

People v June
2012 NY Slip Op 33770(U)
March 5, 2012
Supreme Court, Albany County
Docket Number: DA 569-11
Judge: Dan Lamont
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DIAMON JUNE

Defendant.

DECISION/ORDER

Indictment # 15-3789

Index # DA 569-11

APPEARANCES:

For the People:

HONORABLE P. DAVID SOARES
Albany County District Attorney
Albany County Judicial Center
Albany, New York 12207

DAVID A. GONZALEZ, ESQ.
Assistant District Attorney, of Counsel

For the Defendant:

SHERRI BROOKS, ESQ.
Albany County Alternate Public Defender
112 State Street, Suite 1220
Albany, New York 12207

MATTHEW ALPERN, ESQ.
of Counsel

DAN LAMONT, J.

The Indictment accuses the defendant of committing the crimes of Robbery in the Second Degree in violation of Penal Law § 160.10(1), a class C violent felony; and Robbery in the Second Degree in violation of Penal Law § 160.10(2)(b), also a class C violent felony. The charges are that on June 17, 2011, at approximately 12:11 a.m., in front of 29 Wilkins Avenue, in the City of Albany, County of Albany, the defendant Diamon June did forcibly steal money, food and a cell phone from a pizza delivery man while aided by another person actually present and while defendant or another participant in the crime displayed what appeared to be a rifle or shotgun.

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On the eve of a trial date certain of March 5, 2012, the defendant's Alternate Public Defender Matthew Alpern, Esq. moved this Court for an Order removing the Alternate Public Defender's Office from representing the defendant and/or allowing the Alternate Public Defender's Office to withdraw from representing the defendant.

The uncontroverted facts pertaining to defendant's legal counsel's motion are as follows:

June 17, 2011: Defendant Diamon June and co-defendant Tyler Amos arrested and taken into custody and charged with armed robberies allegedly committed on May 31, 2011; June 6, 2011; and June 17, 2011

The Albany City Court assigned: (1) the Albany County Public Defender's Office to represent Tyler Amos; and (2) the Albany County Alternate Public Defender's Office to represent Diamon June.

June 23, 2011: Preliminary Hearing was held before Albany City Court Judge Carter. During the Preliminary Hearing, co-defendant Tyler Amos was represented by then Assistant Public Defender Sherri Brooks, Esq..

Defendant Diamon June was represented at the Preliminary Hearing by Assistant Alternate Public Defendant Matthew Alpern, Esq.

The only evidence presented by the People at the Preliminary Hearing pertained to the alleged June 17, 2011 at 12:11 a.m. robbery of a pizza delivery man in front of 29 Wilkins Avenue, City and County of Albany. Both the co-defendant Tyler Amos and defendant Diamon June were held for action of the Grand Jury on that charge.

July 20, 2011: Both defendants, Tyler Amos and Diamon June, were indicted by an Albany County Grand Jury for acting in concert to commit the alleged armed robbery on June 17, 2011 at about 12:11 a.m. in front of 29 Wilkins Avenue, in the City and County of Albany. In addition, co-defendant Tyler Amos was indicted and charged with an armed robbery allegedly committed on May 31, 2011 at approximately 1:25 a.m. in front of 44 First Street, City and County of Albany, and an armed robbery allegedly committed on June 6, 2011 at approximately 11:00 p.m. in front of 29 Second Street in the City and County of Albany.

- July 25, 2011: Co-defendant Tyler Amos represented by Assistant Public Defender Melissa Carpinello, Esq. was arraigned upon the indictment in Supreme Court, Albany County (Lamont, J.).
- July 27, 2012: Defendant Diamon June represented by Assistant Alternate Public Defender Matthew Alpern, Esq. was arraigned upon Counts 3 and 4 of the indictment in Supreme Court, Albany County (Lamont, J.).
- Sept. 14, 2011: Co-defendant Tyler Amos represented by Assistant Public Defender Melissa Carpinello, Esq., entered a plea of guilty to Attempted Robbery in the Second Degree (displayed what appeared to be a rifle or shotgun) as to the June 17, 2011 at approximately 12:11 a.m. armed robbery (allegedly committed by both of the defendants) and agreed to cooperate as a witness for the People by providing truthful testimony at the trial of People v. Diamon June.
- Sept. 14, 2011 -
Jan. 6. 2012: Meanwhile, and thereafter, the case of People v. Diamon June proceeded through Omnibus Motions; People's Affirmation in Opposition; and the Court's Decision/Order dated November 10, 2011 on the Omnibus Motion. The Pre-trial Suppression Hearings were conducted on December 9, 2011, and the Court issued a written Decision/Order dated January 6, 2012 on the issues raised at the Suppression Hearings. Assistant Alternate Public Defender Matthew Alpern, Esq. continued to represent the defendant Diamon June throughout.
- Mid-Feb 2011: Attorney Sherri Brooks, Esq. resigned from the Albany County Public Defender's Office and was hired as an Assistant Alternate Public Defender in the Albany County Alternate Public Defender's Office. Shortly thereafter, and prior to this trial, Sherri Brooks, Esq. was appointed the Alternate Public Defender for Albany County. Former Assistant Public Defender Sherri Brooks, Esq. represented co-defendant Tyler Amos for only about six (6) days—from the date of his arrest on June 17, 2011 until the Preliminary Hearing was concluded on June 23, 2011.

To this day, the Albany County Public Defender's Office (APD Melissa Carpinello, Esq.) continues to represent the co-defendant Tyler Amos who has not been sentenced yet and won't be sentenced until after he testifies as a witness for the People against defendant Diamon June. Alternate Public Defender Matthew Alpern, Esq.,

continues to represent the defendant Diamon June to this date and is scheduled to represent the defendant at the criminal jury trial to commence March 5, 2012.

DISCUSSION

Claiming possible attorney-witness conflict, Alternate Public Defender Matthew Alpern, Esq. moves this Court for an Order that his office be relieved from representing defendant Diamon June. Of course, “‘side switching’ clearly implicates the policies both of maintaining loyalty to the first client [Tyler Amos] and protecting that client’s confidences” (Kassis et al. v. Teachers’ Insurance, 93 NY2d 611, at 616 [1999]).

Here, former Assistant Public Defender Sherri Brooks did not “switch sides” in the conventional sense, but rather she left the Public Defender’s Office (months after the Tyler Amos case had been resolved by a guilty plea) and moved to the Alternate Public Defender’s Office. Sherri Brooks, Esq. had no part whatsoever in representing co-defendant Tyler Amos after June 23, 2011—the date of the preliminary hearing herein—which was conducted only six (6) days after the June 17, 2011 date of arrest of the defendants.

Typically, a conflict requiring reversal exists when defense counsel simultaneously represents a defendant and a primary prosecution witness (see, e.g. People v. Wandell, 75 NY2d, 951 [1990]). Here, Assistant Alternate Public Defender Matthew Alpern has never personally represented co-defendant Tyler Amos; and has no knowledge of any confidential communications involving defendant Tyler Amos; and has at no time simultaneously represented defendant Diamon June and co-defendant Tyler Amos.

In this case, the co-called “aggrieved prior client” would be co-defendant Tyler Amos—who is still represented by the Albany County Public Defender’s Office and has agreed to cooperate with the People and provide truthful testimony in the case of the People v. Diamon June. By pleading guilty and agreeing to testify as a witness for the People, co-defendant Tyler Amos implicitly waives any attorney-witness conflict pertaining to former Assistant Public Defender Sherri Brooks by appearing in the Courtroom during the Diamon June trial and testifying as a witness for the People; and furthermore, the defendant herein has no standing to raise or assert any attorney-witness conflict complaint belonging to the co-defendant witness against him.

In the context of this case; the procedural history in this case; and the recency of the “switch” by Attorney Sherri Brooks from the Public Defender’s Office to the Alternate Public Defender’s Office, this Court finds no conflict of interest whatsoever, and indeed this Court has every confidence that the defendant’s attorney—Assistant Alternate Public Defender Matthew Alpern—will vigorously cross-examine the co-defendant accomplice witness Tyler Amos. There is no mandatory disqualification rule, and this Court holds and determines that the defendant is not deprived of meaningful representation by Assistant Alternate Public Defender Matthew Alpern simply because a former Assistant Public Defender with minimal prior participation in representing the co-defendant Tyler Amos has now become the Alternate Public Defender for Albany County.

CONCLUSION

This Court holds and determines that the defendant’s motion for an Order removing the Alternate Public Defender’s Office from representing defendant Diamon June and/or allowing the Alternate Public Defender’s Office to withdraw from representing

defendant Diamon June should be and the same is hereby denied in all respects.

The foregoing constitutes the Opinion, Decision, and Order of this Court.

Dated: Albany, New York
March 5, 2012

(Signed March 15, 2012)

ph


DAN LAMONT, Acting J.S.C.

cc: David A. Gonzalez, Esq., Asst. District Attorney
Matthew Alpern, Esq., Asst. Alternate Public Defender

Thomas J. Ch...
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