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## **Court of Appeals of New York, People v. Rose**

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Court of Appeals of New York, People v. Rose

Cover Page Footnote

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**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, SECOND DEPARTMENT**

**People v. Rose<sup>1</sup>  
(decided July 7, 2003)**

Anthony Rose was convicted in the Supreme Court of New York, Kings County, of two counts of sodomy in the first degree, two counts of sexual abuse in the first degree, and two counts of incest.<sup>2</sup> On appeal, Rose unsuccessfully claimed he was denied the fundamental right of effective assistance of counsel<sup>3</sup> guaranteed by both the Federal Constitution<sup>4</sup> and the New York State Constitution.<sup>5</sup> He also claimed a violation of his right to a speedy trial, however this claim was dismissed.<sup>6</sup> The appellate division ultimately reversed his convictions,<sup>7</sup> not on the claimed errors, but due to a violation by the prosecution which was addressed by the court sua sponte. The court stated that although meaningful representation was accomplished by the defense counsel, the

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<sup>1</sup> 761 N.Y.S.2d 686 (App. Div. 2d Dep't 2003).

<sup>2</sup> *Id.* at 687.

<sup>3</sup> *Id.*

<sup>4</sup> U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

<sup>5</sup> N.Y. CONST. art. I, § 6 provides 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. . . ."

<sup>6</sup> *Rose*, 761 N.Y.S.2d at 687 (claim of a violation of defendant's right to a speedy trial was found to be properly dismissed in the lower court. *See* 18 N.Y. CRIM. PROC. L. § 30.30 – Motion to Dismiss Accusatory Instrument Timeliness for Denial of Right to Speedy Trial (McKinney's 2003)).

<sup>7</sup> *Rose*, 761 N.Y.S.2d at 688.

prosecution had violated its fiduciary duty by purposely arguing a position which was known to be false.<sup>8</sup>

The appellate division held that Rose was not denied effective assistance of counsel in light of the totality of the circumstances of his convictions and consistent with the time period of representation.<sup>9</sup> The court used New York's long standing 'flexible approach' on reviewing claims of ineffective assistance of counsel in criminal proceedings. Under this approach, meaningful representation will meet the standard of effective counsel required by the New York Constitution.<sup>10</sup>

Rose's claim of ineffective counsel was based on the fact that the defense attorney waived an opening statement at trial.<sup>11</sup> The court reasoned that the flexible approach safeguards against confusing ineffective assistance with losing trial strategies. The claim of ineffectiveness must arise from more than an isolated error which, in retrospect, appears not to have been the best possible defense.<sup>12</sup> The Court of Appeals of New York had previously held that an error by defense counsel will merit reversal of the trial court decision when it is so material that the defendant did not receive a fair trial.<sup>13</sup> The appellate division concluded that the defense attorney's election to waive an opening statement was

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 687.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 688.

<sup>12</sup> *Rose*, 761 N.Y.S.2d at 688.

<sup>13</sup> *Id.* (citing *People v. Henry*, 744 N.E.2d 112, 113 (N.Y. 2000); quoting

not a material error because it was in furtherance of a legitimate trial strategy and did not prejudice the outcome. Accordingly, the court held that effective assistance of counsel was not denied to Anthony Rose.<sup>14</sup>

The United States Supreme Court addressed the issue of ineffective assistance of counsel in *Strickland v. Washington*.<sup>15</sup> The Court reviewed ineffectiveness of counsel which results from acts or omissions of a defense attorney and set forth a test for evaluating claims based upon ineffective assistance of counsel under the Federal Constitution.<sup>16</sup>

The defendant in *Strickland* was charged with and convicted of myriad brutal crimes.<sup>17</sup> At the trial court level, the defendant claimed six reasons he believed his Sixth Amendment rights were violated.<sup>18</sup> The predominant claims were that his attorney failed to pursue a strategy based on his psychiatric condition and that he also failed to develop and present character evidence.<sup>19</sup> The defendant's request for relief was denied because the court found that the omissions were in furtherance of a reasonable trial strategy, and even if the evidence was presented it would not have changed the outcome.<sup>20</sup> This decision was

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<sup>14</sup> *Id.*

<sup>15</sup> 466 U.S. 668 (1984).

<sup>16</sup> *Id.* at 684, 686.

<sup>17</sup> *Id.* at 672 (“respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion and theft”).

<sup>18</sup> *Id.* at 675.

<sup>19</sup> *Strickland*, 466 U.S. at 676, 677.

affirmed by the district court and then by the United States Court of Appeals for the Fifth Circuit on different grounds.<sup>21</sup>

On appeal, the Supreme Court reversed, holding that there is a presumption of effective counsel,<sup>22</sup> and for a defendant to rebut the presumption, the federal standard of review is “reasonably effective assistance”<sup>23</sup> based on the totality of the circumstances.<sup>24</sup> The Court explained that the “benchmark for judging any claim of ineffectiveness [is] whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on as having produced a just result.”<sup>25</sup>

The federal standard for reversal requires the defendant to prove two interdependent theories. First, counsel’s performance must be deficient to the extent that reasonable skill or knowledge necessary to meet the prosecution’s case is lacking. Second, the deficient performance must be found to have prejudiced the proceedings of the trial, rendering them fundamentally unfair, thereby resulting in a breakdown of the adversarial process and an unreliable result. These theories work together to preserve a criminal defendant’s fundamental right to a fair trial.<sup>26</sup> Counsel’s duties are to ensure a fair trial by utilizing his or her expertise in defending criminals, maintaining loyalty, and avoiding conflicts of

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<sup>21</sup> *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982).

<sup>22</sup> *Strickland*, 466 U.S. at 687.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 690.

<sup>25</sup> *Id.* at 686.

<sup>26</sup> *Id.* at 687.

interest.<sup>27</sup> Using these theories, the Court will first decide whether there was an error due to deficient counsel, based on all the circumstances surrounding the case, and then decide whether the act or omission affected the impartiality of the trier of fact.<sup>28</sup>

New York State courts have consistently applied a stricter standard when reviewing ineffective assistance of counsel claims. The tougher standard requires the defendant to show that the attorney's conduct was "egregious and prejudicial" to the point that counsel was less than meaningful. The courts focus on the totality of the circumstances involved and appear to give deference to counsel's decisions. This tougher standard creates a heavier burden for the appealing defendant.

In *People v. Baldi*,<sup>29</sup> the Court of Appeals of New York held that an unsuccessful defense does not automatically give rise to a successful claim of ineffective assistance of counsel when the asserted defense is based on a legitimate strategy.<sup>30</sup> Baldi was charged with attempted murder, burglary, and felonious possession of weapons.<sup>31</sup> He was sentenced to a psychiatric institution as a result of a successful insanity plea.<sup>32</sup> He was later released,<sup>33</sup> and while released, arrested and charged with murder.<sup>34</sup> His assigned

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<sup>27</sup> *Strickland*, 466 U.S. at 688.

<sup>28</sup> *Id.* at 690.

<sup>29</sup> 429 N.E.2d 400 (N.Y. 1981).

<sup>30</sup> *Id.* at 401.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 402.

<sup>33</sup> *Id.*

<sup>34</sup> *Baldi*, 429 N.E.2d at 403.

counsel assumed the defense of both charges.<sup>35</sup> The defendant was convicted of all previous charges, as well as murder in the second degree.<sup>36</sup> He raised the issue of ineffective assistance rendered by counsel in both proceedings.<sup>37</sup> The conduct that he alleged to have been the source of the ineffective assistance claim included the attorney taking the stand to testify as to the psychiatric appearance of the defendant during his confessions, consenting to interrogations, failing to assert the defendant's innocence, and handling of expert witnesses.<sup>38</sup>

The court reasoned that the importance of separating ineffective counsel and retrospective analysis requires an examination of all evidence, law, and circumstances of a particular case at a particular point in time.<sup>39</sup> If all circumstances reveal that meaningful representation was provided, that is, a recognized legal defense was presented and handled professionally, the constitutional requirement will be met.<sup>40</sup>

In *People v. Benevento*,<sup>41</sup> the defendant was tried and convicted of robbery in the Supreme Court of New York, Kings County.<sup>42</sup> The appellate division reversed the conviction and held that the defendant was denied effective assistance of counsel under the New York State Constitution because his attorney asserted "no

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 401.

<sup>37</sup> *Id.* at 404.

<sup>38</sup> *Id.* at 405.

<sup>39</sup> *Baldi*, 429 N.E.2d at 405.

<sup>40</sup> *Id.*

<sup>41</sup> 697 N.E.2d 584 (N.Y. 1998).

<sup>42</sup> *Id.* at 586.



discernible defense strategy.”<sup>43</sup> The Court of Appeals reversed and concluded that the defendant did receive meaningful representation under its application of the *Baldi* rule.<sup>44</sup>

The defendant was charged with robbing a woman and claimed that he had been drinking prior to the incident. His attorney asserted the defense that the requisite mens rea necessary for a conviction of robbery was absent due to the defendant’s intoxicated state. The attorney requested a jury charge to the effect of his argument and introduced evidence that the defendant had two hundred dollars on him at the time of the incident and, therefore, had no motive to steal fifteen dollars from the victim.<sup>45</sup> The defendant claimed ineffective counsel because the attorney failed to explain the defense using relevant hypothetical situations in summation and failed to place the defendant on the stand to testify to his own state of mind.<sup>46</sup> The court found that counsel asserted the only available defense, given the circumstances, and presented sufficient evidence to that end.<sup>47</sup>

The Court of Appeals applied the meaningful representation standard used in *Baldi*, a flexible standard considering the totality of the circumstances involved in the case, and further stated that consideration of the issue of meaningful representation relies on whether the attorney’s specific act and omissions constituted “egregious and prejudicial” error that

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<sup>43</sup> 657 N.Y.S.2d 606, 607 (App. Div. 1st Dep’t 1997).

<sup>44</sup> *Benevento*, 697 N.E.2d at 586.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

rendered an unreliable judgment.<sup>48</sup> The issue is whether the defendant's fundamental right to a fair trial was affected by counsel's alleged errors.<sup>49</sup> Since this more stringent standard of error was not found, the claim of ineffective assistance of counsel did not succeed.<sup>50</sup>

In *People v. Henry*,<sup>51</sup> the defendant was convicted of first and second degree robbery.<sup>52</sup> The appellate division reversed the conviction, holding that the defendant had been denied effective assistance of counsel.<sup>53</sup> The issue raised on appeal was whether the defendant was denied effective counsel when his attorney presented a hostile witness and, therefore, created a conflict of interest.<sup>54</sup> The defendant contended that his attorney called an alibi witness who testified that she was not with the defendant at the time of the crime. He believed that this destroyed his defense of mistaken identity.<sup>55</sup> The conduct of the attorney in eliciting testimony from an alibi witness who in fact destroyed the alibi with her testimony was logically in conflict with the interests of the defendant, which resulted in a violation of a fiduciary duty of counsel to avoid conflicts of interest between his own interests and those of his client.<sup>56</sup> However, the court found that the

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<sup>48</sup> *Id.* at 587-88.

<sup>49</sup> *Benevento*, 697 N.E.2d at 588.

<sup>50</sup> *Id.* at 589.

<sup>51</sup> 744 N.E.2d at 112.

<sup>52</sup> *Id.* at 113.

<sup>53</sup> 699 N.Y.S.2d 129 (App. Div. 2d Dep't 1999).

<sup>54</sup> *Henry*, 744 N.E.2d at 112-13.

<sup>55</sup> *Id.* at 113.

<sup>56</sup> *Id.*

interrogation did not “seriously compromise the defendant’s right to a fair trial” because the impeachment device was used in furtherance of a reasonable trial strategy.<sup>57</sup>

The defendant urged the Court of Appeals to adopt the federal standard of ineffective assistance, contending that it is more precise because it provides a separate standard for measuring prejudice.<sup>58</sup> The court initiated its review by stating that the ‘flexible approach’ is well settled as an interpretation of New York State law and seems sufficient in its scope. It requires that all the circumstances be considered and emphasizes the need to discern true ineffectiveness from losing trial strategies.<sup>59</sup> The presentation of the witness was merely an unsuccessful strategy, illustrated by the fact that, on summation, the attorney attacked her credibility and used the impeachment device to assert the misidentification defense.<sup>60</sup> The court addressed the difference between the two standards by explaining that the New York standard, as amended in *Benevento*, focuses on the fairness of the trial as a whole, thereby including a measure for prejudicial effect rather than “any particular outcome of the case.”<sup>61</sup>

The Court of Appeals held that the defendant received meaningful representation, regardless of the discredited alibi testimony, because his right to a fair trial and his misidentification

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<sup>57</sup> *Id.* at 114.

<sup>58</sup> *Id.* at 113-14.

<sup>59</sup> *Henry*, 744 N.E.2d at 113.

<sup>60</sup> *Id.* at 114.

<sup>61</sup> *Id.*

defense were not adversely affected by the testimony.<sup>62</sup> The attorney articulated a recognized defense strategy by impeaching the witness' credibility after receiving her testimony.<sup>63</sup>

Under the federal standard, requiring deficient representation and a reasonable probability that the verdict would have been different absent the prejudice caused by the attorney's performance,<sup>64</sup> Anthony Rose's conviction would not be overturned. The federal standard for any acts or omissions by counsel is "reasonableness" at the time of representation and under the "prevailing professional norms."<sup>65</sup> The Supreme Court has stated that a reversal cannot be based on retrospect because it is far too simple to criticize after a disappointing verdict.<sup>66</sup> As to the second requirement, this error did not sufficiently prejudice the verdict because the failure to state the strategy of the defense in the opening argument is not grossly unreasonable. Likewise, Rose's conviction would not be overturned under the more stringent New York State standard of "egregious and prejudicial" effect because the failure to make an opening statement was in furtherance of a reasonable trial strategy.<sup>67</sup>

Although the right to effective counsel is recognized under both the United States Constitution and New York Constitution, the analysis used under each differs. The difference between the

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Strickland*, 466 U.S. at 687, 688.

<sup>65</sup> *Id.* at 688.

<sup>66</sup> *Id.* at 689.

<sup>67</sup> *Rose*, 761 N.Y.S.2d at 688.

federal standard and the state standard for reversal is that the state court requires a much more specific and highly prejudicial act by counsel, a clear and precise breach of a fiduciary duty to the client in order to find ineffective assistance of counsel. The federal courts require that “in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance,”<sup>68</sup> and “but for counsel’s professional errors, there is a ‘reasonable probability’ that the outcome . . . would have been different.”<sup>69</sup>

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<sup>68</sup> *Strickland*, 466 U.S. at 690.

<sup>69</sup> *Id.* at 670.

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