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Ineffective Assistance of Counsel: In re Jeffrey V.

In re Jeffrey V.[1338]
(decided October 12, 1993)

The juvenile defendant claimed that an order by the family court commencing a fact-finding hearing, despite the defendant's Law Guardian being unprepared, violated his right to effective assistance of counsel under both the New York State[1339] and Federal[1340] Constitutions.[1341] The court of appeals stated that the dismissal of two of the four counts of the petition of juvenile delinquency against the defendant was evidence of the Law Guardian's meaningful representation.[1342]

The defendant, a juvenile, was found guilty, by the Family Court, of menacing[1343] and criminal possession of a weapon in the fourth degree.[1344] He was exonerated of all remaining counts of the petition.[1345] The conviction was subsequently affirmed by the Appellate Division.[1346] Prior to trial, there was some confusion over two overlapping Family Court Acts, Family Court

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1338. 82 N.Y.2d 121, 623 N.E.2d 1150, 603 N.Y.S.2d 800 (1993).

1339. N.Y. CONST. art I, § 6. Section 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 as in civil actions . . . ." *Id.*

1340. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." *Id.*

1341. *Jeffrey*, 82 N.Y.2d at 125, 623 N.E.2d at 1152, 603 N.Y.S.2d at 802.

1342. *Id.* at 126-27, 623 N.E.2d at 1153, 603 N.Y.S.2d at 803.

1343. N.Y. PENAL LAW § 120.15 (McKinney 1987 & Supp. 1994). Section 120.15 states: "A person is guilty of menacing when, by physical menace, he intentionally places or attempts to place another person in fear of imminent serious physical injury. *Id.*

1344. N.Y. PENAL LAW § 265.01(2) (McKinney 1989 & Supp. 1994). Section 265.01(2) states: "A person is guilty of criminal possession of a weapon in the fourth degree when: (2) He possesses any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another." *Id.*

1345. *Jeffrey*, 82 N.Y.2d at 125, 623 N.E.2d at 1152, 603 N.Y.S.2d at 802.

1346. *Id.*

Act section 340.1(1),[1347] and Family Court Act section 325.1,[1348] one of which called for an immediate fact-finding hearing and the other allowing first for a probable cause hearing.

In his initial appearance, defendant was charged with crimes "less serious than a class C felony."[1349] Three days later, when the presentment agency expressed its desire to proceed with a fact-finding hearing, defendant's Law Guardian, only prepared for a probable cause hearing, was directed by the court to commence a fact-finding hearing.[1350] This hearing began with complainant's direct exam, after which defendant's Law Guardian was granted a continuance.[1351] Four days later, when the fact-finding hearing was completed, the defendant was found guilty of acts constituting criminal possession of a weapon in the fourth degree and menacing.[1352] He was exonerated on all other counts.[1353] On appeal, defendant asserted that he was denied his constitutional right to the effective assistance of counsel.[1354]

The court of appeals was not persuaded by defendant's argument "that by directing the commencement of the fact-finding hearing over the Law Guardian's claim of

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1347. N.Y. FAM. CT. ACT § 340.1(1) (McKinney 1983). This section provides in relevant part: "If the respondent is in detention and the highest count in such petition is less than a class C felony the fact-finding hearing shall commence no more than three days after the conclusion of the initial appearance . . . ." *Id.*

1348. N.Y. FAM. CT. ACT § 325.1 (McKinney 1993). This provision states in relevant part:

> 1. At the initial appearance, if the respondent denies a charge contained in the petition and the court determines that he shall be detained for more than three days pending a fact-finding hearing, the court shall schedule a probable-cause hearing . . . .
> 3. For good cause shown, the court may adjourn the hearing for no more than an additional three court days.

Id.

1349. *Id.* at 124, 623 N.E.2d at 1152, 603 N.Y.S.2d at 802.

1350. *Id.*

1351. *Id.*

1352. *Id.* at 124-25, 623 N.E.2d at 1152, 603 N.Y.S.2d at 802.

1353. *Id.* at 125, 623 N.E.2d at 1152, 603 N.Y.S.2d at 802.

1354. *Id.* Appellant also asserted a second ground for reversal, claiming he was denied his statutory right to a probable hearing. *Id.*

unpreparedness, Family Court deprived [defendant] of his constitutional right to effective assistance of counsel."[1355] The court explained that regardless of whether the alleged unpreparedness is of a general nature or of a specific nature, if counsel is present at the time of the hearing, there is a presumption of competent and effective representation.[1356] The burden is on the accused to demonstrate "the absence of meaningful adversarial representation."[1357] The court further explained that a "'refusal on the court's part to postpone a trial at counsel's request for further time to prepare does not by itself give rise to an inference of ineffective representation.'"[1358] The court concluded that the guardian's presence at the hearing coupled with his success in getting two of the four counts against his client dismissed, demonstrated that meaningful representation was served.

Prior to this case, the New York courts held similar view. In *People v. Benn*,[1359] the court of appeals held that a claim of ineffectiveness of counsel "requires proof of true ineffectiveness rather than mere disagreement with strategies and tactics that failed."[1360] Similarly, in *People v. Baldi*,[1361] the court noted that the most critical concern in reviewing ineffective assistance of counsel claims is to avoid "confusing true ineffectiveness with

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1355. *Id* at 126, 623 N.E.2d at 1153, 603 N.Y.S.2d at 803.

1356. *Jeffrey*, 82 N.Y.2d at 127, 623 N.E.2d at 1152, 603 N.Y.S.2d at 804; *see also* Darden v. Wainwright, 477 U.S. 168, 185 (1986). According to the *Darden* Court, "'[j]udicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, . . . and to evaluate the conduct from counsel's perspective at the time.'" *Id.* (quoting Strickland v. Washington, 466 U.S. 688, 689 (1984); United States v. Cronic, 466 U.S. 648, 657 (1984). The *Cronic* Court held that "[i]f counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance." *Id.*

1357. *Jeffrey*, 82 N.Y.2d at 127, 623 N.E.2d at 1152, 603 N.Y.S.2d at 804.

1358. *Id.* (quoting *Cronic*, 466 U.S. at 661-62).

1359. 68 N.Y.2d 941, 502 N.E.2d 996, 510 N.Y.S.2d 81 (1986).

1360. *Id.*

1361. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1988).

mere losing tactics and according undue significance to retrospective analysis."[1362] More recently, in *People v. Rivera*,[1363] the New York Court of Appeals pointed out that "[a] convicted defendant, with the benefit of hindsight, often can point out where he or she thinks counsel went awry."[1364]

Recognizing that "what constitutes effective assistance of counsel . . . cannot be fixed with yardstick precision," the *Baldi* court stated that two different standards have developed which are appropriate for reviewing counsel's effectiveness.[1365] The traditional standard was to see if the "attorney's shortcomings were such as to render the 'trial a farce and a mockery of justice.'"[1366] The newer standard, "developed predominantly in the Federal courts," is stricter, requiring a determination of whether the attorney exhibited "'reasonable competence.'"[1367]

The United States Supreme Court has applied its own two part test, announced in *Strickland v. Washington*.[1368] First, the petitioner must demonstrate that counsel's representation was at a level below an objective standard of reasonableness.[1369] Then the petitioner must demonstrate that there is a reasonable probability that but for counsel's errors, the result would have been different.[1370]

It appears that the Federal courts and the New York state courts are in harmony on this issue. If a defendant is represented by counsel that he feels is ineffective, the courts presume that counsel has in fact acted in an effective manner; the defendant has the burden of proving otherwise. Without defendant

1362. *Id* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

1363. 71 N.Y.2d 705, 525 N.E.2d 698, 530 N.Y.S.2d 52 (1988).

1364. *Id.* at 708, 525 N.E.2d at 700, 530 N.Y.S.2d at 54.

1365. *Baldi*, 54 N.Y.2d at 146, 429 N.E.2d at 404, 444 N.Y.S. at 897.

1366. *Id.* (quoting People v. Aiken, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 274, 408 N.Y.S. 444, 447 (1978)).

1367. *Baldi*, 54 N.Y.S.2d at 146; *see* United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); United States v. Elksnis, 528 F.2d 236 (9th Cir. 1975); United States v. Toney, 527 F.2d 716 (6th Cir. 1975), *cert. denied*, 429 U.S. 838 (1976).

1368. 466 U.S. 668 (1984).

1369. *Id.* at 669.

1370. *Id.*

satisfying this burden, there will be no violation of either the Sixth Amendment or article I, section 6, of the New York State Constitution. Only "serious" defects will render counsel ineffective, thereby affording the defendant a valid constitutional claim.

People v. Allah[1371]
(decided November 24, 1992)

The defendant claimed that his State[1372] and Federal[1373] Constitutional rights to effective assistance of counsel were violated when his attorney failed to represent him during jury deliberations. Although codefendants' attorney assumed representation, a conflict of interest existed between the defendant and codefendants. The defendant was not made aware of potential risks of having codefendants' counsel take over his representation. As a result, the New York Court of Appeals held that the defendant was deprived of effective assistance of counsel because his attorney was absent during deliberations.[1374] Furthermore, joint representation by codefendants' counsel presented an actual conflict of interest, since it was done without the informed consent of the defendant.[1375] Therefore, the order of the appellate division, affirming the judgment of conviction, was reversed and a new trial ordered.[1376]

The defendant was tried in Supreme Court, Kings County in a joint trial with two codefendants. The codefendants, however, were represented by separate counsel. The jury returned a verdict of criminal possession of a weapon in the second degree and

1371. 80 N.Y.2d 396, 605 N.E.2d 327, 590 N.Y.S.2d 840 (1992).

1372. N.Y. CONST. art I, § 6. Section 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 . . . ." *Id.*

1373. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." *Id.*

1374. *Allah*, 80 N.Y.2d at 400, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

1375. *Id.* at 401, 605 N.E.2d at 330, 590 N.Y.S.2d at 843.

1376. *Id.*