

NEW YORK COURT OF APPEALS ROUNDUP

JUDGES VOICE STRONG VIEWS IN INEFFECTIVE ASSISTANCE OF COUNSEL DECISION

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The Court of Appeals recently addressed an ineffective assistance of appellate counsel claim in *People v. Alvarez*. The decision is notable for the unusually direct criticism with which the judges address each other's arguments in the majority opinion and two strong dissents.

Background

Defendant was convicted in 1996 of murder, attempted murder, conspiracy, assault, criminal possession of a weapon and criminal sale of a controlled substance in connection with defendant's membership in a drug trafficking organization. The trial record included evidence that defendant was involved in a drive-by shooting that resulted in the death of a 14-year-old and injury to two 15-year-olds. At sentencing, defendant refused to apologize to the deceased victim's family and apparently laughed when the trial court explained its determination to sentence defendant to 66-2/3 years to life in prison.

Defendant was represented by assigned counsel for the appeal of his conviction. He raised four arguments on appeal: (1) evidence seized at his arrest was the result of an illegal search and should have been suppressed; (2) the trial court erroneously denied a request for an adjournment so defendant could review certain evidence with his lawyer before trial; (3) the court improperly sealed the witness list before trial, which interfered with defendant's ability to prepare for cross-examination; and (4) the verdict on the conspiracy count was against the weight of the evidence. The Appellate Division, First Department rejected each of defendant's arguments on the merits and affirmed his conviction in 2000.

Seventeen years later, defendant commenced the instant action seeking a writ of error coram nobis and vacatur of the First Department order affirming his conviction. Defendant based his request for relief on the claim that his prior appellate counsel's performance was so deficient that it was constitutionally defective. The First Department denied the application, and the Court of Appeals granted leave to appeal.

The Majority Opinion

In a majority decision written by Judge Leslie Stein and joined by Chief Judge Janet DiFiore and Judges Eugene Fahey, Michael Garcia and Paul Feinman, the Court of Appeals affirmed the First Department's denial of defendant's coram nobis application. While the majority recognized that original appellate counsel's

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performance was not exemplary, the majority found that it did not rise to the level of a constitutional deprivation. In order to establish a claim for ineffective assistance, the claimant must demonstrate that counsel failed to provide meaningful representation. This does not require counsel to make every potentially meritorious argument, and counsel is provided “wide latitude” with respect to the arguments to make on appeal.

The majority opinion noted that, unlike the federal standard, the standard for an ineffective assistance of counsel claim in New York State courts does not require the movant to establish that a different result would have obtained in the absence of counsel’s errors. Actual prejudice nevertheless remains a significant factor and was one of the issues considered by the majority in its affirmance.

Judge Stein explained that defendant supported his ineffective assistance claim with four primary arguments: (1) that original appellate counsel failed to communicate with defendant during the appeal; (2) that counsel’s appellate brief was poorly structured; (3) that counsel failed to challenge as unduly harsh the minimum portion of the indeterminate sentence; and (4) that counsel neglected to file a criminal leave application for leave to appeal to the Court of Appeals. The majority addressed and rejected each of these arguments and found that defendant had not been deprived of meaningful representation.

The majority found that the claim of a failure by counsel to communicate was not supported by competent evidence other than defendant’s own unsupported allegation. As to the quality of counsel’s brief, the majority explained that relief on this basis is granted only in very limited circumstances and appellate counsel’s brief here demonstrated his “grasp of the relevant facts and law.” The only substantive argument that original appellate counsel allegedly failed to raise on appeal was the excessive minimum sentence, but given the nature of defendant’s crimes and his behavior at sentencing, the majority could not find that counsel lacked a “sound, strategic reason” for not urging discretionary relief that had little chance of success.

Finally, according to the majority, a failure to seek leave to appeal to the Court of Appeals does not, in and of itself, constitute ineffective assistance, and defendant did not identify any reviewable claim that would have been included in such an application.

In addition to rejecting each of defendant’s arguments on appeal, the majority opinion specifically addressed and dismissed issues raised in the two dissents—characterizing some of them as “quibbl[ing]” over “miniscule issues” and “largely exalting form over substance”—and found that counsel’s performance, while not perfect, did not represent a constitutional failure to provide meaningful representation.

The Dissents

In her strong and lengthy dissent, Judge Jenny Rivera argued that the performance of defendant’s original appellate counsel fell so far below acceptable standards that it represented a constitutional deprivation and that the majority’s acceptance of this performance “erodes our constitutional standard for effective assistance...and sends a message to the profession that there is seemingly little to no value attached to a lawyer’s skill in advocacy.” Rivera then proceeded to identify a series of issues with counsel’s performance, some of which she contended had not been addressed by the majority. She took direct issue with certain of the majority’s findings, including its characterization of one of her arguments as speculative, and took the unusual step of attaching a link to original appellate counsel’s brief and asking the reader to make a determination if this is “an acceptable work product.”

Judge Rowan Wilson issued a shorter, but equally strong, dissent in which he joined Judge Rivera's opinion and focused on the original appellate counsel's failure to ask the First Department to exercise its discretion to reduce defendant's sentence in the interests of justice. He noted defendant's young age at the time of his arrest, and the fact that a 66-2/3 year minimum term was effectively a life sentence that would prevent a parole board from considering whether defendant had been rehabilitated later in life.

He described in detail defendant's subsequent efforts to rehabilitate himself, including his completion of various educational and rehabilitative programs while in prison. Wilson explained that he is not advocating for a rule that a failure to seek a sentence reduction in the interests of justice automatically constitutes ineffective assistance of counsel in every case, but that counsel's failure to do so here, in and of itself, constituted a failure to provide meaningful representation.

Conclusion

It is not surprising that the three opinions in this case evidence strongly held views. At its core, this case addresses the ultimate fairness of a criminal proceeding—one of the most fundamentally important issues in our justice system.

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