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Ineffective Assistance of Counsel: People v. Morin

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).

counsel in violation of his State[1448] and Federal[1449] Constitutional rights.[1450] He also claimed he was denied his due process right to be present "at all material stages of a criminal prosecution" including when his counsel questioned potential jurors regarding their fitness to serve.[1451] The appellate division held that the defendant was not denied effective assistance of counsel,[1452] and that the rule established in *People v. Antommarchi*[1453] did not apply retroactively because *Antommarchi* implicates cases in which jury selection occurred after the decision was rendered, which was on October 27, 1992.

The court found defendant's first constitutional claim to be meritless.[1454] Defendant claimed he was denied effective assistance of counsel because his attorney failed to make certain

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1448. N.Y. CONST. art. 1, § 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.*

1449. 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.*

1450. *Morin*, 192 A.D.2d at 792, 596 N.Y.S.2d at 510. Defendant objected to the introduction into evidence of an admission he allegedly made, however, since no objection was made at trial, the issue was not reviewable. *Id.* Defendant also argued several counts of the indictment were unsupported by the evidence. *Id.* He also claimed that the jury was improperly instructed. *Id.* The court found all the claims to be meritless. *Id.* Defendant's only successful point on appeal was that his sentence was unduly harsh. *Id.* at 793, 596 N.Y.S.2d at 512. Accordingly, the appellate division reduced defendant's sentence. *Id.*

1451. *Id.* at 793, 596 N.Y.S.2d at 511.

1452. *Id.*

1453. 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992) (holding that the questioning of jurors is a material stage of trial at which defendant's have a constitutional right to be present); *see also* People v. Mitchell, 80 N.Y.2d 519, 606 N.E.2d 1318, 591 N.Y.S.2d 990 (1992) (holding rule in *Antommarchi* should be applied prospectively only); People v. Elliot, 157 Misc. 2d 148, 596 N.Y.S.2d 662 (Crim. Ct. Kings County 1993) (holding that since the right to jury trial was a fundamental one the fact that the defendant did not raise the objection at trial did not prevent the defendant from moving to set aside the verdict later).

1454. *Morin*, 192 A.D.2d at 793, 596 N.Y.S.2d at 511.

motions.[1455] However, the appellate division disagreed, holding that counsel's decisions were strategically reasonable and did not constitute inadequate representation.[1456] Defendant failed to prove that counsel's decisions were not based on trial strategy.[1457] Furthermore, some of counsel's strategic decisions were successful, including the dismissal of two charges against the defendant.[1458]

Defendant's second constitutional argument was also unsuccessful. Defendant, based on the rule in *Antommarchi* claimed he should have been present when jurors were questioned by his attorney. However, the court noted that the court of appeals, in *Mitchell*, held that the right to be present at the questioning of witnesses arises from a statutory right under New York Criminal Procedure Law section 260.20,[1459] and not a federal constitutional right. The *Mitchell* court stated:

> It is manifest that *Antommarchi* was decided as a question of state law. The basis for the decision is found in N.Y.C.P.L. which provides that a defendant 'must be present during the trail of an indictment' . . . [a]lthough the statue has underlying due process concerns, its protective scope is broader than the constitutional right it encompasses.[1460]

1455. *Id.* Defendant claimed counsel failed to make a motion to sever the trial and failed to make objections concerning the admission of evidence. *Id.* Defendant also claimed counsel should have allowed him to testify at trial. *Id.*

1456. *Id.*

1457. *Id.*; *see also* People v. Rivera, 71 N.Y.2d 705, 525 N.E.2d 698, 530 N.Y.S.2d 52 (1988). The *Rivera* court held that "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's failure to request a particular hearing. Absent such a showing, it will be presumed that counsel acted in a competent manner and exercised professional judgment in not pursuing a hearing." *Id.* at 709, 530 N.E.2d at 698, 530 N.Y.S.2d at 54.

1458. *Morin*, 192 A.D.2d at 793, 596 N.Y.S.2d at 511.

1459. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1982). The statute provides in relevant part: "A defendant must be personally present during the trial of an indictment." *Id.*

1460. People v. Mitchell, 80 N.Y.2d 519, 526, 606 N.E.2d 1318, 1384, 591 N.Y.S.2d 990, 993 (1992); *see also* People v. Morales, 80 N.Y.2d 450, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992) (prospective jurors were questioned at

Therefore, *Mitchell* held that state courts can determine whether to apply a state court decision retroactively or prospectively.[1461] Accordingly, since defendant's trial took place prior to the *Antommarchi* decision and that rule is applied prospectively, defendant could not rely on this rule as a basis for his appeal.[1462]

Under federal law, the Supreme Court in *Griffith v. Kentucky*[1463] has held that "a new constitutional rule is to be applied retroactively to all cases pending on direct review."[1464] However, in *Mitchell*, the court pointed out that the *Griffith* rule is not binding on state courts when no constitutional principles are involved.[1465] State courts have the power to determine whether or not a state rule should be applied retroactively.[1466] Accordingly, since state law applied to defendant's claim, the state rule of retroactivity was applicable. Thus, the court affirmed defendant's conviction on both constitutional claims.

In re Jamie TT.[1467]
(decided July 1, 1993)

The Department of Social Services, petitioner in a child abuse proceeding, and the law guardian, claimed that the child's

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trial when defendant was not present but the court upheld that defendant's conviction applying the *Antommarchi* rule prospectively).

1461. *Mitchell*, 80 N.Y.2d at 526, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. *Mitchell* applied the rule announced in People v. Pepper, 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889, *cert. denied*, 454 U.S. 967 (1981). The rule follows a three part test in determining what effect a rule would have if applied retroactively. The court looks at the purpose of the rule, the extent of reliance on the rule, and the effect its retroactive application would have on administration. *Id.*

1462. The verdict in the instant case was rendered on June 28, 1991.

1463. 479 U.S. 314 (1987) (holding courts must apply rules retroactively).

1464. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993 (citing *Griffith*, 479 U.S. at 314).

1465. *Id.*

1466. *Id.*; *see also* American Trucking v. Smith, 496 U.S. 167 (1990) (holding state courts can determine how to apply their own rules as they see fit).

1467. 191 A.D.2d 132, 599 N.Y.S.2d 892 (3d Dep't 1993).