SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 71

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THE PEOPLE OF THE STATE OF NEW YORK

-against- Ind. No. 1360/09

EKKEHART SCHWARZ,

Defendant.

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BERKMAN, J:

Defendant, along with Vassileios Giamagas, was convicted after trial by jury of Robbery in the First Degree, two counts of Robbery in the Second Degree and Grand Larceny in the Second Degree.[1] Each was found not guilty of Kidnapping in the Second Degree and of three counts of Coercion in the First Degree. A third defendant, Gogoladze, was convicted of Robbery in the Second Degree and Grand Larceny in the Second Degree. Schwarz was sentenced to concurrent determinate terms of eight years with five years of post release supervision and a concurrent indeterminate term of five to fifteen years.

Defendant Schwarz now moves to set aside his conviction on the grounds that he did not receive effective assistance of counsel. It is difficult to summarize

[1]Giamagas was additionally convicted of three counts of criminal possession of a weapon in the fourth degree.

his complaints accurately, as they shift somewhat from the motion, to the supporting memorandum of law, to the reply memorandum. In broad strokes, defendant contends that the lawyer failed to correct prosecutorial lies/misconduct with respect to defendant's financial status and the complainant's prior inconsistencies/lies. Additionally, he points out that at one point the lawyer said that a computer on which damaging evidence was found belonged to defendant, although it actually belonged to Giamagas. Defendant claims that his lawyer from the nonpayment case, as well as other materials associated with that proceeding, could have generated favorable evidence for him, but that the trial lawyer failed to investigate this matter or call the civil lawyer to testify. He asserts that the trial lawyer's failure to research the law and argue at an early stage that nonpayment of rent cannot support a larceny count resulted in the admission of evidence which would otherwise not have been admitted. Defendant argues that the contract obtained as a result of the January 2008 robbery was not property, but that his trial lawyer failed to object on that ground and he complains that the lawyer failed to advocate for defendant at sentencing.

The People oppose the motion, arguing that defendant's trial counsel provided a vigorous defense, that the defendant has not factually demonstrated that there were no strategic reasons for counsel's choices, as the hearsay

statements of a conversation between defendant's current lawyer and trial counsel do not establish that point. The People further contend that the trial record demonstrates that defendant received a fair trial and effective representation.

The motion is denied. Defendant has failed to demonstrate that his trial lawyer did not provide meaningful representation, *People v. Caban,* 5 N.Y.3d 143, 152, has failed to demonstrate that there were no valid strategic explanations for a number of the actions by counsel complained of in this motion, and has also failed to establish that he was prejudiced by counsel's failures. *People v. Stultz,* 2 N.Y.3d 277, 284 (showing of prejudice significant but not dispositive). Many of the arguments made here by the defendant are an attempt to revisit factual issues already raised and thoroughly litigated at trial. Almost all of them are conclusory and do not put the lawyer's actions in context.

The case arises out of a landlord-tenant relationship. Schwarz, an architect, and Giamagas, a chef, planned to open a restaurant and entered into a lease for a property on West Third Street, owned by Marokh Eshagian, in August 2007. The property manager, Niroo Yavari, had secured that position because of family connections, and apparently had neither training nor experience for the task. The lease stipulated that certain alterations were to by undertaken by the landlord, to be completed by a date certain, and that rent was to be abated during the period in

which this work was incomplete. Rent was never paid.[2]

In January 2008, according to the People's evidence and the jury's verdict, Giamagas forced Yavari to sign a lease amendment providing, *inter alia,* an additional $100,000 rent abatement and requiring the landlord to perform additional renovations.[3] Schwarz was alleged to be an accomplice in this event, and was so found by the jury. Further, according to the People's evidence and the jury's verdict, on January 20, 2009, under threat of force, Yavari gave Schwarz seven blank signed checks drawn on the landlord's account.[4] Again, Schwarz was alleged to be an accomplice in this transaction, and was so found by the jury.

After this incident, Yavari finally decided to report the crimes. An investigation followed, which included a controlled telephone call and a recorded meeting between Yavari and Giamagas at the Moxa Café on January 24, 2009, and

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[2]The count alleging larceny by reason of nonpayment of rent was dismissed by the court during trial when its research revealed that nonpayment of rent is not larceny. *See People v. Nappo,* 94 N.Y.2d 564, 566. The defendant complains that had his lawyer properly researched this issue, certain evidence of Giamagas' misconduct would not have been admitted at trial. The defense does not explain why this should be, given that the course of conduct of the parties was relevant as background, and the court cannot imagine what evidence would have been excluded. To the contrary, the defense strategy was to explore the landlord-tenant relationship (and Yavari's shortcomings as a manager) as much as possible.

[3]As to whether or not this constitutes "property" as to be the subject of a robbery, and whether trial counsel failed to preserve that objection, the record is sufficient and the appeal is apparently pending.

[4]Additional counts, relating to alleged coercion to force Yavari to fire the building superintendent and to the alleged kidnapping of Yavari on January 20, 2009, resulted in acquittal.

defendants were arrested on or about March 19, 2009. The trial was held in January 2010.

Discussion

A motion to set aside a conviction on the grounds of ineffective assistance of counsel simply cannot be premised on arguable mistakes by trial counsel without regard to context, even where the lawyer in question cannot or will not come up with a 'trial strategy' explanation, or admits that he apparently had no such "strategy" or made mistakes, in an informal conversation with successor counsel two years after the fact.[5] There is no reason here for a hearing, because, as defendant concedes, the only factual issue *de hors* the record is what explanations trial counsel might or might not provide were there a hearing. We need not reach that issue, as defendant in this petition has made many an argument as to defects in the People's proof which the jury has already resolved against the defendant, but failed to show *prima facie* that counsel's representation was constitutionally defective. In fact, in the context of the entire case counsel was far more than marginally competent.

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[5]Defendant has adequately explained his failure to provide an affidavit from trial counsel, and that omission is not itself fatal to this petition. On the other hand, it is difficult to say that the conversation between current counsel and trial counsel is sufficient to establish a lack of strategic reasons, as we do not know whether trial counsel was given a chance to review his files, or took that opportunity, before the conversation.

> The constitutional right to the effective assistance of counsel does not mean that the representation was error free in every respect, but simply that defendant was afforded a fair trial (*see* ***People v. Claudio*, 83 N.Y.2d 76, 80, 607 N.Y.S.2d 912, 629 N.E.2d 384 [1993]).** The effective assistance of counsel is provided when "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" **(*People v. Baldi*, 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]).** Disagreements with counsel over trial strategy, tactics or the scope of cross-examination do not suffice to establish the absence of the requisite meaningful representation (*see* ***People v. Curry*, 294 A.D.2d 608, 611–612, 741 N.Y.S.2d 324 [2002],** *lv. denied* **98 N.Y.2d 674, 746 N.Y.S.2d 463, 774 N.E.2d 228 [2002]).**

People v. Damphier, 13 A.D.3d 663, 664 (3rd Dep't 2004).

An examination of the record shows that the three lawyers between them cross-examined the complainant exhaustively, and that defendant's trial counsel played an active and effective role in this effort, both by asking pertinent question and making valid objections.

Effective assistance of counsel does not require duplication of effort (and indeed counsel properly stated on the record that he was attempting not to "overlap" his cocounsels' questions). It also does not require that every conceivable question be asked. Moreover, if there was an omission to ask about the matters raised in defendant's instant motion, all three lawyers joined in the decision to omit that area of cross-examination, although all of them had a similar interest in showing that the complainant was untruthful. Notwithstanding the

omission (if indeed any potentially fruitful area of cross-examination was omitted), there was an acquittal on the serious charges which depended almost exclusively on complainant's word.[6]

A number of explanations for the alleged omissions and errors by counsel are easily inferred from the record. Additionally, the record demonstrates a lack of prejudice. For example, while counsel chose not to make a statement at sentence, the defendant, an educated and articulate man, advocated for himself quite effectively, not to speak of the impact of the letters from defendant's supporters. A lawyer who has cultivated a tendentious relationship with the trial judge, as did trial counsel here, may reasonably conclude that his educated and articulate client would be better served at sentencing by his lawyer's silence.

As to counsel's misstatement that both computers belonged to defendant, for another example, competent assistance of counsel does not require that the

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[6]Yavari claimed repeatedly that the rent-abatement clause slipped his mind until the prosecutor showed it to him in March or April 2009. He said (in response to cross-examination by defendant's attorney) that he delayed substantially in completing the landlord's work, that the contractors wanted much more than he had anticipated for that work and indeed he did little to further his projects in this regard until defendant recommended various contractors (Daily copy transcript, pp. 462-478). Yavari admitted that he gave Schwarz a number of checks to pay for the landlord's work (*id.*, at 348-349, 351) and claimed that the landlord's work was complete by February or March 2008 (*id.*, at 338). Yavari had previously acknowledged that he knew the work was important to his tenants in order to maximize the capacity of the planned restaurant (*id.*, at 337). He also admitted repeatedly that he failed to pay taxes on the property and lied to his employer about the fact that rent was not being paid.

lawyer make no mistakes. In any event, the mistake was *de minimus*: the jurors were aware from the evidence of where the computers were found, they were aware that Giamagas had lived in Schwarz's apartment until recently, they knew that Giamagas was funded to a great degree by Schwarz, and they heard evidence that defendant had a user account on the computer found in Giamagas' apartment. The evidence made it impossible to distance Schwarz from Giamagas, who is on tape referring to Schwarz as "my sweetheart . . . my big love."[7] While this reference by Giamagas might well have been sarcastic, their relationship was incontrovertibly close, financially and otherwise.

As to counsel's failure to address the prosecutor's "almost broke" argument, "almost broke" is a relative term. At the rate of Schwarz's expenditures, a quarter of a million dollars was not a safe financial cushion for him, particularly if this quarter million dollars was the last of Schwarz' retirement account being used to fund the restaurant venture (the check deposited was according to defendant's

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[7]While Giamagas does not directly admit guilt during this taped conversation at the Moxa Café, the conversation strongly supports Yavari's claim that he was victimized. Some brief excerpts from Giamagas' side of the conversation gives a flavor of the interchange: "Okay, rules of engagement in public. Please not loud . . . . never words that we shouldn't use in the streets . . . . You see what we put in your car? [gps surveillance, according to other evidence] . . . . We can do different, other things. . . . [Yavari: If I took a gun and shoved it in your face, would that leave room for interpretation] You see how nice I am? I took it away. . . . [Yavari: I'm not going to your office, Vasili.] If you don't do it, they will pick you up and bring you. Is that what you like? . . . Let me put it this way. I have killed my brother. You get it?"

motion ¶122 payable to Schwarz's Defined Benefit Plan from the Guardian Insurance Company). Without more from the defendant on this point, ineffective assistance cannot be inferred from trial counsel's decision not to litigate whether or not Schwarz's financial condition gave him a motive for theft.

The heated arguments (particularly in defendant's reply memorandum) that the prosecutor repeatedly made "false" statements (like the argument that Schwarz was almost broke) are simply unsupported by the record. As to the asserted failure by the prosecutor to correct Yavari's 'false statements' about the timeliness of the landlord's work, the date of completion of that work, his forgetfulness about the rent abatement clause, and his prior inconsistent statements with respect to these matters, those issues were exhaustively litigated at trial. The prosecutor's duty to correct testimony he knows to be false does not apply to the situation in this case.

The claim with respect to Mr. Walzer, the defendant's lawyer for the landlord-tenant action, is that he would have testified that the tenants never owed rent because, contrary to Yavari's trial testimony, the landlord's work was never completed. It appears that Walzer did not have first-hand knowledge of whether or not the work was completed. Rather, Walzer's assertion that the work was not completed was based, according to his affidavit, on a "publicly-available DOB document, Exhibit 5, the chimney job was not complete until April 1, 2009, when

it was signed off."

How this could have helped defendant is unclear, as one of these 'sign off' documents were filed and apparently prepared after defendant was indicted; one of them names defendant himself as the applicant; the other applicant was JKW Engineering, recommended to Yavari by Schwarz. That company apparently did some chimney work, whether or not it was the same chimney work required of the landlord by the lease, and invoiced for the work some time before the 'sign off' document was submitted. Indeed, the head of this company, Mr. Wai, testified at trial that he was initially paid by check dated June 3, 2008, by Schwarz, but the Department of Buildings required an amended plan and Wai was paid for additional work by Schwarz on January 20, 2009. Of course the settlement of the civil case (under which the landlord abandoned any claim for back rent) was not evidence that back rent was not actually owing. Finally, the issue of whether rent was actually owing or not is substantively irrelevant, as the charges relating to theft of unpaid rent were dismissed by the court.

Additionally, Walzer's testimony as to the importance of the rent abatement clause would have been redundant and self-evident. Yavari had already testified that he knew it was important to defendants that the landlord's work be completed so that they could open their restaurant. It appears that Walzer could not have

opined, as a witness, that this made Yavari's claim that he forgot the rent abatement clause incredible and thus his testimony would have added little or nothing to the evidence already before the jury. Similarly, the argument that there was an inconsistency between Yavari's testimony and the landlord's position in the civil action is strained; in any event, any such inconsistency would have been cumulative.

It is indeed sad and strange and apparently inexplicable that the respectable architect Schwarz should have associated himself with Giamagas, whose mode of conflict-resolution was aggressive and illegal, but he did, and this conviction was the consequence. Because of effective representation by counsel, defendant was convicted of those counts for which there was strong if not overwhelming evidence, and acquitted of the others. It is plain that his lawyer provided competent, but of course not perfect representation. Defendant's motion to set aside the verdict is in all respects denied.

This constitutes the order and opinion of the court.

Dated: New York, New York
June 6, 2012

CAROL BERKMAN, J