

<b>Matter of Wade v Pitt</b>
2018 NY Slip Op 31527(U)
June 13, 2018
Supreme Court, Bronx County
Docket Number: 250503/2017
Judge: Donald A. Miles
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

Index No. 250503/2017

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In the Matter of the Application of  
LAMONT WADE,

Petitioner,

For a Judgment under Article 78 of the Civil  
Practice Law and Rules.

**DECISION/ ORDER**

**Present:**

-against-

**Hon. Donald A. Miles**  
Justice Supreme Court

BAHAATI PITT, Judge, Criminal Court of the City of  
New York, Bronx County, and THE PEOPLE OF THE  
STATE OF NEW YORK,

Respondents.

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By order to show cause and Verified Petition, dated August 25, 2017, the Petitioner Lamont Wade ["Mr. Wade"] brings this Article 78 proceeding for an order of prohibition, preventing Respondent Hon. Bahaati Pitt ("Judge Pitt") from relieving The Bronx Defenders as Petitioner's counsel in People v. Lamont Wade - Criminal Docket No. 2015BX035265 ("Criminal Prosecution") at Mr. Wade's trial in Criminal Court on March 17, 2017.

The Petitioner was represented by The Bronx Defenders by V. Marika Meis and Ilona Coleman. The Respondent was represented by the Office of the Attorney General by Assistant Attorney General Elizabeth A. Figueira. The District Attorney of Bronx County also appeared by Rafael Curbelo, Esq.

The Petitioner asserts that there was no conflict due to The Bronx Defenders' unknowing, simultaneous representation of Mr. Wade and Oumar Sylla, the complaining witness, as a defendant, on March 17, 2017 when the court relieved The Bronx Defenders from representing Mr. Wade on his trial date; that The Bronx Defenders should have been allowed to remain as counsel for Mr. Wade upon the assurances given that no confidences were shared and where they offered immediately to be relieved from Mr. Sylla's case, which was subsequently dismissed and sealed on April 19, 2017. Petitioner argues that in relieving the Bronx Defenders, Judge Pitt

violated Mr. Wade's state and federal constitutional right to counsel of choice by erroneously focusing on the length of time of the concurrent representation and speculating about possible sharing of confidences, instead of relying on the record, facts and representations demonstrating that no sharing of confidences had occurred and that none would or could be shared going forward. By refusing to allow The Bronx Defenders to be relieved from Mr. Sylla's case and analyzing the conflict as one of concurrent, rather than successive representation, Petitioner contends that the decision of the court below was both arbitrary and capricious and an abuse of its discretion.

The Respondent opposes this petition upon the grounds that the Article 78 proceeding is time-barred; that the Petitioner has not identified a clear legal right to relief and that prohibition is inappropriate because the petitioner can appeal the March oral order after the criminal prosecution ends.

#### *Factual and Procedural Background*

On June 5, 2015 Mr. Wade was arrested for an alleged assault and was issued a Desk Appearance Ticket ("DAT"). In a felony complaint dated July 22, 2015, Mr. Wade was accused of assaulting complainant Oumar Sylla ("Mr. Sylla") on May 29, 2015 by cutting Mr. Sylla above his right eye with a box cutter and kicking Mr. Sylla in his left knee. Mr. Sylla required five sutures to repair the cut above his eye and he also sustained bruising to his left knee. On August 4, 2015 Mr. Wade was arraigned and the case was sent to Part FA for Grand Jury action. On August 31, 2015, The People moved to dismiss the felony complaint and stated ready on the misdemeanor information. The Bronx Defenders, by Shannon Cumberbatch, was assigned to represent him and she remained his attorney through June 16, 2016, when Mr. Wade's case was transferred to staff attorney Andrew Multer, who personally appeared for Mr. Wade up until March 17, 2017.

On March 17, 2017 the Criminal Prosecution was assigned for trial before Judge Pitt, who heard arguments on a Sandoval application and resolved other pre-trial disputes. After the luncheon recess, but prior to opening statements, a supervising attorney from The Bronx Defenders announced that "there was a potential conflict of interest given that different attorneys" from The Bronx Defenders represented both Mr. Wade in the Criminal Prosecution

and Mr. Sylla, on an unrelated pending criminal case, for which he had been arraigned on October 16, 2016. The Bronx Defenders offered to withdraw as counsel for Mr. Sylla but remain on Mr. Wade's case since Mr. Sylla's case was slated for dismissal and Mr. Wade's trial was about to begin. The Bronx Defenders argued that the prior period of concurrent representation was unknowing and since no confidences had been shared between the attorney representing Mr. Sylla and the attorneys representing Mr. Wade, there was no conflict that required disqualification. Furthermore, they claimed that given the size of their office, the knowledge possessed by one attorney cannot be imputed to another.

The Office of the District Attorney opposed The Bronx Defenders' continued representation and indicated that Mr. Sylla had informed the prosecutors that he had shared details about his involvement in the Criminal Prosecution with The Bronx Defenders. During oral argument, The People revealed that it had been aware of the conflict for at least a week prior to March 17, 2017 but took no action to alert the court or counsel for the defense or even seek to have The Bronx Defenders relieved as counsel, prior to the day of trial. Judge Pitt issued an oral decision on the record, relieving The Bronx Defenders and appointing an attorney from the 18b panel, Mitchell Golub, and adjourned the case to May 31, 2017 for trial. Thereafter, the court issued a written decision dated March 20, 2017 which was placed in the case file. Petitioner and The Bronx Defenders claim they only received the March 20 decision on May 31, 2017, when they next appeared before Judge Pitt.

On April 24, 2017, The Bronx Defenders moved to renew and reargue the court's March oral decision in light of the subsequent dismissal of Mr. Sylla's criminal case, which they argued would make him a former client and the matter one of successive representation, instead of concurrent representation. In a Decision and Order dated July 18, 2017, Judge Pitt denied the motion on the basis that the motion to reargue was untimely, and assuming *arguendo*, that the motion was timely, that The Bronx Defenders failed to show that the court overlooked or misapprehended the law and the facts; and denied the motion to renew on the ground that the dismissal of Mr. Sylla's case was previously argued. This proceeding has ensued.

### *The Article 78 proceeding*

This Article 78 proceeding was commenced on August 29, 2017 seeking an order of prohibition against the respondents for conducting proceedings in excess of jurisdiction and in violation of petitioner's constitutional right to counsel. Among the issues with respect to the Petition is whether, in the event of Mr. Wade's conviction, the decision by Judge Pitt to relieve The Bronx Defenders as his counsel, can be adequately reviewed on direct appeal and whether the exercise of discretion by the respondent Judge Pitt was arbitrary and capricious and therefore subject to the writ of prohibition.

### *The Petitioner's Claim*

The Petitioner argues that the unknowing and concurrent representation of both Mr. Wade and Mr. Sylla by different lawyers at The Bronx Defenders did not disqualify them from continuing to represent Mr. Wade where they offered to be immediately relieved from Mr. Sylla's case, none of Mr. Sylla's confidences were shared with counsel for Mr. Wade, and the size and structure of The Bronx Defenders established that confidences would be maintained. Second, Petitioner argues that by refusing to allow The Bronx Defenders to be relieved from Mr. Sylla's case and instead relieving them from Mr. Wade's case, Judge Pitt interfered with Mr. Wade's right to counsel. Finally, it is asserted that Judge Pitt, by making no inquiry of Mr. Wade as to his wishes and refusing to accept a waiver of any possible conflict of interest, abused her discretion and acted in an arbitrary and capricious manner in relieving The Bronx Defenders.

### *Discussion*

As a preliminary matter, the Court must determine whether this Article 78 proceeding is time-barred. Pursuant to CPLR § 217, a special proceeding against a body or officer must be commenced within four months "after the determination to be reviewed becomes final and binding upon the petitioner...or after the respondent's refusal, upon demand of the petitioner or the person whom he represents, to perform its duty." CPLR § 217.

Respondents argue that Judge Pitt clearly and unambiguously relieved The Bronx Defenders as counsel and named Mitchell Golub as Rule 18b counsel at the end of the March 17 hearing and that the March 20 decision memorialized Judge Pitt's ruling, which means that the

statute of limitations expired on July 17, 2017, over a month before Petitioner filed his Order to Show Cause on August 24, 2017.

While the court agrees with respondents that the absence of a Notice of Entry does not affect petitioner's ability to move under Article 78, as that notice triggers the time for an appeal and a motion for leave to reargue, it has not been disputed that the Court's March 20 decision was prepared at the request of the Petitioner. Counsel therefore had every reason to expect a written decision would be issued and eventually served on the parties, instead of being placed in the public case file. Therefore, the court finds that Petitioner's application is timely, petitioner having not received a copy of Judge Pitt's written decision prior to May 31, 2017, the adjourned date of the matter.

The extraordinary remedy of prohibition does not issue as of right, but only in the sound discretion of the court, and only when there is a clear legal right (*Matter of Dondi v Jones*, 40 NY2d 8, 13 [1976]). In exercising its discretion, the court must determine whether the issue presented is the type for which the remedy may be granted and, if so, whether prohibition is warranted by the merits of the claim (*Matter of Holtzman v Goldman*, 71 NY2d 564, 568 [1988]).

Prohibition is ordinarily employed to restrain a tribunal from entertaining a cause or proceeding over which it has no jurisdiction, or to enjoin a court from exceeding its authorized powers in a proceeding over which it has jurisdiction (*Matter of Culver Contr. Corp. v Humphrey*, 268 NY 26, 39 [1935]). A writ of prohibition will ordinarily not be granted where the grievance can be redressed by ordinary proceedings at law or in equity, or merely to prevent error which may be readily corrected on appeal (*id.*).

Judges have broad discretion to examine conflicts of interest and disqualify counsel where those conflicts are irreconcilable. In *People v Carncross*, the Court of Appeals stated that "in protecting a defendant's Sixth Amendment rights, a trial court may, on occasion, properly disqualify an attorney of a defendant's choosing due to that attorney's conflicts, actual or potential, even in the face of defendant's waiver of such conflicts." 14 N.Y.3d 319, 327-30 (2010); see also *People v Watson*, 26 N.Y.3d 620, 624 (2016) (the trial judge did not abuse his discretion when he relieved counsel and appointed conflict-free attorney to represent defendant).

Judge Pitt acted within her jurisdiction and within her discretion during the March 17 hearing and in issuance of her order on the record. Judge Pitt detailed the basis for her decision on the record, outlining how the “court has the interest in protecting the fairness of the trial court, the defendant, and the complaining witness,” and clearly articulated her concern that The Bronx Defenders had not properly managed its conflict inquiry and had allowed concurrent representation for a client that had been represented for over two years. In this case it was clear that an actual or potential conflict existed due to the fact that attorneys from The Bronx Defenders had represented Petitioner and Mr. Sylla concurrently for over five months. The Assistant District Attorney also stated that she was concerned that information had been shared.

In light of the foregoing, and, accepting the allegations of the petition as true, the court concludes that the challenged action of Judge Pitt is not “the type of issue for which the remedy of a writ of prohibition may be granted” and thus, a writ of prohibition will not lie and the instant petition must be dismissed.

This constitutes the Decision and Order of the Court.

JUN 13 2018

DATE



HON. DONALD MILES, J.S.C.