No. 144

The People &c.,
Respondent,
v.
Eddie Thompson, Jr.,
Appellant.

Jack H. Weiner, for appellant.
Joan Gudesblatt Lamb, for respondent.

SMITH, J.:

We hold that a failure to exercise a peremptory challenge against a juror who was a long-time friend of the prosecuting attorney did not amount to ineffective assistance of counsel.

Defendant was charged with murder for shooting his

girlfriend. The District Attorney of Ulster County tried the case personally. During voir dire, a prospective juror, whom we will call William Peters, volunteered that he had been "a friend" of the District Attorney "for forty plus years." In response to the court's question, Peters said that the relationship would not in any way affect his "ability to be a fair and impartial juror." Later, Peters disclosed that he was on a first-name basis with the District Attorney, knew his wife and socialized with him "[o]ccasionally." In response to a question from defense counsel, he also said of the District Attorney: "I've known him to be wrong before."

Defense counsel challenged Peters for cause. The trial court denied the challenge, and the defense lawyer, though he had peremptory challenges available, chose not to use one on this panelist. Peters was selected for, and sat on, the jury, which acquitted defendant of second degree murder but convicted him of the lesser included offense of manslaughter. The Appellate Division affirmed (People v Thompson, 92 AD3d 1139 [3d Dept 2012]), and a Judge of this Court granted leave to appeal (19 NY3d 977 [2012]). We now affirm.

While defendant raises many arguments on appeal, we think that the only one requiring discussion is that his trial counsel was ineffective for failing to use a peremptory challenge to remove Peters from the jury. Defendant criticizes some of defense counsel's other decisions, but we find those criticisms

to be ill-founded. Counsel's overall performance at trial was competent. Indeed, considering the evidence in the case -- the victim had two bullet wounds, and defendant's claim that he shot her accidentally was contradicted both by eyewitness testimony and by forensic evidence -- a verdict of manslaughter, rather than murder, seems something of an achievement.

Thus, defendant can prevail on his ineffective assistance claim only by showing that this is one of those very rare cases in which a single error by otherwise competent counsel was so serious that it deprived defendant of his constitutional right (see People v Turner, 5 NY3d 476, 478 [2005]). We held in Turner that this had occurred where a lawyer overlooked "a defense as clear-cut and completely dispositive as a statute of limitations" (id. at 481). The mistake that defendant accuses defense counsel of making here was not of that magnitude.

It could be argued that counsel's decision not to use a peremptory challenge on Peters was a mistake for two reasons: because Peters, as a juror, would be biased in the prosecution's favor; and because, by not using a peremptory challenge to excuse him, counsel failed to preserve for appeal any claim that the court erred in rejecting the for-cause challenge. We consider those arguments separately.

The first argument is a weak one, because defense counsel may reasonably have thought Peters an acceptable juror from the defense point of view. Defense counsel may have liked

Peters's demeanor, or may have believed that his relationship with the prosecutor would make him bend over backwards to be fair. Of course, to refrain from challenging an old friend of the prosecutor's was an unconventional, perhaps risky choice -- defense counsel clearly knew that, for he mused aloud after making the decision "I should have my head examined" -- but lawyers selecting juries are not ineffective because they make unconventional choices or play hunches. And, in any event, an ineffective assistance claim cannot succeed without a showing that the fairness of the trial was impaired (People v Stultz, 2 NY3d 277, 283-284 [2004]; People v Benevento, 91 NY2d 708, 713 [1998]). The record here provides no basis for concluding that Peters's presence on the jury prejudiced defendant (see People v Turck, 305 AD2d 1072, 1073 [4th Dept 2003]; People v Driscoll, 251 AD2d 759, 761 [3d Dept 1998]; People v Thomas, 244 AD2d 271 [1st Dept 1997]).

The second argument -- that counsel erred by failing to preserve the issue of the for-cause challenge for appeal -- gives us somewhat more pause. The trial court's decision to deny the challenge for cause may have been error (see People v Branch, 46 NY2d 645 [1979] [error to deny challenge to a prospective juror who had both a professional and personal relationship with the prosecutor]). Counsel's choice not to exercise a peremptory challenge deprived defendant of the opportunity to make that argument on appeal; under CPL 270.20 (2), where a defendant has

not exhausted his peremptory challenges, a denial of a challenge for cause "does not constitute reversible error unless the defendant . . . peremptorily challenges such prospective juror." Considering the poor odds of acquittal that defendant was facing, it is hard to see how keeping a particular juror -- no matter how strong defense counsel's hunch that he would be favorable -- could justify the loss of a significant appellate argument.

We conclude, however, that counsel's mistake, if it was one, was not the sort of "egregious and prejudicial" error that amounts to a deprivation of the constitutional right to counsel (People v Caban, 5 NY3d 143, 152 [2005]). The issue of the for-cause challenge was not, in the words of Turner, "clear-cut and completely dispositive." The record shows that Peters and the prosecutor had a long relationship that Peters described as a friendship, but we do not know how intimate they were or how often they socialized. Peters did not, as the prospective juror in Branch did, have a professional relationship with the prosecutor as well as a personal one. Unquestionably, it would have been wiser for the trial judge to excuse Peters -- thus, at worst, replacing one impartial juror with another (see Branch, 46 NY2d at 651; People v Scott, 16 NY3d 589, 595 [2011]; People v Blyden, 55 NY2d 73, 78 [1982]). But whether the court committed reversible error is debatable. While defense counsel's decision not to use a peremptory challenge on Peters was questionable, we cannot say that it rendered his representation of defendant as a

whole ineffective.

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

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Order affirmed. Opinion by Judge Smith. Chief Judge Lippman and Judges Graffeo, Read, Pigott, Rivera and Abdus-Salaam concur.

Decided October 10, 2013