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## Right to Counsel, Supreme Court, Appellate Division, First Department: People v. Leslie

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## SUPREME COURT, APPELLATE DIVISION

### FIRST DEPARTMENT

People v. Leslie<sup>149</sup>  
(decided September 25, 1997)

After a jury trial, defendant, Anthony Leslie, was convicted of attempted murder in the first degree and sentenced to a term of twenty-five years to life.<sup>150</sup> Defendant appealed his conviction arguing that he was denied effective assistance of counsel when he was “jointly represented in a criminal proceeding by a layman posing as an attorney and a bona fide attorney appearing pro hac vice on the motion of the imposter.”<sup>151</sup>

Two years after defendant’s conviction, “and as a result of a complaint filed against” the imposter attorney, the deception was uncovered.<sup>152</sup> Thereafter, the defendant filed an application pursuant to Criminal Procedure Law § 440.10<sup>153</sup> seeking to vacate the judgment against him on Sixth Amendment grounds.<sup>154</sup> The

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<sup>149</sup> 232 A.D.2d 94, 662 N.Y.S.2d 761 (1st Dep’t 1997).

<sup>150</sup> *Id.* at 100-01, 662 N.Y.S.2d at 765.

<sup>151</sup> *Leslie*, 232 A.D.2d at 95, 662 N.Y.S.2d at 762.

<sup>152</sup> *Id.* at 97, 662 N.Y.S.2d at 763.

<sup>153</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 1994). This statute provides in pertinent part:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

*Id.*

<sup>154</sup> *Leslie*, 232 A.D.2d at 97, 662 N.Y.S.2d at 763. *See also* U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” *Id.* N.Y. CONST. art. I, § 6. This section states: “In any trial in any court whatever the party accused shall be

trial court cited *People v. Winkler*,<sup>155</sup> as precedent, in rejecting defendant's argument that a per se violation of his right to counsel occurred due to the presence of the imposter.<sup>155</sup>

In *Winkler*, defendant sought to vacate his second degree murder conviction on the ground that a contingent fee arrangement in a criminal proceeding was a per se violation of the Sixth Amendment.<sup>157</sup> The *Winkler* court held that a defendant is entitled to relief if the defendant can show that the "possible conflict of interest affected the defense in such a way . . . that meaningful representation was not supplied under the Federal and State Constitutions."<sup>158</sup> Additionally, the court in *Leslie* stated that the defendant must demonstrate that a conflict of interest was created by the participation of the imposter.<sup>159</sup>

In *Leslie*, the defendant failed to carry his burden.<sup>160</sup> The court attributed defendant's failure . . . to the presence of a duly admitted attorney who acted on defendant's behalf, in addition to the imposter.<sup>161</sup> The court found that the representation by the duly admitted attorney was not deficient in any manner and did not adversely affect the outcome of the defendant's case.<sup>162</sup> The court found no conflict of interest to exist between the attorney and the imposter attorney or the defendant and the attorney or the imposter attorney.<sup>163</sup> The court concluded that when a defendant

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allowed to appear and defend in person and with counsel as in civil actions." *Id.*

<sup>155</sup> 71 N.Y.2d 592, 523 N.E.2d 485, 528 N.Y.S.2d 360 (1988).

<sup>156</sup> *Leslie*, 232 A.D.2d at 97, 662 N.Y.S.2d at 763.

<sup>157</sup> *Winkler*, 71 N.Y.2d at 594, 523 N.E.2d at 486, 528 N.Y.S.2d at 361.

<sup>158</sup> *Id.* at 597, 523 N.E.2d at 488, 528 N.Y.S.2d at 363.

<sup>159</sup> *Leslie*, 232 A.D.2d at 97, 662 N.Y.S.2d at 763.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 99, 662 N.Y.S.2d at 764. The court noted that the duly admitted attorney was considered lead counsel and was present in the courtroom at all times, advocating for his client. *Id.* "The defense consistently argued the evidence in an artful, cogent manner, taking advantage of weaknesses in the People's case, obscuring weaknesses in its own and demonstrating astute forbearance where appropriate." *Id.*

<sup>163</sup> *Id.* "[D]efendant failed to allege any disagreement between [the attorneys] as to defense strategy." *Id.*

is represented by more than one attorney and one turns out to be an imposter, the mere presence of the imposter will not constitute a per se violation of the Sixth Amendment.<sup>164</sup> Defendant must demonstrate that a conflict of interest exists that affects his defense in a manner inconsistent with his Sixth Amendment rights.<sup>165</sup>

The general rule is that when a criminal defendant is represented unwittingly "by a layman masquerading as an attorney . . . his conviction must be set aside without regard to whether he was individually prejudiced by such representation."<sup>166</sup> Given the unique situation before the court, where an imposter attorney and a bona fide attorney represented the defendant, the Appellate Division was forced to turn to the decisions in other jurisdictions.<sup>167</sup>

In *Higgins v. Parker*,<sup>168</sup> the court found that although the defendant was represented by an imposter attorney, he was also represented by a duly licensed attorney.<sup>169</sup> The duly licensed attorney participated in defendant's defense throughout the representation.<sup>170</sup> Based on the record, the court held that the incompetence of the imposter did not sufficiently support defendant's claim that the incompetence of the imposter denied [defendant] his constitutional right to a fair trial.<sup>171</sup>

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<sup>164</sup> *Id.* at 100-01, 662 N.Y.S.2d at 765.

<sup>165</sup> *Id.* at 99, 662 N.Y.S.2d at 764.

<sup>166</sup> *Id.* at 97, 662 N.Y.S.2d at 763.

<sup>167</sup> *Id.*

<sup>168</sup> 191 S.W.2d 668 (Mo. 1945).

<sup>169</sup> *Id.* at 671.

<sup>170</sup> *Id.* at 670. The bill of exceptions showed that the duly licensed attorney participated in the defendant's trial from the beginning of the evidence until the end. *Id.*

<sup>171</sup> *Id.* at 669. At the very least, this case represents the outer limits of permissible Sixth Amendment representation. In *Higgins*, "[t]he trial judge, his successor in office, and an assistant prosecuting attorney who represented the State in the criminal case, all signed recommendations for [ ] parole [stating that the imposter attorney] . . . had [ ] unskillfully represented" the defendant. *Id.* In addition, petitioner argued that the imposter "botched up" his case, wrongly advised the defendant, and was fined by the trial judge fifty

In *United States v. Novak*,<sup>172</sup> the court applied a slightly different analysis in determining whether effective assistance of counsel was denied when one of two attorneys was subsequently disbarred after the defendant's trial. The court reasoned that the question of whether a defect in an attorney's licensure amounted to a denial of a criminal defendant's right to counsel depended on whether such defect was merely technical or substantive.<sup>173</sup> The attorney's disbarment was based on an allegation of fraudulent misrepresentation in obtaining his license.<sup>174</sup> The court held that such a defect was substantive and hence representation by said attorney did not satisfy the defendant's Sixth Amendment rights.<sup>175</sup> In addition, the court recognized that the duly admitted co-counsel did not participate and was absent for most of the

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dollars for contempt. *Id.* The Missouri Supreme Court, sitting en banc, held that:

There are Federal decisions which hold that in some instances the incompetence of counsel may deny accused his constitutional right to a fair trial. But these decisions say the facts must be strong to warrant the overturning of a criminal judgment on that ground. The facts here certainly do not warrant it.

*Id.* at 671.

<sup>172</sup> 903 F.2d 883 (2d Cir. 1990).

<sup>173</sup> *Id.* at 888. The *Novak* court discussed the difference between a substantive defect in licensure, such as fraudulent misrepresentation and a technical defect, such as neglecting to take the oath required to practice. *Id.* The court noted that the Second Circuit held that a substantive defect is a per se violation of the Sixth Amendment. *Id.* (citing *Solina v. United States*, 709 F.3d 160,167 (2d Cir. 1983)). See also *People v. Leslie*, 232 A.D.2d 94, 98 n.1, 662 N.Y.S.2d 761, 764 n. 1 (1st Dep't 1997). Interestingly enough, the attorney in *Novak* was the infamous Joel Steinberg, "domestic abuser." *Id.* Although he was admitted to the Bar, Steinberg was admitted under false pretenses. *Id.* He lied about his qualifications in order to obtain a certificate of dispensation allowing him to forgo the bar exam. *Id.* Steinberg claimed his legal studies were interrupted by a requirement that he serve in the military and thus was entitled to a dispensation that allowed him to be exempted from taking the bar exam upon completing two-thirds of his studies. *Id.* Steinberg also lied about the time he had spent in law school. *Id.* See also *Novak*, 903 F.2d at 890.

<sup>174</sup> *Novak*, 903 F.2d at 883.

<sup>175</sup> *Id.* at 890.

trial.<sup>176</sup> However, the court did expressly state that if the defendant had been represented by the duly admitted lawyer, “at all critical stages of the proceeding,” defendant’s Sixth Amendment protections would have been preserved.<sup>177</sup>

The Federal and New York State Constitutions are in accord on the issue of whether the mere presence of an imposter attorney is a per se violation of the Sixth Amendment.<sup>178</sup> The initial question appears to be whether the imposter was representing the attorney without co-counsel. If he was, it is quite likely that a per se violation will exist. However, as in the case at bar, when one of two attorneys is an imposter, the critical question will be whether the participation of the imposter attorney created a conflict of interest that affected the defense in such a way as to deprive defendant of his right to effective legal counsel.<sup>179</sup> If the court finds that effective legal representation was rendered by a duly licensed attorney at all critical times, no violation of defendant’s Sixth Amendment right will be found.

Defendant, Leslie, further argued that he was denied assistance of effective counsel by his duly admitted lawyer because an admission pro hac vice,<sup>180</sup> does not authorize an attorney to practice in pre-trial motions.<sup>181</sup> In support of his argument, the defendant offered a Third Department case, *Largeteau v. Smith*.<sup>182</sup> *Largeteau* held that pro hac vice admissions of out-of-state attorneys limit practice to trial or argument.<sup>183</sup> The *Leslie* court rejected *Largeteau* and preferred to follow *Johnson v. Mesch Eng’g, P.C.*,<sup>184</sup> a Fourth Department decision. In *Johnson*, the court held that pro hac vice admission “should be read to

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<sup>176</sup> *Id.* at 891.

<sup>177</sup> *Id.* at 890.

<sup>178</sup> See *People v. Leslie*, 232 A.D.2d 94, 99-100, 662 N.Y.S.2d 761, 764-65 (1st Dep’t 1997).

<sup>179</sup> *Leslie*, 232 A.D.2d at 97, 662 N.Y.S.2d at 763.

<sup>180</sup> See *supra* note .

<sup>181</sup> *Leslie*, 232 A.D.2d at 99, 662 N.Y.S.2d at 764.

<sup>182</sup> 197 A.D.2d 832, 603 N.Y.S.2d 62 (3d Dep’t 1993).

<sup>183</sup> *Id.* at 833, 603 N.Y.S.2d at 63. See also *Leslie*, 232 A.D.2d at 99, 662 N.Y.S.2d at 765.

<sup>184</sup> 212 A.D.2d 970, 624 N.Y.S.2d 710 (4th Dep’t 1995).

encompass admission for matters of pre-trial preparation including pre-trial discovery.”<sup>185</sup> Additionally, The New York Code of Rules and Regulations § 520.11(a)(1)<sup>186</sup> provides that pro hac vice admissions permit “participation in any matter in which the attorney is employed.”<sup>187</sup>

The *Leslie* court concluded by rejecting defendant’s argument that he was denied effective counsel in violation of the Sixth Amendment and rejecting defendant’s pro hac vice admission argument.<sup>188</sup> When representation is provided by two attorneys, one of which is an imposter, a violation of the Sixth Amendment to the Federal and State Constitutions exists only when the defendant was prejudiced by the presence of the imposter and when the duly licensed attorney failed to provide effective counsel.<sup>189</sup> Neither the Federal nor the State Constitutions recognize a per se violation of the Sixth Amendment when an imposter attorney assists a duly licensed attorney.<sup>190</sup> Furthermore, a pro hac vice admission allows an attorney to participate at any stage of a legal proceeding.<sup>191</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 520.11 (a)(1) (1995) provides that:

An attorney and counselor-at-law or the equivalent who is a member in good standing of the bar of another state, territory, district or foreign country may be admitted *pro hac vice* . . . in the discretion of any court of record, to participate in any matter in which the attorney is employed.

*Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Leslie*, 232 A.D.2d at 99-100, 662 N.Y.S.2d at 764-65.

<sup>189</sup> See *supra* notes and accompanying text.

<sup>190</sup> See *supra* notes and accompanying text.

<sup>191</sup> See *supra* notes and accompanying text.