

**SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE****PATRICIA K. COSTELLO**
ASSIGNMENT JUDGE50 W. MARKET STREET
ESSEX COUNTY COURTS BUILDING
NEWARK, NJ 07102
(973) 693-6470

August 17, 2010

Constantine Soupios, Esq.
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Veterans Courthouse
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Re: State v. Iadipaoli
Indictment No.: 2005-2-441

Dear Counsel:

This matter comes before the Court by way of a reversal and remand from the Appellate Division, which ordered a plenary hearing to be held on the reasons for defense counsel's decision not to call certain witnesses proffered by defendant at his original trial.¹

The statement of facts and procedural history are set forth in the original PCR decision dated December 5, 2008, as well as in the Appellate Division decision and will not be repeated here, but are incorporated by reference.

The plenary hearing commenced on March 29, 2010. At that time, John Johnson, Esq., the trial attorney, began his testimony. At defense counsel's request, the hearing was adjourned to allow him more time to secure the trial file from the Office of the Public Defender. The file proved elusive, but was eventually turned over to defense counsel, and the hearing resumed on August 16, 2010. Johnson finished his testimony, and his trial investigator, Paul Ibsen, also testified.

The receipt of the trial file, and the balance of the questioning of Johnson, revealed that little of the decisions made leading up to and during the trial were actually based on trial strategy.

¹ State v. Iadipaoli, Docket No. A-6250-06T4, decided January 7, 2010.

The defendant provided the names of several character witnesses, and although they were interviewed by the investigator, and all demonstrated a willingness to testify, none were called. Johnson explained that he was afraid that if he put in evidence of good character, then the State would have an opportunity to show evidence of bad character, namely that the children-victims in this indictment would be allowed to also testify that defendant had raped his god-daughter, SJ² (two of the four victims in this case claimed to have actually seen defendant rape SJ. The investigator's notes state that SJ was examined at a hospital and the forensic exam showed no evidence of a sexual assault. SJ herself has consistently denied the rape ever happened).

Johnson could not explain why he didn't seek an *in limine* ruling on the issue that the alleged rape of SJ would be excluded. He could not explain in any logical manner why he himself did not seek to introduce the forensic evidence of the lack of assault, to help show that the children were lying.

He first claimed that the witnesses offered by the defendant were only character witnesses, but when confronted with his own file, it was apparent that at least three of the witnesses were fact witnesses.

He next stated that SJ's mother was sick with cancer and unavailable to testify. This was unequivocally contradicted by the contents of the file and the notes and testimony of Inv. Paul Ibsen. SJ's mother was very willing to testify, kept in touch with Ibsen even after she relocated to California, and was willing to return to New Jersey for the trial. She did have cancer, though, and ultimately died two months before trial. No attempt was made at any point to take a *de bene esse* deposition, pursuant to R. 3:13-2(a), and Johnson seemed more than unfamiliar with the option.

He then stated that one of the other two witnesses, either SJ or another woman, Sade, was unavailable to testify because she was in a drug rehabilitation facility. Again, this was flatly contradicted by the contents of the file and the testimony of Ibsen. Neither woman was unavailable, nor was there any indication that either had ever been in a drug rehabilitation facility. In fact, there was no inkling in the file that either had ever had any history of drug abuse. There was evidence in the file that the victims' mother was in a drug rehabilitation facility; the fair inference is that Johnson simply had the various women confused.

Johnson stated that it was his practice to discuss trial strategy, including decisions about calling witnesses, with his client during the jury selection. This was obviously too late to have done defendant any good in this case. Two of his three fact witnesses had relocated to California; one of those two had died without any attempt being made to preserve her testimony, no arrangements had been made to have the other brought in to New Jersey to testify, and even the one based in New Jersey had not been subpoenaed.

Despite Johnson's claim at this hearing that all his decisions were based on trial strategy, none of them can be justified with that rubric. His own investigator testified that he had advised Johnson that the witnesses would be good, if not excellent, and was surprised they were never called to the stand.

² She has also been described as his daughter. Her name, and that of her mother Donna, have been transposed in many of the documents.

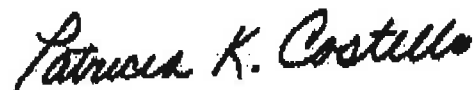
Johnson never spoke to any of the people on defendant's witness list. Decisions not to pursue an investigation can never be justified as trial strategy. State v. Savage, 120 N.J. 594, 617 (1990); Strickland v. Washington, 466 U.S. 668, 690-691 (1984). His errors in confusing the women in the case, his failure to preserve the testimony of one, and his practice (as applied in this case) of addressing trial strategy during jury selection all amount to ineffective assistance of counsel under the first prong of the Strickland/Fritz test (see Strickland, supra, adopted in State v. Fritz, 105 N.J. 42 (1987)).

The second prong requires an analysis of whether that evidence, had it been admitted, would have raised a reasonable probability of a different result. State v. Russo, 333 N.J. Super. 119, 140 (App. Div. 2000). While the Appellate Division envisioned calling the witnesses, counsel chose instead to use their statements, to agree to stipulations as to what was contained in the Public Defender's file, and to rely on what was available pre-trial to Johnson, and which had been researched by Ibsen. Applying the second prong of the Strickland/Fritz standard, there is a reasonable probability a different result would have occurred had the fact and character witnesses been called.

The case against defendant relied on the combined testimony of four children. The proffered testimony about the false allegation of rape would have certainly eviscerated at least two, and by extension, the credibility of all four of the children. The trial was extremely short, as defense counsel here pointed out, less than 100 transcript pages. The children gave versions that were internally inconsistent, and did not agree in many parts with their prior videotaped interviews. Forensic evidence that they had falsified a claim that SJ was raped would certainly have shaken the jury's view of their credibility. Evidence of the possible motive for the mother of the children's to orchestrate their testimony was never presented and could also have provided a reasonable doubt.

Therefore, defendant has met both prongs of the Strickland/Fritz test. The conviction is vacated, and a conference is scheduled for September 13th, 2010 before this Court.

Very truly yours,



PATRICIA K. COSTELLO, A.J.S.C.

STATE OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CRIMINAL PART
ESSEX COUNTY

v.

JOSEPH IADIPAOLI,
Defendant

INDICTMENT #: 05-02-441

FILED

AUG 17 2010

**ORDER ON POST-CONVICTION APPLICATIONS
ON INDICTABLE OFFENSES**

PATRICIA K. COSTELLO, AJSC

This matter being opened on the application of defendant, Joseph Iadipaoli's

- Petition for Post-Conviction Relief determined to be defendant's:
 - First petition
 - Second or subsequent petition
 - Motion for Change or Reduction of Sentence pursuant to *Rule 3:21-10*
 - Motion for _____

And the defendant having been represented by Jeffrey Lichtman, Esq.

- Attorney for the Office of the Public Defender
- Retained Counsel
- Designated Counsel
- The court having concluded that there was no good cause entitling the assignment of counsel on the application

And the State having been represented by Assistant Prosecutor Constantine Soupios Esq.; and

- There having been proceedings conducted on the record on
- or
- The matter having been disposed of on the papers;

It is on this the 17th day of August, 2010 ORDERED THAT DEFENDANT'S APPLICATION IS
HEREBY:

- Granted - *Conviction is vacated.*
- Denied
- Other

For the reasons:

- Expressed in the court's written opinion of August 17th, 2010
- Expressed orally on the record on

Conference scheduled for Sept 13th 2010 @ 9 AM
Patricia K Costello
Patricia K. Costello, A.J.S.C.

Original: Court Jacket
Cc: Office of the Public Defender
Assistant Prosecutor