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### Court of Appeals of New York, People v. Veray

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## Court of Appeals of New York, People v. Veray

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## NEW YORK CITY CRIMINAL COURT

People v. Veray<sup>1</sup>  
(published August 12, 2002)

On June 15, 1993, Teddy Veray was arrested and charged with violating New York Penal Law Sections 220.16(1)<sup>2</sup> and 220.09(1).<sup>3</sup> Eight days later, Veray pleaded guilty to criminal possession of a controlled substance in the fourth degree and was sentenced to five years probation.<sup>4</sup> Subsequently, Veray moved to withdraw his guilty plea based on the constitutional safeguards set forth in both the Federal<sup>5</sup> and New York State<sup>6</sup> Constitutions regarding effective assistance of counsel. Veray presented a twofold argument as to why the court should vacate his conviction and remand the case for trial. Veray contended that his legal representative failed to safeguard his interests by not contesting the manner in which the police seized his property.<sup>7</sup> Veray's second argument was that his counsel failed to advise him of the ramifications of a guilty plea; specifically he argued the denial of "the right to a competent attorney and a vigorous defense."<sup>8</sup> At a subsequent hearing, the New York City Criminal Court denied Veray's motion to withdraw his plea and vacate the conviction, on

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<sup>1</sup> N.Y.L.J., Aug. 12, 2002, at 20, col. 6 (N.Y.Cty. Crim. Ct.).

<sup>2</sup> N.Y. PENAL LAW § 220.16(1) (McKinney 1999) provides: "A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses: a narcotic drug with intent to sell it."

<sup>3</sup> N.Y. PENAL LAW § 220.09(1) (McKinney 1999) provides:

A person is guilty of criminal possession of a controlled substance in the fourth degree when he knowingly and unlawfully possesses: one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more.

<sup>4</sup> Veray, *supra* note 1.

<sup>5</sup> U.S. CONST. amend. VI states in pertinent part: "[A]nd to have the Assistance of Counsel for his defence."

<sup>6</sup> 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 as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him . . . ."

<sup>7</sup> Veray, *supra* note 1.

<sup>8</sup> Veray, *supra* note 1.

the ground that the ineffective counsel argument was unfounded.<sup>9</sup> In reaching this conclusion, that court stated, “[t]he defendant failed to make any showing that his attorney’s decision not to contest the search rose to the level of ineffective assistance of counsel.”<sup>10</sup> On July 23, 1993, the court set forth in detail the ramifications of the guilty plea to the defendant.<sup>11</sup> For example, the court explained that if Veray pleaded guilty to the charge of criminal possession of a controlled substance in the fourth degree, he would waive his fundamental due process rights guaranteed under both the New York State and Federal Constitutions.<sup>12</sup> These rights included, among others, the right to a jury trial, the right to testify on his own behalf, and the right to challenge the manner in which the police officer seized his property.

The *Veray* court began its analysis by discussing *People v. Baldi*,<sup>13</sup> which set forth the New York standard for ineffective assistance of counsel. The *Baldi* court held that “so 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.”<sup>14</sup> In *Baldi*, the defendant was convicted in two separate trials.<sup>15</sup> In the first trial, Baldi was convicted of attempted murder, burglary in the second degree, and felonious possession of weapons.<sup>16</sup> Two months later,

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<sup>9</sup> *Veray*, *supra* note 1

<sup>10</sup> *Veray*, *supra* note 1.

<sup>11</sup> *Veray*, *supra* note 1. The New York City Criminal Court accepted Veray’s guilty plea for criminal possession of a controlled substance in the fourth degree.

<sup>12</sup> *Veray*, *supra* note 1. See also U.S. CONST. amend. VI and N.Y. CONST. art. I, § 6.

<sup>13</sup> 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981).

<sup>14</sup> *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

<sup>15</sup> *Id.* at 140, 429 N.E.2d at 401, 444 N.Y.S.2d at 893.

<sup>16</sup> *Id.* at 141, 429 N.E.2d at 401-02, 444 N.Y.S.2d at 895. In *Baldi*, police responded to a prowler complaint, and came upon Baldi in the vicinity of the call. *Id.* Upon asking for identification, Baldi produced a pistol and fired one time at the chest of the responding officer. The gun failed to discharge and Baldi was subsequently searched and arrested. *Id.* at 141, 429 N.E.2d at 402, 444 N.Y.S.2d at 895. The search revealed live ammunition and personal items from the woman that made the initial call to police. *Id.* Baldi later denied the burglary and stated that he found the items on the street. Baldi, was later

Baldi was convicted of murder in the second degree.<sup>17</sup> Baldi appealed his conviction arguing that throughout both trials, his attorney's conduct denied him effective assistance of counsel.<sup>18</sup> Specifically, Sparrow, Baldi's attorney, opted for the defense of not guilty by reason of insanity, rather than factual innocence.<sup>19</sup> To help prove the insanity claim, Sparrow testified that he observed Baldi both during his initial interview and when he visited Baldi at the psychiatric hospital.<sup>20</sup> Baldi claimed that it was inappropriate for Sparrow to testify, and that claim served as a basis for appeal.<sup>21</sup> Additionally, Baldi contended that Sparrow's examination of expert witnesses also was ineffective.<sup>22</sup> Baldi further claimed that Sparrow's involvement in two police interrogations, and the poor quality of his effort to suppress a confession, were further evidence of ineffective counsel.<sup>23</sup>

The court analyzed each of Baldi's contentions to determine if he had received meaningful representation.<sup>24</sup> In regard to the first contention, the court answered in the negative.<sup>25</sup> Specifically, the court found that Sparrow employed a viable defense, insanity, which was bolstered by the fact that his client

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indicted on multiple related charges, but found to be incompetent to stand trial.  
*Id.*

<sup>17</sup> *Id.* at 141-43, 429 N.E.2d at 402-03, 444 N.Y.S.2d at 895. The charge of murder in the second degree stemmed from events that took place after Baldi's release from Creedmoor State Hospital. Four months after Baldi's release, a fifteen year-old girl was stabbed to death while sleeping in her bedroom. New York City Police came upon Baldi while conducting a post-incident investigation that involved "staking-out" the neighborhood of the murder. Subsequent investigation involved the police searching and removing knives and sexually explicit material from Baldi's apartment. Later that day, Baldi was escorted to the police station where he entered a trance-like state and acted-out the killing of the fifteen year-old girl. Baldi acted out the killing two more times at the police station and once at the home of the child victim before he was taken back to the station and charged her murder. *Id.*

<sup>18</sup> *Baldi*, 54 N.Y.2d at 145, 429 N.E.2d at 404, 444 N.Y.S.2d at 897.

<sup>19</sup> *Id.* at 143, 429 N.E.2d at 403, 444 N.Y.S.2d at 896.

<sup>20</sup> *Id.* at 143-44, 429 N.E.2d at 403, 444 N.Y.S.2d at 896.

<sup>21</sup> *Id.* at 143-44, 429 N.E.2d at 402-03, 444 N.Y.S.2d at 895.

<sup>22</sup> *Id.* at 144, 429 N.E.2d at 403-04, 444 N.Y.S.2d at 896-97.

<sup>23</sup> *Baldi*, 54 N.Y.2d at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

<sup>24</sup> *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

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

was found incompetent to stand trial when first arrested.<sup>26</sup> Additionally, the court held that Sparrow used the factual defense of innocence when he pointed out the weakness in the People's case.<sup>27</sup> Furthermore, the court found that Sparrow had examined the expert witnesses in depth during cross-examination but was simply unable to establish any contradictory testimony that would help the defense.<sup>28</sup> Similarly, the court found Sparrow's testimony during the trial strengthened Baldi's defense.<sup>29</sup> By testifying, Sparrow was able to introduce evidence of Baldi's previous morally reprehensible crimes, such as sexual assaults, which furthered his insanity defense.<sup>30</sup> The court also noted that Sparrow's participation during the interrogations and his efforts to suppress the statements made during the interrogations did not pass the threshold of ineffective counsel.<sup>31</sup> Eerily foreshadowing the future federal outcome determinative test,<sup>32</sup> the court found that Sparrow's inability to secure a written agreement from the Assistant District Attorney, ensuring Baldi's statements would not be used against him, might have raised a question of ineffectiveness.<sup>33</sup> The issue was later deemed moot because the statements were subsequently suppressed, and therefore had no bearing on the outcome of the case.<sup>34</sup>

Baldi's next contention was that Sparrow's testimony regarding Baldi's apparent mental condition was ground for reversal because the testimony hindered his defense. The court expressly rejected this theory, finding that Sparrow would have violated the ethics code if he did not testify.<sup>35</sup> The court added that Baldi's final claim of ineffective counsel, the alleged failure to illicit testimony from expert witnesses, was invalid because

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<sup>26</sup> *Id.* at 141, 429 N.E.2d at 402, 444 N.Y.S.2d at 893.

<sup>27</sup> *Id.* at 148, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

<sup>28</sup> *Baldi*, 54 N.Y.2d at 148, 429 N.E.2d at 406, 444 N.Y.S.2d at 899.

<sup>29</sup> *Id.* at 148, 429 N.E.2d at 406, 444 N.Y.S.2d at 898.

<sup>30</sup> *Id.* at 148, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

<sup>31</sup> *Id.* at 150, 429 N.E.2d at 407, 444 N.Y.S.2d at 900.

<sup>32</sup> *See Strickland v. Washington*, 466 U.S. 668 (1984) (holding that ineffective assistance of counsel will not be found where the contended errors did not lead to a prejudiced result).

<sup>33</sup> *Baldi*, 54 N.Y.2d at 149, 429 N.E.2d at 406, 444 N.Y.S.2d at 900.

<sup>34</sup> *Id.* at 149, 429 N.E.2d at 406, 444 N.Y.S.2d at 899.

<sup>35</sup> *Id.* at 150, 429 N.E.2d at 407, 444 N.Y.S.2d at 900.

Sparrow's decision was merely an unsuccessful trial tactic, which does not automatically create a reversible error.<sup>36</sup> The court added that Sparrow had used a known defense and his cumulative knowledge to produce a vigorous and competent defense.<sup>37</sup> Unfortunately, Sparrow's defense was unsuccessful and the court held that mere failure to win at trial does not automatically deem the representation ineffective.<sup>38</sup>

In the instant case, the New York City Criminal Court was not persuaded by Veray's arguments. The court found that Veray was given "meaningful representation" under the *Baldi* standard.<sup>39</sup> The court found that Veray failed to meet the burden set forth in *People v. Rivera*,<sup>40</sup> primarily because Veray was unable to demonstrate that his attorney's decisions were not well thought-out, planned choices, and were not part of a greater defense strategy.<sup>41</sup> It appeared the court was offended by the proposition that counsel failed to give meaningful representation, given that defendant received such a disproportionate sentence.<sup>42</sup> Veray was facing the possibility of serving twenty-five years in prison, however, his attorney was able to secure the minimum sentence of five years probation. Veray further argued that his representation was ineffective because counsel failed to explain the effect of his guilty plea on the federal sentencing guidelines, and other nuances

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<sup>36</sup> *Id.* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

<sup>37</sup> *Id.* at 151, 429 N.E.2d at 407, 444 N.Y.S.2d at 900-01.

<sup>38</sup> *Baldi*, 54 N.Y.2d at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

<sup>39</sup> *Veray*, *supra* note 1.

<sup>40</sup> See *People v. Rivera*, 71 N.Y.2d 705, 709, 525 N.E.2d 688, 700, 530 N.Y.S.2d 52, 54 (1988). In *Rivera*, the defendant was convicted of felony murder and sentenced to prison for twenty years to life. *Rivera* argued that his attorney failed to move for the suppression of statements in front of police after he had asked for representation and then was told by police "it would take too long and only make matters worse." *Id.* In the consolidated case of *People v. Montana*, the defendant alleged that he was denied effective representation of counsel because his attorney failed to move to suppress physical evidence and statements following an illegal stop. The court discussed the likelihood of alternative reasons for defendant's counsel to fail to make certain pretrial motions, and held that absent such a showing the court would presume counsel's representation was effective. *Id.*

<sup>41</sup> *Veray*, *supra* note 1.

<sup>42</sup> *Veray*, *supra* note 1 ("To say that defense counsel's conduct lacked 'strategic or other legitimate explanation' in not pursuing the hearing is difficult to fathom. . .").

of his decision to plead guilty.<sup>43</sup> The court found this position equally untenable because the record was wholly devoid of any evidence to support that proposition.<sup>44</sup> The court relied on the New York Court of Appeals case of *People v. Francis*,<sup>45</sup> and held that the court was under no obligation to ascertain whether the defendant understood the ramifications of his plea,<sup>46</sup> but nevertheless explained the rights that Veray would be forfeiting by admitting his guilt.<sup>47</sup> Veray's other claims of ineffective counsel were wholly rejected by the court as unsupportable.<sup>48</sup>

In 1995, the New York Court of Appeals decided *People v. Ford*.<sup>49</sup> The court decided that failure of an attorney to warn of collateral consequences, such as deportation proceedings following a criminal conviction or plea arrangement, does not constitute ineffective assistance of counsel.<sup>50</sup> Relying on the *Baldi* standard,

<sup>43</sup> *Veray*, *supra* note 1.

<sup>44</sup> *Veray*, *supra* note 1.

<sup>45</sup> 38 N.Y.2d 150, 341 N.E.2d 540, 379 N.Y.S.2d 21 (1975). In *Francis*, the defendant was arrested for carrying a gun and ammunition at his job in the post office at Kennedy Airport. The law under which he was charged makes possession of a gun and ammunition a D felony unless the possession occurs in a person's home or place of business, in which case the offense is a misdemeanor. At the time, the term "place of business" had not been definitely defined. Francis contended, for the first time on appeal, that the judge had an absolute duty to warn him that he might qualify for the misdemeanor charge. *Id.* at 152. The Court of Appeals rejected defendant's argument, holding that there is no requirement that the Judge conduct a *pro forma* inquisition in each case on the off chance that the defendant who is adequately represented by counsel and who admits to the underlying facts, may nevertheless not know what he is doing. *Id.* at 155, 341 N.E.2d at 544, 379 N.Y.S.2d at 26.

<sup>46</sup> *Veray*, *supra* note 1.

<sup>47</sup> *Veray*, *supra* note 1.

<sup>48</sup> *Veray*, *supra* note 1 (rejecting defendant's claim that he was coerced to accept the guilty plea as a result of being threatened with the possibility of indictment, because the record was devoid of sufficient facts).

<sup>49</sup> 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995).

<sup>50</sup> *Id.* at 403-04, 657 N.E.2d at 267-68, 633 N.Y.S.2d 272-73. In *Ford*, relying on the advice of counsel, defendant pleaded guilty to manslaughter, following an accidental discharge of a firearm that killed his girlfriend. After the defendant served the minimum sentence and was released, the Immigration and Nationalization Service began deportation proceedings. Ford was a documented legal alien from Jamaica. Ford alleged that his attorney failed to warn him of the possibility of deportation and therefore furnished ineffective assistance of counsel. *Id.* at 402, 657 N.E.2d at 267, 633 N.Y.S.2d at 272.



the Court of Appeals decided that Ford had received meaningful representation.<sup>51</sup> Ford was facing the possibility of serving concurrent sentences for manslaughter and criminal possession of a weapon in the second degree, equaling a 30-year jail sentence. However, his counsel was able to limit the sentence to two to six years. Additionally, the court stated that failure to advise Ford of the possibility of collateral consequences does not manifestly constitute ineffective assistance of counsel.<sup>52</sup>

In 1984, the United States Supreme Court decided *Strickland v. Washington*, which set the federal standard for reviewing claims of ineffective assistance of counsel.<sup>53</sup> The Court set forth a two-prong test for evaluating claims of ineffective assistance of counsel. First, a defendant must show that the representation received from the attorney was “deficient,” meaning that counsel was not functioning as “counsel” guaranteed the defendant under the Sixth Amendment.<sup>54</sup> The Court added that the Sixth Amendment does not rely upon a set of explicit instructions, but rather the legal profession’s own standards for determining the particular requirements of effective counsel.<sup>55</sup> The second prong of the test mandates that the defendant must show that he was actually prejudiced.<sup>56</sup> The Court explained that the defendant’s lawyer must have made “errors so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”<sup>57</sup> There must be a “reasonable probability” that if not for the errors of defendant’s counsel, the result would have been different.<sup>58</sup> Following *Strickland*, the Supreme Court decided *Lockhart v. Fretwell*,<sup>59</sup> where the Court elaborated on what constitutes prejudice when applying the first prong of the *Strickland* test. The Court held that overall fairness must be taken into consideration

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<sup>51</sup> *Id.* at 404, 657 N.E.2d at 268, 633 N.Y.S.2d at 273.

<sup>52</sup> *Id.* at 402, 657 N.E.2d at 267, 633 N.Y.S.2d at 273.

<sup>53</sup> 466 U.S. 668 (1984).

<sup>54</sup> *Id.* at 687.

<sup>55</sup> *Id.* at 688.

<sup>56</sup> *Id.* at 687.

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

<sup>58</sup> *Strickland*, 466 U.S. at 694.

<sup>59</sup> 506 U.S. 364 (1993).

when analyzing a federal case for ineffective assistance of counsel.<sup>60</sup>

The New York standard for deciding when representation is deemed ineffective allows for broad review by a court in gauging the effectiveness of representation by looking at all the relevant factors, using a totality of the circumstances as the yardstick to measure the meaningfulness of the representation. The *Baldi* court articulated that “so 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.”<sup>61</sup>

Conversely, federal courts employ a stricter standard which analyzes the possible deficient representation and the outcome thereafter, coupled with the principle of fairness to maintain the integrity of the underlying guiding foundation. To recapitulate, the current test for federal constitutionally ineffective assistance of counsel requires a showing that the attorney’s performance was deficient and that the deficiency prejudiced the defendant. However, even if counsel’s performance was deficient and prejudicial, the claim of ineffective assistance will not prevail if the outcome comports with fundamental fairness.

*Randy S. Pearlman*

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<sup>60</sup> *Id.* at 372.

<sup>61</sup> *Baldi*, 54 N.Y.2d at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.