#6145

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 85
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In the matter of imposing a sanction pursuant to
Part 130-2 of the Rules of the Chief Administrator
of the Courts (22NYCRR)

- against -

DECISION AND ORDER
INDICTMENT NO. 5502/2009

DOUGLAS G. RANKIN, an attorney.
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MONDO, SUZANNE, J.:

The issue before the Court was what sanction, if any, should be imposed for defense counsel's failure to appear in court at 9:30 a.m. on March 5, 2012, to begin trial, as ordered by the Court. As set forth more fully below, defense counsel's failure to appear as directed is the most recent example of his pattern of practice to delay trials.

According to records maintained by the Office of Court Administration, as of January 31, 2012, defense counsel (Douglas G. Rankin) had 31 retained cases pending in Supreme Court, Kings County, 19 of which were older than two years. At the same time pending in other Supreme Courts in other counties, Mr. Rankin had only three cases in Queens, three in Nassau, three in the Bronx and two in New York. To ensure the prompt resolution of these old cases, the Administrative Judge for Kings County ordered all of them transferred to one court part. These cases encompass hundreds of adjournments that waste hundreds of hours of court resources.

The following is a sample of cases that have yet to be tried by Mr. Rankin, and the approximate number of adjournments:[1]

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[1] On all of the listed cases, Mr. Rankin was retained by the defendants before the Supreme Court arraignments.

People v. Antonio Hennis, Ind. #4496/2006 – 111 adjournments;[2]

People v. Thermine Remy, Ind. # 4642/2007 – 66 adjournments;

People v. Thermine Remy, Ind. No. 2324/2008 – 63 adjournments;

People v. James Goodman, Ind. No. 8247/2009 – 63 adjournments;

People v. Malik White, Ind. No. 7873/2007 – 56 adjournments;

People v. Vernett Shaw, Ind. No. 12764/2008 – 35 adjournments.

Every effort was made to inform Mr. Rankin of the Court's procedure in moving his cases forward as expeditiously as possible. The Court set a schedule and issued letters of engagement to Mr. Rankin and to the assigned assistant district attorneys outlining the order in which cases would be tried. The Court also informed Mr. Rankin of its intentions:

> THE COURT: In Kings County, right now, all of your trial cases will be before me. I am trying to work out a system that I thought would work better for the court and better for you so that you could have some input in which cases get tried pushing the oldest cases out first and not having another judge send you a letter of engagement that conflicts with two others that you have gotten. You will receive only a letter from me. That could help you not hurt you. I should think it would be in your interest to try to get rid of some of your old cases since you have a busy business and have new cases coming in.
>
> (1/26 Marcia King minutes, p. 8 (ll.23-25) - p. 9 (ll.1-9)
>
> . . .
>
> [DEFENSE COUNSEL]: If you are willing to allow me to follow the procedures

[2] The first trial of Antonio Hennis ended in a mistrial in May 2010.

> and to do some cases out of county as well as do cases in Brooklyn, this will be a lovely marriage, but if you try to stop me from doing every other case out of the county and make your cases the only priority cases, then we will spend time in the Appellate Division and the grievance and judicial conduct areas. That's where we will spend time because I'm not going to allow you to strangle me out of business. (1/26 Marcia King minutes, p. 11 (ll. 3-11)

It is against this backdrop that Mr. Rankin was ordered to be present in court at 9:30 a.m. on March 5, 2012, in the case of People v. Marcia King, indictment number 5502/2009. He knew full-well that a trial would commence and that it was his obligation to be present at 9:30 a.m., the time the Court ordered him to appear. Mr. Rankin's conduct in the Marcia King case exemplifies his practice of failing to appear on specified dates and times before this and other courts. See, e.g. People v. Jones, 31 Misc.3d 1241(A) (Sup. Ct., NY County 2011) (relieving Mr. Rankin who "repeatedly failed to comply with court orders directing him to appear on specified dates and times and be ready for trial").

History of the Marcia King Case

On September 2, 2009, defendant Marcia King was arraigned on indictment number 5502/2009, which charged her with grand larceny in the third degree, welfare fraud in the third degree and six counts of offering a false instrument for filing in the first degree. Defense counsel appeared on that date and informed the Court that he had been retained by defendant.

The case was first scheduled for hearing and trial on February 1, 2010, and the People announced that they were ready. Defense counsel submitted an affirmation of engagement. The case was next on for hearing and trial on July 22, 2010, and the People announced that they were ready.

Defense counsel, however, stated that he may move to dismiss based upon a statute of limitations violation. A motion schedule was set, and the case was adjourned for decision and hearing and trial to September 22, 2010. Defense counsel neither filed a motion nor appeared in court on September 22, 2010.

The case was next on for trial on November 30, 2010. On that date, defense counsel was not ready because of discovery issues. The discovery issues continued until May 2, 2011, when the case was adjourned to June 2, 2011, for hearing and trial. On June 2, 2011, the People announced that they were not ready, and the Court adjourned the case to June 21, 2011, for hearing and trial. On June 21, 2011, defense counsel was engaged in another matter. After nine additional adjournments, which were either for hearing and trial or defense counsel to appear, a Huntley hearing was conducted on October 7, 2011. The case was then adjourned twelve times for trial.

On January 24, 2012, the Court informed counsel by letter that this case was included with four other trial-ready cases that dated to 2007, 2008 and 2009, in which he was ordered engaged. All of the cases listed in the letter, including this case, had been included in the transfer orders from the Administrative Judge of Kings County.[3]

On February 24, 2012, the Court ordered defense counsel to begin trial in this case on February 28, 2012, at 9:30 a.m. Defense counsel asked the Court for a written order so that he could "appeal it to the appellate division" because he was not going to "be able to make it" (2/24/12 Marcia King minutes, p. 5 (ll. 25-26); p. 6 (l. 6)). Defense counsel also stated that he had personal issues,

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[3] These transfer orders, which were issued by the Honorable Barry Kamins in July 2011 and February 2012, were not the first ones issued. As early as May 2010, transfer orders for Mr. Rankin's oldest cases were issued, and Mr. Rankin was informed that the cases were being transferred to one court for the purposes of trial.

including doctors' appointments, during the week of February 27, 2012. When the Court requested that counsel submit an affirmation outlining why he would be unable to proceed on February 28, counsel responded, "Why would you ask me to do something like that?" (2/24/12 Malik White minutes, p.10 (ll. 23-24)). Consequently, the Court adjourned the case for trial to February 28, 2012. Counsel failed to submit an affirmation explaining why he would be unavailable.

On Tuesday, February 28, 2012, defense counsel appeared in the courtroom at approximately 12:30 p.m. (2/28 Marcia King minutes, p. 2). The Court advised counsel that he was three hours late and that a trial part was waiting for the case.

> THE COURT: Good afternoon
>
> It's now 12:40, Mr. Rankin. You walked in the door just about 12:30 this afternoon. This matter is on, and has been on, for trial today. And today, the prosecutor was here at 9:30 in the morning, your client was here at 9:30 in the morning. She's been now waiting three hours.
>
> And in fact, there is a court part. Judge Goldberg has been sitting and waiting for you. Because this case was marked down and you were told it was on for trial today and so I arranged a part yesterday afternoon, which was Judge Goldberg.
>
> So, many people now, Mr. Rankin, have been waiting on you.
>
> People are you ready to go forward?
>
> [ASSISTANT DISTRICT ATTORNEY]: Yes, your Honor.
>
> THE COURT: Mr. Rankin, this case is going to another part for trial.
>
> [DEFENSE COUNSEL]: I'll make my record and whatever you like me to do, Judge.
>
> First of all, was the case set for a time certain?

THE COURT: Yes, I said 9:30. I told your client, be here at 9:30. And Mr. Rankin, please, you have been around the block, you have been in this courthouse, you know that the court parts open early in the morning and especially when it's a trial matter, that they are sent out early. You are aware of that.

[DEFENSE COUNSEL]: Yes. I mean, we don't have time certain in criminal court cases. You can show up at 9:30, it doesn't mean your case won't be put over.

THE COURT: Not when you are ordered to start a trial. When you are ordered to start a trial, you know that it's important to be there early in the morning to get a part.

[DEFENSE COUNSEL]: Did you give me an order that the trial was going to start?

THE COURT: Mr. Rankin–

[DEFENSE COUNSEL]: Yes.

THE COURT: I don't have to give you a written order. There was an oral order. If you look at the transcript, I told your client, 9:30 for trial. Usually, when a judge tells a defendant to be here at 9:30 in the morning, it's incumbent upon the attorney to be here with the defendant.

(2/28 Marcia King minutes, p. 2 (ll. 7-25) - p. 3 (ll. 1-24))

Counsel then informed the Court that he had scheduled three doctors' appointments – one that afternoon, one on Wednesday and one on Thursday – and was unable to work on Friday because of a family commitment. Counsel requested that the case be adjourned to Monday, March 5 (2/28 Marcia King minutes, pp. 4-6). He also stated that he was not responsible for the delays on many of his old cases because he was "like a hired gun that comes on just to try the case" (2/28 Marcia

King minutes, p.7 (ll. 23-24)).[4]

The Court reluctantly granted counsel's request, notwithstanding its skepticism of the validity of the medical appointments, which appear to have been manufactured by counsel to avoid trial. The Court nonetheless adjourned the case for trial to March 5, 2012; and ordered defense counsel to appear at 9:30 a.m., informing him that if he were late, it would impose sanctions (2/28 Marcia King minutes, pp. 13-14, 16). The following colloquy occurred between the Court and defense counsel:

> THE COURT: . . .
>
> However, on March 5, the day the trial is scheduled to start, you are expected to be here at 9:30.
>
> Mr. Rankin, you were three hours late today. If you are late at all on Monday March 5, for trial, past 9:30, I'm sanctioning you. There will be fines. You are on notice.
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> (2/28 Marcia King minutes, p. 13 (ll. 24-25); p. 14 (ll. 1-5))
>
> . . .
>
> [DEFENSE COUNSEL]: Can I continue, Judge.
>
> THE COURT: No. We have done this already. There's nothing else to argue about. You are starting trial on Monday. You need to be here at 9:30. There's nothing else.

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[4] A review of his cases that are, or have been, before this Court reveal that counsel is nearly always retained by the date of Supreme Court arraignment.

(2/28 Marcia King minutes, p. 16 (ll. 2-6))

On March 5, 2012, counsel arrived in the courtroom at one to two minutes before 10:00 a.m., but left immediately. He later returned to the courtroom, and the case was called at approximately 10:05 a.m. (3/5 Marcia King minutes, pp. 2-4). When the Court asked counsel his explanation for being late, the following colloquy ensued:

> THE COURT: Good morning. It is now 10:04, Mr. Rankin. You were ordered to be here at 9:30 this morning to start a trial. You walked into this courtroom at a minute or two before 10:00 o'clock this morning and then put your coat down and picked up your Blackberry or cell phone and walked out of the courtroom talking on your phone. You came back into the courtroom and you were texting rather than having your case called. It 's now 10:05. What is the explanation for your lateness?
>
> (3/5 Marcia King minutes, p. 2 (ll. 6-15)
>
> [DEFENSE COUNSEL]: . . .
>
> In terms of why I wasn't here at exactly 9:30 I got here about five minutes to ten, Judge. I would like to think the only issue would be traffic. I take the LIE, BQE and the Grand Central in order to get here. Again, you know, in my experience it's never been a time certain in any up front part especially when most of the time it's about trial. We're just being sent out for trial. I'm ready for trial. I'm ready to go Judge. I don't really see the prejudice here or any other issue other than the Court seeking to create one.
>
> (3/5 Marcia King minutes, p 3 (ll. 3-12)

. . .

> [THE COURT]: On February 28th this case was on before this Court. You were ordered to be here on that date and your client was ordered to be here at 9:30. You came in three hours late. During that three hour period Judge Goldberg who had been assigned the matter was sitting on the bench in his Court part and was waiting for you for three hours. Because of that episode last week I ordered you, many times on the record, to be here exactly 9:30.
>
> In fact Judge Goldberg who will be now trying the case who has waited approximately four days to start this case reserved a jury panel on Friday afternoon. There are 60 jurors that have been waiting since 9:30 this morning to be sent up to his part.
>
> In addition to that, your client has been here. This Court has been here sitting and waiting for you. It's totally unacceptable.
>
> (3/5 Marcia King minutes, p. 4 (ll. 2-17))

The Court told counsel that it had ordered him to appear at 9:30 a.m. because it was imperative that the trial start promptly given counsel's scheduling issues in Nassau County.[5] When the Court informed counsel that it was imposing a $500 sanction for his lateness, counsel requested a hearing concerning the sanction, which the Court granted.

Sanction Determination

After conducting a hearing at which counsel was represented by Attorney Richard E.. Grayson and permitted to testify and offer evidence, the Court determined that counsel should be sanctioned $500 for his failure to appear in court at 9:30 a.m. on March 5, 2012. The Court

[5] Counsel was scheduled to start pre-trial hearings in Nassau County on March 12, 2012.

considered the following factors set out in 22NYCRR 130-2.1(b):

(1) the explanation, if any, offered by the attorney for his or her nonappearance;

(2) the adequacy of the notice to the attorney of the time and date of the scheduled appearance;

(3) whether the attorney notified the court and opposing counsel in advance that he or she would be unable to appear;

(4) whether substitute counsel appeared in court to explain counsel's absence;

(5) whether counsel filed an affidavit of engagement;

(6) whether the attorney on prior occasions in the same action or proceeding failed to appear at a scheduled court action or proceeding;

(7) whether financial sanctions or costs have been imposed upon the attorney pursuant to this section in some other action or proceeding; and

(8) the extent and nature of the harm caused by the attorney's failure to appear.

The only excuse counsel offered for his lateness on March 5, 2012, was he "would think the only issue would be traffic" (3/5 Marcia King minutes, p. 3 (ll. 4-5)). Further, at the hearing, counsel's attorney argued that: "it's a matter of public record . . . that there's heavy traffic on the LIE, the BQE and the Grand Central. So, my client's reason for not appearing at 9:30, he testified to, was the traffic on the roads that he takes to downtown Brooklyn" (hearing transcript, p. 7 (ll. 17-22).

The Court found counsel's explanation inadequate. Although counsel knew that his timeliness on March 5, 2012, was of paramount importance, he clearly made no effort to arrive by 9:30 a.m. See Matter of Marcus v. Bamberger, 180 AD2d 533 (1st Dept. 1992) (upholding sanction

where counsel, who arrived 21 minutes late, admitted that she did not leave her office until 9:30 a.m., although the Court had ordered her to appear in court at that time). This is not a case where the delay was due to unexpected circumstances outside of counsel's control. See ACS-NY v. Pizarro, 285 AD2d 406 (1st Dept. 2001) (court improvidently exercised its discretion in sanctioning attorney where his delay was due to an unexpected fire drill, a defective elevator and problems with a witness). To the contrary, counsel was well aware that he would encounter traffic on the way to court.

Moreover, despite arriving one-half hour late on March 5th , counsel did not remain in the courtroom at that time, but rather, left holding his cellular phone in his hand. He returned approximately five minutes later. See Matter of Marcus v. Bamberger, 180 AD2d at 534 (1st Dept. 1992) (noting that when counsel first arrived in the courtroom – 13 minutes late – she did not note her appearance or request to leave, but rather chose to leave and consult with her client).

Not only did the Court repeatedly notify defense counsel that he was due in court at 9:30 a.m. on March 5th , to begin trial, defense counsel stated that he would appear at that time (2/28 Marcia King minutes, p.14). The Court, in fact, told counsel that if he did not arrive at 9:30 a.m., it would impose sanctions. See Matter of Marcus v. Bamberger, 180 AD2d at 534 (upholding sanction where the court had informed counsel to appear at 9:30 a.m. and that it would impose sanctions if she were late).

Moreover, although at the hearing, counsel's attorney initially maintained that the Court had ordered counsel only once to appear at 9:30 a.m., he later conceded that the Court had twice instructed counsel to appear at 9:30 a.m. Further, neither counsel nor an associate informed the court that counsel would be late. See In re Gurwitch, 256 AD2d 180 (1st Dept. 1998) (upholding sanction

for attorney's failure to timely appear at a hearing where no evidence that he telephoned court or arranged for another attorney to inform court of his lateness). Although counsel's attorney maintained at the hearing that counsel's secretary had telephoned the Court to let it know that Mr. Rankin was stuck in traffic, no such call was received by this Court. Significantly, Mr. Rankin did not inform the Court on March 5, 2012, that his secretary had telephoned or tried to telephone the Court; nor did Mr. Rankin's secretary testify at the hearing.

Nor was this counsel's first late appearance in the case. On February 28th , counsel arrived at 12:30, despite knowing that the case was on for trial and that the Court had instructed him to appear at 9:30 a.m. (2/28 Marcia King minutes, pp. 2, 13, 16).

Defense counsel, in fact, has a history of appearing late for cases that are on for trial in this part. For example, on January 26, 2012, in the case of People v. Malik White, indictment number 7873/2007, defense counsel appeared in court at 12:40 p.m., despite knowing that the case was on for trial and that the People were ready to proceed (1/26/12 Malik White minutes, p. 2). See Matter of Marcus v. Bamberger, 180 AD2d 533, 534 (1st Dept. 1992) (not error for court to consider other instances of misconduct that predated alleged misconduct to clarify or provide background information for formal charges). When the Court questioned counsel about his late arrival, the following colloquy ensued between the Court and defense counsel:

> THE COURT: Mr. Rankin, I'm going tell you something, first of all, you walked in here at 12:40 today. Could you tell me what court part you were in?
>
> [DEFENSE COUNSEL]: I can, Judge.
>
> THE COURT: What is it?
>
> [DEFENSE COUNSEL]: How late is this court open to?

(1/26 Leslie Bourne minutes, p.4 (ll. 22-25) - p. 5 (ll.1-2))

When the Court told counsel that he needed to appear earlier for his cases, the following colloquies ensued:

> THE COURT: I'm telling you right now, when you come to my part, you need to come here earlier than 12:30. It's too late.
>
> [DEFENSE COUNSEL]: That is why the court has no discretion.
>
> THE COURT: Step out.
>
> [DEFENSE COUNSEL]: You are biased.
>
> THE COURT: Step out.
>
> [DEFENSE COUNSEL]: That's your problem.
>
> THE COURT: Step out.
>
> Step out of the well of the court. Mr. Rankin.
>
> [DEFENSE COUNSEL]: Have a good day.
>
> Even you, Judge.
>
> (1/26 Leslie Bourne minutes, p. 6 (ll.4-16))
>
> . . .
>
> THE COURT: The bottom line is, you are ordered to be here earlier in the day, not a quarter after one.
>
> [DEFENSE COUNSEL]: Do we have time certains in this court part? If you give me a time certain, I will be here time certain and you can call my case at that time.
>
> THE COURT: Step out of the courtroom.
>
> (1/26 Leslie Bourne minutes, p.6 (ll. 22-25) - p. 7 (ll.1-2))

This was not a single instance of arriving late to Court. Matter of Walsh v. People, 206 AD2d 434 (2nd Dept. 1994) (court improvidently exercised its discretion in sanctioning appellant for singular and brief delay).

In addition, an inquiry made of The Lawyers Fund For Client Protection indicates that financial sanctions previously were imposed against counsel in 2004 in a proceeding in Westchester County Court. And, as previously noted, Mr. Rankin was relieved as counsel in another case involving similar conduct. People v. Jones, 31 Misc.3d 1241(A) (Sup. Ct., NY County 2001).[6]

Finally, in this case, counsel's failure to appear caused many court resources to be wasted: a panel of prospective jurors, which was reserved by the trial court; the entire court staff of the trial part; and an assistant district attorney all of whom were required to wait an additional one-half hour.

Thus, weighing all the factors, the Court found that counsel's lateness on March 5, 2012, was "premeditated, blatant and willful." See Matter of Harris v. Rowley, 72 AD3d 1252 (3rd Dept. 2010) (upholding contempt charge against attorney who disobeyed court order to commence trial); see also Matter of Balter v. Regan, 63 NY2d 630, 631 (1984) (upholding contempt charge where petitioner not free to disregard court order – even if it was misguided – and decide for himself how to proceed). Counsel was, therefore, sanctioned $500. The Court expects that this sanction will deter counsel from disregarding the Court's orders and his duty to his clients and opposing counsel.

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[6] The Appellate Division, First Department, denied counsel's application for an order, pursuant to article 78 of the Civil Practice Law and Rules, and dismissed his petition. Jones v. Conviser, 86 AD3d 444 (1st Dept. 2011).

This opinion constitutes the decision and order of the Court.

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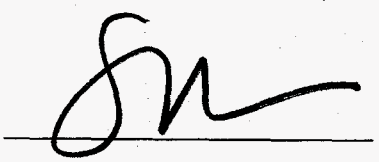

SUZANNE MONDO, J.S.C.

DATED: March 30, 2012