



Alerts

Failure to Challenge Victim's Credibility Sufficient to State Malpractice Claim Against Defense Counsel

March 25, 2015

Lawyers for the Profession® Alert

Arnold v Devane, 123 A.D.3d 1202, 998 N.Y.S.2d 509 (N.Y. 2014)

Brief Summary

A New York appellate court rejected a criminal defense counsel's argument in a legal malpractice case that he was entitled to summary judgment as a matter of law because the appellate court in the underlying criminal case found that the client's conviction was in accord with the weight of the evidence. The appellate court's prior evaluation of the evidence was based upon the evidence as it was presented to the jury and did not resolve the question of whether plaintiff would have been convicted had defense counsel been effective.

Complete Summary

Plaintiff client (Client) was charged with various sex-related crimes for which he retained defendant lawyer (Lawyer) to represent him. Following a trial in 2009, the Client was convicted. He thereafter retained different appellate counsel. On appeal, the court determined that the Client did not receive the effective assistance of counsel, reversed the judgment of conviction and remitted the matter for a new trial. The state decided not to re-prosecute the Client, and the indictment was dismissed.

The Client and his wife then filed a legal malpractice action against the Lawyer. The Lawyer moved for summary judgment, which the trial court denied. On appeal, the appellate court initially agreed with the Lawyer's argument that the trial court should have dismissed the wife's claims of legal malpractice because there was no attorney-client relationship between her and the Lawyer.

Turning to the Lawyer's summary judgment motion, the court recognized that in a legal malpractice claim, proximate cause is established by demonstrating that but for the attorney's negligence, the plaintiff would have prevailed in the underlying matter or would not have sustained any ascertainable damages. Further, the court noted that "[f]or malpractice actions arising from allegations of negligent representation in a criminal matter, the plaintiff must have at least a colorable claim of actual innocence." See *Dombrowski v Bulson*, 19 N.Y.3d 347, 350-351 (2012). Here, the court found that a colorable claim was demonstrated based upon the Client's expressed assertions of innocence, together with the appellate court's reversal of the conviction, as well as the decision not to re-prosecute the Client and the dismissal of the indictment.

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On appeal, although the Lawyer acknowledged some errors in his representation of the Client and offered explanations for his trial strategies and failures, he argued that none of his deficiencies caused the Client's conviction. The court rejected the Lawyer's argument that the court's previous determination that the conviction was in accord with the weight of the evidence precluded a finding that the Client would not have been convicted but for the Lawyer's alleged negligence. The court's prior evaluation of the evidence was based upon the evidence as it was presented to the jury and did not resolve the question of whether the Client would have been convicted had counsel been effective at trial. Similarly, the court noted that the Lawyer's argument that the Client's conviction was based on the jury's finding that the victim was credible, and not on his own failures, ignored the fact that the court expressly found the Lawyer's representation to be ineffective, in part, because he did not sufficiently challenge the victim's credibility or impeach the victim with her prior inconsistent statements — actions that were essential to mount an effective defense precisely because "the People's case rested almost entirely upon the credibility of the victim." (*People v Arnold*, 85 A.D.3d at 1333).

Although the court recognized that because the Client was not retried and acquitted it might be difficult for him to ultimately meet his burden of establishing at trial that he would not have been convicted in the absence of defendant's negligence, it held that the Lawyer failed to meet his *prima facie* burden on the summary judgment motion of establishing a lack of proximate cause.

Significance of Opinion

This decision is significant because although the court recognized the "actual innocence" rule in legal malpractice actions against criminal defense counsel, it held that the Client established enough to mount that hurdle and state a claim against defense counsel based on counsel's trial conduct, particularly with respect to counsel's alleged failure to challenge the victim's credibility.

For more information, please contact [Terrence P. McAvoy](#).

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