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# Ineffective Assistance of Counsel: People v. Benson

intelligently waive the right to conflict-free assistance of counsel.[1417]

While both the New York and Federal Constitution are in harmony regarding the importance of safeguarding a defendant's right to effective assistance of counsel, the duty imposed on trial courts in New York more adequately safeguard a criminal defendant's right to conflict-free representation. Conversely, the standard maintained under federal law, that there be actual conflict before a duty of inquiry is mandated, may not provide defendants with the requisite knowledge of the inherent risks of such representation.

## SUPREME COURT, APPELLATE DIVISION

### *THIRD DEPARTMENT*

People v. Benson[1418]
(decided January 20, 1994)

Defendant claimed that the failure of his counsel 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[1419] and Federal[1420] Constitutions.[1421] The court remitted

1417. *Gomberg*, 38 N.Y.2d at 313, 342 N.E.2d at 553-54, 379 N.Y.S.2d at 774. (finding that defendant can knowingly and intelligently waive right to separate representation).

1418. ___ A.D.2d ___, 606 N.Y.S.2d 828 (3d Dep't 1994).

1419. 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.*

1420. 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 also* Reece v. Georgia, 350 U.S. 85, 90 (1955) (stating that the right to counsel includes the effective assistance of counsel).

1421. *Benson*, ___ A.D.2d at ___, 606 N.Y.S.2d at 828.

the matter to further develop the record and held defendant's motion to vacate in abeyance.[1422]

Defendant pled guilty to three criminal counts on May 8, 1992, arising from three separate indictments. The first indictment was filed on November 26, 1991, and charged defendant with burglary and petit larceny.[1423] Its filing constituted commencement of that criminal action and less than six months transpired between that commencement and the entry of defendant's guilty plea.[1424]

In the second action, defendant was charged with criminal mischief and it was commenced on October 19, 1991.[1425] The third and final action was commenced on November 3, 1991 and defendant was charged with second degree criminal possession of a forged instrument, a Class D felony.[1426] The second and third actions exceeded the statutory six month commencement required by New York Criminal Procedure Law section 30.30(1)(a).[1427] Although the court noted that counsel for defendant acknowledged receiving a timely notice of readiness for the criminal mischief charge, the record was unclear in regard to the date of the action for possession of a forged instrument.[1428] 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.[1429]

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1422. *Id.* at ___, 606 N.Y.S.2d. at 829.

1423. *Id.* at ___, 606 N.Y.S.2d. at 829.

1424. *Id.* at ___, 606 N.Y.S.2d. at 829.

1425. *Id.* at ___, 606 N.Y.S.2d. at 829.

1426. *Id.* at ___, 606 N.Y.S.2d. at 829.

1427. 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.*

1428. *Benson*, ___ A.D.2d at ___, 606 N.Y.S.2d at 829.

1429. *Id.* at ___, 606 N.Y.S.2d at 829.

The court, citing *People v. Kendzia*,[1430] stated that a notice of readiness was ineffective unless the People were ready to go to trial at the time of filing.[1431] In *Kendzia*, convictions for grand larceny in the second degree, offering false statements in the first degree and violations of the Tax Law were all 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 section 30.30(1)(a).[1432] 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, it was held that "ready for trial encompasses two elements."[1433] First, there must be a statement of readiness that is inserted in the trial court's record.[1434] It 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.[1435] Second, in order for the notice of readiness to be valid, the statement must be made when the People are ready to proceed in fact.[1436] The court stated "[t]he statute contemplates an indication of present readiness, not a prediction or expectation of future readiness."[1437]

Since a void notice of readiness would result in a dismissal of the charge, the court stated that the failure of counsel to move to dismiss because of non-compliance with section 30.30 would constitute, "denial of the meaningful representation guaranteed a criminal defendant by the United States and New York Constitutions"[1438] as held in *People v. O'Connell.*[1439]

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1430. 64 N.Y.2d 331, 339, 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))).

1431. *Benson*, ___ A.D.2d at ___, 606 N.Y.S.2d at 829.

1432. *Kendzia*, 64 N.Y.2d at 338, 476 N.E.2d at 290, 486 N.Y.S.2d at 891.

1433. *Id.* at 337, 476 N.E.2d at 289, 486 N.Y.S.2d at 890.

1434. *Id.*

1435. *Id.*

1436. *Id.* at 337, 476 N.E.2d at 289-90, 486 N.Y.S.2d at 890-91.

1437. *Id.* at 337, 476 N.E.2d at 290, 486 N.Y.S.2d at 891.

1438. *Benson*, ___ A.D.2d at ___, 606 N.Y.S.2d at 829-30.

In *O'Connell*, defendant, because he was a repeat offender, was indicted on a felony charge of driving while under the influence of alcohol.[1440] There was an eight month delay between the filing of the charge and the notice of readiness.[1441] The court held that unless the failure of a motion to dismiss was attributable to trial strategy, it constituted a denial of representation by effective counsel.[1442]

The federal courts addressed the lack of a motion to dismiss in *Barker v. Wingo*,[1443] where the Supreme Court denied a claim for a violation of the right to a speedy trial because it was part of the defendant's trial strategy.[1444] 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.[1445] 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.[1446] The failure to raise an issue which will 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.

People v. Morin[1447]
(decided April 15, 1993)

Defendant appealed his conviction of several counts of sodomy, sexual abuse and endangering the welfare of a child on several grounds, including denial of his right to effective assistance of

1439. 133 A.D.2d 970, 971, 521 N.Y.S.2d 121, 122 (3d Dep't 1987).

1440. *Id.* at 970, 521 N.Y.S.2d at 122.

1441. *Id.* at 971, 521 N.Y.S.2d at 122.

1442. *Id.*

1443. 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).

1444. *Id.* at 534-36.

1445. *Id.* at 535.

1446. *Id.* at 536.

1447. 192 A.D.2d 791, 596 N.Y.S.2d 508 (3d Dep't 1993).