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Right to Counsel, Supreme Court, Appellate Division, Third Department: People v. Gabriel

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

People v. Gabriel[192]
(decided July 31, 1997)

Defendant, Duane M. Gabriel, was convicted of the second degree murders of Robert Hathaway and his son, Michael Hathaway, two counts of grand larceny in the fourth degree and three counts of petit larceny.[193] Defendant was sentenced to consecutive terms of twenty-five years to life for each murder, consecutive one and one-third to four years terms for each grand larceny conviction and to concurrent one-year sentences for each petit larceny convictions.[194]

Gabriel appealed his convictions claiming that these convictions violated his right to counsel under the United States

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[192] 661 N.Y.S.2d 306 (3d Dep't 1997), *appeal denied*, 91 N.Y.2d 892 (1998).

[193] *Id.* at 308. N.Y. PENAL LAW § 125.25 (McKinney 1996). This section provides in relevant part that "[a] person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . . ." *Id.* N.Y. PENAL LAW § 155.30 (McKinney 1996). This section provides in pertinent part that:

> A person is guilty of grand larceny in the fourth degree when he steals property and when:
> 1. The value of the property exceeds one thousand dollars; or
> . . .
> 5. The property, regardless of its nature and value, is obtained from the person of another; or . . .
> 7. The property consists of one of more firearms, rifles of shotguns as such terms are defined in section 265 of this chapter; or
> 8. The value of the property exceeds one hundred dollars and the property consists of a motor vehicle . . . .

Id. N.Y. PENAL LAW § 155.25 (McKinney 1996). This section provides in relevant part that "[a] person is guilty of petit larceny when he steals property." *Id.*

[194] *Gabriel*, 661 N.Y.S.2d at 308.

Constitution,[195] the New York State Constitution,[196] and New York State statute.[197] Gabriel claimed that he was denied effective assistance of counsel in two ways. First, Gabriel claimed that since one of his two defense attorneys was a former acquaintance of the victim, Robert Hathaway's brother, there existed a possible conflict of interest.[198] Second, defendant claimed that he was generally denied effective assistance of counsel.[199] The Appellate Division affirmed the defendant's convictions holding that defendant's "unequivocal reaffirmation" of the attorney four months prior to trial, despite the alleged conflict, and the "vigorous representation" by both defense counsel did not warrant reversal of Gabriel's convictions.[200]

On September 19, 1994, the 16 year old defendant, Duane M. Gabriel, skipped school and was alone in the Hathaway home where he had resided since July 1994.[201] Gabriel testified that Robert Hathaway returned home and began to harass him about

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[195] U.S. CONST. amend. VI. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id.

[196] N.Y. CONST. art. I, § 6. This section provides 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." *Id.*

[197] N.Y. CRIM. PROC. LAW § 210.15(2) (McKinney 1996). This section provides in relevant part that "the defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action." *Id.*

[198] *Gabriel*, 661 N.Y.S.2d at 309.

[199] *Id.* at 310.

[200] *Id.*

[201] *Id.* at 307.

"[messing] up the family."[202] Defendant, angered by this harassment, retrieved a .22 caliber rifle and shot Robert Hathaway once in the back.[203] The rifle malfunctioned on the second shot so Gabriel retrieved and loaded a 12-gauge shotgun and fired several additional shots into Robert Hathaway.[204] Shortly thereafter, Michael Hathaway returned home and was lured into the basement, where defendant shot and killed him.[205] Gabriel then removed twenty-four dollars and car keys from Michael Hathaway's body.[206] Next, Gabriel stole some jewelry from the house, packed his clothes and fled in the Hathaway's car.[207] Gabriel hid one gun under a friend's porch.[208] He distributed the stolen jewelry among his friends and disposed of the victims' automobile by pushing it off a nearby cliff.[209]

Several months prior to trial, one of Gabriel's attorneys received a telephone call from Robert Hathaway's brother, a former acquaintance, that made him conscious of a possible conflict with his continued representation of Gabriel.[210] The attorney immediately notified the court, the prosecution and the defendant.[211] The trial court conducted a conference regarding the possible conflict four months prior to trial.[212] During this conference, the defendant "unequivocally advised the court that, despite co-counsel's prior relationship with the victims' family member, he wanted counsel to continue representing him."[213]

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[202] *Id.* Gabriel testified that Robert Hathaway appeared drunk, however, "autopsy results contradicted this . . . ." *Id.*
[203] *Id.*
[204] *Id.* at 307-08.
[205] *Id.* at 308.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.* at 309-10.
[211] *Id.* at 309.
[212] *Id.* at 310.
[213] *Id.*

The Appellate Division, relying on *People v. Gomberg*[214] and *People v. Lombardo*,[215] concluded that it was unnecessary for the trial court to hold a hearing concerning the alleged conflict of interest of Gabriel's attorney.[216] In *Gomberg*, the New York Court of Appeals held that the right of an accused to the assistance of counsel, guaranteed by the Federal Constitution, the State Constitution and by state statute, may be impaired when "one lawyer simultaneously represents the conflicting interests of a number of defendants."[217] Accordingly, a trial court must ascertain that the defendant's choice to continue with the lawyer is an informed choice.[218] Equally, a court may inquire into whether the attorney himself perceives and appreciates the risk posed by a possible conflict.[219] Similarly, in *People v. Lombardo*[220] the defendant's lawyer had previously represented the prosecution's key witness.[221] Although the trial court failed to hold a hearing on the issue of a possible conflict, the New York Court of Appeals held that where the potential for conflict exists, the principals of *People v. Gomberg* apply.[222]

The *Gabriel* court concluded that since the lawyer's alleged conflict involved neither a joint representation of a co-defendant nor former legal representation of a witness a Gomberg-style hearing was not required.[223] The *Gabriel* trial court, however, held a *Gomberg*-hearing wherein the defendant affirmed his selection of trial counsel.[224]

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[214] 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975) (holding that a trial court has a duty to inquire into the defendants decision to continue with an attorney that represents more than one defendant in the same trial).

[215] 61 N.Y.2d 97, 460 N.E.2d 1074, 472 N.Y.S.2d 589 (1984) (holding that a trial court has duty to inquire into a defendants choice to continue with an attorney who has previously represented a key witness for the prosecution).

[216] *Gabriel*, 661 N.Y.S.2d at 310.

[217] *Gomberg*, 38 N.Y.2d at 312, 342 N.E.2d at 553, 379 N.Y.S.2d at 773.

[218] *Id.* at 313, 342 N.E.2d at 554, 379 N.Y.S.2d at 774.

[219] *Id.*

[220] 61 N.Y.2d 97, 460 N.E.2d 1074, 472 N.Y.S.2d 589 (1984).

[221] *Id.* at 102, 460 N.E.2d at 1075, 472 N.Y.S.2d at 590.

[222] *Id.*

[223] *Gabriel*, 661 N.Y.S.2d at 310.

[224] *Id.*

Moreover the Appellate Division believed that "the aggressive representation by both attorneys" did not warrant reversal of Gabriel's conviction.[225] In reaching this conclusion the court again relied upon *People v. Lombardo*.[226] The *Lombardo* court stated that where a defendant has not "demonstrated 'that a conflict of interests, or at least a significant possibility thereof, did exist . . . the defendant is not entitled to a reversal of his conviction.'"[227] The *Lombardo* court remarked that an analysis of the attorney's searching cross-examination of the witness demonstrated that the attorney operated on the premise that he "no longer owed the witness any professional obligation."[228]

The New York Court of Appeals in *People v. Baldi*[229] noted that "the most critical concern . . . is to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis."[230] The court held that an attorney's effectiveness should be evaluated under two different standards.[231] First, "whether the attorneys shortcomings were such as to render the 'trial a farce and a mockery of justice'"[232]

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[225] *Id.*

[226] 61 N.Y.2d 97, 460 N.E.2d 1074, 472 N.Y.S.2d 589 (1984).

[227] *Id.* at 103, 460 N.E.2d at 1076, 472 N.Y.S.2d at 591 (citing People v. Macerola, 47 N.Y.2d 257, 264, 391 N.E.2d 990, 995, 417 N.Y.S.2d 908, 913 (1979)).

[228] *Lombardo*, 61 N.Y.S.2d at 103, 460 N.E.2d at 1076, 472 N.Y.S.2d at 591. *See also* People v. Medina, 208 A.D.2d 974, 617 N.Y.S.2d 230 (3rd Dep't 1994) (holding that the defendant's right to be present at all material stages of trial was not violated when trial court conferred with attorneys, outside defendant's presence, about the possibility that defense counsel's prior representation of chief prosecution witness created impermissible conflict of interest).

[229] 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981) (holding that the defendant was not denied effective assistance of counsel where his attorney failed to pursue a claim of actual innocence when faced with the strong possibility that the defendant was legally insane).

[230] *Id.* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

[231] *Id.* at 146, 429 N.E.2d at 404, 444 N.Y.S.2d at 897.

[232] *Id.* (citing People v. Aiken, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978) (quoting People v. Brown, 7 N.Y.2d 359, 361, 165 N.E.2d 551, 197 N.Y.S.2d 705 (1960)). The *Brown* court found that defense counsel's negligence or error in judgement for failing to call a key witness did

and second "'whether the attorney exhibited reasonable competence.'"[233] The *Gabriel* court concluded "that the defendant was represented by two well-prepared and experienced criminal attorneys [who] mounted a collaborative, albeit unsuccessful, defense."[234] The court was completely satisfied that Gabriel was provided meaningful representation.[235]

Both the Federal and New York State Constitutions require that a criminal defendant be given meaningful representation by counsel at trial. This requirement includes the obligation that a defendant's lawyer be free from conflicting loyalties and obligations at trial. At a minimum, the Federal and State Constitutions require that the defendant make an informed choice when presented with a potential conflict. In *Gabriel,* the Appellate Division was "eminently satisfied" that defendant received effective assistance from both attorneys and that the trial

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not render the trial a farce or mockery of justice. *Id.* at 361, 165 N.E.2d at 558, 197 N.Y.S.2d at 707. *See also* People v. Bennett, 29 N.Y.2d 462, 467, 280 N.E.2d 637, 329 N.Y.S.2d 801(1972) (holding that representation of defendant by his assigned lawyer was so inadequate and ineffective as to deprive defendant of fair trial where there was a complete lack of investigation or preparation on issue of defendant's insanity, which was only possible defense available to defendant).

[233] *Baldi*, 54 N.Y.2d at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898. *See, e.g.*, United States v. Fessel, 351 F.2d 1275, 1279 (5th Cir. 1976) (holding that a defense attorney's failure to request a court appointed psychiatrist to aid in the presentation of an insanity defense "denied the accused services necessary to the preparation and presentation of an adequate defense, and thus denied the defendant minimally effective representation . . . ."). *See also* United States v. Elksnis, 528 F.2d 236 (9th Cir. 1975) (holding that entrapment instructions did not establish incompetence of counsel on the theory that instructions served to confuse jury and failed to properly instruct jury on the issue of intent); United States v. Toney, 527 F.2d 716 (9th Cir. 1975) (holding that the test for effective assistance of counsel is whether counsel is reasonably likely to render and does render reasonably effective assistance); United States v. De Coster, 487 F.2d 1197 (D.C. 1973) (holding that when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel).

[234] People v. Gabriel, 661 N.Y.S.2d 306, 310 (3d Dep't 1997).

[235] *Id.*

court went beyond constitutional requirements in holding a *Gomberg*-style hearing four months prior to trial.[236]

People v. Himko [237]
(decided May 8, 1997)

Defendant, Andrew J. Himko, was convicted in 1996 following a jury trial of depraved indifference murder[238] and attempted murder[239] in the second degree.[240] Defendant was sentenced to consecutive terms of incarceration of 20 years to life for the conviction of murder in the second degree and 5 to 15 years for the conviction of attempted murder in the second degree.[241] Defendant appealed his conviction, claiming that the verdict should be set aside on the grounds that the County Court was required to inform the defendant of his right to proceed pro se[242].

The Appellate Division, Second Department, affirmed the trial court's conviction.[243] With respect to the defendant's contention that the County Court was required to inform the defendant of his right to proceed pro se, the court held that "the County Court was under no obligation, constitutional or otherwise, to inform the defendant of this right."[244]

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[236] *Id.*

[237] 657 N.Y.S.2d 127 (3d Dep't), *appeal denied*, 90 N.Y.2d 906, 686 N.E.2d 230, 663 N.Y.S.2d 518 (1997).

[238] *Id.* at 128. The New York Statute for murder in the second degree is embodied in N.Y. PENAL LAW § 125.25 (McKinney 1986).

[244] *Id.* The New York Statute for attempted murder in the second degree is embodied in N.Y. PENAL LAW § 125.30 (McKinney 1986).

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.* (citing People v. McIntyre, 36 N.Y.2d 10, 324 N.E.2d 322, 364 N.Y.S.2d 837 (1974) (holding that a defendant's outburst due to the trial court's denial of his motion to proceed pro se and from a belittling inquiry by the trial judge to an otherwise legal applicant was unjustified and the defendant should have been allowed to proceed pro se); People v. Burton, 106 A.D.2d 652, 482 N.Y.S.2d 909 (2d Dep't 1994) (holding that when a criminal defendant requests