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No. 107  
The People &c.,  
Respondent,  
v.  
Nicholas Sanchez,  
Appellant.

Margaret E. Knight, for appellant.  
Noah J. Chamoy, for respondent.

GRAFFEO, J.:

In this case we consider whether defendant has adequately demonstrated that he was deprived of meaningful legal representation based on defense counsel's alleged conflict of interest. On this record, we hold that defendant has not sustained his burden of establishing ineffectiveness, but that he

is not precluded from raising this issue in a CPL article 440 proceeding that would permit further factual development of the circumstances pertaining to the claimed conflict.

I

One evening in December 2004, Freddy Penalo was working as a taxi driver when he received a call to pick up passengers at a certain location in the Bronx. When he arrived, two young men approached his taxi and asked to be driven to West 233rd Street. Once in the vehicle, Penalo spoke to the men in the rear seat and observed them in the rear-view mirror during the 10 to 12 minute trip.

When the taxi was in the vicinity of the destination, one passenger grabbed Penalo, announced a robbery and displayed a handgun. He ordered Penalo to turn over his cash, jewelry and cell phone. The other passenger told the gunman to kill Penalo, but the initial aggressor assured Penalo that he would not be murdered if he gave all of his money to them, which he did. Penalo was then pulled out of the taxi and the men drove away in the vehicle.

The police found the taxi parked near 3460 Bailey Avenue. They discovered that a "taxi cam" inside the vehicle had taken photographs during the robbery. Penalo gave descriptions to the police, stating that the two assailants were Hispanic men, about 20 years old, approximately 5'8" tall and weighed 150 pounds and 160 pounds, respectively. The police also dusted the

vehicle for fingerprints.

An investigating detective printed the taxi cam photographs and recognized one of the rear-seat passengers as defendant Nicholas Sanchez, who had been the victim in an earlier case the detective had worked. Another detective who viewed the photographs also identified defendant as someone he had interacted with in the neighborhood during the preceding five years. The officers eventually located defendant at 3340 Bailey Avenue -- less than a block from where the taxi had been abandoned -- and they took defendant's photograph. That photograph was included in a photo array that Penalo reviewed and he identified defendant as the man with the gun in his cab. After Penalo subsequently selected defendant in a lineup, defendant was arrested for the robbery. He told the police that he was 20 years old, 5'6" tall and weighed 160 pounds.

Attorney Charles Ippolito, from the Legal Aid Society, represented defendant at trial. During jury selection, the People informed defense counsel that a fingerprint found in the taxi matched another person involved in a sealed criminal case. Supreme Court issued an order unsealing the file and the People revealed that the fingerprint was attributed to Elvis Montero. The People also gave defense counsel a copy of a detective's report memorializing a statement from defendant's brother, who indicated that he heard a rumor that the taxi robbery had been committed by "Macho" (A/K/A Franklin DeJesus). Defense counsel

received photographs of Montero and was told that he had been arrested for a robbery in the Bronx two months after the crime involving Penalo, but that Montero had jumped bail.

Prior to opening statements, defense counsel alerted the court to a possible conflict of interest. Legal Aid had represented DeJesus in an unrelated robbery case that ended in an acquittal. Based on certain "privileged information," Legal Aid believed that there was some connection between Montero and DeJesus. After internal discussions, defense counsel advised the trial judge that Legal Aid had concluded that "there is no conflict regarding the issue surrounding Mr. Montero" and that a conflict of interest would arise only if DeJesus had to be mentioned during defendant's trial. Defense counsel stated that this would not be necessary for "evidentiary reasons and for just reasons related to common sense . . . since there is no physical evidence connecting [DeJesus] to this crime." He further indicated that although Legal Aid recognized "the possibility of [a] potential for conflict," it was "not necessarily" an actual one and, therefore, the defense was "not asking the Court to act on this" since counsel wanted to avoid "going into" DeJesus as the possible unapprehended perpetrator in order to prevent a conflict or a mistrial. Counsel remarked that the matter had been discussed with defendant and the defense was "ready to proceed" with the trial. The prosecutor commented that the People had "no information about this Mr. DeJesus" and any link

he had to the case was "all based on speculation."

During the trial, Penalo identified defendant as the gunman. The two detectives testified over defendant's objection that they had recognized defendant from the taxi cam photographs and that defendant had gained weight since his arrest. The defense strategy was to establish an alibi for defendant and present evidence to support the theory that Montero was the actual perpetrator. The jury ultimately found defendant guilty of first-degree robbery.

After defendant's conviction, Legal Aid moved to set aside the verdict on various grounds, including newly discovered evidence consisting of DeJesus' alleged jailhouse confession to defendant. Legal Aid was then relieved as defendant's counsel and defendant was assigned a new attorney. Supreme Court ordered a hearing on DeJesus' purported confession, and defendant testified that DeJesus had admitted to him that he and Montero robbed Penalo. DeJesus, in contrast, acknowledged that he had a conversation with defendant while they were incarcerated, but denied that he confessed to the Penalo robbery or that he knew Montero. According to DeJesus, defendant attempted to bribe him into accepting responsibility for the crime. Defendant's former counsel also testified but did not claim personal knowledge of DeJesus' alleged admission. Supreme Court found DeJesus to be credible, denied the motion to set aside the verdict, and sentenced defendant to eight years of imprisonment and five years

of postrelease supervision.

The Appellate Division affirmed (95 AD3d 241 [1st Dept 2012]). It determined that defendant had not been deprived of his right to effective legal assistance due to Legal Aid's dual representation of defendant and DeJesus because there was no conflict between their interests and, even if there were, it did not operate on the defense since defendant was able to present a third-party culpability theory focusing on Montero as the gunman. The dissenting Justice, who believed that defendant was entitled to a new trial because his Legal Aid attorney had a conflict of interest that affected the defense, granted defendant leave to appeal.

## II

Defendant contends that trial counsel was ineffective as a result of a conflict of interest stemming from Legal Aid's dual representation of defendant and DeJesus. According to defendant, this conflict of interest provides the only reasonable explanation for his attorney's failure to inform the jury about DeJesus' possible connection to the Penalo robbery. Defendant also maintains that the trial court had a duty to conduct a Gomberg (38 NY2d 307 [1975]) inquiry in order to ensure that he was aware of the nature of the conflict and the risks associated with it.

The defendant bears the burden of establishing a denial of meaningful representation (see e.g. People v Baker, 14 NY3d

266, 270 [2010]). When such a claim is premised on a perceived conflict of interest, our precedent differentiates between actual and potential conflicts (see People v Solomon, 20 NY3d 91, 95 [2012]). An actual conflict exists if an attorney simultaneously represents clients whose interests are opposed (see People v Prescott, \_\_\_ NY3d \_\_\_, 2013 NY Slip Op 03266 [decided May 7, 2013]; People v Solomon, 20 NY3d at 97) and, in such situations, reversal is required if the defendant does not waive the actual conflict (see People v Solomon, 20 NY3d at 96).

In contrast, a potential conflict that is not waived by the accused requires reversal only if it "operates" on or "affects" the defense (see People v Abar, 99 NY2d 406, 409 [2003]) -- i.e., the nature of the attorney-client relationship or underlying circumstances bear a "'substantial relation to the conduct of the defense'" (People v Ennis, 11 NY3d 403, 410 [2008], quoting People v Berroa, 99 NY2d 134, 142 [2002]). The "requirement that a potential conflict have affected, or operated on, or borne a substantial relation to the conduct of the defense -- three formulations of the same principle -- is not a requirement that [the] defendant show specific prejudice" (People v Ortiz, 76 NY2d 652, 657 [1990]). Nevertheless, it is the defendant's "heavy burden" (People v Jordan, 83 NY2d 785, 787 [1994]) to show that a potential conflict actually operated on the defense (see People v Ennis, 11 NY3d at 411; People v Harris, 99 NY2d 202, 211 [2002]).

Here, defendant has established that a potential conflict of interest was apparent: Legal Aid represented both defendant and DeJesus in unrelated criminal matters; DeJesus had been named as a potential suspect during the police investigation; and Legal Aid possessed privileged information indicating that there was "some connection" between DeJesus and Montero, whose fingerprint had been discovered in the rear passenger area of Penalo's taxi. Although Legal Aid no longer represented DeJesus because he had been acquitted of his criminal charges, it owed him a continuing professional duty to maintain his confidences<sup>1</sup> and therefore raised the possibility of a conflict between its former and present clients -- as defense counsel specifically recognized and attempted to avoid (see People v Prescott, \_\_ NY3d at \_\_, 2013 NY Slip Op 03266, quoting People v Ortiz, 76 NY2d at 656).

Contrary to defendant's claim, however, the record does not establish as a matter of law that the potential conflict actually affected the presentation of the defense or otherwise impaired counsel's performance. Defendant's trial lawyer correctly observed that there was no physical evidence that linked DeJesus to the Penalo robbery. Rather, his name had been provided to the police by defendant's brother based on an unsubstantiated neighborhood rumor. Counsel therefore reasonably

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<sup>1</sup> Legal Aid supervisors did not allow attorney Ippolito to review its file on DeJesus.

concluded that DeJesus was unlikely to be a necessary component of the overall defense strategy due to evidentiary restrictions and "common sense."

Moreover, the extent to which DeJesus may have been relevant to the case was significantly diminished by Legal Aid's apparent belief that DeJesus may have been the unidentified accomplice who was sitting behind Penalo on the driver's side of the taxi. Defendant was accused of being the gunman who was depicted in the taxi cam photographs sitting in the rear passenger's side of the vehicle. Since Montero's fingerprint had been found on that side of the cab, the theory of the defense was that defendant had been misidentified as the person on the passenger side and that Montero was the true perpetrator. Defendant's attorney was able to present this theory to the jury without implicating DeJesus or acting adversely to his interests as a former client. Indeed, counsel mounted a cogent misidentification and third-party culpability defense consisting of expert testimony regarding the discovery of Montero's fingerprint in proximity to the area of the taxi where the People claimed defendant had been sitting; the taxi cam photographs; a photograph of Montero, which counsel asked the jury to compare to the taxi cam photos; and a stipulation that Montero confessed to a gunpoint robbery that he committed with two accomplices about seven weeks after Penalo had been robbed. Since this defense strategy did not betray any professional obligations owed to

DeJesus or defendant, the record supports the view that the potential conflict was not realized in this case.<sup>2</sup> As a result, defendant has not adequately demonstrated that he received less than meaningful representation.

Our holding does not preclude defendant from raising this issue in a CPL article 440 proceeding in order to supplement the record with additional facts to bolster his contention that the potential conflict of interest affected the presentation of the defense (see e.g. People v Konstantinides, 14 NY3d 1, 12-13 n 4 [2009]).

III

Defendant's remaining contentions do not require extended discussion. It was not an abuse of discretion to allow the detectives to state their beliefs that defendant was depicted in the taxi cam photographs because it was undisputed that his appearance had changed since the robbery occurred (see generally People v Russell, 79 NY2d 1024, 1025 [1992]) and the trial court issued appropriate limiting instructions to the jury. Defendant received the remedy he requested after the People disclosed the Montero fingerprint evidence on the eve of trial and he had a

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<sup>2</sup> The lack of a Gomberg inquiry does not amount to reversible error because defendant and DeJesus were not codefendants being simultaneously represented by Legal Aid, defense counsel stated that the matter had been explained to defendant and the court was told that it was not being asked to take any action (see e.g. People v Jordan, 83 NY2d at 787-788; People v McDonald, 68 NY2d 1, 9 [1986]; People v Macerola, 47 NY2d 257, 264 [1979]).

reasonable opportunity to use it as part of his defense (see People v Cortijo, 70 NY2d 868, 870 [1987]). Defendant is not entitled to relief on his challenge to the denial of the motion for a new trial on the basis of newly discovered evidence (see People v Crimmins, 38 NY2d 407, 415 [1975]). And there is support in the record for the finding that the identification procedures were not unduly suggestive (see People v McBride, 14 NY3d 440, 448 [2010]).

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Accordingly, the order of the Appellate Division should be affirmed.

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Order affirmed. Opinion by Judge Graffeo. Chief Judge Lippman and Judges Read, Smith, Pigott and Rivera concur. Judge Abdus-Salaam took no part.

Decided June 4, 2013