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1 No. 168
The People &c., Respondent,
 v.
Sheldon Ennis, Appellant.

Richard M. Greenberg, for appellant.
Susan Axelrod, for respondent.

GRAFFEO, J.:

Defendant, his brother and a coconspirator were jointly
tried and convicted of participating in a conspiracy to sell
drugs and assaulting rival drug dealers to further the
conspiracy. On appeal, defendant argues that his convictions
should be reversed because his trial counsel failed to make

appropriate use of potentially exculpatory information that he discovered during the trial. We agree with the Appellate Division that reversal is not warranted and we therefore affirm.

Sheldon Ennis, his brother Aaron, and coconspirator Keith Taylor were named in a 23-count indictment as participants in a drug selling conspiracy in which they used violence to keep rival drug dealers from encroaching on their territory. At the joint trial of the three men, the People offered proof that Sheldon and Aaron Ennis ran their operation -- known as the "Dog Pound" -- out of a hotel on 38th Street in Manhattan. The Ennis brothers allowed other groups to sell drugs in the vicinity but warned them to stay outside of a designated area in front of the hotel. Those who failed to heed the warning were severely punished, as demonstrated by the two violent incidents that led to the convictions Sheldon Ennis challenges in this appeal.

One such incident, which occurred in August 1996, involved Frank "Nitti" Brown who ran a competing drug operation adjacent to the Dog Pound territory. Brown testified at trial that, for many months, he had a peaceful relationship with the Ennis brothers. That changed when Brown antagonized the brothers by his decision not to use them as his supplier. Then, one of Brown's workers crossed into Dog Pound territory and sold drugs near the hotel. The Ennis brothers confronted Brown about the transgression and a verbal altercation ensued. Brown retreated to his base of operations in the Bronx, intending to return with

a group of armed associates the next day. Nonetheless, that evening he and Billy Moody drove down 38th Street, accompanied by two female acquaintances. Brown and Moody both testified that they were unarmed and did not intend to provoke a fight.

Brown recounted at trial that, as he proceeded down the street, he spotted Sheldon Ennis leaning against a telephone pole. Once Sheldon saw Brown's car, he raised a gun and began to shoot. Brown swerved and then observed Aaron on the opposite side of the street. Aaron also began firing at Brown's vehicle. A third conspirator -- Keith Taylor -- pointed a gun at the car, although Brown was not sure whether Taylor pulled the trigger. As they drove off, Moody told Brown that he had been shot. A couple of blocks away, Brown was able to locate a police car to report the shooting. He then sought medical assistance for Moody, who survived but was paralyzed as a result of the incident. The police retrieved numerous discharged shells and casings from the area of the shooting and, at trial, a ballistics expert testified that at least two and probably more guns were involved. In connection with this shooting, the Ennis brothers and Taylor were charged with attempted murder of Moody and several counts of assault and criminal possession of a weapon.

The second violent incident occurred six months after the Moody shooting -- in December 1996 -- when the Ennis brothers were involved in another fracas with Clarence Calwell and Randolph Sherman, rival drug dealers who ran an operation down

the street. Similar to the Brown incident, the dispute arose when one of the dealers who worked for Calwell and Sherman conducted a drug sale in Dog Pound territory. Sheldon and Aaron located the rival dealers and initiated a confrontation that resulted in Calwell and Sherman each suffering multiple stab wounds. Both brothers were charged with two counts of attempted murder in the second degree and multiple counts of assault.

The jury returned a verdict convicting defendant Sheldon Ennis of conspiracy in the second degree for his participation in the Dog Pound drug operation. In connection with the Moody shooting, the jury acquitted defendant of the attempted murder count but convicted him of assault in the first degree and criminal possession of a weapon in the second and third degrees. Defendant was also acquitted of the two attempted murder counts arising from the stabbing of Sherman and Calwell but was convicted of one count of assault in the first degree and one count of assault in the second degree for the injuries they sustained.¹

After the verdict but before sentencing, defendant's trial counsel -- David Cooper -- submitted a CPL 330.30 motion alleging that Sheldon's convictions should be reversed based on a

¹ Defendant was convicted of six out of the nine counts charged against him in the indictment: conspiracy in the second degree, two counts of assault in the first degree, criminal possession of a weapon in the second and third degrees, and one count of assault in the second degree.

Brady violation. Cooper asserted that, during the trial, he learned that Aaron Ennis had participated in a proffer session with the District Attorney's Office in which Aaron stated that he shot Billy Moody and that defendant was not present at the shooting. The People never turned over the statement as Brady material. Cooper explained that he was told about the statement in confidence and with the understanding that he would not disclose it until after the trial concluded. He claimed that, if the People had timely provided the Brady information, he would have sought a severance and a separate trial for defendant so that he could have called Aaron as a witness. Having learned of the statement late in the trial, however, Cooper contended there was no way he could get the statement before the jury because Aaron would have invoked his Fifth Amendment privilege against self-incrimination if Cooper had tried to call him as a witness at the joint trial.

The trial court denied the CPL 330.30 motion, reasoning that, although the People should have disclosed Aaron's statement, reversal was not warranted because defense counsel knew of the information during trial, at a time when he could have pursued various remedies (including an ex parte application to the court). The court concluded that defense counsel "tactically chose not to do anything" until after the jury reached its verdict, attempting "to use the Brady doctrine as both a shield and a sword." After the motion was denied,

defendant was sentenced as a predicate felon to an aggregate term of 43 1/3 years in prison.

Five years later, defendant made a CPL 440.10 motion to vacate the judgment, repeating his Brady argument and raising an ineffective assistance of trial counsel claim. The motion was supported by the affidavit of David Cooper, Sheldon's trial attorney, who explained that it was Aaron's attorney who told him that, in an attempt to enter into a cooperation agreement with the People, Aaron stated that he shot Billy Moody and that defendant was not involved in the shooting. Cooper averred that, because he had promised Aaron's attorney that he would not disclose this information until the trial was over, he felt constrained not to alert the trial court. He further claimed that he had no "tactical or strategic reason" for his failure to act on the information during the trial. The motion court denied the application, echoing the reasoning of the trial court.

The Appellate Division affirmed defendant's convictions, rejecting the ineffective assistance of counsel and Brady violation arguments for reasons similar to those articulated by the trial and motion courts. The court noted that there was no reasonable possibility that the People's failure to timely disclose Aaron's statement contributed to the verdict because there would have been no means for defendant to use the statement at trial, even if a severance had been granted, since Aaron would undoubtedly have invoked his Fifth Amendment

privilege to avoid testifying on his brother's behalf. The court reasoned that any attempt to introduce the statement as hearsay through a third party present at the proffer session would have been unsuccessful because the statement did not fall within any hearsay exception, including the exception for declarations against penal interest. Finally, the Appellate Division also rejected defendant's claim that his assault convictions arising from the Calwell and Sherman incident were not supported by legally sufficient evidence. A Judge of this Court granted defendant leave to appeal.

Defendant raises two ineffective assistance of trial counsel arguments. First, he contends that when Cooper made a promise to Aaron's counsel not to reveal information about Aaron's exculpatory statement until the trial ended, a conflict of interest was created and reversal is necessary because the conflict significantly impacted the defense. Second, he asserts that he did not receive meaningful representation because Cooper failed to appropriately act on the information he received from Aaron's lawyer during the trial. We conclude that both arguments lack merit.

Under the state and federal constitutions, a criminal defendant is entitled to the effective assistance of counsel, defined as "representation that is reasonably competent, conflict-free and singlemindedly devoted to the client's best interests" (People v Harris, 99 NY2d 202, 209 [2002] [citations

omitted]). A claim that defense counsel's representation was compromised by a conflict of interest requires two inquiries. First, the court must examine the nature of the relationship or circumstances that are alleged to establish a conflict. Second, if a conflict is identified, the Court must determine whether the conflict "operated on the representation," (People v Ortiz, 76 NY2d 652, 657 [1990][internal quotation marks and citations omitted]), i.e., whether the relationship or circumstances "bore a substantial relation to the conduct of the defense" (People v Berroa, 99 NY2d 134, 142 [2002] [internal quotation marks and citations omitted]).

To date, our conflict of interest cases have generally fallen into one of two categories: cases where a potential conflict of interest was identified based on defense counsel's previous or concurrent representation of a client whose interests conflicted with those of defendant (see e.g. People v Abar, 99 NY2d 134 [2002]; People v McDonald, 68 NY2d 1 [1986]) and cases where defense counsel became a witness against defendant (see e.g. People v Lewis, 2 NY3d 224 [2004]; Berroa, 99 NY2d 134). Regardless of the circumstances, in our prior cases the potential conflicts of interest were discernible based on objective facts that were not easily subject to manipulation by the conflicted attorney. For example, in Abar, the purported conflict arose from defense counsel's former employment as a prosecutor who had been involved in prior prosecutions of defendant. In Berroa,

defense counsel's out-of-court conversations with defense witnesses created the potential that she would become a witness against her client when those witnesses later gave alibi testimony contradicting what they had previously told her.

In this case, the purported conflict of interest does not arise from objective facts or circumstances external to defense counsel. Rather, it is alleged that defense counsel was torn between keeping a promise to Aaron's counsel not to reveal the exculpatory information and fulfilling his professional obligation to act in defendant's best interests. In the affidavit submitted in connection with the CPL 440.10 motion, Cooper stated that he did not tell the trial court about the alleged Brady violation or otherwise attempt to use the exculpatory information at trial because he felt constrained to remain silent, apparently based on his personal (as opposed to professional) ethical values.

The personal dilemma defense counsel describes is markedly different from the types of conflicts that we have previously recognized as triggering our conflict of interest analysis because it is entirely subjective. Many (perhaps most) attorneys would not have perceived any conflict; having learned information that they deemed useful to their client, they presumably would have pursued one of several available courses of action, including advising the trial court, ex parte and without necessarily divulging their source, that they had reason to

believe there had been a proffer session in which exculpatory statements were made. For these lawyers, any personal concern stemming from the assurance of confidentiality would have been outweighed by the professional obligation to pursue the interests of a client who was on trial for serious offenses, including attempted murder. We are therefore hard-pressed to place the internal struggle cited by defense counsel in the same category as the conflicts of interest discussed in our precedents.

Even if we viewed this case as presenting a conflict situation, reversal would not be warranted under the second prong of the inquiry. "Whether a conflict of interest operates on the defense is a mixed question of law and fact and, as a result, our review is limited. We may disturb an Appellate Division determination on this issue only if it lacks any record support" (Abar, 99 NY2d at 409 [citations omitted]). Here, the Appellate Division rejected the argument that defense counsel's failure to raise a Brady violation or to otherwise attempt to use the exculpatory information at trial was a result of the purported conflict. Defendant argues that this conclusion is unsupported by the record because defense counsel stated that he had no tactical or strategic reason for acting as he did. But the Appellate Division was not required to accept defendant's allegations at face value. Rather, in determining what motivated defense counsel, all of the circumstances surrounding the situation could be taken into account. In this case, we cannot

say that the inference drawn by the Appellate Division (and the other two fact-finding courts) lacked any support in this record, particularly because, as addressed below, the actions defendant contends that his trial counsel should have taken would not have advanced his defense.

Defendant's related claim that defense counsel's performance fell below constitutionally adequate levels is also based on his assertion that his lawyer failed to appropriately use Aaron's statement -- which he characterizes as Brady material -- at trial. Where no conflict of interest is involved, the standard for assessing the effectiveness of trial counsel is whether the attorney provided meaningful representation. New York courts have adopted a flexible approach that takes into account the fairness of the trial process as a whole and the totality of the representation (see People v Benevento, 91 NY2d 708 [1998]). Unlike the federal ineffective assistance standard, which requires a showing that, but for counsel's inadequacy, the outcome of the trial would have been different, New York courts do not conduct a strict prejudice inquiry (see id. at 713-714). However, this Court has held that it "would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice" and that such a showing is "a significant but not indispensable element in assessing meaningful representation" (People v Stultz, 2 NY3d 277, 283-284 [2004]).

In this case, defense counsel performed as an effective

advocate in many significant respects. He vigorously cross-examined the People's witnesses, gave a strong closing argument, and succeeded in obtaining acquittals on the most serious charges facing defendant -- the three attempted murder counts (one relating to the Moody shooting and the others stemming from the stabbings of Calwell and Sherman). Defendant contends that counsel operated below the minimally-required level of effectiveness because he failed to preserve an objection to the purported Brady violation (or to seek a mistrial or severance based on the violation) and made no attempt to get Aaron's exculpatory statement before the jury. We disagree.

Defendant's claim that his trial should have been severed from Aaron's so that he could call Aaron as a witness is undermined by the fact that Aaron would undoubtedly have asserted his Fifth Amendment privilege against self-incrimination if this had occurred. Nor could defendant have called a witness who overheard Aaron's statement -- such as Aaron's attorney -- to testify as to its content because, in a trial against defendant, the statement would be hearsay not subject to any exception.

Defendant's allegation that the statement would be admissible through a third party under the exception for declarations against penal interest (DAPI) also fails. To qualify under this exception, the declarant must be unavailable, must have competent knowledge of the facts and must have known at the time the statement was made that it was against his or her

penal interests (People v Brensic, 70 NY2d 9, 15 [1987]; see People v Settles, 46 NY2d 154, 167 [1978]). Even if these criteria are met, the statement cannot be received in evidence unless it is also supported by independent proof indicating that it is trustworthy and reliable (id.). Here, only two of the DAPI criteria are present: Aaron would have been unavailable to testify on defendant's behalf because of his Fifth Amendment privilege and, since Aaron acknowledged (and independent evidence indicated) that he participated in the shooting, he would have had competent knowledge of whether defendant was also a participant.

The requirement that the statement be contrary to the declarant's penal interest, however, poses a problem since the part of the statement that defendant would have sought to admit -- that defendant was not present at the time of the shooting -- is not directly inculpatory of Aaron (Brensic, 70 NY2d at 16 [citations omitted] [courts "admit only the portion of [the] statement which is opposed to the declarant's interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant"]). Moreover, given the context in which the statements were elicited, it is questionable whether Aaron would have viewed them as being against his penal interest. Aaron made the statements at the District Attorney's office, in the presence of his attorney, at a time when he was already being prosecuted

for the offense and as part of a proffer in which he apparently sought to obtain an advantage, perhaps a plea bargain for himself or leniency for Sheldon, in exchange for his cooperation. As such, Aaron was in control of whether any statement he made could be used against him and, if it was, it would only be because he had reached an agreement with the prosecution that he deemed sufficiently valuable to justify such a result. Finally, inculpatory declarations are not admissible under the fourth criterion unless there is "sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability" (id. at 15 [citation omitted]) and, in this case, no such proof has been identified.

Because Aaron could not have been compelled to testify on his brother's behalf and his statements would not have been admissible through a third party, defense counsel cannot be deemed ineffective for failing to seek a severance or to otherwise attempt to admit the statements into evidence. Nor can the representation be deemed constitutionally deficient based on defense counsel's failure to raise the Brady argument during the trial.² While the People have an ongoing obligation to turn over

²Although we discuss the Brady issue in connection with defendant's ineffective assistance of counsel claim, defendant's separate argument that reversal is warranted based on the purported Brady violation is not properly before this Court for review due to defense counsel's failure to preserve the issue by making a timely objection to the People's non-disclosure when he discovered it during the trial (see People v Rogelio, 79 NY2d 843 [1992]).

exculpatory information -- and their failure to do so in this case cannot be condoned -- noncompliance with this requirement will not rise to the level of a Brady violation unless the evidence was material which, in New York, turns on whether the defense made a specific request for the information (People v Vilardi, 76 NY2d 67, 77 [1990]). Here, defense counsel sought disclosure of all statements made by participants in the crime that were exculpatory of defendant. As such, the People's failure to turn over Aaron's statement would be material if there is a "reasonable possibility" that the non-disclosure contributed to the verdict (id.). That standard is not met because, had the statement been turned over, there would have been no avenue for defense counsel to admit it into evidence, either in the joint trial of the Ennis brothers or in a separate trial of defendant had severance been granted.

As defendant acknowledges in his brief, it was not the content of Aaron's statement that was potentially valuable to the defense; if true, the fact that defendant was not present at the shooting would be a fact already known to defendant. In other words, this is not a case where the information might have opened a line of investigation for the defense that was not otherwise available. Rather, here it was the fact that Aaron made the statement that was significant. Defendant contends that, if the jury had learned that the actual shooter stated that defendant was not involved, this would be compelling evidence supplying

reasonable doubt. While the impact of such testimony is debatable since jurors would have had ample reason to question Aaron's credibility given that he had an obvious motive to lie to protect his brother, a case could be made that, had the statement been admissible, there is at least a reasonable possibility that the outcome of the trial would have been different. But because there is no way that defendant could have presented the statement to the jury, this is a situation where the inadmissibility of the exculpatory information prevented it from being material, meaning its nondisclosure did not rise to the level of a Brady violation (see e.g. People v Scott, 88 NY2d 888 [1996]). As such, defense counsel's failure to preserve a Brady objection during the trial did not amount to ineffective assistance of counsel because an attorney is not deemed ineffective for failing to pursue an argument that had little or no chance of success.

Finally, we have considered defendant's challenge to the sufficiency of the evidence underlying the Calwell and Sherman assault convictions and find it to be without merit. There was ample evidence from which a rational jury could conclude beyond a reasonable doubt that the two brothers acted in concert and shared the intent to inflict the requisite degree of physical injury.

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

* * * * *

Order affirmed. Opinion by Judge Graffeo. Chief Judge Kaye and Judges Ciparick, Read, Smith, Pigott and Jones concur.

Decided November 20, 2008