

M E M O R A N D U M

**SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-17**

-----:
THE PEOPLE OF THE STATE OF NEW YORK

BY EVELYN L. BRAUN, J.S.C.

- against -

DATED: December 14, 2006

DARWIN REYES,

Defendant.

IND. NO.: 678/95

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On August 29, 1995, after a jury trial held before now retired Justice James Robinson in Part K-17 of the Supreme Court, Queens County, defendant Darwin Reyes was convicted of committing the crimes of Kidnapping in the First and Second Degrees and Unlawful Imprisonment in the Second Degree. On September 19, 1995, he was sentenced to an indeterminate term of imprisonment of from fifteen years to life on the top count and to concurrent terms of incarceration on the lesser crimes.¹

The charges in the indictment were based on the following allegations: On January 26, 1995, defendant forced the complaining witness, Sandra Rodriguez, from her home by threatening to kill her. Thereafter, he restrained her with an extension cord, gagged her mouth with a sock and placed her in his car. Co-defendant Felix Reyes joined them sometime later and pointed a gun at Ms. Rodriguez. Together they took her to Forest Park, located in Queens County, where they used duct tape to tie her to a park bench. Subsequently, they placed her back in the car and drove to a telephone from which they called Ms. Rodriguez's mother in an effort to extract a ransom from her. When her mother agreed to pay it, Ms. Rodriguez was released. Evidence against the defendant included a post-arrest videotaped statement wherein

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he admitted to certain of the acts underlying the charges and a tape recording of the ransom demand made during the conversation with the victim's mother.

Almost eight years after his conviction of the crime of Kidnapping in the First Degree was affirmed by the Appellate Division and his application for leave to appeal the conviction to the Court of Appeals was denied, defendant now moves to vacate the judgment pursuant to CPL 440.10 on the ground that he received ineffective assistance of counsel. In his motion, he asserts that had trial counsel, Michael Siff, informed him of the strength of the People's case, his sentencing exposure and the possibility of a conviction on the top count of the indictment, Kidnapping in the First Degree, he would have accepted a plea offer extended by the People and waived his right to a trial. He claims that he rejected the plea offer because Mr. Siff advised him that he would only be convicted of a misdemeanor, exposing him to a maximum sentence of one year.

The burden of proof is on the defendant to establish that he was denied effective assistance of counsel. A hearing was held before this Court on defendant's motion to vacate his judgment of conviction (see *People v. Rogers*, 8 AD3d 888 [2004]; *People v. Howard*, 12 AD3d 1127 [2004]). At the hearing, defendant called Johnny Flores and Stephanie Torres. He also testified on his own behalf. The People called Michael Siff as their witness.

I. THE DEFENSE CASE

Shortly after defendant was arrested for the crimes charged in the instant indictment, his family retained an attorney, Douglas B. Lyons, from the firm of Jacoby and Meyers, to represent him. Mr. Flores, defendant's uncle, testified that Mr. Lyons said that with respect to the charge of Kidnapping in the First Degree, he would be able to "assist [defendant] with a plea of four and a half to nine years," although he did not

represent that such offer had been conveyed by the prosecution. Mr. Flores stated that the family was unhappy with the offer and sought new representation.

Mr. Flores recalled that subsequently, he was referred to Mr. Siff. Accompanied by defendant's mother and aunt, he went to Mr. Siff's office for an initial meeting at which time he told Mr. Siff that he was seeking an attorney who could get the defendant a "good deal." Mr. Flores testified that after he recounted certain facts he knew about the case, Mr. Siff told him that he was going to work on getting a sentencing recommendation of one year in exchange for a plea of guilty to a misdemeanor charge. According to Mr. Flores, Mr. Siff said that he would obtain paperwork relating to the case from the court, speak with the defendant and get back to him afterwards.

Mr. Flores testified that Mr. Siff arranged a second meeting with him and members of defendant's family. Mr. Flores claimed that Mr. Siff was very confident that a favorable outcome in the matter would be obtained because defendant had no prior record and the case was weak. According to him, Mr. Siff reiterated that he felt that he could get defendant a sentence of one year in exchange for a plea to unlawful imprisonment. Mr. Flores acknowledged during his testimony that there was no offer on the table at that time. Nevertheless, he said it sounded to the family like a guarantee and they relied on that representation. The family retained Mr. Siff to represent the defendant.

Mr. Flores and Stephanie Torres, defendant's aunt, both testified that thereafter, they were present during various court proceedings but claimed that they had no specific discussions with Mr. Siff concerning the case. They further claimed, however, that Mr. Siff told them that everything looked very good; that everything was going to be fine.

Mr. Flores testified that it was only after jury selection that he had another meeting with Mr. Siff at the attorney's office where he was told that the process had begun and if defendant lost at trial, he could receive a sentence of fifteen years to life. During her testimony, Ms. Torres recollected that at one point toward the end of the trial her sister told her that defendant was facing a sentence of fifteen years to life.

Mr. Flores stated that the family was worried when they were advised of the possible consequences if the defendant lost the case, but because of Mr. Siff's confidence, they again relied on his evaluation of the case.

Defendant testified that he was eighteen years old when he was arrested in 1995. He recalled that he was briefly represented by Mr. Lyons but that he did not discuss any plea offers with him. Shortly thereafter, the family retained Michael Siff to represent him. Defendant first met Mr. Siff in the early stages of the proceedings. He described one meeting at Rikers Island which he claimed lasted about an hour during which they discussed his involvement in the case, his statement to the police and the background of the complaining witness.

He testified that subsequent discussions between them occurred at the court pens for periods of between ten and fifteen minutes. After one court appearance, defendant stated that Mr. Siff provided him with a copy of the indictment and showed him the charges against him, but did not explain the elements necessary to prove the respective crimes. During that meeting, according to the defendant, Mr. Siff wrote fifteen to life next to the top charge printed on the indictment and commented: "That's too much time." Mr. Siff then crossed it out. Defendant claimed he understood that to mean that the People would be unable to prove the charge of Kidnapping in the First Degree and that he no longer had to be concerned about it. He said that Mr. Siff circled

the charge of Unlawful Imprisonment and told him that based upon his conduct and the statements made at the time of his arrest, he would ultimately be convicted of that crime.

During another conversation, defendant testified, he and Mr. Siff discussed the character of the complaining witness in the case and that she was a drug addict. Defendant claims that Mr. Siff told him that “nine times out of ten” such witnesses do not appear in court. Defendant said that he was not concerned about going to trial because he had already admitted to his role in the incident and believed that the jury would understand what happened.

According to the defendant, Mr. Siff told him that the District Attorney was offering “four and a half to nine,” and repeated that it was too much time based upon his admitted conduct. The defendant testified that Mr. Siff said, “we’re going to work on the unlawful imprisonment.”

Defendant stated that although Mr. Siff never told him to reject the offer and he understood that he did not have to concur with Mr. Siff’s evaluation of the case, he trusted his attorney and decided to rely on him.

During the trial, defendant testified that he became aware that his co-defendant would be receiving a sentence of three to nine years in exchange for a plea. He said he asked Mr. Siff why he was not receiving a similar plea offer and that Mr. Siff told him that such offer was an agreement between the District Attorney and the co-defendant and that he was in a good position. Defendant claimed that Mr. Siff reiterated that based upon the statements he made at the time of his arrest, he would eventually be convicted of unlawful imprisonment. During the trial, defendant stated that Mr. Siff told

him not to worry, to be patient and that “everything was going to be good.”

Defendant claimed that he did not really understand that fifteen years to life was his “actual” exposure and that Mr. Siff did not tell him that if he lost at trial, he would be facing fifteen years to life on the top count. He contended that had he been properly advised, he would have accepted the People’s offer and would have admitted guilt to the felony charge of Kidnapping in the Second Degree.

II. THE PEOPLE’S CASE

Mr. Siff testified that he has practiced criminal law for approximately 18 years. In 1995, he was retained to represent defendant in connection with the charges in the indictment. An individual who worked with a member of Mr. Siff’s family and who was acquainted with the Reyes family referred them to Mr. Siff.

Mr. Siff stated that he obtained the criminal court complaint and transcript of the arraignment from defendant’s former attorney and received a copy of defendant’s videotaped statement from the District Attorney. He recollected initially meeting with members of defendant’s family, most of whom were Spanish speaking, and particularly with defendant’s uncle who was able to communicate with him in English. He testified that he discussed the charges pending against the defendant.

According to Mr. Siff, the first time he met defendant was on February 21, 1995 at his arraignment in Part AA-1 of the Supreme Court, Queens County. Aided by a notation on the file he maintained in this case, Mr. Siff claimed that he spoke with the defendant and his family about an offer made by the assistant district attorney then assigned to the case which would permit defendant to plead guilty in exchange for a

recommendation that he be sentenced to a term of imprisonment of six to twelve years.² He also stated that the People were not willing to sever defendant's trial from that of his co-defendant at that time.³

Mr. Siff said that a marking on his file, dated February 28, 1995, reminded him that he also spoke with the family on that date about what was happening and what to expect, including the potential that defendant could be sentenced to fifteen years to life. He claims that he advised them that this was a serious matter.

Mr. Siff testified that he met with the defendant sometime between July 25 and August 14, 1995 at Rikers Island at which time he informed him of each crime with which he was charged and the elements thereof, the differences between them and the range of sentences applicable to each. Mr. Siff stated that he told the defendant that he was facing a sentence of fifteen years to life if he was convicted of the crime of Kidnapping in the First Degree. He claimed that he also stressed the seriousness of the charges, the evidence the prosecution was prepared to present, including the videotaped statement and tape recorded telephone call with the victim's mother, the potential testimony of the complaining witness and the fact that duct tape allegedly used to restrain the complainant had been recovered from the park bench to which she had been bound. According to Mr. Siff, they also discussed defendant's involvement in and possible defenses to the case, the possibility of conviction on each count and the related lesser crimes. After being shown the indictment in order to refresh his recollection, Mr. Siff said he believed that it was likely that he made the notations on the face of the indictment, including circling the crime of Unlawful Imprisonment and placing

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a slash through the crime of Kidnapping in the First Degree listed thereon, in order to illustrate “different things” while he was speaking with the defendant.

Mr. Siff explained that he discussed with the defendant whether he wanted to plead guilty, including the reality that maybe he should plead guilty. He claimed that defendant was absolutely opposed to pleading guilty and confident that the trial would end in his favor. In this regard, Mr. Siff testified that the defendant indicated that, in his opinion, the People would be unable to produce the evidence needed to obtain a conviction. First, according to Mr. Siff, the defendant took the position that the complaining witness would not appear to testify against him or, in the event she did testify, that the character of the complaining witness and her involvement with drugs and prostitution was such that her credibility could be attacked to such an extent that she would not be credible to the triers of fact. Mr. Siff stated he made it clear to the defendant that, in his opinion, she would testify. He noted that he discussed with the defendant the possible results if the complaining witness was believed and what might happen if she was not. Mr. Siff claimed that he also explained, as is his practice, that the outcome of a trial is uncertain whereas the consequences of a plea is known at the time a plea is entered.

Mr. Siff emphatically denied that he predicted or guaranteed that defendant would be convicted of nothing more than unlawful imprisonment. He said that he did recollect advising the defendant that even if everything went his way, based upon his admissions, at the very least he would likely be convicted of unlawful imprisonment.

After discussing those matters and setting forth the positives and negatives of the People’s case, Mr. Siff testified that he allowed defendant to consider what his chances at trial might be and to make the decision whether to plead guilty or go to trial.

He stated the he did not take a “steadfast” position regarding whether defendant should or should not accept the plea offer of the People.

Mr. Siff testified that his file also reflects that on July 25, 1995, he saw defendant in the holding pen and defendant’s family in the hallway and again spoke with them about the case, including defendant’s exposure on the top count.

Mr. Siff stated that a notation on his file, dated August 14, 1995, approximately a week before the trial commenced, reads, “defendant no deal” [sic], which indicated to him that he had a discussion about a plea offer with the defendant and that defendant rejected it.

In hindsight, Mr. Siff said that perhaps he should have imposed his will upon the defendant, forcing him to or insisting that he plead guilty, although he said it certainly has never been his policy to force a defendant to plead guilty. He expressed the thought that in retrospect, if he had been more emphatic when discussing the strength of the People’s evidence with the defendant, and told him that he had “no shot” to win the case, that he had to take the offer, defendant might have entered a plea of guilty.

III. CONCLUSIONS OF LAW

Both the Federal and State Constitutions guarantee criminal defendants the right to effective representation by counsel (see US Const 6th Amend; NY Const, art I, § 6; *Gideon v. Wainwright*, 372 US 335 [1963]; *People v. Linares*, 2 NY3d 507, 510 [2004]). This includes the right to effective assistance of counsel.

The Federal test for evaluating ineffective assistance of counsel claims is set forth in *Strickland v. Washington*, 466 US 668 [1984]. Generally, there is a strong presumption that counsel’s conduct falls within “the wide range of reasonable

professional assistance” (*Strickland v. Washington*, 466 US 668, 669 [1984], *supra*). To overcome the presumption of effective representation, a defendant must demonstrate that (1) the attorney’s performance was deficient as measured by objective professional standards, and (2) but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different (*id.* at 694). The United States Supreme Court has held that the touchstone of the second prong of the analysis is whether counsel’s performance rendered the proceeding fundamentally unfair or left an unreliable result (*People v. Henry*, 95 NY2d 563, 566 [2000], citing *Lockhart v. Fretwell*, 506 US 364, 369 - 370 [1993]).

As explained by the Second Circuit United States Court of Appeals in *Purdy v. United States*, 208 F3d 41, 44 [2d Cir 2000], “the performance inquiry is contextual; it asks whether defense counsel’s actions were objectively reasonable considering all the circumstances. See *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052.”

When assessing whether or not counsel’s performance falls below an objective standard of reasonableness under prevailing professional norms, *Strickland* requires a court to consider the circumstances counsel faced at the time of the relevant conduct and to evaluate the conduct from counsel’s point of view (*Davis v. Greiner*, 428 F3d 81, 88 [2d Cir 2005], citing *Strickland*, 466 US at 689).

The United States Supreme Court has expressly extended the application of the *Strickland* standards to ineffective assistance claims arising out of the plea process (see *Hill v. Lockhart*, 474 US 52, 57 [1985]).

Professional standards governing an attorney’s performance in his representation of a client who is deciding whether to accept a plea offer require: (1) that defense counsel give the client the benefit of his professional advice on the crucial decision of

whether to plead guilty (see *Boria v. Keane*, 99 F3d 492 [2d Cir 1996]; and (2) that counsel leave the ultimate decision of whether to plead guilty to the defendant.

As part of his advice, counsel must communicate to the defendant the terms of the plea offer, (*Cullen v. United States*, 194 F3d 401, 404 [2d Cir 1999]), and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed (see *United States v. Gordon*, 156 F3d 376 [2d Cir. 1998]; *Pham v. United States*, 317 F3d 178, [2d Cir 2003]).

Additionally, in representing a client at this critical time, an attorney who renders effective assistance should take into account, among other things, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea, whether the defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision. A lawyer shall explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (*Purdy v. United States*, 208 F3d 41, 45 [2d Cir 2000], *supra*).

In a criminal case, the lawyer shall abide by the client's decision, after their consultation, as to the plea to be entered. The lawyer must take care not to coerce a client into either accepting or rejecting a plea offer. An attorney has an affirmative duty to avoid exerting undue influence on the accused's decision and to ensure that the decision is ultimately made by the defendant (see ABA Standards for Criminal Justice 4-5.1 [b]; 14-3.2 [b]).

The United States Supreme Court stated in *Strickland* that counsel's conclusion as how to best advise a client in order to avoid, on the one hand, failing to give advice

and, on the other, coercing a plea, enjoys a wide range of reasonableness because representation is an art and there are countless ways to provide effective assistance in any given case.

As stated by the Second Circuit in *Purdy*, and reinforced in *Davis*, counsel need not advise his client in so many words about whether or not to plead guilty, so long as he advises on the factors necessary to allow a defendant to make an informed decision (*Purdy v. United States*, 208 F3d 41, 47 [2d Cir 2000], *supra*; *Davis v. Greiner*, 428 F3d 81, 89 [2d Cir 2005], *supra*).

Recognizing that memories fade after the passage of many years, Mr. Siff's recollection of events, which occurred more than ten years ago, impressed the Court as being more reliable and credible than that of the defendant. He did not pretend to recall the actual words spoken during conversations with the defendant but as one would reasonably expect, was able to remember the significant aspects of his interactions and discussions with the defendant. He was unequivocal as to the subject matter and the sum and substance of such discussions.

The Court credits Mr. Siff's testimony that he conveyed the plea offer of the People, explained the nature and seriousness of the charges and the sentencing exposure on each count to the defendant. He also discussed the evidence, the possible defenses to the charges, the strengths and weaknesses of the case and the possibility of conviction. After doing so, in the face of defendant's firm belief that the complaining witness, at best, would not appear, or if she did, that she would be found incredible, and that his version of the facts would be believed, Mr. Siff was compelled to allow the defendant to make the ultimate determination about whether to go to trial.

Although Mr. Siff expressed his regret about not explicitly advising the defendant

to plead guilty and not insisting that he enter a plea, what is actually of significance is Mr. Siff's credible testimony that in discussing the strengths and weaknesses of the case with the defendant, he did, in fact, discuss "the reality that maybe he should plead guilty." The credible evidence concerning the nature and tenor of the interactions between Mr. Siff and the defendant makes it clear to this Court that counsel's conduct fell within the range of professional reasonableness.

The testimony offered by the defense, that Mr. Siff, in effect, guaranteed that defendant would only be convicted of unlawful imprisonment, that defendant did not really understand that fifteen years to life was his "actual" exposure in the event he was convicted of Kidnapping in the First Degree and that Mr. Siff represented that the complaining witness would likely not testify, is unconvincing. Defendant's concession that, at the very least, Mr. Siff conveyed the People's offer to him, showed him the charges and wrote fifteen years to life next to the top charge on the indictment and additionally, his testimony that counsel never told him to reject the offer, corroborates much of Mr. Siff's version of the events.

Although the Court recognizes that the defendant was eighteen years old at the time of his arrest,⁴ the credible evidence dispels the attempt to portray this particular defendant as someone who was naive, passive and ill equipped to make a decision whether to accept a plea offer rather than proceed to trial. Defendant's statements to Mr. Siff concerning the character of the complaining witness, his expressed opinion that she would not appear at trial, as well as his testimony that he never worried about going to trial because he was certain that the jury would believe his account of what happened, persuade this Court that defendant was actively engaged in weighing the pros and cons

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of going to trial. It is clear that after being properly counseled by Mr. Siff, the defendant was adamant that he wished to proceed to trial, rather than enter a plea.

The words of encouragement which defendant and his family claim were uttered by Mr. Siff reflect the type of reassurances from counsel which one would expect to occur during the ebb and flow of a case and do not compel a finding that the attorney failed to properly communicate to the defendant the risks as well as the benefits of proceeding to trial or that he failed to properly advise the defendant in connection with any plea offers; nor do they compel a finding that Mr. Siff ever guaranteed what the outcome of the trial would be.

Defendant's contention that he was misled by his attorney is unsupported by the credible evidence and simply appears to be the product of reflection and regret occurring after many years of incarceration. In the judgment of this Court, the defendant's allegations impugning Mr. Siff's representation appear to be a recent fabrication and constitute a desperate attempt by the defendant to extricate himself from his current situation. Much of defendant's testimony, in contrast to the testimony of Mr. Siff, struck the Court as tailored and rehearsed.

After a searching analysis of the testimony adduced at the hearing, the Court concludes that Mr. Siff represented defendant in a manner consistent with professional standards in this area. As in *Purdy*, Mr. Siff's representation "successfully steered a course between the Scylla of inadequate advice and the Charybdis of coercing a plea" (*Purdy v. United States*, 208 F3d 41, 45 [2d Cir 2000], *supra*).

Assuming *arguendo* however, that defendant did demonstrate that Mr. Siff's performance was deficient, the first showing required by *Strickland*, his motion would still be denied inasmuch as he has failed to establish a reasonable probability that but for

Mr. Siff's alleged deficiencies, he would have entered a plea of guilty. There is no reasonable basis upon which to conclude that defendant would have pled to a charge of kidnapping at the time in question. In the face of the credible evidence adduced at this hearing, including defendant's awareness of the sentencing disparity between the plea offer and his exposure at trial and his insistence, nevertheless, that he present his case to a jury, defendant's current, self-serving testimony that he would have accepted the plea is incredible and insufficient to meet the second prong of the *Strickland* test.

In evaluating the standard for effective representation under the State Constitution, the courts have consistently applied the test of "meaningful representation" (*People v. Benevento*, 91 NY 2d 708, 714 [1998]). So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, a defendant's State constitutional right to the effective assistance of counsel will have been met (*People v. Baldi*, 54 NY2d 137, 147 [1981]). Unlike the federal standard which examines whether the outcome of the proceedings might have been different but for counsel's unprofessional errors, the focus of the State analysis is on the fairness of the process as a whole rather than on any particular impact on the outcome of the case (*People v. Benevento*, 91 NY2d 708, 714 [1998], *supra*; *People v. Henry*, 95 NY2d 563 [2000]).

Applying that standard here, the Court concludes that defendant received meaningful representation. The credible testimony demonstrates that under all of the circumstances, Mr. Siff performed competently in his evaluation of the case and in his advice to defendant. Defendant's present doubts and reflections on what he understood or what impressions he was left with at the time he faced the charges in the indictment cannot taint what was then competent representation.

Accordingly, defendant's motion to vacate the judgment of conviction on the ground that he received ineffective assistance of counsel is denied.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant and to the District Attorney.

1 On April 27, 1998, the Appellate Division, Second Department, modified defendant's judgment of conviction by vacating the convictions for the crimes of Kidnapping in the Second Degree and Unlawful Imprisonment in the Second Degree, since they are lesser included counts of Kidnapping in the First Degree. His conviction for Kidnapping in the First Degree was unanimously affirmed (see *People v. Reyes*, 249 AD2d 569). Thereafter, leave to appeal to the Court of Appeals was denied (see *People v. Reyes*, 92 NY2d 903).

2 On September 20, 1995, Felix Reyes entered a plea of guilty to the crime of Kidnapping in the Second Degree and received a sentence of three to nine years incarceration.

3 The parties stipulated that a notation appears on the file kept by the District Attorney indicating a plea offer of "5 - 15," but that there is no evidence that such offer was ever conveyed to the defense.

4 The Court file indicates defendant's date of birth as January 31, 1976 and the date of arrest as January 29, 1995.

Dated: December 14, 2006

J.S.C.