

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM, PART K-21, QUEENS COUNTY
125-01 QUEENS BOULEVARD, KEW GARDENS NEW YORK 11415

PRESENT : HON. MARK H. SPIRES
JUSTICE

-----X
THE PEOPLE OF THE STATE OF NEW YORK IND. NO.: 1047/99

-AGAINST-

COREY BUSSEY

Defendant(s)

CPL §330.30(1)
SET ASIDE VERDICT

-----X

For the motion
Lawrence Hochheiser, Esq.

Opposed
Eugene Reibstein, A.D.A.

A hearing was conducted before this Court on January 27, 2003, , pursuant to defendant's motion, to determine whether the defendant received ineffective assistance of trial counsel because the defendant's trial attorney failed to call specific "alibi" witnesses proffered by the defendant during the defendant's trial of this indictment.

Facts

This indictment arose out of an incident that took place on March 31, 1999, at approximately 11:15 p.m., in South Ozone Park, Queens. On this date, at this time, Roderick Padgett, the decedant, and his friend Rushawn Matthews left a bar in this area. Matthews exited the bar, followed by Padgett. The defendant and an unapprehended individual began shooting at Padgett, from across the street. Padgett started to run. The defendant and his accomplice pursued, continuing to fire shots at Padgett. Padgett was shot to death as he attempted to climb a fence. Matthews ran to Padgett's home, returning with Padgett's brother James. When they found Padgett, he had already died. The defendant and his accomplice were long gone. During the shooting, Mr. Kemraj Singh, an eyewitness unknown to any of the parties, was nearby, riding a bus. He viewed the

incident. Mr. Singh exited the bus, dialed "911" and reported what he had seen to the police. Later interviewed by police, Singh identified the defendant's photograph. Initially, Matthews could or would not identify the defendant.

On April 12, 1999, while appearing in court on an unrelated case, the defendant was arrested for the murder of Roderick Padgett. A lineup was conducted of the defendant, without the presence of defense counsel. Singh and Matthews viewed the lineup separately. Singh identified the defendant as the shooter. Matthews identified the defendant as someone he knew "from the neighborhood," not as the shooter. Immediately thereafter, Matthews fled to Pennsylvania.

Procedural History

The defendant was charged and indicted for murder in the second degree (PL 125.25-1), criminal possession of a weapon in the second degree (PL 265.03(2)) and criminal possession of a weapon in the third degree (PL 265.02(4)).

The defendant served alibi notice as to two individuals: Jean and Josephine Adams. Additional individuals sent letters to the court (Hon. Robert Hanophy, J.S.C.) claiming that they were with the defendant at the time of the homicide.

Court records reflect that the law firm of Brettschneider and Didio were the attorneys of record. Mr. Allan Brenner, Esq. represented the defendant at numerous calendar calls and tried the case to verdict.

In December of 2001, this indictment, along with another indictment unrelated to this defendant, was sent for trial before this Court (Hon. Mark H. Spires, J.S.C.) to be tried by defense attorney Allan Brenner. The other case was tried first. On February 27, 2002, jury selection on the People of the State of New York v. Corey Bussey began.

During the defendant's trial, the People presented evidence that included identification testimony of Matthews and Singh, police testimony, and ballistic and forensic testimony. The defendant did not present any witnesses.

At the close of the trial, after an extensive charge conference, the jury was charged and sent to deliberate. On March 13, 2002, the jury returned a verdict of guilty on all counts.

The defendant retained new counsel, who filed a motion to set aside the verdict,

pursuant to CPL 330.30(1) and (3). Extensive motion practice followed. As a result, this Court granted a hearing specifically to determine whether the defendant received ineffective assistance of counsel because his attorney failed to call any alibi witnesses.

The "330" Hearing

(Defense Case)

(The Alibi Witnesses)

At this hearing the defendant presented the following witnesses: Ms. Josephine Adams, Ms. Shanella Adams, Mr. Garvin Wheat, and Mr. Houston Kelly as alibi witnesses; Mr. Allan Brenner, Esq. the defendant's trial counsel, and the defendant himself. The People called Mr. Brenner as their witness, as well.

Ms. Josephine Adams, the mother of Shanella Adams (18) and Garvin Wheat (12) testified that on March 31, 1999, she lived at 200 Hudson Street, Roosevelt, Long Island. During the evening of March 31, 1999 until April 1, 1999 her home was filled with people - expressing condolences, smoking, eating and drinking. She insisted that the defendant was in her home from 9:30 p.m. on March 31, 1999 until the morning of April 1, 1999.

After the defendant's arrest, Ms. Josephine Adams, along with several other people, met with the defendant's attorney of record, Brettschneider and Didio. She spoke to one of the lawyers and offered to testify on the defendant's behalf¹. In August of 1999, she also provided prosecutors with a statement about the events of the evening of the homicide.

At the time of the defendant's trial, she spoke with the defendant's trial counsel, Mr. Allan Brenner, about testifying at the defendant's trial on his behalf. She indicated to Brenner that she was afraid, and would have to check with her family before she testified.

During cross examination, Ms. Josephine Adams also discussed the defendant's role in the rap community and the recent deaths of certain members of rap groups that occurred in the neighborhood. She also indicated that the travel time, without traffic, between her home and the area where the decedent was killed was approximately one half

¹The grand jury impaneled on this case voted not to hear Ms. Adams' testimony.

hour (½). She knew this because her grandmother's house was nearby.

In addition, Ms. Adams indicated she assisted others in preparing (and submitted herself) form-letter affidavits that reiterated that the defendant was present at 200 Hudson Street at midnight on March 31, 1999.²

Ms. Shanella Adams (18) testified that on March 31, 1999, at approximately 9:00 p.m., a number of people, including the defendant, were present at 200 Hudson Street. Ms. Shanella Adams was not allowed to interact with the guests, but from her window she observed people entering and leaving her home until the early morning hours of April 1, 1999. During the evening, she observed the defendant playing Playstation video games with her brother, Garvin Wheat.

Ms. Shanella Adams discussed the defendant's role in the rap group "Queens Most Wanted." She testified she also signed a form-letter affidavit, attesting to the defendant's whereabouts at midnight on March 31 - April 1, 1999.

Ms. Garvin Wheat (12), also a resident at 200 Hudson Street, testified that on March 31, 1999 at about 8:00 p.m., the defendant arrived at his home, with a number of other people. At about midnight, he played video games with the defendant for about one hour and one half. Mr. Wheat was not permitted to spend time with the other guests that evening - he stayed in his room.

Mr. Houston Kelly, the manager of the rap group "The Lost Boyz," a cousin of Ms. Josephine Adams, also testified on the defendant's behalf. He related that he spent the night of March 31, 1999 to April 1, 1999 at 200 Hudson Street. Many people were there, including the defendant.

After the defendant's arrest, Mr. Kelly went to Mr. Brettschneider's office with other individuals who were at 200 Hudson Street the night of the homicide. He indicated that he would testify for the defendant, but was never contacted to do so.

Mr. Kelly also signed a form-letter affidavit stating that he was with the defendant at midnight on March 31, 1999 - April 1, 1999. Mr. Kelly also discussed the two rap groups "Queens Most Wanted" and "The Lost Boyz."

² These letters were typed, notarized and sent to the Court (Hanophy, J.) for retention in the court files.

The Trial Counsel

(Allan Brenner, Esq.)

Mr. Allan Brenner, the defendant's trial attorney, testified that he tried the defendant's case to verdict. Mr. Brenner had an "of counsel" relationship with the law firm of Brettschneider and Didio, who were attorneys of record for the defendant.

Mr. Brenner was present when the defendant was arrested on this indictment. Mr. Brenner was covering the defendant's case for Mr. Brettschneider at that time.

Mr. Brenner stated that, in his mind, his representation of the defendant began in December of 2001. He began to prepare for this trial in January of 2002. However, at the same time, he was preparing to try another case first.³ This trial last 3½ to 4 weeks.

In reviewing the Bussey file, Mr. Brenner became aware of a formal notice (CPL 250.20) of alibi; naming two potential alibi witnesses: Josephine Adams and her mother: Jean Adams. In addition, Mr. Brenner became aware of a series of letters sent to the Court (Hanophy, J.).

After the first trial concluded, Mr. Brenner sought an adjournment from this Court, which was granted. The Bussey trial commenced on February 27, 2002. A break of approximately 1½ weeks took place between the two trials.

During the trial of the other matter, Mr. Brenner did not have an opportunity to interview the witnesses listed on the form letters, in person. He did speak on the telephone with at least one person on the list prior to the trial, but provided the information to Mr. Didio, for follow-up.

Brenner advised this Court that when he began to prepare for this trial, he retained the services of a private investigator. He advised the investigator to interview witnesses that were listed, and to use his judgement in following any leads. Of note, when the investigator spoke with Ms. Josephine Adams, she indicated that she didn't want to get involved anymore; that there were too many related shootings in the neighborhood. Brenner noted that after he spoke with Ms. Josephine Adams, he decided not to call her as a witness.

³The matter of the People of the State of New York v. Eric Forbes was sent to Part K-21, along with the defendant's case.

Brenner indicated that he maintained a dialogue about the case with the defendant. He visited the defendant at Rikers Island, and in the Men's House of Detention, in Queens (Queens Detention Complex), prior to and during his trial. Brenner spoke with the defendant about his trial strategy, but claimed the ultimate decision about the case strategy was for the attorney.

In considering whether to call the alibi witnesses, Brenner indicated a number of concerns. First, the "informal" alibi witnesses (those listed on the form letters) were not filed in a timely and appropriate fashion with the Court. Brenner was unsure if he would be permitted to call them, and accordingly, did a great deal of legal research on this matter.⁴ Another concern of Brenner's occurred when he learned that numerous "alibi" witnesses had extensive interviews with members of the district attorney's office. He guessed their statements might have been recorded, either audiotaped or by hand. He knew that because these witnesses were defense witnesses, he was not entitled to copies of these statements. He feared the trial prosecutor knew more about these witnesses than he did. He was also concerned there were no notes or statements in the defense file on any of these witnesses.

In regard to the alibi form-letters, Brenner felt that the trial prosecutor would attack the context of these letters, and the circumstances under which they were prepared.

While Brenner had sought a motion in limine, which was granted, precluding any mention of the rap community, he was concerned that if these witnesses had testified, they would have revealed the background of the defendant's alibi - why they were all together the evening of March 31, 1999. Brenner was concerned that the assistant district attorney would accidentally blurt out something prejudicial about the rap community that would somehow "cause the jurors to stop listening."

Brenner felt his concern was not unwarranted. During the jury selection process, a series of articles about this case and related shootings appeared in the New York Post and New York Daily News.

Brenner explained that in evaluating how to proceed on this case, he assumed that

⁴At a bench conference during the trial, the assistant district attorney trying the case waived any objection to late alibi notice.

the alibi witnesses would have been the most perfect witnesses for the defendant. However, he had to balance that with the issue that without these witnesses in the case, the People would not be able to prove “motive” for the crime. The People’s evidence consisted of one eyewitness on a bus and one witness who knew the defendant from the neighborhood.⁵ Brenner felt that with a weak identification of the defendant, the People did not have a strong case. Brenner stated by proffering the alibi witnesses, he would be strengthening the People’s case. He balanced a list of factors, and decided to rely on a vigorous cross-examination, rather than call alibi witnesses.

(The Defendant)

The defendant testified on his own behalf. The defendant, a 26 year old male, advised this Court that from March 31, 1999 at approximately 6:30 p.m. until April 1, 1999 at approximately 4 p.m., he was at 200 Hudson Street, Roosevelt, New York. He did not leave the house between 10:30 p.m. and 1 a.m.. During that time, he played cards, and video games, drank stout and smoked marijuana. He insisted he couldn’t leave that night, because he had no car and no driver’s license.

On April 12, 1999, he was arrested for the murder of Roderick Padgett. He was placed in four separate lineups. He hired a lawyer to defend him: Scott Brettschneider.

The defendant recalls that at one time, Houston Kelly was told by Mr. Brettschneider that his case would be dismissed. Another time, around June of 2001, he was visited by Mr. Brettschneider and Mr. Brenner, who tried to get him to take a plea on this case.

The defendant insisted that he did not hire Allan Brenner to try this case. He had few conversations with Brenner and only saw him once or twice, before his trial. He states that Brenner asked the defendant if he knew what his case was about. The defendant never received any paperwork on his case, from either attorney.

The defendant insists that during his trial, he asked Brenner where his (alibi) witnesses were. He told Brenner that he wanted them called. Brenner told him “not to stress about it.” Brenner told the defendant not to make any telephone calls by himself,

⁵Rushaw Matthews did not make a consistent identification of the defendant.

because the phone lines were probably tapped.

The defendant denied knowing anything about the form letter alibis sent to the Court. The defendant stated Mr. Brettschneider asked him about the letters. The defendant stated he later learned that his girlfriend had prepared the letters.

The defendant complained he didn't speak to Mr. Brenner as often as he would like. He telephoned Mr. Brenner at home, but only spoke to Mr. Brenner's wife.

The defendant stated that he didn't testify in his own defense because Mr. Brettschneider advised him that it was not the best thing to do. Mr. Brenner never asked him if he wanted to testify, and the defendant never mentioned it again.

The defendant insisted that until February 27, 2002, he was certain that Mr. Brettschneider would be trying his case. He did not retain Mr. Brenner. He paid Mr. Brettschneider. The defendant claims that on the day of the commencement of his trial, he demanded to see Mr. Brettschneider because he expected him to try his case. The defendant was advised by Mr. Brenner that Mr. Brettschneider could not appear for him because he was in the middle of a trial on another case.

(The People's Case)

After the defendant rested, the People called Mr. Allan Brenner as their witness. Mr. Brenner testified that between January 4, 2002 and February 27, 2002, he visited the defendant in jail with Mr. Brettschneider to discuss his case with him. From February 27, 2002 until the conclusion of the defendant's trial, Mr. Brenner had extensive conversations with the defendant about his case on the phone, and in the courtroom.

Mr. Brenner specifically recollected talking extensively with the defendant about alibi witnesses, motive and the "rap" connection. He knew that there were potentially between 8 to 12 alibi witnesses. He discussed with the defendant the fact that Ms. Josephine Adams was afraid to testify.

As far as Mr. Brenner recalled, no one ever suggested that the defendant plead guilty on this case, in his presence. Mr. Brenner does recall discussing plea negotiations with the defendant on a pending narcotics case.

Mr. Brenner stated that as far as he knew, Mr. Brettschneider never came out and told the defendant that he would not try this case. Sometime in December of 2001, or

even in January of 2002, Mr. Brenner advised the defendant that he, Mr. Brenner, would try this case.

The Law

CPL §330.30(1) specifically provides when the trial court has grounds to set aside a verdict..

“At any time after the rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof, upon the following grounds:

(1) any ground appearing on the record which, if raised upon an appeal from a prospective judgement of conviction would require a reversal or modification of the judgement as a matter of law by an appellate court.”

The Sixth Amendment of the United States Constitution guarantees that, in all criminal cases “the accused shall enjoy the right ... to have the assistance of counsel in his defense.” The right to counsel is deemed fundamental because “the very premise of an adversary system of criminal justice is the partisan advocacy on both sides of a case will at least promote the ultimate objective that the guilty be convicted and the innocent go free.” See, Herring v. New York, 422 US 853 (1975). See, also, United States v. Cronic, 466 US 648 (1984).

It is axiomatic that in a criminal proceeding, the accused is entitled to the effective assistance of counsel. See, McMann v. Richardson, 397 US 759 (1970). Under the two prong test established in Strickland v. Washington, 466 US 668 (1984) ineffective assistance is demonstrated when it is shown that (1) defense counsel’s performance was deficient, namely that he made errors so serious that he was not functioning as the “counsel guaranteed the defendant by the Sixth Amendment” and (2) the deficient performance prejudiced the defense, namely, counsel’s errors were serious enough to deprive the defendant of a fair trial, a trial the result of which is reliable. Id at 687

In People v. Baldi, 54 NY2d 137 (1980), the Court of Appeals held that the constitutional requirement of effective assistance is satisfied only when all the circumstances of the case indicate that the attorney provided “meaningful representation.”

Id at 147. According to the Supreme Court in Strickland v. Washington, *supra*. “The benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id at 686

Of course, a court must avoid confusing ineffectiveness with mere losing tactics and engaging in retroactive analyses. See, People v. Benevento, 91 NY2d 708 (1999). Moreover, a defendant bears the burden of demonstrating the absence of strategic or other legitimate explanations for counsel’s alleged short comings. See, People v. Rivera, 71 NY2d 705 (1988). However, even where the testimony suggests that a tactic by counsel was strategically motivated, a court must review counsel’s conduct to determine if it was reasonable under the circumstances.

In considering a motion based on ineffective counsel, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and the defendant must overcome the presumption that, under the circumstances, counsel’s strategy might be considered sound trial strategy. See, Michel v. Louisiana, 350 US 91 (1995).

Effective assistance has been defined as “reasonably competent services of an attorney devoted to the client’s best interests ...” See, People v. Ortiz, 76 NY2d 652 (1990). It means “... more than just having a person with a law degree nominally represent a defendant in a trial and ask questions. See, Benevento, *supra* at 136. The phrase “ineffective assistance” is not amenable to precise denunciation applicable in all cases ... Baldi, *supra* at 146. What constitutes “effective assistance” varies according to the unique circumstances of each representation. Rivera, *supra*, at 708. It is clear a court must be flexible. A court must review the evidence, the law and the circumstances of the case, in totality, at the time of the representation to decide if it was meaningful. Baldi, *supra*.

It is important to remember that in evaluating counsel’s trial performance, counsel’s efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective. See, People v. Satterfield, 66 NY2d 796 (1985). An accused is guaranteed a fair trial, not a perfect one. See, People v.

Flores, 84 NY2d 184 (1994). Representation does not have to be free of error. See, People v. Modica, 64 NY2d 828 (1985). Ineffectiveness cannot be confused with mere losing tactics, Baldi, supra, but must be objectively evaluated. See, People v. Angelakos, 70 NY2d 670 (1987).

Evidence of error that may rise to the level of ineffectiveness may, as an example, include instances where counsel may fail to present an opening statement. See, People v. Kilstein, 174 AD2d 756 (2d Dept. 1991). People v. Echavarra, 167 AD2d 138 (1st Dept. 1990). A decision based on a legal misunderstanding is not considered a strategic one. See, e.g., Williams v. Taylor, 529 US 362 (2000). Nor can a decision be labeled strategic when it is merely the result of confusion; see, Bean v. Calderon, 163 F.3d 1073 (9th Cir 1998), or a lack of diligence. See, e.g., United States v. Gray, 878 F2d 702 (3d Cir 1989).

Under certain circumstances, an attorney may fail to present alibi witnesses. In People v. Park, 229 AD2d 598 (2d Dept. 1999), the defendant's conviction was vacated and this case was remitted for a new trial. In Park, the defendant's attorney failed to present witnesses at trial who would have supported the defendant's alibi. In addition, the attorney failed to present witnesses and other evidence which indicated that the defendant suffered injury as a result of a recent accident that would have shown it was unlikely he committed the crime. The Park court found that while there may have been a valid strategy for failing to present an alibi defense, the cumulative effect of the attorney's errors warranted reversal.

The failure to present an alibi defense at trial may be a legitimate trial strategy. See, People v. Rodriguez, 132 AD2d 682 (2d Dept. 1987). Often, a trial attorney may plan to call alibi witnesses, but realize they are vulnerable to attack. See, People v. Jackson, 74 AD2d 585 (2d Dept. 1980). In Jackson, trial counsel planned to present an alibi defense. Her witnesses, however were vulnerable to impeachment because of a close family relationship, and/or because of an "unsavory background." Instead, the trial attorney in Jackson chose to attack the identification made by prosecution witnesses. In Jackson, the Second Department found that counsel's failure to call alibi witnesses to be a product of calculated trial strategy. Jackson, supra at 587.

An attack is often made post-verdict on a trial attorney's performance for failing to

present alibi witnesses. In People v. Smith, 115 AD2d 304 (4th Dept. 1988), counsel was alleged to be ineffective for failing to call an alibi witness. However, this alibi witness resided in Vermont, and the claim of ineffectiveness was found to be without merit. In People v. Williams, 206 AD2d 331 (1st Dept. 1994), the trial lawyer was challenged as being ineffective for failing to present an alibi defense. However, the witness in Williams who was also the defendant's girlfriend, refused to appear. In spite of counsel's failure to pursue her by obtaining a material witness order, the court discounted the "ineffective" claim and upheld Williams' conviction. In People v. Adams, 148 AD2d 964 (4th Dept. 1984), an ineffectiveness claim was discounted where the record showed exhaustive efforts to meet with potential alibi witnesses by counsel were unsuccessful.

In People v. Jackson, 52 NY2d 1027 (1981) the Court of Appeals found that counsel was not ineffective for not calling a proposed "alibi" witness because that witness originally accused the defendant of committing the crime. In People v. Warner, 299 AD2d 956 (4th Dept. 2002), the Fourth Department found that an attorney was not ineffective for failing to call three alibi witnesses. In Warner, one witness was ill, another failed to appear and a third would not have been permitted to testify.

Where proposed alibi witnesses are at issue, an attorney's trial strategy will be closely scrutinized. Rodriguez, supra. Jackson, supra. Smith, supra. In People v. Washington, 184 AD2d 451 (1st Dept. 1992), the First Department decided that the failure of the trial attorney in Washington in refusing to call the defendant's mother and brother was purely trial strategy.

Often a review of these challenges reflect that the failure to present alibi witnesses did not occur through the fault of the attorney. Smith, supra. Williams, supra. Adams, supra. In People v. Stewart, 248 AD2d 414 (2d Dept. 1998), the attorney was unable to produce the "alibi" witness, who was a flight attendant. This, coupled with the fact that the witness did not remember the defendant, supported the claim of trial strategy. In People v. Hamilton, 272 AD2d 553 (2d Dept. 2000), a challenge to the trial counsel's effectiveness was defeated where the record established that the witness was too frightened to testify.

Conclusions of Law

In turning to the defendant's claim, this Court has heard and reviewed the testimony of the "alibi" witnesses: Ms. Josephine Adams, Ms. Shanella Adams, Mr. Garvin Wheat and Mr. Houston Kelly; the defendant's trial counsel and the defendant, himself.

The witnesses were adamant in their belief that the defendant was with them at the time of the homicide of Roderick Padgett. In spite of the constant movement of people through 200 Hudson Street, Roosevelt from March 31 to April 1, 1999, the distraction with anger and sadness over the loss of a family member-friend and the consumption of beer and marijuana, these witnesses remain convinced the defendant was present throughout the night.

The defendant insists he was at 200 Hudson Street as well. He played games, smoked and drank. He tells this Court he could not have left the house because he had no driver's license or car.

This Court finds that while the defendant may have been able to present several "alibi" witnesses, their relationship to him and to the "rap" community would not likely have changed the outcome of this case. See, CPL 330.30(1).

In receiving the testimony of the trial attorney, Mr. Allan Brenner, this Court finds him to be articulate, knowledgeable of the law and decisive in analyzing the value and strength of a case.

Mr. Brenner, while admitting he would have preferred to have had the time to interview the defendant's witnesses himself, acted properly under the circumstances. Brenner, faced with a client with a serious charge, examined the People's case and found it weak. Brenner evaluated the prosecutor's case as consisting of two weak identifications with nothing else connecting the defendant to the homicide.

Brenner knew the defendant's witnesses had spoken to the prosecutors, who probably knew more about the witnesses than he did. He was aware that this case may have been related to other shootings, and wanted to distance this case from any connection to the "rap" community. Also, he was aware of newspaper articles about this case, appearing in the New York Post and New York Daily News. He was afraid that

presenting these witnesses would establish a motive, where without them one was not easily seen.

In addition, there was some reluctance on the part of at least one witness to testify. Brenner did not see presenting a frightened witness as ideal.

It is clear Mr. Brenner thought long and hard about whether to present an alibi defense and his decision on this issue has been demonstrated to be part of the trial strategy.

In sum, this Court finds, based on the circumstances of the trial of this indictment, the facts elicited during the "330" hearing and the statutory and case precedent, that the trial attorney's failure to present an alibi defense in this trial of this indictment was based on reasoned trial strategy. As such, there is no legal reason to set aside the verdict of guilty in this case.

Accordingly, the defendant's motion is denied. The defendant will be sentenced within the appropriate guidelines of the penal law of this state.

This is the decision and order of this Court.

Kew Gardens, New York

Dated

MARK H. SPIRES, J.S.C.