



1992

## Ineffective Assistance of Counsel

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## COUNTY COURT

## NASSAU COUNTY

People v. Brown<sup>600</sup>  
(decided March 25, 1991)

The defendant moved to set aside a class B felony verdict under Criminal Procedure Law (CPL) section 330.30(1)<sup>601</sup> and reinstate a class C felony guilty plea upon the grounds that, *inter alia*, his constitutional right to counsel was violated under the federal<sup>602</sup> and state<sup>603</sup> constitutions when his counsel failed to check the accuracy of his pre-sentence report. The pre-sentence report incorrectly indicated that he was a second felony offender. Assuming that the motion was properly brought before the court under CPL section 330.30(1), the court concluded that counsel provided meaningful representation throughout the proceedings.<sup>604</sup>

The defendant was charged with criminal sale and possession of a controlled substance, class B felonies under the Penal Law.<sup>605</sup> At a preliminary conference, the defendant was offered a reduced class C felony in satisfaction of both class B felonies, and the judge sentenced him to one to three years, provided that the defendant was not a second felony offender. Upon an initial inspection of the defendant's N.Y.S.I.I.S.<sup>606</sup> sheet several months later, defense counsel determined that the defendant was not a second felony offender. Thus, a plea was taken by the

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600. 150 Misc. 2d 334, 568 N.Y.S.2d 1014 (County Ct. Nassau County 1991).

601. N.Y. CRIM. PROC. LAW § 330.20(1) (McKinney 1986).

602. U.S. CONST. amend. VI.

603. N.Y. CONST. art. I, § 6.

604. *Brown*, 150 Misc. 2d at 338, 568 N.Y.S.2d at 1017.

605. N.Y. PENAL LAW § 220.39(1) (McKinney 1989).

606. N.Y.S.I.I.S. is an acronym for the New York State Identification and Intelligence System: a computerized database containing an individual's criminal history. *See* *People v. Velez*, 124 Misc. 2d 612, 614, 477 N.Y.S.2d 78, 79 (Sup. Ct. Bronx County 1984).

defendant for the class C felony.<sup>607</sup>

However, approximately one month later, the parties appeared before a sentencing judge and reviewed the pre-sentence report prepared by the Nassau County Probation Department. The pre-sentence report, unlike the N.Y.S.I.I.S. sheet, indicated that the defendant was, in fact, a second felony offender. The parties conferred and all agreed, without contest, that the defendant was a second felony offender.<sup>608</sup> Defendant's counsel did not investigate the pre-sentence report, even though it conflicted with the defendant's N.Y.S.I.I.S. sheet, and despite defendant's insistence that he was not a second felony offender.<sup>609</sup> The defendant refused to be sentenced and was permitted to withdraw his guilty plea. Approximately one year later, the case went to trial and a jury convicted the defendant of both class B felonies originally charged.<sup>610</sup>

The assistant district attorney subsequently obtained certificates of prior incarceration from the state and county corrections departments because the defendant continued to purport that he was not a second felony offender. The certificates showed that more than a ten year period had elapsed between the defendant's prior incarceration and his commission of the present charge. Thus, it was determined that the pre-sentence report was incorrect and that the defendant was not a prior felony offender.<sup>611</sup> Defendant then moved to set aside the verdict based, *inter alia*, on ineffective assistance of counsel at the time of the withdrawal of defendant's guilty plea.

In holding that defendant was not denied effective assistance of counsel, the court relied on the seminal case of *People v. Baldi*.<sup>612</sup> In *Baldi*, the New York Court of Appeals asserted that meaningful representation is measured by "the evidence, the law,

607. *Brown*, 150 Misc. 2d at 335, 568 N.Y.S.2d at 1015-16.

608. *Id.*

609. *Id.* at 335, 568 N.Y.S.2d at 1016.

610. *Id.*

611. *Id.*; see N.Y. PENAL LAW § 70.06(1)(b)(iv)-(v) (McKinney 1987).

612. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981).

and the circumstances of a particular case.”<sup>613</sup> It also asserted that “[w]hat constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation.”<sup>614</sup>

The *Brown* court further relied upon the New York Court of Appeals’ decisions of *People v. Rivera*<sup>615</sup> and *People v. Strempack*<sup>616</sup> to assert that while the New York State and Federal Constitutions guarantee defendants the right to counsel, they do not guarantee a right to counsel which will be “error-free.”<sup>617</sup> The *Rivera* court held that the failure of trial counsel to request a hearing, via pre-trial motion, does not necessarily constitute ineffective assistance of counsel.<sup>618</sup> The *Strempack* court held that “[d]efense counsel’s failure to make a suppression motion prior to negotiating a plea bargain for his client does not . . . constitute ineffective assistance of counsel.”<sup>619</sup> Applying the principals asserted in prior case law, the *Brown* court held that the defendant’s attorney clearly provided meaningful representation, and that his single oversight of failing to check the accuracy of defendant’s pre-trial sentence report did not amount to ineffective assistance of counsel.<sup>620</sup>

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

614. *Id.* at 146, 429 N.E.2d at 404, 444 N.Y.S.2d at 898.

615. 71 N.Y.2d 705, 708, 525 N.E.2d 698, 700, 530 N.Y.S.2d 52, 54 (1988) (stating that counsel’s failure to make a pre-trial motion does not, by itself, establish ineffective assistance of counsel).

616. 71 N.Y.2d 1015, 525 N.E.2d 746, 530 N.Y.S.2d 100 (1988).

617. *Brown*, 150 Misc. 2d at 338, 568 N.Y.S.2d at 1017.

618. *Rivera*, 71 N.Y.2d at 709, 525 N.E.2d at 700, 530 N.Y.S.2d at 54.

619. *Strempack*, 71 N.Y.2d at 1016, 525 N.E.2d at 746, 530 N.Y.S.2d at 101.

620. *Brown*, 150 Misc. 2d at 338, 568 N.Y.S.2d at 1017. For a discussion of federal law, see *supra* notes 589-95 and accompanying text.