

Adverse Testimony By Defense Counsel Constitutes Ineffective Assistance

BY LAZAR EMANUEL

In *People v. Lewis*, April 7, 2004, NYLJ page 18, the Court of Appeals restated its position with respect to testimony by defense counsel in a criminal matter: testimony by defense counsel on any issue adverse to the client will generally constitute a denial of effective assistance of counsel requiring a new trial. Speaking for the majority, Judge Albert M. Rosenblatt said:

As we pointed out in *Berroy* [*People v. Berroy*, 99 NY2d 134 (2002)], attorneys should withdraw when called to testify against their client on a significant issue. When the prosecution expressed its intention to call defendant's lawyer as a witness, the lawyer should have objected - or the court itself should have interceded - and raised the potential conflict.

Defendant Lewis was indicted for possession and sale of a controlled substance. The prosecution relied on evidence obtained during a search of defendant's premises and a signed statement by a witness who had bought cocaine from the defendant. Shortly after jury selection, the prosecution gave a copy of the statement to defense counsel. Within the hour, the witness had received a phone call from someone who claimed to know where he lived, threatening both him and his family.

The next day, the witness advised the police that he would refuse to testify, and the prosecution brought the matter to the court's attention. The prosecution reminded the court that the defendant was out on bail. It argued that the defendant was behind the threats; that by threatening the witness, he had forfeited his right to confront the witness; and that the statement should be revealed to the jury.

Court Conducts Sirois Hearing

Defense counsel acknowledged that he had shared the statement with defendant, but that defendant had "responded indifferently, dismissing the statement as too recent and unreliable to be of any concern." He denied that his client was behind the threat.

To resolve the issue, the court conducted a Sirois hearing. [Editor's note: Named after the defendant in *People v Sirois*, 92 AD2d 618 (2nd Dept, 1983). A Sirois hearing is conducted "whenever the People allege specific facts which demonstrate a distinct possibility... that a criminal defendant's misconduct has induced a witness' unlawful refusal to testify...or has caused the witness' disappearance or demise."]

At the hearing, a State Police investigator testified that he had spoken to the witness, who told him that he had received the threatening call from an unknown male. Defendant took the stand and admitted that his lawyer had shown him the statement. He denied, however, any responsibility for the threats. He conceded that he had told one other person about the statement: "my friend Dale, over there," but denied that he had told Dale who the witness was.

The prosecution asked to call defense counsel to the stand. Counsel did not object and the court did not suggest that the testimony would be improper. The prosecutor asked defense counsel: "Did you tell anyone other than (defendant) about this statement, that is, either the identity of the declarant or the substance of the statement?" Counsel answered, "No."

Relying on this testimony, the prosecution argued that only the defendant and his friend knew about the statement and only defendant had anything to gain by delivering or arranging the threat. The trial court agreed and allowed the witness' statement to be admitted.

Defendant was convicted. The Appellate Division affirmed. The Court of Appeals reversed on the ground that the testimony by defense counsel constituted a denial of effective assistance of counsel. The Court said, "In reaching this result, we need look no further than *People v. Berroa*." (*Supra.*)

Facts of Berroa

In *Berroa*, two defense witnesses testified that the defendant was in Philadelphia at the time of the crime and could not have committed it. The prosecutor objected because the defense had not served an alibi notice. Defendant's attorney replied that the alibi testimony was a surprise to her as well. Recognizing the dilemma that would be created if defense counsel were to take the stand and challenge the alibi, defense counsel stipulated before the jury that neither witness had told her about the defendant's being in Philadelphia at the time of the crime. The defendant was convicted.

In reversing the conviction, the Court of Appeals held that the stipulation had converted the defendant's attorney into a defense witness who undermined the testimony of the defendant's other witnesses.

Confirming the reasoning of the Court in *Berroa*, Judge Rosenblatt concluded in *Lewis*:

Our dissenting colleagues agree that the prosecution should not have been permitted to call defendant's attorney as a witness in the Sirois hearing. In our view, a new trial is also required because defense counsel crossed the line when, without protest, he gave testimony against his client. True, the testimony was an addendum to the informal remarks he made earlier, but by testifying, he became a witness for the prosecution.It is inapt for us to weigh the importance of the testimony and draw fine distinctions as to where the spectrum of harm falls. If, as we all agree, the attorney's testimony had at least some significance, it was enough to rupture the attorney-client relationship not only for the Sirois hearing but for the balance of the trial itself.

Writing for the dissent, Judge George B. Smith rejected the analogy to *Berroa*.

The error in *Berroa* was much more serious than the error here for two reasons: (1) in *Berroa*, the attorney became, in effect, a witness before the jury on an issue touching her client's guilt or innocence; and (2) in *Berroa*, the only facts the attorney provided were adverse to her client. Here, at a hearing outside the presence of the jury on a collateral issue, defense counsel was permitted to make factual representations in support of his client's cause, and then was required to answer a single question which served to place his representations in context....Under these circumstances, I do not find that requiring him to testify was so gross a deviation from acceptable practice as to render his assistance to the client at the Sirois hearing 'ineffective.'

Judge Smith also argued that the taint of counsel's testimony extended only to the Sirois hearing, not to the trial itself. "The testimony defense counsel gave was out of the jury's presence and had nothing to do with any issue the jury considered....I find nothing in the record to suggest that defense counsel became a less effective advocate after his testimony. He presented a competent, aggressive defense throughout the trial."

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