

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM PART L-5 QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y.

P R E S E N T :

HON. TIMOTHY J. FLAHERTY
Justice

THE PEOPLE OF THE STATE OF NEW YORK : IND. NO. 2590-99
:
-against- : MOTION To Vacate Judgment
:
: DATED May 3, 2005
JASON FAULKNER :
:
Defendant. : ARGUED

Defendant, Pro Se
For the Motion

Hon. Richard A. Brown
By: Ushir Pandit, Esq.
Opposed

	Papers
	Numbered
Notice of Motion & Affidavit Annexed _____	<u>1</u>
Answering & Reply Affidavit _____	<u>2</u>
Exhibits _____	_____
Minutes _____	_____
Other _____	_____

Defendant's motion to vacate the judgment is denied for the reasons set forth in the accompanying memorandum.

DATED: May 3, 2005
Gloria D'Amico
Clerk of the Court

Timothy J. Flaherty, J.S.C.

at 218-28 Merrick Boulevard in Queens County. While Sorey entered the back of the restaurant the defendant waited outside as a lookout. When the owners of the restaurant resisted Sorey's attempt to rob them, defendant fired a gun inside in an effort to aid his accomplice. The bullet struck Sorey, killing him.

In the instant application the defendant contends that the judgment is constitutionally infirm because his trial lawyer, Richard Calley, did not provide him with effective assistance in violation of his Sixth Amendment right to counsel. In support of this claim he does not challenge the manner in which Mr. Calley defended him at trial. Instead he argues (1) that the fact that Mr. Calley was himself under indictment created a fatal attorney-client conflict of interest and (2) that Mr. Calley failed to file a notice of appeal with the Clerk of the Court. The District Attorney opposes the relief sought, largely disputing defendant's factual allegations and arguing in any event even if the facts were proven, that the defendant's motion must fail as a matter of law.

As to the first matter it is true that the existence of a genuine conflict of interest that adversely affects an attorney's

performance raises serious constitutional right to counsel issues, Cuyler v. Sullivan, 446 US 335 (1980); People v. Allen, 88 NY2d 831 (1996). "A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel.'" United States v. Schwarz, 283 F.3d 76, 90 (2d Cir. 2002) (quoting United States v. Blau, 159 F.3d 68, 74 (2d Cir. 1998)). "[A] defendant has suffered ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance.'" United States v. Blau, 159 F.3d at 74.

But here the District Attorney correctly argues that no conflict of interest existed by reason of counsel's own difficulties with the law. It is undisputed that at the time of defendant's trial defense counsel, Richard Calley, was himself awaiting trial for an indictment brought against him not by the Queens District Attorney but by the United States Attorney for the Eastern District of New York. Mr. Calley's indictment charged him with criminal conduct totally unrelated to the case at bar. These two facts, taken individually or in combination,

fall far short of establishing the existence of a conflict since the charges were brought by a different prosecutorial agency and were factually unrelated to the issues at bar.

Defendant cites no authority for the proposition that Mr. Calley's personal circumstances presented a conflict of interest and this Court concludes that no such conflict existed. Rather Mr. Calley had a serious personal situation - legally no different than the serious business, personal or family pressure that every attorney faces from time to time during the course of his or her representation of a criminal defendant. These are potential distractions but they are not conflicts, potential or actual, as that term is defined by the applicable case law. As such, standing alone and in the absence of demonstrated prejudice, they are constitutionally irrelevant and therefore cannot form the basis for the relief sought herein.

Since Mr. Calley's personal travail created no legal conflict with his ability to represent the defendant, it follows therefrom that whether or not he revealed his situation to him is of no consequence. The Court does note, however, that the District attorney has submitted proof by affidavit from Mr.

Calley himself stating that (1) he did in fact share his difficulties with his client and his client's family and that (2) they nevertheless desired that he continue his legal representation of the defendant. But more to the point, since the defendant herein points to no professional infirmity in Mr. Calley's performance save an alleged failure to file a notice of appeal, discussed infra, there is no factual or legal basis to justify action by this Court.

Defendant's second claim is that his attorney failed to serve and file a notice of appeal. He made similar claims in support of two previous motions to the Appellate Division for permission to serve and file a late notice of appeal. Those motions papers included a letter from the office of former Administrative Judge Steven W. Fisher which indicated that no notice of appeal was found in any of the Court files.

In responding to the motions in the Appellate Division the District Attorney took the position that the relief could not be granted because defendant's motion was made after the one year statutory limitation for such applications [CPL Section 460.30]. The motions were denied without opinion by the Appellate

Division.

But in responding to the instant motion the District Attorney makes the following argument with respect to the issue of whether or not a timely notice of appeal was served and filed by Mr. Calley:

Defendant's claim that his trial counsel was ineffective for failing to file a notice of appeal is also meritless because it appears that trial counsel filed a notice of appeal. Indeed, Exhibit A, attached here clearly indicates that trial counsel filed a timely notice of appeal. And although there is no record of this notice of appeal having been filed in the Supreme Court, Queens County, there is, nevertheless, a strong presumption that such a notice was filed with the court. First, the notice itself indicates the parties to be served - the clerk of the Supreme Court at 125-01 Queens Boulevard and the Queens County District Attorney. Second, the Queens County District Attorney was actually served with this notice of appeal. Third, the notice of appeal to the Queens County District Attorney's was hand delivered to its office, located on the first floor of the Supreme Court courthouse. Indeed, trial counsel would have only had to go to the sixth floor of the same courthouse building to serve the notice of appeal upon Supreme Court, Queens County. Thus, there is no merit to defendant's claim that his trial attorney was ineffective for his failure to serve a timely notice of appeal.

District Attorney's Memorandum of Law page 17.

The District Attorney supplemented their argument with an affidavit dated April 1, 2005 from Mr. Calley in which he avers that "to the best of my recollection, as was my practice at the time" he did indeed file a timely notice of appeal with the appropriate clerk of the Supreme Court after serving the District Attorney.

In short, the prosecutor advances strong factual evidence in support of their position that this aspect of the motion has no merit because Mr. Calley did indeed serve and file in a timely manner a notice of appeal from the instant judgment.

Hence the prosecutor presumably takes the view that the appeal, having neither been perfected by defendant nor dismissed by the Appellate Division, is still pending. It follows therefore that should defendant perfect a judgment of appeal the District Attorney will respond to it on the merits, the defendant will have his day in appellate court and the question of whether Mr. Calley did or did not file a notice of appeal is academic. For this reason the Court declines to hold an evidentiary hearing on the question.

For these reason the Court finds the defendant's contentions

to be without merit.

Accordingly, the motion is denied.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this Memorandum and Order to the defendant at his last known address and to the District Attorney.

DATED: May 3, 2005

TIMOTHY J. FLAHERTY, J.S.C.