at 1258.

[14] *Id.* at 1259.

The Court of Appeals acknowledged that the constitutional right to counsel is a right to *effective assistance of counsel*, which is defined as "reasonably competent, conflict-free and single-mindedly devoted to the client's best interests."[15] The court examined two factors: Whether there was "a potential conflict of interest in a defendant's representation" and whether the defense was "in fact affected by the operation of the conflict of interest."[16] In previous cases, the court distinguished cases of actual conflict where, for example, an attorney represented co-defendants whose interests diverged, from cases involving only potential conflicts.[17]

In *People v. Shinkle*,[18] the court found an inherent conflict of interest when a supervising attorney at the Legal Aid Society who had participated in the early stages of Shinkle's defense accepted a position with the district attorney's office.[19] Although the attorney insulated himself from any cases involving a defendant represented by his former employer, the court held that

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[15] People v. Harris, 783 N.E.2d 502, 506 (N.Y. 2002) (citation omitted). Unknown to Harris' attorney, he simultaneously represented the confidential informant involved in Harris' arrest for drug related charges. The court found that since the confidential informant's identity was not revealed during Harris' trial and the defense attorney therefore was unaware of the conflict, it did not impact the defense. *Id.*

[16] *Abar*, 786 N.E.2d at 1257. The court explained the *Abar* standard is less strict than the constitutional harmless error standard, as a defendant need not prove that "but for the error, the defendant would not have been convicted," instead requiring only that the conflict "in some way affected" the defense. *Id.* at 1259.

[17] People v. Ortiz, 564 N.E.2d 630, 633 (N.Y. 1990) Defense counsel was operating under a conflict of interest when his former client perjurously testified as to Ortiz's innocence. The court held that an attorney's duty to a client does not end when the representation ceases, and when the interests of two clients diverge, the defendant does not have effective assistance of counsel. *Id.*

[18] 415 N.E.2d 909 (N.Y. 1980).

such a situation "inescapably gave both defendant and the public the unmistakable appearance of impropriety and created the continuing opportunity for abuse of confidences entrusted to the attorney during the months of his active representation of defendant."[20] Despite no evidentiary showing of actual prejudice, the court's concern for the integrity of the process resulted in what Judge Jasen's dissenting opinion criticized as an adoption of a "per se rule of automatic disqualification."[21] This stringent protection of a defendant's right to a conflict free trial was a logical extension of statements similar to that in *People v. Crimmins*,[22] where the court reasoned that:

> if in any instance, an appellate court concludes that there has been . . . such inadequacy of defense counsel, or such other wrong as to have operated to deny any individual defendant his fundamental right to a fair trial, the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction.[23]

So great was the concern for a fair trial that the court, it seemed, would prefer reversing and retrying cases even when the inherent conflict may not have been a factor in the defendant's

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[19] *Id.* at 910.

[20] *Id.*

[21] *Id.* at 911 (Jasen, J., dissenting). The dissent argued that "[m]ere speculation and innuendo should not be the basis for establishing a per se rule of disqualification" for conflicts of interest. Justice Jasen urged a rule that requires the defendant show some evidence of actual prejudice to the defense. *Id.*

[22] 326 N.E.2d 787 (N.Y. 1975).

conviction. However, the court has retreated from such strict protections against even the appearance of impropriety. The court's later decisions hold that potential conflicts are insufficient to require reversal or a new trial without a showing that the conflict operated on the defense.[24] If a conflict is merely possible — that is, it may not ever arise — the court held in *Ortiz* that a defendant alleging ineffective assistance of counsel must show that the conflict "affected the conduct of the defense."[25] This is the standard upon which the *Abar* court relied.

In reaching its decision, the *Abar* court defined inherent conflict by way of an example: a defense attorney who represents a defendant through a portion of his criminal proceeding, then joins the district attorney's office and prosecutes the defendant has created an inherent conflict.[26] The court then distinguished Abar's case, reasoning that concerns about a former defense attorney using a defendant's confidences while participating in the prosecution do not apply when the situation is reversed.[27] In other words, the court discounted the idea that an attorney leaving the prosecutor's office to become defense counsel on the same case would create an inherent conflict. Instead, the court categorized such a situation as a potential conflict, since it is within the realm of possibility that the attorney will not allow her prior work on the prosecutorial team to influence or affect her representation of the

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[23] *Id.* at 791.
[24] *Ortiz*, 564 N.E.2d at 634.
[25] *Id.*
[26] *Abar*, 786 N.E.2d at 1257-58 (citing People v. Shinkle, 415 N.E.2d at 910).
[27] *Id.*

defendant. This classification required Abar to show that the conflict operated on his defense before relief would be granted.[28] Since Abar was unable to satisfy the *Ortiz* requirement by proving the conflict affected his defense, the court reasoned that he was not entitled to relief.[29]

The United States Supreme Court has defined conflict free assistance of counsel as a "fundamental right"[30] that requires "great emphasis on procedural and substantive safeguards."[31] In the context of a defense attorney representing multiple defendants whose interests may conflict, the Supreme Court held in *Cuyler v. Sullivan*[32] that a defendant who failed to raise an objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" to prove ineffective assistance of counsel.[33] In short, the Supreme Court, like the New York Court of Appeals in *Abar*, held that a defendant may not merely point to a conflict of interest to win a reversal or a new trial because "the possibility of conflict is insufficient to impugn a criminal conviction."[34]

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[28] *Id.* at 1258.

[29] *Id.* ("Here, record evidence buttresses the Appellate Division's finding that any conflict did not operate on the conduct of the defense.").

[30] Gideon v. Wainwright, 372 U.S. 335, 343 (1963). Indigent criminal defendant was refused court appointed counsel under a Florida law which provided counsel only for defendants charged with capital offenses. The Supreme Court held that the Sixth Amendment guarantees counsel for all criminal defendants. *Id.*

[31] *Id.* at 344.

[32] 446 U.S. 335 (1980).

[33] *Id.* at 348.

[34] *Id.* at 350.

In *Strickland v. Washington*,[35] defendant was sentenced to death on three counts of murder and sought collateral relief alleging ineffective assistance of counsel with respect to strategic decisions made by counsel at the sentencing phase.[36] In considering the problem of ineffective assistance of counsel, the Supreme Court delineated the standard for judging such claims. The *Strickland* test has two prongs: that counsel's representation "fell below an objective standard of reasonableness"[37] and that but for counsel's errors, "there is a reasonable probability . . . the result of the proceeding would have been different."[38] The Court announced that defendants alleging ineffective assistance must show that counsel's performance was deficient and that this deficiency prejudiced the defense,[39] but declined to adopt specific guidelines for judging the proper standard for what it termed "reasonably effective assistance."[40] Additionally, the Court held that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the

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[35] 466 U.S. 668 (1984).
[36] *Id.* at 675.
[37] *Id.* at 688.
[38] *Id.* at 694.
[39] *Id.* at 687.
[40] *Strickland*, 466 U.S. at 687.

Constitution."[41] The Court concluded that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding."[42]

The next important decision on this issue was *Lockhart v. Fretwell*,[43] which "emphasized that the Sixth Amendment right to counsel exists in order to protect the fundamental right to a fair trial."[44] Fretwell, a defendant in a capital case, alleged that his attorney did not appropriately object during the sentencing phase, which would likely have spared him from the death sentence.[45] The objection, however, would have been based on case law that was later overturned by the Eighth Circuit.[46] Consequently, the *Lockhart* Court reasoned that "unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[47] In other words, because the Eighth Circuit no longer recognized the objection upon which Fretwell based his claim, it was not a

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[41] *Id.* at 692. *See also* United States v. Feyrer, 333 F.3d 110, 116 (2d Cir. 2003) ("In order for a defendant to prevail on a claim that he was denied effective assistance of counsel based on counsel's actual conflict, the defendant must still establish that (a) counsel actively represented conflicting interests, and (b) such conflict adversely affected his lawyer's performance.").

[42] *Id.* at 696. *See, e.g.*, Ruiz v. United States, 339 F.3d 39, 42 (1st Cir. 2003) ("Even if the lawyers were ineffective, the defendants must show that this mistake prejudiced them.").

[43] 506 U.S. 364 (1992).

[44] *Id.* at 368 (internal quotes omitted).

[45] *Id.* at 367.

[46] *Id.* at 368.

[47] *Id.* at 372. Justice Stevens harshly criticized this reasoning in his dissent, arguing that counsel's performance was deficient under *Strickland* and it could not "be seriously disputed that the decision reached would reasonably likely have been different, but for counsel's failure to make . . . [an] objection. . . . Under *Strickland*, this is the end of the inquiry. . . . The adversary process has malfunctioned, and the resulting verdict is therefore and without more,

procedural or substantive right to which he was entitled.[48] The *Lockhart* Court emphasized that the "touchstone of an ineffective assistance claim is the fairness of the adversary proceeding."[49]

What both the Supreme Court and the New York Court of Appeals seem unwilling to address is the idea that a trial in which defense counsel has potentially divided loyalties may be fundamentally unfair. In his persuasive *Cuyler* dissent, Justice Marshall argued that "it is the simultaneous representation of conflicting interests against which the Sixth Amendment protects a defendant."[50] Marshall reasoned that if an attorney considers anything other than her client's best interests in making decisions regarding her client's case, the client's representation has been adversely affected even if the client cannot prove it with concrete evidence. Therefore, a defendant alleging ineffective assistance of counsel by reason of his attorney's conflict of interest should only be required to show an actual conflict.[51] Marshall pointed out that a defendant may be unable to demonstrate that the alleged conflict altered his attorney's conduct.[52]

Justice Marshall's approach to the problem of potential conflicts of interest is echoed by Judge Smith's dissenting opinion

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constitutionally unacceptable." *Id.* at 379 (Stevens, J,. dissenting) (internal quotes omitted).

[48] *Lockhart*, 506 U.S. at 371 ("Had the trial court chosen to follow [the subsequently overturned precedent], counsel's error would have deprived respondent of the chance to have the state make an error in his favor.") (internal quotes omitted)).

[49] *Id.* at 370.

[50] *Cuyler*, 446 U.S. at 356 (Marshall, J., dissenting).

[51] *Id.*

[52] *Id.* at 358. *See also Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

in *Abar*. Smith argued that an attorney working as both a prosecutor and a defense attorney on the same case has an inherent conflict because counsel dealt with the same party from opposite sides of the case.[53] Smith emphasized even the appearance of impropriety has the potential to undermine the public's trust in the judicial process.[54] In *Abar*, counsel's original duties as a prosecutor included advising the court to issue an order of protection for a woman Abar had dated, while her later duties as Abar's attorney would include arguing against such measures.[55] Counsel was not direct counsel for Abar's alleged victim, to be sure, but her position as a District Attorney bringing suit on behalf of the people of New York implies that she is at least indirectly the attorney for victims of alleged criminals.[56] While this apparent conflict should not preclude an attorney leaving the district attorney's office from ever working as defense counsel, it should, as Justice Marshall suggests, preclude her from defending anyone on whose prosecution she worked. Such a solution would satisfy concerns about both the appearance of impropriety and the possibility of such a conflict operating on the defense.

In conclusion, both the United States Constitution and the New York Constitution guarantee the right to counsel and, by extension, the right to conflict free counsel. When addressing claims that a defendant's right to effective assistance of counsel

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[53] *Abar*, 786 N.E.2d at 1259 (Smith, J., dissenting).
[54] *Id.*
[55] *Id.* at 1261.
[56] *Id.*

has been violated, the two court systems have instituted different tests. The New York Court of Appeals adopted a test that considers first whether a potential conflict existed, and if so, whether such conflict operated on the defense. A defendant must establish both before relief will be granted. The federal standard is also a two prong test, but one that examines first whether there was any deficiency in counsel's performance, and second, whether such deficiency sufficiently compromised the defense so as to render the proceeding fundamentally unfair. Under both tests, the defendant alleging ineffective assistance must show evidence that the conflict operated on his defense before a new trial will be granted, but the New York test does not require the proceedings to be rendered fundamentally unfair by operation of the conflict. Consequently, New York affords defendants greater protection than the constitutional harmless error standard.[57]

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[57] *Id.* at 1258.

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