



United States Supreme Court

HOW EYEWITNESS IDENTIFICATION WILL BE REVIEWED WHEN THERE IS NO IMPROPER CONDUCT BY LAW ENFORCEMENT



Perry v. New Hampshire

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In *Perry v. New Hampshire*ⁱ the United States Supreme Court reviewed an eyewitness identification that led to an arrest in Nashua, New Hampshire. The arrest of Barrion Perry was the result of a radio call at 3:00 a.m. on August 15, 2008. Officers responded to an apartment building after receiving a report that a black male subject was trying to break into vehicles. Officer Nicole Clay was the first to arrive on the scene. Upon her arrival Officer Clay heard something metal clang to the ground and observed Barrion Perry carrying two car stereo amplifiers. She noted a metal bat on the ground behind Perry. When Officer Clay asked Perry where he got the stereo equipment he responded that he had found them on the ground. Officer Clay asked Perry to remain at the scene while officers investigated further.

While officers were responding, Nubia Blandon, a witness to the event went to her neighbor's apartment and woke him with the news that someone was breaking into his vehicle. The neighbor Alex Clavijo went to the parking lot and found that his vehicle had been broken into and the stereo equipment as well as his bat was taken. He reported this to Officer Clay, who at this point was on the scene.

Officer Clay, accompanied by the victim, Clavijo then went to the 4th Floor of the apartment building where Officer Clay interviewed Nubia Blandon. Blandon reported that she was looking out her kitchen window at about 2:30 a.m. when she saw a tall black male subject roaming the parking lot and looking into cars. She watched as he broke into Clavijo's car and took the items out. Officer Clay asked Blandon if she could provide a more detailed description of the subject. Blandon



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responded by pointing to her kitchen window and indicating that the subject (Perry) standing in the parking lot next to the police officer was the subject responsible. It is this identification process that Perry challenged to the United States Supreme Court.

Through a series of eyewitness identification cases, the United States Supreme Court has determined that where there is a challenge to a pretrial identification based on Due Process grounds the trial court utilizes a two-stage inquiry to determine whether or not the pretrial identification violated the defendant's right to due process.

The trial court first asks: was there "unnecessarily suggestive conduct by law enforcement?" If the answer is no, then the defendant cannot establish a Due Process violation at all. If the answer is yes there was unnecessarily suggestive conduct by law enforcement that does not mean that the in-court identification of the defendant by witnesses and victims is excluded, instead it means the court must do a further inquiry to determine if the unnecessarily suggestive identification process has tainted the in-court identification. In other words, is the witness making their in-court identification based on their memory from the crime or are they making their identification from their memory of the subject from the overly suggestive identification process. That is why court's look at things like the witness' ability to see the subject at the crime scene; the duration of the viewing; the detailing of the original description by the witness; the lighting; and any other factors which would indicate that the identification was reliable notwithstanding the unnecessarily overly suggestive conduct by law enforcement.

The New Hampshire trial court determined that there was no unnecessarily suggestive conduct by Officer Clay and therefore never reached the second part of the analysis. In fact the court found that the witness, Bandon, spontaneously identified Perry without any "inducement" by the police. Bandon and Clay testified at Perry's trial with respect to the out of court identification made by Bandon.

The issue before the United States Court is whether Perry could challenge on Due Process grounds the reliability of Bandon's identification where there was no unnecessarily suggestive conduct by the police. The Court framed the questions as follows: "...whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police." The trial court had ruled that even though there were some questions with respect to the reliability of Bandon's identification: the parking lot was dark in some locations; Perry was the only black male in the parking lot and standing next to a police officer; and Bandon was unable to pick Perry out of a subsequent photo-array the police conducted, these credibility of the identification could be challenged at trial before the the jury and not on a Due Process challenge.

In the Supreme Court, Perry acknowledged that the identification was not due to conduct by the police but argued that he should be able to challenge the reliability of the witness's identification pretrial to the judge in accord with his Due Process rights.

In refusing to accept Perry's argument the Court asserted that the judicial screening of eyewitness identification's reliability only comes into play when the defendant has established improper police conduct. The Court noted that most identifications have some degree of suggestiveness to them albeit not suggestiveness created by law enforcement. The Court also noted the criticisms to the reliability of eyewitness identification. Notwithstanding these arguments the Court held: "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Thus, if the defendant cannot establish improper law enforcement conduct which created an unnecessarily suggestive identification, then there is no Due Process right to have the judge screen the reliability of the identification. The defendant can still cross-examine the eye witness at trial and challenge their identification so that the jury can access the credibility of the witness. The Court also noted other safeguards including rules of evidence and jury instructions on eyewitness identification as providing sufficient safeguards against unreliable identifications.

Bottom-Line: If the defendant cannot establish improper conduct by law enforcement which created an unnecessarily suggestive identification, the defendant is not entitled by the Constitution to a judicial pretrial screening of the reliability of the eyewitness identification.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

CITATIONS:

ⁱ *Perry v. New Hampshire*, 2012 U.S. LEXIS 579 (January 11, 2012)