

**People v Cifonelli**

2008 NY Slip Op 30261(U)

January 9, 2008

Suffolk County Court

Docket Number: 0001191/2005

Judge: James C. Hudson

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**County Court of the County of Suffolk**  
**Part 7 - State of New York**

PRESENT:

Hon. JAMES HUDSON

\_\_\_\_\_  
PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

DANIEL C. CIFONELLI,

Defendant.  

\_\_\_\_\_

ORIG. RETURN DATE: 10/29/07

FINAL SUBMIT DATE: 12/10/07

PLTF'S/PET'S ATTY:

HON. THOMAS J. SPOTA  
Suffolk County District Attorney  
By: GUY ARCIDIACONO, ESQ.  
200 Center Drive  
Riverhead, New York 11901

DEFT'S/RESP'S ATTY:

UZMAH SAGHIR, ESQ.  
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Brooklyn, New York 11201

Upon the following papers numbered 1 to 10 read on this motion to vacate judgment of conviction Notice of Motion and supporting papers 1-4 ; Affirmation/affidavit in opposition and supporting papers 5-8, 9-10 ; Affirmation/affidavit in reply and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support of and opposed to the motion) it is,

**ORDERED** that Mr. Daniel C. Cifonelli's motion to vacate his judgment of conviction and sentence of imprisonment is denied in its entirety without a hearing.

Mr. Cifonelli pled guilty to four counts of Grand Larceny in the Second Degree (PL §155.40[1]), one count of Grand Larceny in the Third Degree (PL §155.35[1]), one count of Money Laundering in the Third Degree (PL §470.10), and one count of Money Laundering in the Fourth Degree (PL §470.05). On February 7, 2007, Mr. Cifonelli was sentenced to an indeterminate term of two to four years for each count of Grand Larceny in the Second Degree, and a term of one to three years for each remaining count. As stipulated in the plea agreement the court ordered these sentences to run concurrently with Mr. Cifonelli's 30-month federal sentence.

Mr. Cifonelli has now filed a motion pursuant to Criminal Procedure Law §440.10[h]. He seeks to vacate his conviction and sentence based on ineffective assistance of counsel. Specifically, he claims that his constitutional right to effective assistance of counsel was violated based on several errors and omissions allegedly committed by his attorney. Namely, Mr. Cifonelli asserts that his attorney neglected to move for the dismissal of several counts in the indictment under theories including his innocence, duplicity of charges, and the statute of limitations.

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In order to prevail on a claim of ineffective assistance of counsel, a defendant must overcome the presumption of effectiveness and show that counsel failed to provide meaningful representation (*People v. Jackson*, 70 N.Y.2d 768, 520 N.Y.S.2d 746 [1987]). “A defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel (*People v. Boodhoo*, 191 A.D.2d 448, 593 N.Y.S.2d 882 [2 Dept., 1993], *People v. Mayes*, 133 A.D.2d 905, 520 N.Y.S.2d 276 [3 Dept., 1987]).” Where a defendant, on the advice of counsel, has entered a plea of guilty and reaped the benefits of a favorable plea bargain which limits his exposure to imprisonment, he has received adequate representation (see *People v. Mobley*, 221 A.D.2d 376, 633 N.Y.S.2d 203 [2 Dept., 1995], *People v. Smith*, 304 A.D.2d 677, 757 N.Y.S.2d 491 [2 Dept., 2003]). To succeed on a claim of ineffective assistance of counsel upon taking a plea, the defendant must show that he would have insisted on going to trial if not for defense counsel’s alleged error (*People v. Rodriguez*, 188 A.D.2d 623, 591 N.Y.S.2d 846 [2 Dept., 1992], *People v. Ahmetovic*, 157 A.D.2d 489, 549 N.Y.S.2d 677 [1 Dept., 1990]). A defendant must also allege his “innocence” (*People v. Clark*, 254 A.D.2d 299, 680 N.Y.S.2d 258 [2 Dept., 1988], *People v. Hayes*, 186 A.D.2d 268, 588 N.Y.S.2d 328 [2 Dept., 1992] citing *United States v. Tiler*, 602 F.2d 30, 35 [2d Cir. 1979]) and “demonstrate” that had he gone to trial he would have been acquitted or received a lesser sentence (*People v. Guretzky*, 274 A.D.2d 524, 712 N.Y.S.2d 387 [2 Dept., 2000], *People v. Ammarito*, 2001 NY Slip Op 40207U [Bronx Co., 2001]).

Contrary to Mr. Cifonelli’s contentions, he has received effective assistance of counsel. Initially, Mr. Cifonelli argues that he is innocent of Grand Larceny in the Second Degree, although his attorney neglected to pursue this defense. He avers that at the time he began receiving both retirement benefits from the New York State Teacher’s Retirement System [NYSTRS] and payments for his consulting services from the William Floyd School District [WFSD] he was acting in good faith, relying on a contractual agreement between himself and WFSD. However, in order to enter into such an arrangement it was first necessary for Mr. Cifonelli to file certain documents with and gain prior approval from NYSTRS. Mr. Cifonelli did not produce such documents. Furthermore, Mr. Cifonelli’s attorney did in fact argue that he lacked the intent to commit the larceny, however that argument was rejected by the court (see Omnibus Decision at pg. 3).

Next Mr. Cifonelli argues that he was denied his right to effective assistance of counsel when his attorney failed to motion the court to dismiss certain counts of the indictment based of the statute of limitations. He states that since his actions took place on August 31, 1998, and at no time thereafter, count one, Grand Larceny in the Second Degree, should have been dismissed. Mr. Cifonelli is mistaken; based on the evidence presented by the People, his crime was

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ongoing. He unlawfully received and retained funds from NYSTRS from August, 1998 until January, 2002, making the presentation of these facts to the Grand Jury timely.

Mr. Cifonelli also claims that count four of the indictment is impermissibly duplicitous and requires dismissal in that the charge encompasses two offenses: a theft in the amount of \$2,350.00 on April 19, 2001, and a theft in the amount of \$58,325.65 on March 3, 2003. However, as Mr. Cifonelli points out in his motion, “grand larceny may be charged as a series of single larcenies governed by a common fraudulent scheme or plan...” (defendant’s memorandum, pg. 16). This Court agrees with that statement, and looks to the case of *People v. Rossi* for authority. In *Rossi*, 5 N.Y.2d 396 (1959), the Court of Appeals held, “the People may prosecute for a single crime a defendant who, pursuant to a single intent and one general fraudulent plan, steals in the aggregate as a felon and not a petty thief” (citing, *People v. Cox*, 286 N.Y.2d 137 [1941]). In *Rossi*, the defendant was charged with a single count of Grand Larceny after stealing on nine separate occasions. The Court determined that his intent was to commit a single, ongoing crime. In the case at bar, the People charged Mr. Cifonelli with Grand Larceny in the Second Degree for multiple counts of theft occurring between April, 2001, and March, 2003. Following the reasoning set forth in *Rossi*, the People properly charged Mr. Cifonelli with this count after considering his “continuous crime based on his scheme to embezzle” (People’s memorandum, pg. 26).

Each of Mr. Cifonelli’s claims are insufficient in that they are merely conclusory, made without sworn allegations of fact as required by CPL 440.30[4][b] (see also *People v. Wells*, 265 A.D.2d 589, 696 N.Y.S.2d 893 [2 Dept., 1999], *People v. Lake*, 213 A.D.2d 494, 623 N.Y.S.2d 904 [2 Dept., 1995], *People v. Hickey*, 277 A.D.2d 511, 512, 714 N.Y.S.2d 821 [3 Dept., 2000], *People v. Smith*, 251 A.D.2d 226, 674 N.Y.S.2d 682 [1 Dept., 1998]).


Finally, defense counsel provided Mr. Cifonelli with effective assistance of counsel and negotiated a sentence that was significantly less than the maximum of five to fifteen years for each count of Second Degree Larceny (*People v. Mobley*, 221 A.D.2d 376, 633 N.Y.S.2d 203 [2 Dept., 1995], *People v. Smith*, 304 A.D.2d 677, 757 N.Y.S.2d 491 [2 Dept., 2003]). This Court also notes that the defendant never claimed he would have insisted on going to trial if not for defense counsel’s alleged error (*People v. Rodriguez*, 188 A.D.2d 623, 591 N.Y.S.2d 846 [2 Dept., 1992]).

Based on all the reasons stated above, Mr. Cifonelli’s motion to vacate his conviction and sentence is denied in its entirety without a hearing pursuant to CPL 440.30[4][a],[b],[d].

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This constitutes the decision and order of the Court.

**Dated: Riverhead, New York  
January 9, 2008**



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**JAMES HUDSON  
J.C.C.**