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## **NEW YORK COURT OF APPEALS CASE COMPILATIONS: PEOPLE V. BERROA**

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# PEOPLE V. BERROA<sup>1</sup>

(decided November 21, 2002)

## I. SYNOPSIS

In a unanimous decision penned by Judge Wesley, the New York Court of Appeals reversed the Supreme Court of New York, Appellate Division, First Department, and ordered a new trial for Dario Berroa (hereinafter “Berroa” or “defendant”) after opining that defendant received ineffective assistance of counsel at his criminal trial for murder in the second degree.<sup>2</sup> The court held that a particular stipulation by defense counsel<sup>3</sup> amplified an existing conflict and did not constitute a legitimate trial strategy,<sup>4</sup> thus breaching defendant’s federal and state constitutional rights to the effective assistance of counsel.<sup>5</sup>

## II. BACKGROUND

Berroa was arrested and indicted for the June 22, 1994 murder of Weber Lewis (hereinafter “Lewis” or “decedent”) that occurred at the corner of Hunts Point and Garrison avenues in Bronx County, New York.<sup>6</sup> The murder took place in broad daylight and prosecution witness Lourdes Rodriguez testified at trial that she “saw defendant point a gun at the decedent’s head and fire the gun at point-blank range into the decedent’s face.”<sup>7</sup> Rodriguez claimed that she was a mere six feet away from defendant when the incident occurred and described defendant as having “black hair and unique yellow-green eyes.”<sup>8</sup>

The prosecution also called James Lopez who stated that he was familiar with the defendant, whom he had seen selling drugs in

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1. 99 N.Y.2d 134 (2002).

2. *Id.* at 143.

3. *Id.* at 137.

4. *Id.* at 142.

5. U.S. CONST. amend. VI; N.Y.CONST. art. I, §6.

6. *People v. Berroa*, 733 N.Y.S.2d 52 (App. Div. 2001).

7. *Id.* at 54.

8. *Id.*

the area, and similarly testified that he "saw defendant walk up and fire a shot into the decedent's face at point-blank range."<sup>9</sup> Lopez further testified that he believed the murder was the result of a turf war between defendant and Lewis because the latter had been selling drugs in the area.<sup>10</sup> The "turf war" motive suggested by Lopez was corroborated by decedent's brother, Wailly Lewis, who also testified that defendant had dark hair and unique "greenish" eyes.<sup>11</sup>

In light of the factual evidence concerning Berroa's appearance, defendant's counsel decided to pursue a misidentification defense. The prosecutor expressed concern that a misidentification defense may imply an alibi and noted that no alibi defense notice had been served.<sup>12</sup> In response, defendant's counsel confirmed that an alibi defense was not being offered because "none of the witnesses or defendant knew their whereabouts at the time of the shooting."<sup>13</sup> Further, defense counsel asserted that "[the witnesses'] testimony would be offered only to establish that defendant's hair was a distinctive yellow-orange color at the time of the shooting"<sup>14</sup> rather than "black" or "dark" hair as suggested by the prosecution's witnesses.<sup>15</sup>

At trial, defendant called Vivian Rivera who testified that Berroa's hair had been dyed an orange-yellow color when she had first met him in 1992.<sup>16</sup> Rivera further testified that defendant's hair was still that distinctive, artificial color when he visited her at her home in the Bronx in June of 1994, a few days before the shooting.<sup>17</sup> Along with Berroa on this trip to Rivera's home in the Bronx was his girlfriend, Iris Santiago, who similarly testified that Berroa's hair had been dyed an orange-yellow color at the time of their visit and prior thereto.<sup>18</sup> However, the remainder of Santiago's testimony

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9. *Berroa*, 733 N.Y.S.2d at 54.

10. *Id.*

11. *Id.*

12. N.Y. Crim. Proc. Law §250.20 requires the defense to serve notice of an alibi defense in order to permit the prosecution to conduct an appropriate factual investigation.

13. *Berroa*, 99 N.Y.2d at 136.

14. *Id.*

15. *See Berroa*, 733 N.Y.S.2d at 54; *see also* text at notes 8, and 11.

16. *Berroa*, 733 N.Y.S.2d at 54.

17. *Id.*

18. *Id.*

and the testimony of a third defense witness, Anna Torres, became problematic for the defense as their statements constructed an apparent alibi for Berroa.

On direct and cross-examination, Santiago testified that around June 20, 1994, she and Berroa traveled from Massachusetts to New York, spent about an hour or so at Rivera's home in the Bronx, and then headed for Philadelphia where they would be staying with defendant's sister, Anna Torres.<sup>19</sup> Santiago then testified that she and defendant did not leave Philadelphia until after June 24, 1994, which was the date that they celebrated Anna Torres' birthday.<sup>20</sup> At this juncture, trial judge Peter Benitez held a conference and called defense counsel's attention to the unexpected alibi testimony. Defense counsel reiterated that "none of the defense witnesses had previously been able to recall their whereabouts on June 22, 1994 – the day of the shooting."<sup>21</sup>

The prosecution requested that the court allow Santiago's testimony to stand with the intention of dealing with the unanticipated alibi testimony through further cross-examination.<sup>22</sup> However, the prosecution also requested that Anna Torres be precluded from discussing an alibi for defendant during her testimony.<sup>23</sup> The court noted that fulfilling such a request may become difficult since Torres' testimony about Berroa's hair color may be "inextricably interwoven" with defendant's presence in Philadelphia in late June, 1994.<sup>24</sup> The People withdrew their request for preclusion.<sup>25</sup>

The trial judge then inquired with Berroa's counsel about whether the defense witnesses had been encouraged to refrain from disclosing their exculpatory information prior to trial.<sup>26</sup> Defendant's counsel stated that "she nor any other attorney had encouraged their silence in this regard, and reiterated that the witnesses had previously been unable to pinpoint defendant's whereabouts on the day of the shooting."<sup>27</sup>

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19. *Berroa*, 733 N.Y.S.2d at 54.

20. *Id.* at 54-55.

21. *Berroa*, 99 N.Y.2d at 136.

22. *Id.*

23. *Id.* at 136-37.

24. *Id.* at 137.

25. *Id.*

26. *Id.*

27. *Berroa*, 99 N.Y.2d at 137.

In light of defense counsel's statement, the trial judge contemplated remedies in case the witnesses testified that they told defense counsel about the alibi. He expressed concern that defense counsel *may* be called as a witness to impeach one of the witnesses and suggested that, if such situation were to arise, perhaps defense counsel would stipulate that the witness did not tell her of an alibi.<sup>28</sup> The defense counsel agreed that this was a possible remedy, subject to her objections with regard to the wording of the stipulation.<sup>29</sup>

The trial resumed and Santiago testified on cross-examination that she had told defendant's attorney that she was with defendant in Philadelphia on the day of the shooting.<sup>30</sup> Anna Torres then testified that "defendant was at her home [in Philadelphia] from June 20, 1994 through June 25, 1994 and that his hair was a yellow color."<sup>31</sup> On cross-examination, Torres similarly testified that she had specifically told defense counsel before trial that Berroa was at her home in Philadelphia on June 22, 1994, the day Weber Lewis was shot.<sup>32</sup> Finally, the defense called defendant Dario Berroa to the stand and he testified that he "had yellow-orange hair at the time of the shooting and that he was in Philadelphia from June 20 to June 25 to celebrate his sister's birthday."<sup>33</sup>

The defense rested at the conclusion of Berroa's testimony and Judge Benitez held a discussion with the prosecution and defense counsel regarding a stipulation by defense counsel. The court and the parties agreed to the following stipulation that was read to the jury before the People's rebuttal case: "It is stipulated and agreed by [defense counsel] that prior to their appearing in New York to give testimony in this case, Miss Santiago and Miss Torres had spoken with her and that neither Miss Santiago or Miss Torres told [defense counsel] that the defendant Dario Berroa had been in Philadelphia specifically on June 22, 1994."<sup>34</sup>

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28. *Berroa*, 99 N.Y.2d at 137.

29. *Berroa*, 733 N.Y.S.2d at 55.

30. *Berroa*, 99 N.Y.2d at 137.

31. *Berroa*, 733 N.Y.S.2d at 56.

32. *Id.* at 55.

33. *Berroa*, 99 N.Y.2d at 137.

34. *Id.* The author wishes to point out that the stipulation in question does not address whether Berroa had been able to identify his whereabouts at the time of the shooting prior to trial. Thus, defense counsel's stipulation did not contradict defen-

At the end of the trial, defense counsel presented her summation and pointed out that “from ‘day one’ she told the jury that the pivot point of the case was misidentification.”<sup>35</sup> With regard to the alibi evidence, defense counsel stated that “the court would instruct the jury concerning alibi testimony and that ‘you can take it for what you want, you can disregard it, you can look at it. You heard my stipulation.’”<sup>36</sup>

Defendant Dario Berroa was convicted of second-degree murder and sentenced to twenty-five years to life imprisonment.<sup>37</sup> Defendant appealed his conviction to the Supreme Court of New York, Appellate Division, First Department, and argued that he was denied effective assistance of counsel because of the stipulation that his attorney entered with regard to the defense witnesses’ alibi testimony.<sup>38</sup> More pointedly, Berroa argued that defense counsel’s decision to stipulate was “improperly motivated by her desire to protect her reputation for integrity, thereby creating a conflict, and depriving him of the effective assistance of counsel.”<sup>39</sup> The court rejected Berroa’s claim and affirmed defendant’s conviction by a vote of 4-1.<sup>40</sup>

In order to show ineffective assistance of counsel under New York law, the defendant has the burden of demonstrating that his counsel’s performance deviated from the performance that would be expected of a reasonably competent attorney.<sup>41</sup> Further, an unsuccessful strategy does not indicate incompetent performance *per se*<sup>42</sup> and a defendant’s failure to satisfy his burden of proof results in a presumption that defense counsel acted competently.<sup>43</sup> However, the appellate division also pointed out that an attorney’s obligation to vigorously represent her client’s interests is coupled with,

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dant’s testimony and is not relevant to the issue in this case, which only concerns the testimony of Iris Santiago and Anna Torres.

35. *Berroa*, 733 N.Y.S.2d at 56.

36. *Id.* at 93.

37. *Berroa*, 99 N.Y.2d at 138.

38. *Berroa*, 733 N.Y.S.2d at 56.

39. *Id.*

40. *Berroa*, 733 N.Y.S.2d 52 (App. Div. 2001) (Tom, J., dissenting).

41. *Id.* at 56.

42. *Id.* at 59.

43. *Id.* at 56.

as well as restricted by, an equally significant duty to prevent and disclose frauds upon the court.<sup>44</sup>

In denying defendant's ineffectiveness claim, the appellate division majority found that defense counsel's stipulation satisfied her ethical obligation to the court<sup>45</sup> and was the least damaging method of handling the situation, thus forming a legitimate trial strategy.<sup>46</sup> A possible alternative would involve defense counsel being called as a witness to testify on the record about what had transpired between herself and the defense witnesses prior to trial.<sup>47</sup> The appellate division majority surmised that "this testimony . . . would have undermined far more of the witnesses' testimony than the limited portion addressed by the stipulation."<sup>48</sup> According to the majority, the stipulation was the favorable alternative and "it [was] logically incoherent to believe . . . that [defense counsel] labored under improper motivations[.]"<sup>49</sup>

In reaching its conclusion, the appellate division majority relied upon mere cursory views of three cases, only one of which was from a New York court. In *People v. Beals*,<sup>50</sup> the Illinois Supreme Court upheld a defendant's conviction where defense counsel had entered into a stipulation in order to minimize the effect of conflicting defense witnesses' testimony.<sup>51</sup> In *State v. Crespo*,<sup>52</sup> the Supreme Court of Connecticut held that the employment of a stipulation rather than an attorney's testimony is a viable and preferable trial strategy when the information contained in the stipulation could have been presented by the prosecution.<sup>53</sup> Finally, in *People v. Baldi*,<sup>54</sup> the New York Court of Appeals affirmed a conviction against an ineffectiveness claim where the defense attorney tes-

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44. *Berroa*, 733 N.Y.S.2d at 56.

45. *Id.*

46. *Id.* at 60.

47. *Id.*

48. *Id.*

49. *Id.* at 57.

50. 643 N.E.2d 789 (Ill. 1994).

51. *Berroa*, 733 N.Y.S.2d at 58.

52. 718 A.2d 925 (Conn. 1998).

53. *Berroa*, 733 N.Y.S.2d at 59.

54. 54 N.Y.2d 137 (1981).

tified as a witness to identify inconsistencies in his client's testimony and foster the defendant's insanity defense.<sup>55</sup>

The appellate division majority synthesized the superficial principles that it gleaned from *Beals*, *Crespo*, and *Baldi*<sup>56</sup> and concluded that Berroa's attorney's performance was not proven to deviate from the objective reasonableness standard. The majority opined that defense counsel's stipulation was in line with her ethical obligations, was not motivated by self-preservation, and evidenced a legitimate trial strategy that had been supported by prior court decisions. Therefore, Berroa's claim for ineffective assistance of counsel was rejected and the conviction was affirmed.<sup>57</sup>

### III. DISCUSSION

Tom, J., granted defendant leave to appeal to the New York Court of Appeals.<sup>58</sup> At issue for the court of appeals was whether defense counsel's stipulation was necessary to ameliorate the inconsistency that had arisen, therefore constituting a legitimate trial strategy, or if the stipulation served to augment the discrepancy between defense counsel's and defense witnesses' contentions, thereby creating a conflict that impeded Berroa's defense.

After recounting the factual background of the case, the court of appeals pinpointed its perspective for review and stated that "unlike the majority and the dissent at the Appellate Division, we do not view defense counsel's revelation of the witnesses' prior statements to be based on either an overzealous defense of her reputation or the fulfillment of her ethical duties."<sup>59</sup> The court continued, "[t]he attempt to remedy the dilemma that unfolded once the witnesses testified – not defense counsel's reason for the disclosure – is the appropriate focus of our analysis."<sup>60</sup> Viewing defendant's claim of ineffective assistance of counsel in this light, the New York Court of Appeals reversed the decision of the appellate division and ordered a new trial for defendant.<sup>61</sup>

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55. *Berroa*, 733 N.Y.S.2d at 59.

56. *See Berroa*, 733 N.Y.S.2d at 59; *see also* text at notes 51 – 53.

57. *Id.* at 61-62.

58. *Berroa*, 99 N.Y.2d at 138.

59. *Id.*

60. *Id.*

61. *Id.* at 143.



The court announced that, in New York, the constitutional guarantee of effective assistance of counsel ensures meaningful representation that is free of conflict and devoted to the client's best interests.<sup>62</sup> Further, the court noted that this right is impaired when, "absent a defendant's informed consent, defense counsel represents interests which are actually or potentially in conflict with those of the defendant."<sup>63</sup> In Berroa's case, defense counsel had agreed to enter the stipulation<sup>64</sup> in order to circumvent the *prospect* of being called as a witness to impeach two defense witnesses – Iris Santiago and Anna Torres. According to the court, "[t]he use of the stipulation in lieu of her testimony did not cure the conflict as intended; in this case it exacerbated the conflict by eviscerating the credibility of her client's witnesses and his defense."<sup>65</sup>

In its analysis, the court of appeals addressed and distinguished the three cases that the appellate division superficially relied upon in rendering its decision. The court first analyzed *People v. Beals*<sup>66</sup> and found that defense counsel did in fact enter a stipulation that contradicted conflicting statements made by two defense witnesses. However, the court of appeals distinguished *Beals* from the instant case. The court noted that the stipulation in *Beals* "contained facts that were, in the court's opinion, insignificant or not relevant to the testimony of the defendant's two key witnesses."<sup>67</sup> Further, the only individual other than defense counsel who could offer comparable information regarding the defense witnesses' problematic testimony was defendant's sister. "Thus, when faced with the prospect of the State calling defendant's own sister to contradict defendant's witnesses, the court held that defense counsel employed a legitimate trial strategy by offering the stipulation."<sup>68</sup>

The court of appeals next looked at the decision in *State v. Crespo*<sup>69</sup> and found that the Supreme Court of Connecticut did not even have to pass judgment on the effectiveness of counsel issue

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62. *Berroa*, 99 N.Y.2d at 139.

63. *Id.*

64. *See Berroa*, 99 N.Y.2d at 137; *see also* note 34 and accompanying text.

65. *Berroa*, 99 N.Y.2d at 139.

66. 643 N.E.2d 789 (Ill. 1994).

67. *Berroa*, 99 N.Y.2d at 140.

68. *Id.* at 141.

69. 718 A.2d 925 (Conn. 1998).

because it was not adequately preserved for appeal.<sup>70</sup> Nonetheless, “the court noted that counsel’s decision to stipulate readily ascertainable facts could have been a reasonable trial strategy” where defense counsel’s stipulation merely recounted his interaction with the defendant when defendant granted consent for defense counsel to disclose the location of the victim’s body.<sup>71</sup> The New York Court of Appeals also highlighted the fact that the court in *Crespo* compared its case to *Beals* and remarked that, in both cases, the stipulation was strategically preferable for the defendant since the information would have otherwise been offered by the prosecution.<sup>72</sup> Thus, *Crespo* was distinguished from defendant Berroa’s case.

Finally, the court of appeals reviewed *People v. Baldi*,<sup>73</sup> a decision that was rendered by the court’s predecessors some 21 years earlier.<sup>74</sup> The court noted 3 distinctions between *Baldi* and the present case: 1) Baldi’s attorney was testifying on defendant’s behalf rather than against defendant’s own witnesses;<sup>75</sup> 2) Baldi’s defense attorney’s stipulation constituted a legitimate trial strategy since the objective was to further defendant’s insanity defense;<sup>76</sup> and 3) the defense counsel in *Baldi* was not the only source of the impeachment evidence whereas Berroa’s defense counsel is the only known source of such evidence in the instant case.<sup>77</sup>

Based upon its analysis of the facts in Berroa’s case and its reading of *Beals*, *Crespo*, and *Baldi*, the New York Court of Appeals held that Dario Berroa was denied effective assistance of counsel in his criminal trial.<sup>78</sup> The court found that defense counsel’s stipulation was “based on the *assumed necessity* of counsel’s testimony rather than a legitimate trial strategy.”<sup>79</sup> Additionally, the court noted that defense counsel’s stipulation created a credibility contest between defense counsel and defendant’s witnesses and, there-

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70. *Berroa*, 99 N.Y.2d at 141.

71. *Berroa*, 99 N.Y.2d at 141.

72. *Id.*

73. 54 N.Y.2d 137 (1981)

74. *Id.*

75. *Berroa*, 99 N.Y.2d at 142.

76. *Id.*

77. *Id.*

78. *See Berroa*, 99 N.Y.2d at 143.

79. *Berroa*, 99 N.Y.2d at 142 (emphasis added).

fore, was not in defendant's best interests or useful in mitigating the effect of damaging evidence as the appellate division had suggested.<sup>80</sup> Thus, defense counsel's stipulation was not necessary to ameliorate the inconsistency that had arisen and, therefore, did not constitute a legitimate trial strategy. Rather, the stipulation served to augment the discrepancy between defense counsel's and defense witnesses' contentions, and thereby created a conflict that impeded Berroa's defense.

Also of interest is the court of appeals insistent yet unqualified reminder that defense counsel was the only person who knew of the faults in the defense witnesses' testimony. This fact would preclude defense counsel from insisting that her stipulation was made in order to soften the detrimental effects of obtaining this information through another individual's testimony. However, this very same fact also undermines the courts position that defense counsel should not have disclosed the perjurious testimony through a stipulation. If defense counsel is mandated by her ethical responsibilities to disclose frauds upon the court,<sup>81</sup> how else should she have fulfilled her ethical obligation? This is a question that the New York Court of Appeals left unanswered and also one that is likely to perplex defense counsel who find themselves in such situations. Perhaps defense counsels' only option is to withdraw.

#### IV. CONCLUSION

The court found that Defendant Berroa was denied his constitutionally protected right to the effective assistance of counsel when his attorney entered a stipulation that was not a legitimate trial strategy but, rather, a source of aggravation for the conflict that had arisen at trial concerning the testimony of two defense witnesses.<sup>82</sup> The New York Court of Appeals reversed the appellate division's affirmation of defendant's conviction for second-degree murder and ordered a new trial.<sup>83</sup>

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80. See *Berroa*, 733 N.Y.S.2d at 60 and text at note 48.

81. See *Berroa*, 733 N.Y.S.2d 52.

82. See *Berroa*, 99 N.Y.2d at 139.

83. See *Berroa*, 99 N.Y.2d at 143.