Touro Law Review

Volume 11 | Number 3 Article 44

1995

Ineffective Assistance Counsel

INEFFECTIVE ASSISTANCE OF COUNSEL

N.Y. CONST. art. 1, § 6:

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 . . . .

U.S. CONST. amend VI:

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

People v. Benson[1]
(decided Jan. 20, 1994)

Defendant claimed that his lawyer's failure to raise the issue of his statutory right to a speedy trial amounted to a denial of the effective assistance of counsel guaranteed under the State[2] and Federal[3] Constitutions.[4] The court remitted the matter to further develop the record and held defendant's motion to vacate in abeyance.[5]

---

1. 200 A.D.2d 861, 606 N.Y.S.2d 828 (3d Dep't 1994).

2. N.Y. CONST. art. I, § 6. This provision 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 . . . ." *Id.*

3. U.S. CONST. amend. VI. This provision states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of counsel for his defense." *Id. See* Reece v. Georgia, 350 U.S. 85, 90 (1955) (stating that the right to counsel includes the effective assistance of counsel).

4. *Benson*, 200 A.D.2d at 862, 606 N.Y.S.2d at 828.

5. *Id.* at 863, 606 N.Y.S.2d. at 829.

Defendant pled guilty to three criminal counts arising from three separate indictments. The first indictment charged defendant with burglary and petit larceny.[6] In the second action, defendant was charged with criminal mischief. In the third action, the defendant was charged with second degree criminal possession of a forged instrument.[7] The second and third actions exceeded the statutory six month commencement required by New York Criminal Procedure Law section 30.30(1)(a).[8] Although the court noted that counsel for defendant acknowledged receiving a timely notice of readiness for the second action, the record was unclear in regard to the date of the action for the charge of possession of a forged instrument.[9] The record listed November 25, 1991 as the date a notice of readiness was filed, one day prior to the date that the defendant was indicted.[10]

The court, citing *People v. Kendzia*,[11] stated that a notice of readiness was ineffective unless the People were in fact ready to

---

6. *Id.* at 862, 606 N.Y.S.2d. at 829.

7. *Id.*

8. N.Y. CRIM. PROC. LAW § 30.30(1)(a) (McKinney 1993). The section provides in pertinent part:

> Except as otherwise provided in subdivision three, a motion made . . . must be granted where the people are not ready for trial within: (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony . . . .

Id.

9. *Benson*, 200 A.D.2d at 863, 606 N.Y.S.2d at 829.

10. *Id.* at 862, 606 N.Y.S.2d at 829.

11. 64 N.Y.2d 331, 337, 476 N.E.2d 287, 289, 486 N.Y.S.2d 888, 890 (1985) ("'[T]he People must communicate readiness for trial to the court on the record when ready to proceed.'" (quoting People v. Hamilton, 46 N.Y.2d 932, 933, 388 N.E.2d 345, 346, 415 N.Y.S.2d 208, 209 (1979))). In *Kendzia*, convictions were overturned by the New York of Court of Appeals, because the People were not ready for trial within the six month requirement for felony charges as specified in § 30.30(1)(a). *Id.* at 338, 476 N.E.2d at 290, 486 N.Y.S.2d at 891. This occurred despite the fact that the People agreed to set a trial date during an off the record conference and later sent a letter stating an expectation of readiness within three weeks of the dated letter. *Id.* at 337-38, 476 N.E.2d at 290, 486 N.Y.S.2d at 891.

go to trial at the time of filing.[12] This readiness for trial requires two elements.[13] First, there must be a statement of readiness that is inserted in the trial court's record.[14] This statement can be either a written notice delivered to both the court clerk and the defense attorney, or a statement made by the prosecution in an open court.[15] Second, in order for the notice of readiness to be valid, the statement must be made when the People are, in fact, ready to proceed.[16] The court stated "[t]he statute contemplates an indication of present readiness, not a prediction or expectation of future readiness."[17]

Since a void notice of readiness would result in the dismissal of a charge, the court stated that the failure of counsel to move to dismiss because of non-compliance with a notice of readiness would constitute denial of the meaningful representation guaranteed by the Federal and New York State Constitutions.[18]

In *People v. O'Connell*,[19] there was an eight month delay between the filing of the charge and the notice of readiness.[20] The court held that unless the failure of a motion to dismiss was attributable to trial strategy, it constituted a denial of effective representation.[21]

The federal courts addressed the lack of a motion to dismiss in *Barker v. Wingo*,[22] where the Supreme Court denied a claim for a violation of the right to a speedy trial because it was part of the

12. *Benson*, 200 A.D.2d at 862, 606 N.Y.S.2d at 829.
13. *Kendzia*, 64 N.Y.2d at 337, 476 N.E.2d at 289, 486 N.Y.S.2d at 890.
14. *Id.*
15. *Id.*
16. *Id.* at 337, 476 N.E.2d at 289-90, 486 N.Y.S.2d at 890-91.
17. *Id.* at 337, 476 N.E.2d at 290, 486 N.Y.S.2d at 891.
18. *Benson*, 200 A.D.2d at 863, 606 N.Y.S.2d at 829-30.
19. 133 A.D.2d 970, 521 N.Y.S.2d 121 (3d Dep't 1987).
20. *Id.* at 971, 521 N.Y.S.2d at 122.
21. *Id.*
22. 407 U.S. 514 (1972). *But see* United States v. Eight Thousand Eight Hundred and Fifty Dollars in U.S. Currency, 461 U.S. 555, 568 (1983) (holding that 18 months was not unreasonable delay in filing judicial forfeiture action).

defendant's trial strategy.[23] An accomplice who was being tried first had a strong chance of acquittal, and Mr. Barker did not object to the delay of his own trial while the accomplice was tried.[24] The Supreme Court noted in its opinion that the lack of a motion to dismiss on the grounds of violation of a speedy trial because of incompetent counsel can be a situation warranting dismissal on appeal.[25]

The failure to raise an issue, which would result in dismissal of the charges, is thus ineffective assistance of counsel in the federal courts as well as in New York State courts, and is violative of both constitutions. However, if the failure to raise the issue is part of a defendant's trial strategy, there is no valid claim of ineffective assistance of counsel in either state or federal court.

SUPREME COURT

RICHMOND COUNTY

People v. Costello[26]
(printed September 15, 1994)

The defendants filed a motion to set aside their convictions[27] pursuant to New York Criminal Procedure Law section 330.30(1)[28] on the ground that they were denied the effective

---

23. *Barker*, 407 U.S. at 534-36.

24. *Id.* at 535.

25. *Id.* at 536.

26. N.Y. L.J., Sept. 15, 1994, at 33-35 (Sup. Ct. Richmond County 1993).

27. The defendants were charged with five counts, in total, of which they were convicted of three: (1) criminal trespass in the third degree under N.Y. PENAL LAW § 140.10; (2) operating solid waste management without a permit under N.Y. ENVTL. CONSERV. LAW § 27-0707(1); and (3) disposing of solid waste at a non-permitted facility under N.Y. COMP. CODES R. & REGS. tit. 6, § 360.15.

28. N.Y. CRIM. PROC. LAW § 330.30(1) (McKinney 1993). This section provides in pertinent part: