

**People v Foote**

2011 NY Slip Op 34317(U)

March 29, 2011

County Court, Broome County

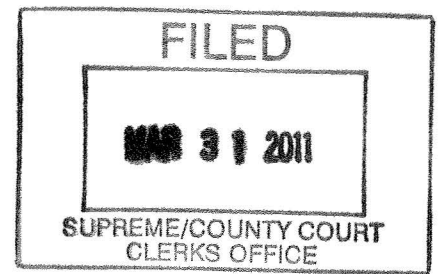
Docket Number: 2009-638

Judge: Jr., Donald F. Cerio

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STATE OF NEW YORK  
 COUNTY OF BROOME SUPREME COURT



Present: Hon. Donald F. Cerio, Jr.  
 Acting Supreme Court Justice

THE PEOPLE OF THE STATE OF NEW YORK

**DECISION AND ORDER**

v.

Index No. 2009-638

RANDY P. FOOTE,

Defendant.

The above-entitled matter comes before the Court upon Defendant's Notice of Motion dated February 9, 2011, pursuant to Criminal Procedure Law (CPL) §330.30(1) seeking to set aside this Court's verdict of guilty entered on January 19, 2011, with respect to a single count of Arson in the Second Degree, in violation of Penal Law §150.15. Defendant seeks such relief upon the ground that trial counsel's errors were such that reversal or modification of the verdict is required as a matter of law. The People submitted a response thereto under cover dated February 22, 2011.

On March 14, 2011, in Broome County Supreme Court, the parties appeared and were heard. Attorney Ronald Benjamin appeared with and was heard on behalf of the defendant, Randy P. Foote, in support of the instant motion<sup>1</sup>. Attorney Peter DeLucia, Senior Assistant District Attorney of Broome County, appeared and was heard on behalf of the People in opposition to the relief requested. At that time the Court reserved decision.

The following reflects the Decision and Order of this Court:

Brief History

The defendant had been indicted by the Broome County Grand Jury on or about November 20, 2009, charged with the single count of ARSON IN THE SECOND DEGREE, in violation of Penal Law §150.15, a class B felony. This charge asserted that the defendant did, on October 1, 2009, "intentionally damage a building located at 1405 Monroe Street, in [the Village of Endicott, Broome County, New York], by starting a fire and another person who was not a participant in the crime was present in such building at the time and the defendant knew that fact or the circumstances were such as to render the presence of such a person therein a reasonable possibility." Hon. Martin E. Smith, Broome County Court, initially assigned Attorney Terrence Gallagher to represent the defendant with respect to this indictment.

<sup>1</sup>Attorney Benjamin had been substituted as counsel on January 25, 2011.

By letter of December 2, 2009, Attorney Gallagher sought permission from the Court to “hire a forensic psychologist to perform an evaluation as to Mr. Foote’s temporary insanity defense.” On January 12, 2010, Judge Smith granted defendant’s request contemporaneous with the filing by Attorney Gallagher of the defendant’s Notice of Intent pursuant to CPL §250.10.

In furtherance of defendant’s posture with respect to this affirmative defense he submitted the Psychological Evaluation Report of Thomas A. Lazzaro, Ph.D., on May 11, 2010. Thereafter, the trial in this matter was scheduled to commence on September 27, 2010. Prior to the commencement of trial the People sought an adjournment of the trial date by letter dated September 13, 2010, and Attorney Gallagher, by letter dated September 21, 2010, also sought to be relieved from representing the defendant due to a conflict which arose with he and a prospective prosecution witness who had only recently been disclosed by the prosecution. This Court directed an appearance on September 27, 2010, to address these various issues as now raised by the parties.<sup>2</sup>

On September 27, 2010, Attorney Gallagher, due to this conflict, was relieved from further representation of the defendant and Attorney Michael Sullivan was appointed in his stead. Attorney Sullivan, by letter dated December 23, 2010, sought an order of this Court granting fees for the services to be rendered by Thomas A. Lazzaro at trial with respect to the affirmative defense as previously raised by Attorney Gallagher stating that, “A result of [Lazzaro’s] evaluation is that my client is putting forth the defense of not guilty by reason of mental disease or defect.” Such expert fee application was granted by Order dated January 4, 2011.<sup>3</sup>

The defendant was subsequently examined by the People’s expert and a report was prepared by Gary J. Horwitz, M.D., dated December 6, 2010.

The trial commenced on January 3, 2011, before this Court as a non-jury trial. The issue of the defendant’s capacity to have committed the instant offense was addressed by defense counsel during the opening statement and testimony was later adduced, during the defendant’s case-in-chief, through both the defendant and Dr. Lazzaro, in furtherance of the defendant’s affirmative defense. The People called Dr. Horwitz to rebut the testimony introduced by the defendant. Thereafter, during the summations, defense counsel again addressed the “cumulative impact” of the defendant’s mental health issues, anxiety and alcohol consumption which he believed served to demonstrate and support his affirmative defense. The People argued that the defendant did not suffer from a mental disease or defect, that the affirmative defense had not been established and that the defendant’s guilt had been proven beyond a reasonable doubt.

This Court, upon careful consideration of the evidence, found the defendant guilty of the single count as contained within the indictment, Arson in the Second Degree.

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<sup>2</sup>Court’s memorandum of September 22, 2010

<sup>3</sup>Judge Smith had previously granted expert fees by letter of May 18, 2010.

By motion pursuant to Article 330 of the CPL defendant moves to set aside this Court's finding of guilt upon the ground that defendant was not provided with effective assistance of trial counsel. Defendant asserts that trial counsel was negligent in failing to properly present the defense of intoxication with respect to the issue of intent, that counsel failed to ask the Court to consider a lesser included offense and that counsel failed to introduce testimony as to the quantity of alcohol and drugs consumed by the defendant on and leading up to the day of the fire.

The People assail the instant motion upon the ground that, (1) defendant's motion is premised upon matters which are de hors the record and, (2) that trial counsel provided meaningful representation to the defendant.

Defendant's motion to vacate the judgment of conviction upon the basis of the purported ineffectiveness of trial counsel is specifically raised pursuant to CPL §330.30(1). This provision reads as follows:

At any time after rendition of a verdict of guilty and before sentencing, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: 1. Any ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

#### Legal Analysis

In determining whether there exists a basis upon which to find that a conviction was the product of the ineffective assistance of counsel the courts have long taken the position that, "the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole." (People v. Hull, 71 AD3d 1336, 1339, 3<sup>rd</sup> Dpt. 2010; citing People v. Benevento, 91 NY2d 708, 714, 1998). Thus, in reviewing a claim of ineffectiveness the courts must look to the circumstances present as, "[w]hat constitutes effective assistance of counsel cannot be fixed with precision. It varies according to the circumstances of each case (People v. Baldi, 54 NY2d 137; People v. Droz, 39 NY2d 457). As these cases hold, the standard is not inflexible." (People v. Natal, 102 AD2d 496, 501-502, 1<sup>st</sup> Dpt. 1984).

In attempting to determine whether a defendant received the effective assistance of counsel the courts of this state have enunciated the following standard: "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." However, "counsel's efforts should not be second-guessed with the clarity of hindsight; and...our Constitution 'guarantees the accused a fair trial, not necessarily a perfect one.'" (People v. Battease, 74 AD3d 1571, 1575, 3<sup>rd</sup> Dpt. 2010; internal citations omitted). Defendant's present assertions seek to demonstrate a failure on the part of trial counsel to have provided him meaningful representation. Defendant asserts that trial counsel failed to elicit sufficient facts with respect to the nature, quantity and temporal proximity of ingestion of

alcohol, prescribed medication and other substances. Defendant further asserts that trial counsel's failure to proffer both notice and proof of mental disease or defect as it pertained to "other defenses" is another indication of counsel's ineffectiveness. (See CPL §250.10(1)(c). This purported failure is, according to defendant, compounded by trial counsel's failure to request the Court to consider lesser included offenses.

Upon the record here, and upon the standard set forth herein, this Court does not find there to have been a lack of meaningful representation by trial counsel and the motion must be denied *in toto*. In particular, it is important to remark upon the fact that trial counsel pursued a course of action or strategy which had had its infancy at the hands of counsel who was subsequently discharged upon his own request due to a potential conflict. Counsel first assigned to the defendant actively chose to pursue the very same strategy which was ultimately employed by substituted trial counsel with respect to the affirmative defense set forth at CPL §250.10(1)(a). The singular reason that this is commented upon by this Court is that it is clear that the strategy of trial counsel was consistent with that of the defendant's original counsel and consistent with the findings of defendant's expert, Dr. Lazzaro, as evidenced by his report submitted on May 11, 2010. While such matters predating the trial of this matter are not, necessarily, determinative of the substantive representation of the defendant at trial, such does evince a continuity of defense posture in this matter by two separate and distinct attorneys upon their individual review of the case, not unlike that analysis conducted by defendant's present counsel in support of the instant motion.

As to trial counsel's representation at trial, such was consistent with the noticed affirmative defense and consistent with the opinion submitted by defendant's expert witness, Dr. Lazzaro. Trial counsel's strategy was evidenced throughout his opening statement, his cross-examination of the People's witnesses who testified in their case-in-chief, his direct examination of both the defendant and Dr. Lazzaro, his cross-examination of the People's witness, Dr. Horwitz, during the course of rebuttal, as well as his summation. Defendant's trial counsel made appropriate objections during the trial and, as an example, successfully precluded the introduction of additional rebuttal testimony by witnesses sought to be called by the prosecution. (See People v. Valderama, 25 AD3d 819, 3<sup>rd</sup> Dpt. 2006). The strategy chosen by the defendant elicited or sought to elicit information which would give credence and support to the opinion of Dr. Lazzaro and the testimony of the defendant that he, the defendant, suffered from a mental disease or defect, based upon his consumption of alcohol, his consumption of various substances, the circumstances emergent the day of the fire and his mental health diagnosis. Dr. Lazzaro, while acknowledging that any of the various components as set forth alone may not give rise to the sufficiency of the affirmative defense, collectively, on the date in question, such did, in his opinion, evince a basis upon which to offer his opinion as to the defendant's affirmative defense. Dr. Lazzaro's testimony at trial was consistent with his report wherein he stated, "Although none of these elements alone would satisfy the criteria from Mental Disease or Defect, i.e., his voluntary intoxication, his mental disorders, or his prescribed medications, in this examiner's opinion, with a reasonable degree of psychological and professional certainty, in combination they do so and resulted in his lacking the capacity to know or appreciate the nature and

consequences of his conduct or that it was wrong.” (Lazzaro report at p. 2).

Here, it cannot be gainsaid that trial counsel did not provide meaningful representation to the defendant. “Review of the record reveals that defendant’s ...attorney pursued a feasible, though unsuccessful, strategy at trial.” (People v. Ryan, 46 AD3d 1125, 1126, 3<sup>rd</sup> Dpt. 2007). As such, it cannot be said that “defense counsel’s trial strategy unduly prejudiced the defendant.” (People v. Baldi, 54 NY2d 137, 152, 1981).

Finally, trial counsel’s strategy not to seek a charge down to a lesser included offense is consistent with the strategy employed throughout the proceedings. Further, the testimony adduced did not support a finding of intoxication by the defendant contemporaneous with the fire such that he could not have formed the requisite intent. Therefore, on this record, this Court does not find trial counsel’s decision not to seek consideration of a lesser included offense error.

Therefore, upon the totality of the circumstances present here, this Court finds that the defendant was provided meaningful representation during the trial of this matter.<sup>4</sup>

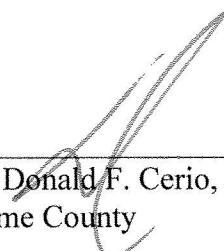
#### Conclusion

Now, upon the proceedings heretofore had herein, the relevant law as set forth above, and the facts and circumstances of this matter, it is

ORDERED, that defendant’s motion pursuant to Criminal Procedure Law §330.30(1) is hereby DENIED in all respects.

Enter.

DATED: March 29, 2011  
Wampsville, New York

  
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Hon. Donald F. Cerio, Jr., AJSC  
Broome County

TO: Peter DeLucia, Esq., Assistant District Attorney  
Ronald Benjamin, Esq., Attorney for Defendant  
Broome County Supreme Court Clerk

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<sup>4</sup>This Court also finds that the defendant’s motion must fail procedurally as the basis upon which counsel now seeks relief is without the record and thus beyond the scope of Article 330. (See People v. Wells, 265 AD2s 588, 2<sup>nd</sup> Dpt. 1999).