

Counsel's Stipulation Renders Assistance Ineffective

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In *People v. Berroa*, N.Y. No. 151, 11/21/02, the New York Court of Appeals confronted a case of ineffective assistance of counsel under circumstances substantially different from those before the 5th Circuit in *U.S. v Mullins*. [See, Lazar Emanuel, NYPRR this issue, adjoining p. 2.] In *Mullins*, defense counsel's assistance was rendered ineffective by counsel's continuing rejection of defendant's wish to testify in his own behalf.

In *Berroa*, defense counsel's assistance was made ineffective by her stipulation at trial to facts which directly contradicted the testimony of two of her own defense witnesses.

Defendant Berroa was indicted for murder committed during daylight. Two witnesses testified that they saw the defendant shoot the victim at point blank range. One of them testified that defendant had black hair and distinctive green eyes. Defendant's brother also described his black hair and unusual green eyes.

Defense counsel did not file an alibi notice as required by CPL 250.20 and told the jury in her opening statement that she would offer proof of "possible discrepancies in identification" and of "what the [shooter] looked like." She told the court that both the defendant and his witnesses did not know their whereabouts at the time of the shooting and that the witnesses would testify only that the defendant's hair was a distinctive orange-red on the day of the shooting. The testimony of Berroa's two defense witnesses was that his hair had been dyed orange-red for more than two years at the time of the killing. One of the witnesses - Berroa's girl friend - "indicated" that she and Berroa had traveled to Philadelphia before the murder and were still there on the day of the murder.

Now faced with a possible alibi defense which she had not asserted, defense counsel told the court that both witnesses had been unable to pinpoint their whereabouts in their pre-trial statements to her. On cross-examination, both witnesses insisted that they had told defense counsel of their stay in Philadelphia with the defendant. In his own defense, Berroa testified that the testimony of his witnesses had reminded him that he was in Philadelphia on the day of the murder.

Concerned that defense counsel might be called as a witness to impeach her defense witnesses, the court permitted defense counsel to stipulate in open court that she had talked with both witnesses prior to trial and that neither had told her that defendant had been in Philadelphia on the day of the murder.

In her summation, counsel told the jury that the only issue before them was misidentification. On the alibi issue, she stated "you heard my stipulation."

Writing for the Court, Judge Wesley rejected the Appellate Division's suggestion that defense counsel had submitted the stipulation to protect her own reputation or to satisfy her ethical obligations to the court. In any event, counsel's motivation was immaterial to the Court's decision.

The Court agreed with defendant's contention that counsel's stipulation transformed her into an adverse witness whose credibility was "pitted against" the other defense witnesses. Effective assistance of counsel requires "meaningful representation." (*People v. Henry*, 95 NY2d 563, 565 (2000)). "In applying this standard, we have emphasized the difference between ineffective representation and losing trial tactics." (*People v. Benevento*, 91 NY2d 708, 712 (1998)).

The Court stated that ineffective assistance of counsel may be premised on a conflict of interest between lawyer and client. "The right to effective counsel ensures not only meaningful representation but also assistance of counsel that is 'conflict-free and single-mindedly devoted to the client's best interests'" (quoting *People v. Longtin*, 92 NY2d 640, 644 (1998)).

The conflict in this case presented itself when the court suggested, and counsel agreed, that she was the only source who could impeach defendant's witnesses and thus stood to be called as a witness. "The use of the stipulation in lieu of her testimony did not cure the conflict as intended; in this case it exacerbated the conflict by eviscerating the credibility of the client's witnesses and his defense."

The New York Code of Professional Responsibility in DR 5-102 requires that a lawyer withdraw if it becomes obvious that she "may be called as a witness on a significant issue other than on behalf of the client...[and] it is apparent that the testimony is or may be prejudicial to the client." The Code provisions "cannot be applied as if they were controlling statutory or decisional law" (quoting *S & S Hotel Ventures v. 777 S. H. Corp.*, 69 NY2d 437, 443 (1987)), and not every violation of an ethical rule will constitute ineffective assistance of counsel. "However, when a lawyer is called to testify against the client's interest the conflict is obvious."

The Court distinguished *Berroa* from other cases in which a testimonial stipulation was construed as a legitimate trial strategy. It also distinguished its own decision in *People v. Baldi*, 54 NY2d 137. In *Baldi*, defense counsel testified as a witness and some of his testimony contradicted defendant's testimony. But counsel's testimony was voluntary and not compelled, and was in furtherance of defendant's insanity plea. The testimony constituted legitimate trial strategy which was intended to establish a foundation for a credible insanity defense. Also, Baldi's counsel was not the only source of impeachment evidence. Here, defense counsel was the only source of information contradicting defendant's witnesses.