

Allocation of Authority Between Lawyer & Client In a Criminal Trial

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In a recent decision, the Court of Appeals failed to consider its own precedents on the allocation of decision-making between client and lawyer and rejected a claim of ineffective assistance of counsel rooted in counsel's acquiescence to defendant's insistence that counsel present no defense at trial. *People v. Henriquez*, 3 NY3d 210 (2004).

Defendant Henriquez was indicted for the murder of his wife after finding her "in a compromising situation with another man." Attorney Loverro was appointed by the trial court to handle his defense. At the trial, defendant directed counsel not to examine any witnesses, not to object to any line of questioning, not to approach the bench, not to call any witnesses, "not to sum up, not to do anything... He just wants me to sit here and do nothing."

Counsel asked to be relieved and requested that defendant be permitted to precede pro se. When the defendant refused to represent himself ("I didn't ask to represent myself. You can't tell me I have to represent myself."), the trial court denied counsel's motion to withdraw and instructed him to remain available during the proceedings "in case the defendant changed his mind and decided to consult with [you] or present a defense."

In fact, defendant did not participate in the trial and resisted every effort by his attorney to help him. Thus, the court's preliminary instructions to the jury were not challenged, defendant made no opening statement, the state's witnesses testified without cross-examination or challenge, the state entered crime scene photographs and the murder weapon without objection, the defendant called no witnesses and made no motions, and the court's final instructions to the jury were not challenged. When the court advised the defendant that the defense of extreme emotional disturbance might be available to him, defendant refused to ask for a jury instruction on that possible defense. So complete was the control of trial tactics by the accused that when counsel objected to the testimony of a prosecution witness because the witness had been in the courtroom during the testimony of a prior witness, the court asked whether counsel had the permission of the client to make the motion. At another point, the court stated, "Mr. Henriquez, I am respecting your right to restrict your attorney in the way he defends you."

Inevitably, the jury found the defendant guilty of murder in the second degree. Defendant appealed, claiming that he had not waived or forfeited his right to effective assistance of counsel under the Sixth Amendment. The Appellate Division upheld the conviction, "concluding that defendant, after being consistently warned by the trial court about the pitfalls of his conduct, knowingly, intelligently and voluntarily waived his rights to present a defense, cross-examine or call witnesses, or testify in his own behalf." The Court of Appeals affirmed with a dissent by Judge G. B. Smith.

Guiding Principles

The principles which guide criminal defense lawyers in the allocation of authority between themselves and their clients are well established.

The extent of a lawyer's authority when a lawyer represents a person accused of crime has been comparatively well worked out, perhaps because the issues have so frequently been litigated. Courts generally agree that in fact the accused must explicitly consent to very few critical decisions on the part of the defendant's lawyer. Moreover, the courts do not generally draw distinctions between court-appointed defense lawyers and those personally retained by the accused. The four decisions to which client consent is required are those involving (1) the plea that will be entered; (2) whether to forgo the right to jury trial; (3) whether the accused should testify; and (4) whether to appeal. Charles W. Wolfram, *Modern Legal Ethics*, West, 1986 at 173.

The ABA recognizes a fifth decision which is reserved to the client:

Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive a jury trial
- (iv) whether to testify in his or her own behalf; and
- (v) whether to appeal [Emphasis added ABA Standards for Criminal Justice, Standard 4-5.2

These principles are also confirmed in case law. The Supreme Court has recognized counsel's sovereignty over tactical decisions in a criminal proceeding. In allowing counsel to waive the benefit of a speedy trial rule, the Court said "... the lawyer has – and must have – full authority to manage the conduct of the trial." *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 664 (2000). As Chief Justice Burger noted in his concurring opinion in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 2510 (1977): "The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds." See, also, *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 3313, fn.6 (1983) (citing with approval ABA Standards 4-5.2, supra.)

Court of Appeals Precedents

The approach taken by the Court of Appeals in *Henriquez* ignores the Court's prior rulings on the allocation of decisions between lawyer and client. In *Hallock v. State*, 64 NY2d 224, 485 NYS2d 513 (1984), the Court stated: "From the nature of the attorney-client relationship itself, an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions." In *People v. Ferguson*, 67 NY2d 383, 502 NYS2d 972, 976 (1986), the Court said, "...a defendant who has a lawyer relegates control of much of the case to the lawyer except as to certain fundamental decisions reserved to the client." (concluding that counsel may consent to a mistrial without consulting with the accused.)

In its most recent statement on the issue, the Court found no error in the trial court's refusal to consider a pro se motion filed by a represented defendant, and noted with approval the well-established case law limiting decision-making by a represented defendant in a criminal case. "By accepting counseled representation, a defendant assigns control of much of the case to the lawyer, who ... is entrusted with sifting out weak arguments, charting strategy and making day-to-day decisions over the course of the proceedings." *People v. Rodriguez*, 95 NY2d 497, 719 NYS2d 208 (2000), at 211.

In *People v. Petrovich*, 87 NY2d 961, 641 NY2d 592 (1996), the Court expanded the decisions reserved to the accused by assigning to the accused the decision whether or not to ask for a jury instruction on the affirmative defense of extreme emotional disturbance (EED). The court reasoned that because the EED defense can support a jury's decision to reduce a charge of murder to the lesser charge of manslaughter in the first degree, it is akin to the right of the accused to control the plea which is entered for him. (*see*, ABA Standard 4-5.2, *supra*.)

It is difficult to see why a Court which was capable of making such fine distinctions in lawyer/client allocation in *Petrovich* missed the opportunity in *Henriquez* to confirm the lawyer's obligation to insist on controlling the conduct of the trial, as well as the trial court's obligation to ensure that the accused was adequately represented by counsel.

Judge G. B. Smith's Dissenting Opinion

In his dissenting opinion in *Henriquez*, Judge G. B. Smith correctly stated the controlling principles:

Defendant was denied his constitutional rights to effective assistance of counsel and a fair trial when, after it became clear that defendant did not want to proceed pro se but wanted to have defense counsel serve as his legal representative, defense counsel followed defendant's directions not to do anything (e.g., cross examine adverse witnesses and make objections) on defendant's behalf, and, more importantly, the trial court allowed counsel not to do anything. The trial court and defense counsel did not adhere to the legal and professional standards regarding the allocation of decision-making authority between the accused and defense counsel.

Judge Smith cited the long line of Supreme Court decisions guaranteeing the accused's Sixth Amendment right to effective representation by a lawyer. *Johnson v. Zerbst*, 304 US 458 (1938); *Strickland v. Washington*, 466 US 668 (1984). Under the Fourteenth Amendment, this right is extended to the state courts as well. *Gideon v. Wainwright*, 372 US 335 (1963).

Of course, a criminal defendant has an absolute right to decline the assistance of counsel and to represent himself. But he must exercise this right "voluntarily and intelligently". *Faretta v. California*, 422 US 806 (1975). Thus, before a defendant is allowed to proceed pro se, the trial court must conduct a "'searching inquiry' of the defendant to be reasonably certain that the 'dangers and disadvantages' of giving up the fundamental right to counsel have been impressed upon the defendant." *People v. Sawyer*, 57 NY2d 12, 21 (1982).

Judge Smith rejected the notion that the accused can have it both ways: "...while a criminal defendant has a fundamental right to defend himself, he does not have a right to counsel while conducting a pro se defense." (citing *People v. Ferguson*, 67 NY2d 383 (1986); *People v. Miranda*, 57 NY 2d 261 (1982). ["However, a court may, even over the defendant's objection, appoint standby counsel if and when the

defendant needs assistance and to be available...in the event that termination of defendant's self-representation becomes necessary." (citing *Faretta and Sawyer, supra.*)

If the accused clearly indicates that he wants to be represented by counsel and counsel is appointed or recognized by the court, then the accused has the constitutional right to effective assistance of counsel throughout the trial. Except for the few decisions reserved to the client, all other decisions may be made by counsel without consulting the defendant. "I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval. The decision, for example, whether or not to cross-examine a specific witness is, I think, very clearly for counsel alone." (citing the separate opinion by Judge Harlan, *Brookhart v. Janis*, 384 US at 8.)

As Judge Smith pointed out in his dissent, the Sixth Amendment right to effective assistance of counsel is to protect the accused "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Cronin*, 466 US 648, at 654. The system is based on the premise that "partisan advocacy...will best promote the ultimate objective that the guilty be convicted and the innocent go free."

The accused's attorney must be free to subject the prosecution's case to intense scrutiny. Even if there is no defense available to the defendant, counsel is required to "hold the prosecution to its heavy burden of proof beyond a reasonable doubt." *Cronin*, at 654.

In the federal courts, a claim of ineffective assistance of counsel requires proof that counsel's performance was deficient, that the deficient performance prejudiced defendant and deprived him of a fair trial, and that counsel acted unreasonably as measured by prevailing practice norms. "Prejudice is established if [t]he defendant ...shows[s] that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 US at 694 (*supra*).

The New York Courts apply a different standard. They will inquire whether the "evidence, law and circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation to the defendant." *People v. Baldi*, 54 NY2d 137, 147 (1981); *People v. Benevento*, 91 NY 2d 708 (1998); *People v. Henry*, 95 NY2d 563, 565 (2000). In other words, in the New York courts, the prejudice test of Strickland is not required. While a showing of prejudice is important, it is not an "indispensable element in assessing meaningful representation." *People v. Stultz*, 2 NY3d 277, 283 (2004). Instead, the courts' focus is "on the fairness of the proceeding as a whole." (*Id.* at 274.)

Because the trial of Henriquez did not provide any of the elements of a fair trial, counsel was under no duty to follow the defendant's instructions. Ethical Consideration 7.9 of the New York Code provides:

[i]n the exercise of a lawyer's professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of the client."

Counsel's assistance was ineffective because counsel failed to render any assistance at all. Under either the federal *Strickland* standard or the State's *Baldi* standard, this constituted ineffective assistance and made the trial itself unfair.

The trial court failed also to facilitate adherence to the Sixth Amendment right to the effective assistance of Counsel. A trial court can violate "the right to effective assistance when it interferes with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington, supra*. As Judge Smith pointed out, "Although the trial court repeatedly asked defendant to let counsel put forth a defense, it also gave defendant unfettered discretion to restrict counsel's activities regarding the defense."

It doesn't matter that the evidence against the defendant may have been overwhelming or that counsel's best efforts would probably have failed to change the outcome of the trial. Once the trial begins, the accused is presumed innocent until proven guilty, and counsel is required to provide "meaningful adversarial testing" to hold the prosecution to the burden of proof beyond a reasonable doubt. The trial court gave the accused too much power over the trial. It permitted him to give instructions to his counsel which made compliance with the Federal and State Constitutions impossible.

The Henriquez decision serves as a grim lesson to criminal counsel: If you want to preserve your client's rights and protect yourself against a claim of ineffective assistance of counsel, don't let your client control the trial. Make it clear to the client that you control trial tactics. Make sure, also, that you assert your prerogatives to the court and object strenuously whenever the court permits the client to usurp your authority.

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