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Ineffective Assistance Of Counsel

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

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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:

assistance of counsel during trial in violation of both the State[29] and Federal[30] Constitutions.[31] The court denied the motion and let the convictions stand.[32]

Defendants discharged their counsel upon their conviction, at a bench trial on the counts of trespass in the third degree, operating solid waste management without a permit, and disposal of solid waste at a non-permitted facility. The new counsel alleged five main points of incompetence of the previous counsel.[33] It was asserted that prior counsel was responsible for: (1) ignorance of criminal law and procedure; (2) failure to object to highly prejudicial evidence of an unproven crime and failure to object to inadmissible hearsay evidence; (3) presenting arguments which were "basically incomprehensible;" (4) ineffective cross-examination and the failure by counsel to pursue material inconsistencies in testimony of adverse witnesses; (5) serious error in the failure to raise an objection to the reduction of charges against the defendants which resulted in a non-jury trial,

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> At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
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> 1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment or conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

Id.

29. N.Y. CONST. art. I, § 6. This provision 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 as in civil actions . . . ." *Id.*

30. U.S. CONST. amend. VI. This provision provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence." *Id. See* Reece v. Georgia, 350 U.S. 85, 90 (1955) (holding that the Sixth Amendment right to assistance of counsel includes the effective assistance of counsel).

31. *Costello*, N.Y. L.J., Sept. 15, 1994, at 33.

32. *Id.* at 34. Under § 330.30 of the Criminal Procedure Law, the defendants sought to set aside their conviction for criminal trespass in the third degree based on lack of evidence and the fact that the court lacked subject matter jurisdiction over the environmental claims. *Id.* at 34-35. The court refused to modify or set aside any of the convictions. *Id.* at 34.

33. *Id.* at 33.

and the lack of an objection to request recusal of the trial judge based on a personal relationship with a witness for the prosecution.[34]

The court addressed the Sixth Amendment ineffective assistance of counsel claim in accordance with the federal standard set forth in the consummate federal case, *Strickland v. Washington*.[35] The court expressed surprise that defendants' new counsel did not cite the case in their argument.[36]

In *Strickland*, the Supreme Court set a two-prong test to determine whether errors on the part of counsel reached the level of a constitutional violation.[37] The first prong requires deficient performance on the part of counsel, with the burden on the defendant to show that the representation failed to attain a level of reasonably effective assistance.[38] Counsel's performance must have had serious errors which would cause the court to conclude that counsel's representation was not the functional equivalent of representation as guaranteed under the Sixth Amendment.[39]

The second prong is the so-called prejudice requirement, wherein the defendant is required to demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[40] The Court in *Strickland* stressed that, if either prong was not satisfied, defendants claim would fail.[41] Under the federal standard, the court in the instant case found neither prong of *Strickland* satisfied.[42] Previous counsel had two of the five charges acquitted and performed in a manner that was not deficient.[43] The court remarked that because this case was a

34. *Id.*
35. 466 U.S. 668 (1984).
36. *Costello*, N.Y. L.J., Sept. 15, 1994, at 34.
37. *Strickland*, 466 U.S. at 687.
38. *Id.*
39. *Id.*
40. *Id.* at 694.
41. *Id.* at 696.
42. *Costello*, N.Y. L.J., Sept. 15, 1994, at 34.
43. *Id.*

bench trial, there was no issue concerning the influence of errors upon a jury.[44] Where the trier of fact is a judge, it is presumed a judge will not decide the case based on counsel's performance at trial, but will only consider legally admissible evidence at trial.[45]

The court then examined the ineffective assistance of counsel claim under the New York State Constitution.[46] It stated that the New York rule has the same basic purpose as the federal rule, to foster the adversarial system of justice to best achieve the result that justice is served fairly,[47] and the requirement that the defendant have an advocate competent to secure "fairness in the adversary criminal process."[48]

There is a split in the New York courts concerning the standard for evaluating ineffective assistance of counsel. *People v. Baldi*[49] acknowledged this split[50] and utilized the meaningful representation standard to judge whether counsel provided the defendant with assistance/representation satisfying the constitutional requirement.[51]

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44. *Id.*

45. People v. Harris, 133 A.D.2d at 649, 519 N.Y.S.2d at 758 (2d Dep't 1987).

46. N.Y. CONST. art. I, § 6.

47. *See* United States v. Cronic, 466 U.S. 648 (1984). The Supreme Court commented that the rationale of the adversary system is "'that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Id.* at 655 (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

48. *Costello*, N.Y. L.J., Sept. 15, 1994, at 34 (quoting United States v. Morrison, 499 U.S. 361, 363 (1963)).

49. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981).

50. *Id.* at 146, 429 N.E.2d at 404, 444 N.Y.S.2d at 897 (stating that either of two different standards are appropriate to evaluate effectiveness of counsel; one standard is whether the trial was rendered a "farce and mockery of justice," and the other standard followed the federal view of "reasonable competence" (citing People v. Aiken, 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978))). *See* People v. Brown, 7 N.Y.2d 359, 361, 165 N.E.2d 557, 558, 197 N.Y.S.2d 705, 707 (1960) (explaining the "farce and mockery of justice" view).

51. *Baldi*, 54 N.Y.2d at 146, 429 N.E. 2d at 404, 444 N.Y.S.2d at 897.

In New York, the view of what constitutes ineffective assistance of counsel is very similar to *Strickland*, although the New York Court of Appeals has not expressly adopted *Strickland*.[52] *Baldi* is the controlling case in New York for ineffective assistance of counsel. In *Baldi*, the attorney vigorously pursued an insanity defense for a defendant who was charged with murder, attempted murder, burglary, and weapons possession.[53] On appeal, it was asserted that the attorney blundered by not pursuing a defense of innocence.[54] The New York Court of Appeals held that trial tactics which result in an unsuccessful defense do not automatically indicate ineffective assistance of counsel.[55] The law, evidence, and circumstances of the case, viewed in totality at the time of the representation, must be weighed to determine whether counsel provided "*meaningful representation.*"[56] It was also stressed that, because of the uniqueness surrounding each trial, there could not be an all encompassing fixed list of criteria to prove ineffective assistance of counsel.[57]

The *Costello* court cited *People v. Flores*[58] to stress the point that after the fact differences of opinion about tactics and the scope of examination of witnesses does not meet the required threshold to violate Sixth Amendment guarantees.[59] The court then mentioned several cases where the errors have been grave enough to impair the meaningful representation requirement.[60]

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52. *Id.*

53. *Id.*

54. *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

55. *Id.* at 146-47, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

56. *Id.* (emphasis added)

57. *See* People v. Droz, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882, 384 N.Y.S.2d 404, 407 (1976) (stating the difficulty in defining "inadequate" or "ineffective" legal representation or to formulate "standards which will apply to all cases" (quoting People v. Bennett, 29 N.Y.2d 462, 466, 280 N.E.2d 637, 639, 329 N.Y.S.2d 801, 804 (1972))).

58. 84 N.Y.2d 184, 639 N.E.2d 19, 615 N.Y.S.2d 662 (1994).

59. *Id.* at 187, 639 N.E.2d at 20, 615 N.Y.S.2d at 663.

60. *See* People v. Wandel, 75 N.Y.2d 951, 554 N.E.2d 1274, 555 N.Y.S.2d 686 (1990) (conflict of interest of defense counsel by the representation of prosecution's chief witness and defendant was considered

The case at bar is analogous to *Flores* because prior counsel was able to obtain acquittals against forty percent of the charges brought against the defendants, a fact that is hardly indicative of ineffective counsel.[61]

In addition, as it was a bench trial, there was no impact on the jurors' perception of incompetence that might affect a verdict.[62] In a bench trial, the judge is only allowed to consider evidence that is legally admissible and must exclude any inadmissible evidence in reaching a decision.[63] The court also mentioned that the trial judge offered to recuse himself because although he lacked personal knowledge of one of the witnesses, he knew that the witness played basketball on his son's team.[64] The trial attorney felt this was not a sufficient ground to raise an objection

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ineffective assistance of counsel); *see also* People v. Ortiz, 76 N.Y.2d 652, 564 N.E.2d 630, 563 N.Y.S.2d 20 (1990) (counsel put a former client on stand and elicited false testimony); People v. Rivera, 71 N.Y.2d 705, 525 N.E.2d 698, 530 N.Y.S.2d 52 (1988) (failure to make motion to suppress); People v. McDonald, 68 N.Y.2d 1, 496 N.E.2d 844, 505 N.Y.S.2d 824 (1986) (counsel defended the accused and represented the victim); People v. Mattison, 67 N.Y.2d 462, 494 N.E.2d 1374, 503 N.Y.S.2d 709 (1986) (partner in same law firm represented a codefendant who plea bargained and served as witness against the other codefendant); People v. Peterson, 97 A.D.2d 967, 468 N.Y.S.2d 955 (4th Dep't 1983) (failure of counsel to raise motion for *Wade* hearing on photo identification, and ineffective closing remarks); People v. Angellilo, 91 A.D.2d 666, 457 N.Y.S.2d 118 (2d Dep't 1982) (counsel did not make opening statement, call witnesses, or prepare defense). All of the preceding cases had aggregations of serious errors which, viewed in totality, deprived the defendants of effective assistance of counsel.

61. *See* People v. Ellis, 81 N.Y.2d 854, 613 N.E.2d 529, 597 N.Y.S.2d 623 (1993) (stating that acquittal on three out of four charges brought against the defendant which used as its defense a strategy to make the defendant guilty of the least severe charge does not constitute ineffective assistance of counsel).

62. *Costello*, N.Y. L.J., Sept. 15, 1994, at 34.

63. *See* People v. Harris, 133 A.D.2d 649, 650, 519 N.Y.S.2d 758, 759 (2d Dep't 1987) (stating that trial judge presumed to have considered only admissible evidence introduced at trial, and must exclude inadmissible evidence from reaching a verdict).

64. *Costello*, N.Y. L.J., Sept. 15, 1994, at 34.

and agreed to have the judge hear the case. The decision was reasonable under the circumstances.[65]

Thus, while the New York rule has not adopted the two prong *Strickland* standard, the "meaningful representation" requirement is a very similar standard, in both application and effect, to judge effective assistance of counsel.[66]

65. *Id.*
66. *Id.*