

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

DECISION AND ORDER

Indictment #: 70188-21

GREGORY THAYER,

Defendant.

APPEARANCES:

For the People:

EMMANUEL C. NNEJI, ESQ.

Ulster County District Attorney
275 Wall Street
Kingston, New York 12401-3817

For the Defendant:

ROBERT C. GOTTLIEB & ASSOCIATES PLLC

(Robert C. Gottlieb, Esq., of Counsel)
Trinity Building
111 Broadway, Suite 701
New York, New York 10006

LAW OFFICES OF JOEL B. RUDIN, P.C.

(Joel B. Rudin, Esq., of Counsel)
152 West 57th Street, 8th Floor
New York, New York 10019

Roger D. McDonough, Justice

Defendant was found guilty, after a bench trial, of Manslaughter in the First Degree. Prior to sentencing, defendant moved for various forms of relief. The judge who presided over the trial ("trial judge") then recused himself from the remaining proceedings. The matter was reassigned to

this Court. The Court adjourned the sentencing date pending resolution of the CPL 330.30 portions of the motion. Additionally, the Court advised the parties that the requested relief under CPL § 440.10 was premature in the absence of an actual judgment of conviction. Accordingly, the Court's initial decision solely addressed defendant's various requests for CPL § 330.30 relief. Those aspects of the motion were denied and the parties proceeded to sentencing. After sentencing, the Court allowed the parties to supplement their submissions as to the CPL §440.10 relief.

In his submissions to the Court, defendant asked the Court to vacate his conviction and grant him a new trial pursuant to CPL § 440.10(1)(b),(f), and (h). As to 440.10(1)(b), defendant argued that the trial judge and his law clerk¹ caused the conviction to be procured by misrepresentations by the court or a person acting on behalf of the court. As to 440.10(1)(f), defendant argued that the trial judge and law clerk's alleged conduct constitutes improper/prejudicial conduct not appearing in the record that occurred during the trial. As to 440.10(1)(h), defendant raised the following constitutional issues: (1) that the trial judge and law clerk's alleged conduct deprived him of his right to a jury trial absent a knowing, voluntary and intelligent waiver; (b) that his right to a trial free from the serious risk of judicial bias or the facial appearance of judicial bias was violated; and (c) that the actions/inactions of local defense counsel Kossover deprived him of his constitutional rights to the effective assistance of counsel. Alternatively, defendant argued that the Court was required by law to hold a hearing under CPL § 440.30(5) to resolve material factual disputes. Defendant asserted that these disputes concerned the precise nature and scope of the actions/inactions of the trial judge, law clerk and Attorney Kossover. The defendant further maintained that these factual disputes went directly to all of his requests for relief under CPL § 440.10.

¹ All subsequent references to law clerk refer to the trial judge's law clerk.

The People opposed the 440.10 motion in its entirety and opposed the granting of a hearing. The People's submissions focused on the alleged prejudice visited upon the prosecution by the alleged conduct of the trial judge, law clerk and all defense counsel. The People maintained that defendant greatly benefitted from the unanticipated consideration of an extreme emotional disturbance defense and should not now be rewarded with a new trial. Additionally, the People pointed out that there are no accusations of any inappropriate conduct on their part and that "the only participants in the cheating were the defense and the [trial]court." The People maintain that defendant was not prejudiced by the *ex parte* conversation, and that the judgment of conviction was not procured by any misrepresentation, fraud or duress. The People also asserted that the defendant cannot benefit from the alleged improper and prejudicial conduct because his own attorney participated in the conduct. As to the issue of the law clerk's prior employment with the Ulster County District Attorney's Office, the People contend that the law clerk had no involvement in defendant's case. Finally, the People maintained that it strains credulity, sincerity and credibility for Attorney Kossover to claim that he did not share any information from the subject conversation with his co-counsel. Defendants' reply and the People's sur-reply reiterated and re-emphasized their earlier points.

The Court found that a hearing was warranted, principally as to the detail of the alleged *ex parte* conversation and the veracity/credibility of its alleged participants. The Court conducted said hearing, and heard testimony from Robert C. Gottlieb, Esq., Andrew Kossover, Esq., Paul Townsend, Esq., Gregory Thayer, and Kaylee Kreitenberg, Esq. Following the hearing, the Court reviewed the hearing transcript, hearing exhibits and the post-hearing submissions. Based on said hearing and the entirety of the record, the Court finds that defendant has established his entitlement

to a new trial pursuant to CPL § 440.10(1)(h) upon the grounds of: (1) ineffective assistance of counsel attributable to Mr. Kossover; and (2) the established lack of a knowing and intelligent waiver of his right to jury trial, occasioned by the occurrence, content and untimely disclosure of the *ex parte* conversation. Having reached these conclusions, the Court need not reach or opine upon the alternative statutory and constitutional claims brought by defendant.

Relevant Background

Attorney Gottlieb (“trial counsel”) served as lead trial counsel for defendant. Trial counsel was assisted by two other attorneys from his firm (hereinafter collectively referred to as “trial counsel team”). Attorney Kossover was added by defendant as local counsel to serve as co-counsel to trial counsel. Attorney Kossover understood that trial counsel intended to pursue a defense of “not responsible as a result of a temporary mental defect.” In January of 2023, defendant’s trial counsel informed the trial judge that defendant was waiving his right to a jury trial. In February of 2023, the law clerk met privately with Kossover. While there is no dispute that this meeting occurred, the participants’ recollections as to certain specifics of the meeting do differ. Kossover avers that he was told that the trial judge and law clerk had read defendant’s expert’s report and were concerned about defendant’s lack of support for his extreme emotional disturbance defense. Moreover, Kossover testified that the law clerk advised him that defendant should reconsider his waiver of a jury trial. Further, Kossover testified that the law clerk told him that this information was just for Kossover and answered “no” when Kossover asked if could share it with trial counsel.

The law clerk was not called as a witness at the hearing. In his affirmation he describes the conversation as an effort to facilitate plea negotiations due to a backlog of cases. He also denied telling the trial judge about the conversation and telling Kossover that he had discussed the expert

report with the trial judge. He conceded that he told Kossover that he did not see anything in the expert report that showed an extreme emotion disturbance and remarked that it might be a good sell with a jury. The law clerk also avers that Kossover said that he would tell trial counsel about the contents of the conversation. Finally, the law clerk denied telling Kossover that the conversation was in confidence.

Regardless, there is no dispute that the meeting occurred and there can be no meaningful dispute that it constituted an improper *ex parte* meeting.

Defendant formally waived his right to a jury trial on the record in April of 2023. The bench trial was held in April and May of 2023 and resulted in a guilty verdict. The defendant, the trial counsel team and Kossover all credibly testified that Kossover never revealed the occurrence of the *ex parte* meeting, or its contents, prior to defendant's formal waiver of his right to a jury trial. The finding of credibility is founded upon the testimony when evaluated against the supporting documentary evidence, procedural time line and actions/inactions taken by the respective actors. Additionally, Kossover's credibility on this point is buttressed by his stunning admission to the ethical/constitutional violations in which he engaged with no possible, concomitant, personal benefit arising from said testimony.

CPL 440.10(1)(h)

Ineffective Assistance of Counsel-Kossover

“ [A] criminal defendant is entitled to the effective assistance of counsel, defined as representation that is reasonably competent, conflict-free and single- mindedly devoted to the client's best interests” (People v Ennis, 11 Ny3d 403, 409-410 [2008] [internal quotation marks and citations omitted]). Regrettably, defendant did not receive conflict-free representation that was single-

mindedly devoted to his best interests.

The record reflects that Kossover attempted a “compromise solution” to his perceived ethical predicament by conveying the law clerk’s (and allegedly the trial judge’s) concerns about the defense posture, while not conveying the origin of these concerns. This reticence and silence clearly constituted an inexcusable breach of Kossover’s duty of loyalty to his client, the defendant. The sole explanation advanced by Kossover for this unconscionable dereliction of duty was his desire to maintain his good relationship with the trial judge and law clerk.

Informing defendant of the law clerk’s remarks was clearly necessary if the defendant was to make an intelligent and knowing determination as to whether to exercise his rights to a jury trial. Frankly, it strikes the Court as axiomatic that defendant’s bench trial decision would have been reconsidered had he known: (1) that the law clerk had concerns about the defendant’s expert’s report; (2) that the law clerk thought defendant might be better off with a jury; and (3) that Kossover was under the distinct impression that the law clerk was conveying the thoughts of both the law clerk and the trial judge. This is particularly true in the face of at least the suggestion of a judicial prejudgment as to the viability of defendant’s complete defense of mental disease/defect. In addition to potentially changing course and opting to exercise his right to a jury trial, the defendant could have alternatively advanced a claim that the matter should be reassigned to a new trial judge. Additionally, had the trial counsel team possessed this clearly material information from attorney Kossover, they would have been able to fully advise defendant as to all of his legal options concerning a jury trial/non-jury trial and/or the possibility of successfully seeking the trial judge’s recusal.

Based on of the foregoing, the Court finds that Kossover’s divided loyalties and inexcusable

lack of singleminded devotion to his client constitutes ineffective assistance of counsel (*see, People v Browne*, 220 AD2d 313, 314 [1st Dept. 1995]). Accordingly, defendant is entitled to a new trial.

Waiver of Right to Jury Trial

For all of the reasons set forth in the ineffective assistance section, the Court additionally finds that the defendant “was deprived of material information that led him down a path he might not have otherwise taken were full disclosure made.” (*People v Canales*, 121 AD3d 14, 18-19 [2nd Dept. 2014])². More specifically, defendant’s ignorance of the existence and contents of the wholly improper *ex parte* conversation caused his waiver to be legally inadequate (*see, People v Minaccia*, 185 AD3d 1408 [4th Dept. 2020]). Accordingly, the Court finds that defendant’s waiver of his right to a jury trial was neither knowing nor intelligent in this matter. Defendant is therefore entitled to a new trial on this alternative basis.

Finally, it is worth noting that the defendant is not the only victim of Kossover’s unethical actions. Indeed, the People, the defendant’s own trial counsel team, and the decedent’s family are now, through no fault of their own, forced to go through another trial untainted by Kossover’s malfeasance. This second trial will no doubt cause additional pain and suffering for the decedent’s family and friends. Moreover, this new trial will require the expenditure of significant judicial, prosecutorial, defense and family resources. Nevertheless, the fundamental constitutional and ethical violations committed by attorney Kossover necessitate that defendant be afforded a new trial.

The parties’ remaining legal arguments have been considered and found to be: (1) lacking in merit; and/or (2) unnecessary to reach in light of the Court’s findings; and/or (3) abandoned by

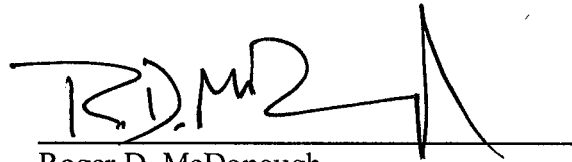
² Canales pertained to the substitution of a juror. However, the Canales Court explained that the safeguards for a defendant in that circumstance are identical and coextensive to the constitutional requirements for a jury trial waiver (*People v Canales, supra* at 17).

the parties.

This memorandum constitutes both the Decision and Order of this Court. Court staff will coordinate with trial counsel, the People and the Ulster County Clerk's Office regarding trial date availability. The People and defense counsel should be prepared to discuss the remaining pending charge(s) and whether defendant wishes to proceed with a jury trial.

SO ORDERED.

Dated: Albany, New York
October 1, 2024



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered³

1. Defendant's Notice of Motion, dated July 11, 2023;
2. Affirmation of Joel B. Rudin, Esq., dated July 11, 2023, with annexed exhibits;
3. Defendant's Affidavit sworn to July 10, 2023;
4. Affirmation of Robert C. Gottlieb, Esq., dated July 10, 2023;
5. Affirmation of Andrew Kossover, Esq., dated July 5, 2023;
6. Affirmation of Bruce A. Green, Esq., dated July 11, 2023;
7. Affirmation of Emmanuel C. Nneji, Esq., dated August 21, 2023, with annexed exhibits including Affirmation of William Ghee, Esq., dated July 26, 2023;
8. Reply Affirmation of Joel B. Rudin, Esq., dated August 25, 2023, with annexed exhibit;
9. Supplemental Affirmation of Andrew Kossover, Esq., dated August 25, 2023;

³ Defendant also submitted a Memorandum of Law in support of his motion as well as a post-hearing Memorandum of Law.

10. Supplemental Affirmation of Robert C. Gottlieb, Esq., dated August 24, 2023;
11. Affirmation of Paul Townsend, Esq., dated August 24, 2023;
12. Affirmation of Kaylee S. Kreitenberg, Esq., dated August 24, 2023;
13. Supplemental Affirmation of Joel B. Rudin, Esq., dated October 25, 2023;
14. Affirmation of Emmanuel C. Nneji, Esq., dated November 23, 2023, with annexed exhibit;
15. Reply Affirmation of Joel B. Rudin, Esq., dated December 4, 2023;
16. Sur-reply Letter from Emmanuel C. Nneji, Esq., dated December 10, 2023, with annexed exhibits;
17. The People's Written Closing Argument, executed by District Attorney Nneji on July 1, 2024, with annexed exhibits;
18. 440 Hearing Transcript and Exhibits.