To be argued by
Patrick Michael Megaro
(15 Minutes)

NEW YORK SUPREME COURT

APPELLATE DIVISION - SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

A.D. Docket # 2014-07802

-against-

MAURICE BROWN,

Queens County Supreme Court
Indictment # 2278/2013

Defendant-Appellant.

INITIAL BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutions

Other Authorities

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X **Docket # 2014-07802**

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

MAURICE BROWN,

STATEMENT PURSUANT TO CPLR § 5531

Defendant-Appellant

Queens County
Indictment # 2278/2013

----------X

1. The indictment number in the court below was Indictment # 2278/2013

2. The full names of the original parties were the People of the State of New York against Maurice Brown.

3. This action was commenced in the Queens County Supreme Court, Criminal Term with the filing of Indictment # 2278/2013.

4. This is an appeal as of right from judgments of conviction for criminal possession of a controlled substance in the Third Degree, Penal Law § 220.16-1, criminal possession of a controlled substance in the Fourth Degree, Penal Law § 220.09-1, three counts of criminal use of drug paraphernalia in the Second Degree, Penal Law § 220.50, and unlawful possession of marijuana, Penal Law § 220.09, entered in the Supreme Court, Queens County, on August 5, 2014 under Indictment # 2278/13, and sentence thereon to an indeterminate term of imprisonment of 15 years imprisonment. (Honorable Barry Schwartz, J.S.C., at trial and sentence).

5. The Defendant-Appellant is appealing on the original record.

Dated: December 22, 2016

PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------X **Docket # 2014-07802**

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CERTIFICATE OF COMPLIANCE

MAURICE BROWN,

Defendant-Appellant

Queens County
Indictment # 2278/2013

----------X

PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury pursuant to 22 NYCRR § 670.10.3(f):

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 7,026.

Dated: December 22, 2016

PATRICK MICHAEL MEGARO

PRELIMINARY STATEMENT

This is an appeal as of right from a judgment of conviction entered in the Supreme Court, Queens County, on August 5, 2014 under Indictment # 2278/13 (Hon. Daniel Lewis, J.S.C. at suppression hearing, Hon. Barry Schwartz, J.S.C. at trial and sentence). Defendant was convicted of the crimes of Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Fourth Degree, three counts of Criminal Use of Drug Paraphernalia in the Second Degree, and Unlawful Possession of Marijuana, and sentenced to a determinate sentence of fifteen (15) years plus one and a half to three years post-release supervision; a determinate sentence of nine years plus one and a half to three years post-release supervision; one year definite; one year definite; one year definite, and a $100 fine, respectively, all sentences to run concurrently.

A timely notice of appeal was served upon the District Attorney and filed with the Queens County Supreme Court.

No application for a stay of execution of sentence has been made, and Defendant-Appellant remains incarcerated pursuant to the judgment herein appealed. Defendant-Appellant was the only original defendant in this action.

Defendant-Appellant is appealing upon the original record and is represented by Law Office of Deron Castro, P.C., by Patrick Michael Megaro, Esq.

QUESTIONS PRESENTED

1. Did Defendant-Appellant receive effective assistance of counsel where trial counsel failed to allege in his motion to controvert the search warrant that Defendant-Appellant had standing to argue the motion; and failed to request a Darden hearing?

2. Whether reversal is required where the trial court denied Defendant-Appellant's motion for a mistrial and motion to set aside the verdict where the People introduced evidence that Defendant-Appellant intended to sell Alprazolam, an offense which was not charged in the Indictment?

3. Whether the trial court imposed a sentence that was unduly harsh and excessive where the People offered Defendant-Appellant a plea offer that would have resulted in a maximum sentence of less than half of what he received after trial and the Defendant-Appellant received the maximum sentence permitted by law?

STATEMENT OF THE FACTS

On August 28, 2013, Brown was charged in Indictment # 2278/13 with Criminal Possession of a Controlled Substance in the Third Degree, Criminal Possession of a Controlled Substance in the Fourth Degree, three counts of Criminal Use of Drug Paraphernalia in the Second Degree, Criminal Possession of a

Controlled Substance in the Seventh Degree[1], and Unlawful Possession of Marijuana. Detective Michael Kelly of the NYPD drafted an affidavit and relied upon a confidential informant's statements to support his request for a search warrant. The confidential informant told Kelly he had "reliable information regarding the defendant selling narcotics at the subject location." (Court file – Defendant's motion to controvert:1-2). Kelly presented the affidavit to the Honorable Gia Morris who authorized the issuance of a search warrant for 176-24 Sunbury Road, Springfield Gardens in Queens County on August 22, 2013. The Search Warrant gave authority to search the premises for cocaine, narcotics, narcotics paraphernalia, records of ownership or use of the location, records of narcotics transactions, and currency used to purchase narcotics.

On January 27, 2014, trial counsel filed a motion seeking to controvert the search warrant. He argued the description of the target of the investigation in the affidavit did not match the defendant, and it did not mention Brown was the perpetrator of any crime and his house is not a location where criminal conduct occurred.

The trial court did not grant him a hearing and denied his motion stating he did not allege Brown had a privacy interest in the home and thus did not establish

[1] This count was dismissed as a lesser-included at sentencing in light of Defendant-Appellant's conviction of the greater offenses.

standing to challenge the warrant; Brown failed to allege the affidavit contained false statements made knowingly or intentionally, or with reckless disregard for the truth; and that the premises were sufficiently described by the search warrant.

The trial court based its opinion that probable cause existed solely upon the confidential informant's statements to Detective Kelly. In the trial court's order denying the motion, it stated,

> the search warrant affidavit shows that the confidential informant went to the specified premises on two dates, and on each date purchased cocaine from an individual whom he identified as being defendant. Accordingly, Judge Morris had ample evidence on which to reasonably conclude that the confidential informant was credible and that probable cause existed to issue the warrant.

(Court file: Decision & Order of the Court 04/30/2014:3).

Trial

DETECTIVE KELLY, a Detective with the New York Police Department, testified that he applied for and obtained a search warrant for 176-24 Sunbury Road in Queens County on August 22, 2013. (T:164; 165-66). On August 28, 2013 he executed a search of the residence (T:169-70). He described it as a two-story attached house. (T:170). When he walked into the master bedroom, he saw Maurice Brown and Johnnina Miller in the bed, and also observed Levon Williams and Lamar White in separate bedrooms. (T:171-72). Each individual was handcuffed. (T:171-72).

While in the house, he spoke with Brown who indicated that he lived at the residence. (T:174). When he originally found Brown, he was in his underwear, but Kelly allowed him to get dressed and he obtained his clothes from a bureau in the master bedroom. (T:174).

Inside the master bedroom he found forty-three (43) zip lock bags of crack/cocaine, $866.00, a zip lock bag of white powdery substance, marijuana, and more than fifty (50) empty zip lock bags. (T:175; 181-82; 185). He stated the zip lock bags can be used to package drugs. (T:185). He also found cornstarch, which he testified is used as a cutting agent to manufacture cocaine into crack cocaine. (T:187). In the master bedroom he found a Sprint telephone bill addressed to Brown with an address listed as "176-24 Sunbury Road." (T:191). He also searched Johnnina Miller's purse located in the master bedroom and found a white powdery substance and $14,000. (T:192). He also found a scale and a plate in Levon Williams' room that had what appeared to be cocaine and marijuana on it. (T:193).

SUNITA RAMSARRAN, a criminalist at the New York City Police Department police laboratory, testified that she analyzed the substances found on the plate found in Williams' room. She determined the substances were cocaine and tetrahydrocannabinol. (T:261-62).

KRISTINE SCICCHITANO, a criminalist at the at the New York City Police Department police laboratory testified he tested a zip lock bag that contained white

powder material that was found in the purse in the master bedroom and determined it contained alprazolam (T:278; 285).

After Scicchitano testified, trial counsel unsuccessfully moved for a mistrial because Scicchitano stated one of the substances contained Alprazolam. (T:292). He argued Alprazolam is not a drug related to any of the crimes for which he is charged. (292).

ROXANNE HOLOWIENKA, a "criminalist two" at the New York City Police Department, testified she analyzed a twist bag that contained twenty-five (25) zip lock bags containing solid material, a twist bag that contained fifteen (15) zip lock bags of solid material, a twist bag that contained three zip lock bags of solid material, a single zip lock bag that contained solid material, and four zip lock bags that contained vegetative matter. (T:300-01). She analyzed twenty-two (22) of the twenty-five (25) zip lock bags, and the fifteen (15) zip lock bags and found that they contained cocaine. (T:309; 311). She testified that the vegetative material was marijuana. (T:315).

Regarding the final item she tested, she stated:

> A The item was found to be metholone.
> Q Is metholone a controlled substance in New York?
> A At the time of this case, no.
> MR. SCHWED: I am going to object on the same basis I objected before. He is not charged with possession.
> MR. YAMPOLSKY: Your Honor, she just said it wasn't a controlled substance at the time she identified it as metholone.

> THE COURT: Therefore, it is not a charge in this case.
> MR. YAMPOLSKY: No.
> THE COURT: It's not a charge in this case. The objection is overruled.

(T:313).

The People rested and the defense did not call any witnesses. Trial counsel then moved to dismiss the possession to sell charge. (T:327-28). The trial court denied the motion. (T:329). Both parties then gave closing arguments.

Deliberations

While deliberating, the jurors asked for a re-explanation of the meaning of criminal possession in the second, third, fourth and seventh degrees. (T:396). They also asked to see the evidence that had the multiple bags of narcotics. (T:402). The jury found Brown guilty of all counts (T:404-405).

Sentence

On August 5, 2014, Brown was sentenced. Prior to sentencing, Brown argued the following:

> MR. SCHWED: I have a motion to set aside the verdict. The reason I'm moving to set aside the verdict is I feel the defendant did not receive a fair trial in the sense that certain evidence introduced by the People during the trial prejudiced the jury against the defendant.
> That evidence was that there was a search warrant issued by a Court that allowed the police to go into the house. That, I felt, raised an inference that the defendant was involved in illegal activities which was observed or that information was given to a Court which then authorized the police to go in.

The second thing was during the trial, the People introduced into evidence the presence of a drug for which the defendant was not charged. That was Xanax. That was found in the purse. That evidence went before the grand jury, and the grand jury decided not to indict him for that. Nevertheless, that was introduced by the People during the trial, and finally the People introduced into evidence a drug that was found on a night table that the lab technician testified was not a controlled substance at the time of the defendant's arrest but is now a controlled substance.

So, you had, in effect, two drugs being offered by the People that the defendant was not charged with and led, again, to the inference that the defendant was more than just perhaps a drug user; that he was in fact a drug seller, the combination of the search warrant and the two other drugs.

So, I would ask the Court to set aside the verdict and grant the defendant a new trial.

THE COURT: Mr. DA.

MR. YAMPOLSKY: Yes, your Honor. Just at the outset I note that every single piece of evidence that I introduced was fully intended to prejudice the defendant. That was the purpose of it, but specifically the search warrant, and your Honor ruled on it previously, the search warrant was important, one, for it completed the narrative and, two, to demonstrate that the police weren't just busting down someone's door willy-nilly and going and randomly looking for drugs. They were authorized and legally permitted to do so; and to not have the search warrant admitted into evidence would be an unfair inference against the police. It would make it seem as though the police were not doing their job properly, and your Honor correctly decided that the search warrant, with the redactions that defense counsel requested, was appropriate for the jury to consider.

As far as the other drugs go, the alprazolam that was found in the defendant's room, while it was found in his room, it was made clear it was found in Jonita Miller's purse with her ID. **It was also made clear to the jury that he is not being charged with possession of that alprazolam;**

however, it's also one of those details that completes the narrative. It is the entire story, and the jury should be entitled to hear the entire truth about this case.
As far as the Methylone goes, the evidence, the testimony, was simply that at the time, it was not a controlled substance. There was no testimony as to what classification the Methylone is presently. I purposely did not elicit that, and I know that that's not relevant, but if it was left a question unanswered, it would be just that. It would be something that the jury would wonder about and wonder why they had no explanation as to what this other substance was, but it made clear to them that that was not a controlled substance, and it was not something that he was being charged with.
So, I ask you deny the defendant's motion.
THE COURT: The motion is denied.

(S:2-5).

The trial court then sentenced Brown to a determinate sentence of fifteen (15) years plus one and a half (1.5) to three years post-release supervision on the criminal possession of a controlled substance in the third degree charge. (S:11). On the criminal possession of a controlled substance in the fourth-degree charge, he sentenced Brown to a determinate sentence of nine years plus one and a half to three years post-release supervision. (S:11). The criminal possession of a controlled substance in the seventh-degree charge was dismissed as a lesser-included offense. (S:11). On the three counts of criminal use of drug paraphernalia charges, he sentenced him to a definite sentence of one year on all three counts. (S:11). On the unlawful possession of marijuana charge, he sentenced Brown to a one hundred (100) dollar fine. (S:11). He ordered that each sentence run concurrent to the other.

(S:11). He also ordered three years of post-release supervision on the criminal possession of a controlled substance in the third degree and the fourth degree and a six-month license suspension. (S:11-12).

Brown now appeals.

ARGUMENT

POINT I – TRIAL COUNSEL WAS INEFFECTIVE WHERE HE FAILED TO ALLEGE IN HIS MOTION TO CONTROVERT THE SEARCH WARRANT THAT DEFENDANT-APPELLANT HAD STANDING AND FAILED TO REQUEST A DARDEN HEARING

A criminal defendant is entitled to "the effective assistance of competent counsel." Strickland v. Washington, 466 U.S. 668 (1984) McMann v. Richardson, 397 U.S. 759 (1970). To resolve a claim of ineffective assistance of counsel, the court must engage in a two-prong analysis. The court must determine whether (a) defense counsels performance was deficient, and (b) whether the defendant suffered actual prejudice as a result of defense counsels deficiency. Strickland v. Washington, 466 U.S. 668 (1984); People v. Baldi, 54 N.Y.2d 137 (1981).

> [A]t the very least, the right of a defendant to be represented by an attorney means more than just having a person with a law degree nominally represent him upon a trial and ask questions. Moreover, and this is well settled, the defendant's right to representation does entitle him to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial.

People v. Bennett, 29 N.Y.2d. 462, 466, (1972)(citing Coles v. Peyton, 389 F.2d. 224, 226 (4th Cir. 1968)).

Clearly, then, where, as in the present case, the record unequivocally demonstrates a complete lack of investigation or preparation whatever on the only possible defense available, the lawyer, far from providing the sort of assistance which the Constitution guarantees to the most lowly defendant, has, in truth, rendered "the trial a farce and a mockery of justice." Bennett, supra, at 467; see also People v. Donovan, 184 A.D.2d. 654, 655, (2d. Dep't 1992) (finding ineffective assistance of counsel based in part on failure of attorney to conduct adequate investigation).

While courts have held that challenges for ineffective assistance of counsel usually should be raised in motions made pursuant to Article 440 of the Criminal Procedure Law, there are exceptions to the general preference. See People v. Ramos, 63 N.Y.2d 640 (1984). The United States Supreme Court has clearly held

> We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsels ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte.

Massaro v. United States, 538 U.S. 500, 508 (2003).

Likewise, this Court has reviewed claims of ineffective assistance of counsel on direct appeal where the record permits a full review. See People v. Yagudayev, 91 A.D.3d 888 (2d. Dept. 2012).

The expanded record as set forth herein supports a finding of ineffective assistance of counsel.

A. *Trial Counsel Failed To Request A Darden Hearing.*

Upon appropriate motion of a defendant, the court may suppress the evidence if the search warrant issued was not based on probable cause. Under both the United States and New York Constitutions, no warrant may be issued except upon probable cause based on facts presented to the magistrate under oath or affirmation. US Const., 4th Amend.; NY Const., Art 1, § 12.

"Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, ... reasonableness generally requires the obtaining of a judicial warrant." Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948).

"Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely requires information sufficient to support a

reasonable belief that an offense has been or is being committed or that evidence of a crime may be found at a certain place." People v. Bigelow, 66 N.Y.2d 417, 423 (1985).

Probable cause may be supplied, in whole or part, through hearsay information. Bigelow, 66 N.Y.2d. Where hearsay information from an undisclosed informant is the basis for the issuance of a search warrant, such information must be examined under the Aguilar–Spinelli two-prong test. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1968). This two-prong test requires that the officer's affidavit show (1) the veracity or reliability of the informants knowledge, and (2) the basis of the informants knowledge.

When probable cause is determined based on information from a confidential informant, the New York Court of Appeals has expressly rejected the more recent relaxed "totality of the circumstances" standard to determine probable cause set forth in Illinois v. Gates, 462 U.S. 213 (1983) and held that instead the Aguilar–Spinelli two-prong test should be applied. See People v. Griminger, 71 N.Y.2d 635, 639 (2d Dept.1988).

When information from a confidential informant provides part of the basis for probable cause, it could severely inhibit the defendants right to confront and cross-examine the People's witnesses at a suppression hearing. To alleviate that concern, the New York Court of Appeals in People v. Darden, 34 N.Y.2d 177

(1974) "established a procedure to verify the testifying officer's credibility while keeping the informant's identity a secret." People v. Edwards, 95 N.Y.2d 486, 492 (2000). The purpose of this in camera inquiry is to ensure that the informant is not "wholly imaginary" and that the information provided by the informant to the police is not "fabricated." Id. at 493.

At a Darden hearing, the trial court must adhere to the following process:

> The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present but not the defendant or his counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer. The Judge should take testimony, with recognition of the special need for protection of the interests of the absent defendant, and make a summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify. That report should be made available to the defendant and to the People, and the transcript of testimony should be sealed to be available to the appellate courts if the occasion arises.

People v. Darden, 356 N.Y.S. 2d 582, 585-86 (1974).

It is the defendant's burden to request that the procedure outlined in Darden be implemented. People v. Fulton, 83 A.D.2d 856 (2d Dept. 2001). While he is not required to specifically request an in camera proceeding, he must ask for the production of the informant and challenge the existence of the informant and the accuracy of the police testimony as to what the informant told the police. Id. When an informant's testimony is necessary to establish probable cause, a court does not

have the discretion to deny a Darden hearing. People v. Edwards, 95 N.Y. 2d 486 (2000)(emphasis added).

In this case, trial counsel failed to challenge the veracity, reliability, and basis of knowledge for the search warrant by requesting a Darden hearing. Kelly relied upon the confidential informant's statements to submit the affidavit in support of the search warrant. As a result, the trial court based its opinion that probable cause existed solely upon the confidential informant's statements to Kelly.

Trial counsel's failure to request a Darden hearing constituted ineffective assistance of counsel. Trial counsel was not required to make any threshold showing to be entitled to a Darden hearing. See Edwards 95 NY 2d 486, 496. He merely needed to request it. Without having knowledge of who the confidential informant is, or what information he or she provided, the defendant is left in the dark about what, if any probable cause supported a search warrant. Requesting a Darden hearing is the only avenue to obtain the information necessary to determine probable cause.

> Obviously, it would be difficult, if not impossible, for a defendant to present evidence that a confidential informant did not exist or was unreliable. It [is] error...to place a burden on defendant that he could not reasonably have been expected to meet...[T]he defendant should not be deemed to have failed in his 'threshold showing' merely because he has no information as to whether the informant lied to the officer-affiant or the officer-affiant lied to the magistrate.

Id. (citing 2 Wayne R. LaFave, Search and Seizure §4.4(d)).

Trial counsel's failure to request a Darden hearing denied Brown his opportunity to suppress the drugs obtained in this matter. This error was clear from the record. As a result, trial counsel was ineffective.

B. Trial Counsel was Ineffective for Failing to Allege in the Motion to Controvert the Search Warrant that Defendant-Appellant had Standing.

The trial court denied Brown's motion to controvert the search warrant and denied the opportunity for a hearing in part because trial counsel did not allege that Brown had standing. An overnight guest has a legitimate expectation of privacy in the premises and has standing to challenge a search. See Minnesota v. Olsen, 495 U.S. 91 (1990); United States v. Pena Ontiveros, 547 F.Supp. 2d 323 (S.D.N.Y. 2008); People v. Ortiz, 83 N.Y.2d 840, 842, (1994); People v. Kemp, 273 A.D.2d 806, 806, (4th Dept. 2000); People v. Williams, 181 A.D.2d 474, 475 (1st Dept. 1992).

It was ineffective to fail to allege Brown had standing. Relevant testimony was admitted at trial that demonstrated Brown had standing. Detective Kelly testified that he entered the residence after obtaining the search warrant at 5:15 a.m. and found Brown in his underwear in the master bedroom. (T:171). He also stated that he found a Sprint telephone bill addressed to Brown in the master bedroom. (T:191).

Either fact presented together or alone demonstrated that Brown had standing as an overnight guest. The only reasonable inference to draw from finding someone in bed in their underwear at 5:15 a.m. is that he slept there the night before. Secondly, the phone bill addressed to Brown at "176-24 Sunbury Road" is an indicator he lived there for a period of time. Trial counsel was aware of these facts, which are clear from the record and he failed to allege them in the motion to support the fact that Brown had standing. His failures resulted in the trial court denying the motion.

C. *Counsel's Strategy was Objectively Unreasonable*

Various courts have held that a failure on the part of an attorney to move to suppress evidence recovered in violation of a defendant's Constitutional rights constitutes ineffective assistance of counsel. Martin v. Maxey, 98 F.3d 844, 848 (5th Cir. 1996); Kirkpatrick v. Butler, 870 F.2d 276, 283 (5th Cir. 1989), cert. denied, 493 U.S. 1051 (1990); see also Thomas v. Varner, 428 F.3d 491, 495 (3d Cir. 2005) (ineffective assistance of counsel for failing to suppress unduly suggestive identification); Morrison v. Kimmelman, 752 F.2d 918, 922 (3d Cir. 1985) affirmed on other grounds 477 U.S. 365 ("proper norms of advocacy" required a "timely [motion] to suppress" where there was a valid basis for suppression), Rodriguez v. Young, 906 F.2d 1153, 1161 (7th Cir. 1990) (failure to move to suppress identification "objectively unreasonable"), Cossel v. Miller, 229 F.3d 649, 654-655

(7th Cir. 2000) (holding ineffective assistance of counsel for failure to move to suppress the "pivotal evidence in the case").

In People v. Velez, 138 A.D.3d 1041, 1041, (N.Y.A.D. 2d 2016), after viewing what appeared to be marijuana growing in the defendant's yard, officers obtained a search warrant to search the defendant's yard and residence. While at the property, officers also searched a bicycle tire tube located inside a shed in the backyard and found cocaine. Id. Trial counsel did not move to suppress the cocaine. Id. at 1042. The Second Department held "here, the search of the shed exceeded the scope of the warrant, which authorized the search of the defendant's residence and yard only. Defense counsel had everything to gain and nothing to lose by moving to suppress the evidence seized during the warrantless search of the shed, and it appears that defense counsel's omission vitiated a viable defense, causing actual prejudice to the defendant." Id. (citations omitted). See also Thrasher v. State, 300 Ga.App 154, 155 (Ga. Ct. App. 2009) (defense counsel was ineffective for failing to file a motion to suppress the chemical test of his blood sample in a driving under the influence of methamphetamine case).

In Rock v. Zimmerman, 586 F.Supp. 1076, 1083 (M.D.Pa. 1984) the defendant was convicted of first-degree murder and attempted murder where he allegedly set fire to his house and a shed on his property and shot and killed his neighbor and a chief of the local fire department. Id. at 1077. Soil samples, rifle

shells, and other material were seized by law enforcement from the Defendant's property without a warrant and without a showing of exigent circumstances. Id. at 1079. The court held that trial counsel's failure to file a motion to suppress physical evidence constituted ineffective assistance of counsel. Id. at 1083.

In this case, trial counsel's failure to argue to controvert the search warrant in a competent manner rendered his representation ineffective. In his incomplete motion to controvert, he merely had to allege facts that supported the position that Brown had standing. He did not.

The trial court made it clear that it relied on the confidential informant's statement to Detective Kelly as probable cause. If trial counsel had requested a Darden hearing and challenged the veracity and reliability of the informant's knowledge, or the basis of the informant's knowledge, it would have been mandatory that the court grant a hearing. Just as in People v. Velez, trial counsel had everything to gain and nothing to lose to request the Darden hearing as well as support his motion to controvert the search warrant with facts that Brown had standing. Trial counsel was ineffective because he did neither.

D. *Prejudice*

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether,

in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, supra at 690.

In this case, the stakes could not have been higher for Brown when the trial court determined whether the search of the residence was constitutionally permissible. The People would not have been able to prove its case if the search was deemed unconstitutional because all evidence obtained from the residence would have been excluded. The People did not have a case without the introduction of the drugs. The only witnesses called were an officer who entered the house and found the drugs and the criminalists who tested the drugs. If the drugs were suppressed, it is a **certainty** Brown would have been found not guilty.

There is no possible reason, let alone a strategic reason, for trial counsel's failure to act on these issues. As a consequence, this Court should find Brown received ineffective assistance of counsel, set aside the judgment of conviction and sentence, and order a new trial.

POINT II – THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S MOTION FOR A MISTRIAL AND MOTION TO SET ASIDE THE VERDICT WHERE THE PEOPLE INTRODUCED EVIDENCE THAT DEFENDANT-APPELLANT SOLD ALPRAZOLAM AND METHALONE, AN OFFENSE WHICH WAS NOT CHARGED IN THE INDICTMENT.

"Evidence concerning sales of narcotics other than that for which defendant is on trial is improperly admitted as 'inextricably intertwined' when it can be readily redacted and is not essential to proof of the crime in issue." People v. Crandall, 500 N.Y.S. 2d 635, 636 (N.Y. 1986). In Crandall, the defendant was charged with the criminal sale of a controlled substance to an undercover officer on September 26, 1983. Id. Defense counsel sought to exclude testimony of the undercover officer that during the transaction on September 26, 1983, the officer handed the defendant three hundred (300) dollars, "after which defendant put the cocaine which was the subject of the indictment on the seat of the officer's car and said, "[h]ere's another seven for you. It's on the front seat. Don't let it melt. That's $650. See you later." Id. at 637. Defense counsel argued the mention of the three hundred (300) dollars was only probative to demonstrate an earlier transaction had transpired. Id. The trial court stated the evidence was admissible because the testimony was the actual words used by the parties on the day in question.

The trial court also admitted the following testimony of the undercover officer in reference to a second meeting on September 26, 1983 later in the day in a men's room at a bar:

> He [defendant] said, 'I got another quarter.' He said, 'This is good-quality rock.' He says, 'I got to get 700 for it,' he says, 'but it's really good rock.' I said, 'I only got about 700 on me. I already owe you 650 from the earlier deal today.' He said, 'Well,' he said, 'give me the 700. I'll give you the rock and you can owe me the 650,' after which defendant gave the officer seven grams of cocaine.

Id.

The Court of Appeals held:

> As we were at pains to point out in People v. Ventimiglia (supra), the "inextricably interwoven" exception for other crimes evidence recognized in People v. Vails, 43 N.Y.2d 364, 401 N.Y.S.2d 479, 372 N.E.2d 320 "does not make evidence admissible simply because it is part of conversation other parts of which are admissible. To be inextricably interwoven in the Vails sense the evidence must be explanatory of the acts done or words used in the otherwise admissible part of the evidence." As Vails put it, it must be "evidence relating directly to the crime charged" such that "the value of the evidence clearly outweighs any possible prejudice."
>
> Here, the payment of $300 for a prior transaction was not necessary to comprehension of defendant's statement with respect to the sale covered by the indictment..., and the prejudicial word "another" in the conversation which occurred as that sale was being made could have been redacted "without distortion of its meaning."... Nor was the men's room conversation concerning the second September 26th sale probative of anything with respect to the earlier sale, except the fact that the $650 due from the

> earlier sale had been paid. To establish that fact, however, required nothing more than a question concerning whether the $650 referred to in the earlier conversation had been paid to defendant and the response that it had in fact been paid to him later the same afternoon.
> It was, therefore, error to deny defendant's attorney's request for the exclusionary rulings he sought.

Id. at 638; (citing People v. Ventimiglia, 52 N.Y.2d 350, 362 (1981)); People v. Vails, 43 N.Y.2d 364, 401 (1977); People v. Ward, 62 N.Y.2d 816, 818 (1984).

In People v. Wilkinson, 71 A.D. 3d 249, 250 (2010), the People introduced uncharged evidence that the defendant sold narcotics on five or ten other occasions to the same buyer in the case for which he was charged. The Second Department held the evidence should have been excluded and stated, "[w]here a drug sale case rests on evidence of a single observed sale by a seller who is quickly arrested, evidence that the defendant had made additional drug sales on other occasions is rarely if ever admissible merely 'to complete the narrative.'" Id. at 255 (citing People v. Resek, 3 N.Y.3d at 389–390 (2004)); People v. Godbold, 55 A.D.3d 339 (2008). The Second Department held the error was not harmless. Id. at 257.

> In any drug sale case, it is entirely logical for a jury to conclude that, if the defendant is shown to be a dealer who has sold drugs in the past, he or she is likely to have sold drugs, as charged, on a particular occasion. The longstanding rule carefully limiting evidence of a defendant's prior criminal acts, however, is not one of logic but one of policy, for as Chief Judge Cardozo wrote for the Court of Appeals nearly 80 years ago, "[i]nflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience

> predisposing to an act of crime." Indeed, more than 40 years before that, the Court observed that "[t]he general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded."... The reason for the rule is to avoid the danger that the jury will "misfocus ... on [the] defendant's prior crimes rather than on the evidence—or lack of evidence—relating to the case before it."... , and will, even though not fully convinced of the defendant's guilt of the crime charged, nevertheless "find against him because his conduct generally merits punishment."

Id. (citing People v. Zackowitz, 254 N.Y. 192, 197 (1930); People v. Sharp, 107 N.Y. 427, 467 (1887); People v. Rojas, 97 N.Y.2d 32, 36–37 (2001); People v. Allweiss, 48 N.Y.2d 40, 46 (2010)).

In the instant matter, the People introduced evidence that in addition to the narcotics found in Brown's room that were the subject of the Indictment (cocaine and marijuana), it introduced that alprazolam, an illegal narcotic was also found in the bedroom and the State inferred Brown possessed it with the intent to sell. The premise of the People's theory was that because of the amount of drugs and type of paraphernalia found at the residence, Brown had the intent to sell narcotics. This included that the marijuana and cocaine that were found in various places in the home belonged to Brown and he would use the ziploc bags as a means of selling it. The People argued and the jurors believed that he intended to sell the cocaine because it was in the room where officers found Brown. The alprazolam was found

in a purse in the same bedroom. The only inference from that evidence is that Brown also intended to sell the alprazolam.

The People called three criminalists to testify in this matter. Holowienka testified that the items he tested contained cocaine and marijuana, but an additional item contained metholone. He testified that methalone was not a controlled substance "at the time of this case." It could not be more clear Holowienka's statement implied possessing methalone is currently illegal and therefore, Brown was possessing another substance with the intent to sell.

Holowienka offered testimony regarding the marijuana and cocaine, which were relevant to the charge. However, Scicchitano did not. She only testified that she determined a package she analyzed contained alprazolam. She was not a necessary or relevant witness for the People to prove that Brown possessed cocaine or marijuana. The only possible purpose of offering the evidence was to show that Brown was a drug dealer and intended to sell more drugs. The People admit, that was its purpose: "[j]ust at the outset I note that every single piece of evidence that I introduced was fully intended to prejudice the defendant." (S:5).

However, the introduction of such evidence is reversible error. The People argued the introduction of the testimony regarding the alprazolam was "one of those details that completes the narrative. It is the entire story, and the jury should be entitled to hear the entire truth about this case." (S:5). Like Crandall, all testimony

of the alprazolam should never have been admitted, but more importantly, could have easily been excluded by not calling Scicchitano as a witness or asking Holowienka about her methalone findings. Evidence concerning selling narcotics other than what the defendant is on trial for is improperly admitted as "inextricably intertwined" because it was not essential to prove the crime and could have easily been redacted.

Therefore, this Court should set aside the verdict and remand for a new trial.

POINT III – THE SENTENCE IMPOSED WAS UNDULY HARSH AND EXCESSIVE WHERE THE PEOPLE OFFERED DEFENDANT-APPELLANT A PLEA OFFER THAT WOULD HAVE RESULTED IN A MAXIMUM SENTENCE OF LESS THAN HALF OF WHAT HE RECEIVED AFTER TRIAL, THE DEFENDANT-APPELLANT RECEIVED THE MAXIMUM SENTENCE PERMITTED BY LAW, AND OTHER MITIGATING FACTORS.

Criminal Procedure Law § 470.15(6)(b) permits this Court to review sentences that may be legal but are excessive under the facts and circumstances of the case. The statute gives this Court "the right to do whatever the trial court could have done even in matters entrusted to the discretion of that court," and substitute its "own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence." See People v. Suitte, 90 A.D. 2d 80, 85-85 (1982).

In fashioning an appropriate sentence, a court is required to weigh and consider societal protection, rehabilitation and deterrence, as well as the

circumstances that gave rise to the conviction. The court is required to consider not only nature of crimes involved, but also personal background and character of particular defendant. See People v. Richard, 65 A.D. 2d 595 (1978). "There are no statutory guidelines to apply upon review of any particular sentence and none are provided that would restrict appellate review to any specific criterion; thus, appellate courts may reach a discretionary determination which is appropriate in each case." See People v. Whiting, 89 A.D. 2d 694 (1982).

The law is clear that a defendant may not be penalized for invoking his right to a trial with a greater sentence. See People v. Pearson, 126 A.D. 2d 680 (1987); People v. Patterson, 106 A.D. 2d 520 (1984); see also Corbitt v. New Jersey, 439 U.S. 212 (1978).

Here, the record establishes that there were pre-trial plea discussions and an offer extended by the People that would have resulted in a much lower sentence than the one imposed by the court. The People had offered to accept a guilty plea in exchange for six years imprisonment. This was less than half of the sentence Defendant-Appellant received after trial.

The other factors are in Brown's favor. The majority of his criminal history are narcotics convictions. Yet Brown was sentenced to an excessive sentence more than twice the number of years the People offered. This was simply because he exercised his right to trial and maintained his innocence.

The Court reviews a sentence for an abuse of discretion. Appellate review determines whether the sentence is excessive to the extent that there was a failure to observe the principles of sentencing. Under such review, the Court takes a "second look" at the sentences in light of the societal aims which such sanctions should achieve. But in reducing any sentence, the appellate body must be sensitive to the fact that its actions become guidelines for the trial court to follow in the imposition of future sentences under circumstances similar to the case reviewed.

In fashioning an appropriate sentence, the trial court is required to weigh and consider societal protection, rehabilitation and deterrence, as well as the circumstances that gave rise to the conviction. See People v Whiting, 89 A.D. 2d 694, 694 (1982); People v Harris, 57 A.D. 2d 663, 663 (1977).

"It is the sensitive balancing of these ... criteria in the individual case that makes the process of sentencing the most difficult and delicate decision that a Judge is called upon to perform." See People v Notey, 72 A.D. 2d 279, 283 (1980). Here, the trial court exceeded its discretion in that it improperly ignored the circumstances giving rise to the conviction and imposed a sentence far greater than necessary to achieve the proper goal of sentencing.

As a result, this Court should find that the sentence was harsh and excessive, and reduce the sentence significantly so that the punishment proportionately fits the crime and the offender.

CONCLUSION

For the reasons set forth above, Brown's convictions should be reversed and dismissed, or in the alternative, a new trial ordered, and this matter should be remanded to the Queens County Supreme Court for further proceedings on the Indictment.

Dated: December 22, 2016

Respectfully submitted,

PATRICK MICHAEL MEGARO