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Right to Counsel

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Rojas[169]
(decided July 20, 1995)

The defendant, Luis Kevin Rojas, was convicted of second degree murder and other related charges and appealed the conviction, asserting that he was denied effective assistance of counsel as guaranteed under the New York State[170] and Federal[171] Constitutions.[172] The Appellate Division, First Department reversed the conviction and remanded the case to the Supreme Court, New York County holding that defendant's trial counsel overlooked certain exculpatory evidence which may have established the defendant's innocence.[173]

Luis Kevin Rojas was convicted of murder in the second degree, criminal facilitation in the second degree, assault in the first degree, and possession of a weapon in the first and second degree.[174] The charges stemmed from a shooting death that occurred approximately five blocks from where the defendant was apprehended.[175] Numerous discrepancies existed concerning the time and location of defendant's arrest and the time and location of the shooting.[176] Rojas asserted that evidence existed

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concerning violations of the right to counsel because of a prohibition of attorney-client contact during a recess supports the majority view.

169. 630 N.Y.S.2d 28 (App. Div. 1st Dep't 1995).

170. 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.*

171. U.S. CONST. amend. VI. The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." *Id.*

172. *Rojas*, 630 N.Y.S.2d at 29.

173. *Id.*

174. *Id.*

175. *Id.* at 29.

176. *Id.* at 32-33. The defendant claimed that he arrived at the scene of arrest, a subway station, approximately seven minutes prior to the shooting incident, which had occurred five blocks away. *Id.* at 32. Furthermore,

which would have proven that it was impossible for him to have perpetrated the crime.[177]

In his motion to vacate the judgment of conviction,[178] the defendant claimed that he received ineffective assistance of counsel because his attorney overlooked evidence which would have tended to prove his innocence.[179] The defendant's counsel made no effort to investigate any aspect of his alibi and, in fact, never gave the notice required for an alibi defense.[180] Furthermore, he asserted that defendant's counsel "not only made no effort to investigate the . . . evidence or the defendant's alibi, but further committed numerous errors during the course of the trial which *tended to implicate defendant* rather than prove his innocence."[181] The defendant contended that his counsel

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according to the defendant, his arrival at the station was witnessed by various police officers performing a "fare beating" sting operation. *Id.*

177. *Id.* at 32-33. The police department "911" tapes were available which pinpointed the exact time of the shooting. District Attorney "Squad tapes" which detailed the exact time the arresting officers first arrived at the train station were also accessible. *Id.*

178. N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1993). This section provides in pertinent part: "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment . . . ." *Id.*

179. *Rojas*, 630 N.Y.S.2d at 32. The defendant's counsel, Mr. Fronefield, failed to interview PATH police officers who could have verified that the defendant was at the station several minutes prior to the shooting. *Id.* It was also shown that Mr. Fronefield ignored segments of a "911" tape in which an eyewitness's description of the suspect was distinctly different than Rojas' physical description. *Id.* at 34.

180. *Id.* at 32. N.Y. CRIM. PROC. LAW § 250.20(1) (McKinney 1993). This provision states in pertinent part:

> At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel . . . a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people . . . a "notice of alibi" . . . .

Id.

181. *Id.* at 34 (emphasis added). The defendant's counsel, Mr. Fronefield continually used the defendant's name while referring to the perpetrator. *Id.* During the cross examination of a witness, rather than inquiring if the witness

overlooked all of the exculpatory evidence and instead chose to defend Rojas by presenting character evidence.[182]

Subsequent counsel, obtained by defendant following his conviction, conducted an in-depth investigation into the defendant's alibi.[183] The results of this investigation led the appellate court to conclude that "[t]he evidence . . . certainly raises genuine questions as to defendant's participation in the crime. This evidence was not presented before the jury and could have persuaded them that reasonable doubt existed as to defendant's guilt."[184]

The court initially began its analysis of the "ineffective counsel" issue by stating that, although there is a constitutional right to effective assistance of counsel, there is "no set litmus test for determining what constitutes ineffective or inadequate legal representation."[185] In *People v. Ellis*,[186] the court of appeals acknowledged that "[t]rial lawyers bring their own talents, experience and personality into the courtroom, and given the unique attributes of each case, must devise and execute appropriate strategy."[187] In the earlier decision of *People v.*

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had seen the *suspect* in certain distinctive clothing, Mr. Fronefield asked "[y]ou saw Mr. Rojas or the man in the orange jacket at that point, isn't that right . . . ." *Id.*

182. *Id.* The only witnesses called by Mr. Fronefield were Rojas' "high school counselor, photography teacher and biology teacher." *Id.*

183. *Id.* at 32-33. The investigation consisted of having someone run the distance from the shooting scene to the subway station to determine if it were possible to get there within the time parameters calculated by the "911" tapes and the eyewitnesses. *Id.* at 33. The investigators for defendant's new counsel interviewed the police officers who were present when the defendant arrived at the station. *Id.* Statements from these officers indicated that it was possible that the defendant was at the PATH station prior to the shooting, making it virtually impossible for him to have been at the shooting scene. *Id.* Further, the defendant's physical condition was inconsistent with someone who had just run five blocks. *Id.*

184. *Id.* at 33.

185. *Id.* at 34.

186. 81 N.Y.2d 854, 856, 613 N.E.2d 529, 530, 597 N.Y.S.2d 623, 624 (1993).

187. *Id.* The *Ellis* court held that the defendant's trial counsel had displayed "reasonable trial strategy" and as such his conduct was not deemed ineffective.

Baldi,[188] the court reasoned that "trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness."[189] The *Rojas* court stated that their most critical concern when determining "the existence of ineffective counsel is to avoid . . . confusing true ineffectiveness with mere losing tactics."[190]

The *Rojas* court, however, did hold that the "right 'to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense.'"[191] The *Rojas* court based this standard, in part, on the New York Court of Appeals' decision in *People v. Bennett*.[192] In *Bennett*, the defendant's attorney, according to the court, was "so completely unfamiliar with either the facts or the law bearing on his client's case as to doom the defense to failure."[193] Although the *Bennett* court agreed that no

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Id. at 857, 613 N.E.2d at 530, 597 N.Y.S.2d at 624; *see also* People v. Baldi, 54 N.Y.2d 137, 146, 429 N.E.2d 400, 404, 444 N.Y.S.2d 893, 897 (1981). The *Baldi* court stated that "[w]hat constitutes effective assistance is not and cannot be fixed with yardstick precision, but according to the unique circumstances of each representation." *Id. But see* People v. Aiken, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 274-75, 408 N.Y.S.2d 444, 447 (1978). The court articulated two standards for determining an attorney's effectiveness. First, it stated the traditional standard where the court will look at "whether the attorney's shortcomings were such as to render the trial a 'farce and a mockery of justice.'" *Baldi*, 54 N.Y.2d at 146, 429 N.E.2d at 404, 444 N.Y.S.2d at 897 (quoting People v. Brown, 7 N.Y.2d 359, 361, 165 N.E.2d 557, 558, 197 N.Y.S.2d 705, 707 (1960), *cert. denied*, 365 U.S. 821 (1961)). Second, it stated the newer, stricter standard, where the court must determine "whether the attorney exhibited 'reasonable competence.'" *Id.*

188. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981).

189. *Id.* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898 (explaining that "[s]o long as the evidence, the law and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met").

190. *Rojas*, 630 N.Y.S.2d at 34.

191. *Id.* at 35 (quoting People v. Droz, 39 N.Y.2d 457, 462, 348 N.E.2d 880, 882, 384 N.Y.S.2d 404, 407 (1976)).

192. 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972).

193. *Id.* at 465, 280 N.E.2d at 638, 329 N.Y.S.2d at 803. In *Bennett*, the defendant had been previously committed to a mental hospital for an extended

precise definition of "inadequate" or "ineffective" counsel exists, it held that:

> [T]he right of a defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him upon a trial and ask questions . . . . [T]he defendant's right to representation does entitle him to have counsel "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial."[194]

New York courts and federal courts are fairly consistent in their holdings concerning matters of effective assistance of counsel. In *Reese v Georgia*,[195] the United States Supreme Court held that the right to counsel means the right to *effective* assistance of counsel.[196] In *Strickland v. Washington*,[197] the Court articulated the federal standard for determining what constitutes effective assistance of counsel. The Court reasoned that "[a]n accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair."[198] Thus, the Court in *Strickland* held that "[t]he proper

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period of time. *Id.* Further, he had attempted suicide on numerous occasions both before and after the commission of the current charge of robbery first degree. *Id.* Despite these obvious doubts about the defendant's mental capacity, the attorney failed to prepare an insanity defense. *Id.* at 464-65, 280 N.E.2d at 637-38, 329 N.Y.S.2d at 802-03.

194. *Id.* at 466, 29 N.E.2d at 639, 329 N.Y.S.2d at 804 (citations omitted). *See* People v. Rodriguez, 94 A.D.2d 805, 462 N.Y.S.2d 914 (2d Dep't 1983). Despite overwhelming evidence of the defendant's guilt, the *Rodriguez* court held that the defendant was deprived of effective assistance of counsel where his attorney failed to call an exculpatory witness and failed to object to incomplete evidence. *Id.* at 807, 462 N.Y.S.2d at 916-17.

195. 350 U.S. 85 (1955).

196. *Id.* at 90 (stating "[t]he effective assistance of counsel in . . . [capital cases] is a constitutional requirement of due process which no member of the Union may disregard").

197. 466 U.S. 668 (1984).

198. *Id.* at 687-88 (stating "counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest . . . [c]ounsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process").

measure of attorney performance remains simply reasonableness under prevailing professional norms . . . whether counsel's assistance was reasonable considering all the circumstances."[199] The Court, however, did go on to clarify that this standard was merely a guide, in that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by the defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."[200]

Although New York has not adopted the "reasonable competence" standard articulated in *Strickland,* the courts do require a similar standard. Taking each case into consideration for its uniqueness, the New York courts look at the totality of circumstances to determine whether counsel provided "meaningful representation."[201]

SECOND DEPARTMENT

People v. DeFreitas[202]
(decided Aug. 14, 1995)

Defendant claimed ineffective assistance of trial counsel, arguing that his attorney failed to request a charge of a lesser-included offense, failed to request that a *Huntley* hearing be reopened and failed to assert that defendant had been "framed."[203] The defendant asserted that the inaction of his attorney amounted to a denial of his rights under the Federal[204]

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199. *Id.*

200. *Id.* at 688-89 (holding that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

201. People v. Baldi, 54 N.Y.2d 137, 147, 429 N.E.2d 400, 405, 444 N.Y.S.2d 893, 898 (1981).

202. 213 A.D.2d 96, 630 N.Y.S.2d 755 (2d Dep't 1995).

203. *Id.*

204. U.S. CONST. amend. IV. This provision states in pertinent part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence." *Id.*; *see* Reece v. Georgia, 350 U.S. 85, 90 (1955) (holding that