

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1646

KA 08-01038

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WESLEY KIRKLAND, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered March 27, 2008. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Erie County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). We agree with defendant that he was deprived of effective assistance of counsel inasmuch as his attorney took a position adverse to him when defendant moved pro se for the assignment of new counsel and to withdraw his guilty plea. Although defense counsel had no duty to support the motions, he became a witness against defendant by taking a position adverse to him, thereby depriving defendant of effective assistance of counsel (see *People v Hunter*, 35 AD3d 1228, 1228; *People v Lewis*, 286 AD2d 934, 934). County Court "should not have determined the motion[] [to withdraw the plea] without first assigning a different attorney to represent defendant" (*People v Chrysler*, 233 AD2d 928, 928). We therefore hold the case, reserve decision, and remit the matter to County Court for the assignment of counsel and a de novo determination of the motion to withdraw the guilty plea (see *People v Chaney*, 294 AD2d 931).

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court