

Decided on July 30, 2008

Supreme Court, Queens County

The People of the State of New York

against

Ismael Nazario, Defendant.

3415/2006

William M. Erlbaum, J.

The defendant was indicted in January of 2007 for the crimes of Robbery in the First Degree [PL 160/15(3)], one count, and Robbery in the Second Degree [PL 160.10(1) and PL 160.10(2A)], two counts. The People allege that on September 28, 2006, the defendant, acting in concert with others, forcibly stole personal property from the complaining witness. Furthermore, the People allege that the defendant used or threatened the immediate use of a dangerous instrument, and caused the complainant physical injury.

The defendant filed a motion dated July 20, 2007, and an undated reply affirmation, seeking to admit at trial "expert testimony on psychological factors that may affect the accuracy of eyewitness identifications" (*see*, defense motion, page 1). Though the defendant particularized eleven points he wished the expert to address, he now indicates that he wishes to have the expert

testify about five factors that may affect the accuracy of identifications, namely cross-racial identifications, stress, the correlation between confidence and the accuracy of identifications, confidence malleability, and the relative effects of show-ups compared to line-ups regarding eyewitness reliability (*see*, defendant's reply affirmation, dated May 23, 2008, filed in response to an application by the People for a *Frye* hearing). In response to the defendant's motion to present expert testimony at his trial, the People filed an affirmation dated September 16, 2007. They consented to the concept of an expert witness on eyewitness identifications, however, they disputed the propriety of the testimony on some of the issues raised. Based upon the People's consent, in a short form decision and order dated November 15, 2007, this Court ordered that the defendant may call an expert at trial, but the scope of the testimony would be referred to the sound discretion of the trial judge.

Subsequently, on April 11, 2008, the parties had an on- the- record discussion with the Court regarding this issue of expert testimony (*see*, the minutes of April 11, 2008, Part K-4). The People submitted that though they initially "consented to the position that [the defendant's witness] was qualified to testify as an expert" at trial (*see*, the minutes of April 11, 2008, page 6, lines 7-8), they did not consent to the expert testifying without the Court first conducting a *Frye* hearing. The Court instructed the People to file a written motion delineating exactly what their position is regarding the testimony at trial of a defense expert witness on the accuracy of identifications. The People did indeed file such a motion, dated May 3, 2008. The defendant filed an answer dated May 23, 2008.

Based upon the recent motion papers and answer filed by the parties, and the discussion on the record on April 11, 2008, the Court has decided to consider the People's motion of May 3, 2008 to be one for reargument (*see*, the minutes, April 11, 2008, and specifically pages 16- 17). When the Court issued its short form decision and order of November 15, 2007 granting the defendant the qualified right to call an expert witness at trial on the issue of identification, it relied almost entirely on the People's consent (*see*, the minutes, April 11, 2008, and specifically pages 6- 7). In fact, the Court did not follow its usual practice, and did not discuss and analyze the issues that were raised by the defendant in his original motion. As the Court stated on page 7 of the minutes of April 11, 2008, at lines 4- 7, "Likely without the consent here, I wouldn't have even granted an expert...". Since the People have modified their position, the Court will now, in the context of the dispute, discuss in depth the issues that have been raised and analyze them as they apply to the case at bar. The Court will consider, *de novo*, the propriety of the defendant calling an expert witness on identification issues at trial as it relates to the specific facts of this case.

The decision to admit at trial expert testimony on the issue of the reliability of eyewitness identification is left to the sound discretion of the trial court (*see, People v. Lee*, 96 NY2d 157 [2001]). In two significant cases in recent years, the New York State Court of Appeals has discussed the issue of judicial discretion and the appropriateness of the admission of expert testimony in identification cases.

In *People v. Young*, 7 NY3d 40 [2006], the defendant was convicted of robbery and burglary, for committing a home invasion, while armed, where he threatened the complainants and stole their personal property. The defendant had covered most of his face and was in the home for

approximately five to seven minutes. One of the complainants stated that she observed the defendant in sufficient light, but retained only an image of his eyes. The defendant was black and the complainants white. The defendant was arrested a month after the event, and though he was not identified by one of the complainants, the other picked him out of a lineup, although she did fail to recognize him in a photo array. Property of the complainants was recovered from acquaintances of the defendant. The complainant testified at trial to her line-up identification and the defendant was convicted. However, his conviction was reversed, as the result of an arrest not based upon probable cause. The line-up identification was suppressed. Eight years later, before the defendant was retried, the trial court held an independent source hearing, and found independent source. The complainant made an in-court identification at the second trial. The defendant sought to introduce at the second trial expert testimony from a psychologist who had studied factors which affected the accuracy of identifications, such as the opportunity to observe, race, stress, whether a weapon was used in the crime, and witness confidence in the identification. The trial court excluded the evidence, the defendant was convicted again, and this time his conviction was affirmed. The Court of Appeals stated that a trial court must determine if "the expert could tell the jury something significant that jurors would not ordinarily be expected to know already" (*see, Young* at page 45). The Court found in that case that in light of the corroboration presented by the People, it was reasonable for the trial court to determine that the expert testimony would have been of minor import, and therefore it was a reasonable exercise of the trial court's discretion to preclude the testimony. The Court continued, however, that, "if this case turned entirely on an uncorroborated eyewitness identification, it might well have been an abuse of discretion to deny the jury the benefit of [the expert's] opinions" (*see, Young* at page 45).

Less than a year later, the Court of Appeals decided the case of *People v. LeGrand*, 8 NY3d 449 [2007]. In *LeGrand*, a cab driver was stabbed to death, and the assailant fled before the police arrived at the scene. There were witnesses to the crime and within a matter of days, they collaborated in the creation of a sketch of the attacker. Two years later, when the defendant was arrested for another unrelated crime, the police considered him a suspect for the stabbing because he resembled the sketch. However, the police were unable to locate the witnesses, so the case remained unresolved. Seven years later, the police again considered the defendant a suspect, and this time located witnesses to the attack. One witness identified the defendant in a photo array and lineup. Though others thought the defendant resembled the attacker, they were unable to identify the defendant. There was no corroborating evidence. The People's case consisted entirely of identifications made seven years after the crime. The defendant was convicted upon a retrial, the first trial having ended in a mistrial due to a hung jury. During the retrial, the defendant moved to introduce in evidence testimony from an expert regarding the factors of weapon focus, the correlation of witness confidence and accuracy, and the effect on the identification of postevent information. The trial court precluded the expert's testimony, and the defendant was convicted of murder. The Appellate Division, First Department affirmed the conviction, however, the Court of Appeals reversed it. The Court held that, "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the

average juror" (*see, LeGrand* at 452). The Court concluded that based upon the facts of that case, it was error for the trial court to exercise its discretion by precluding the expert testimony.

Based upon the holdings of *Young* and *LeGrand*, it is clear that "the reliability of eyewitness identification is classically, and properly, a factual issue for the jury to decide, and should not be handed over to the experts. But in an appropriate case- where an eyewitness's identification is the sole incriminating evidence and is marked by features to which the scientific data is particularly relevant- a court should allow expert testimony, as background to help the jury assess the identification" (*see, Miriam Hibel, New York Identification Law, 2007 edition, page 13-16*). The issue then for courts, including this one, to grapple with is, what is an appropriate case for expert identification testimony?

The cases of *Young* and *LeGrand* both dealt with situations where the defendants were arrested long after the crimes, one month later for defendant Young and seven years later for defendant LeGrand. Both defendants were subjects of photo arrays and line-ups, and defendant Young was identified in open court eight years after the crime. Based upon facts such as these, it is not difficult to accept that an expert witness on identification reliability would be able to provide the jurors with information that they might not already possess and understand, such as what the correlation may be between the confidence a witness has in the witness's identification and the accuracy of that identification, especially in light of situations when the identifications are made long after the crime, and when the cases involve photos and line-ups.

The Court also notes the holdings in *People v. Williams*, 14 Misc 3d 571 [2006], *People v. Banks*, 16 Misc 3d 929 [2007], and *People v. Gonzalez*, 47 AD3d 831 [2nd Dept 2008], *leave denied*, 10 NY3d 863 [2008], all recent post *Young* and *LeGrand* cases, where expert testimony on identification reliability was, or should have been, permitted at trial. In each of these cases, the defendants were the subjects of photo arrays and line-ups. Furthermore, in *Williams*, though the defendant was identified in a photo array on the day of the crime, he was not picked out of a line-up until three weeks later. In *Banks*, the defendant was not identified by certain witnesses until more than a year after the crime. Again, it is clear that in such cases involving the interplay between the issues of passage of time, photo arrays and line-ups, "the specialized knowledge of the expert can give jurors more perspective than they get from their day-to-day experience, their common observation and their knowledge" (*see, Williams*, at 586, quoting *Young*).

In the case at bar, the defendant is accused of committing a robbery on September 28, 2006. The complainant's testimony before the Grand Jury indicates that the offense was committed at approximately 3:00 PM. He testified that he was in the vicinity of 94th Avenue and 106 Street, in Queens County, talking on his cell phone when an individual, later identified as the defendant, asked him for the time. The complainant testified he told the defendant the time, the defendant left, and then returned and asked for the complainant's cell phone. When he refused, the defendant punched the complainant in the eye, allegedly while wearing brass knuckles, caused bleeding, took the cell phone, and then allegedly gave the phone to another individual. The defendant fled. The police were called, and when they arrived, the complainant provided them with a description of the defendant, and then with the complainant in the police car, canvassed the area. The complainant saw the defendant about three blocks from the location of the incident

and immediately identified him. The complainant testified that only about *seven minutes* passed between this dramatic criminal encounter and the moment he spotted the defendant. In fact, the People served CPL 710.30(1)(b) notice that the defendant was identified in a show-up on September 28, 2006, at approximately 3:08 PM.^[FN1]

In evaluating the issue as to whether the defendant should be permitted to introduce expert testimony on the issue of eyewitness identification in this particular case, it is crucial to note that the facts of the case at bar are critically distinguishable from the facts of *Young* and *LeGrand*, as well as their progeny, discussed *supra*. In the instant case, the only identification procedure conducted was a prompt show-up, held in exceedingly close geographic and temporal proximity to the crime.^[FN2] The defendant was found in the vicinity of the crime and immediately arrested after the crime. There was no delay in locating the defendant, and there was no need for the police to conduct a photo-array or a line-up, as the defendant was corporeally identified very soon after the crime.^[FN3] Furthermore, unlike *LeGrand*, the complainant in this case dealt directly with the defendant, and spoke with him, twice in a short period of time in what amounted to substantive interactions, and was the actual victim to the crime, not a mere witness to it (*see, People v. Allen*,— NYS2d —, 2008 WL 2747095 [2nd Dept 2008], 2008 NY Slip Op. 06301). And unlike *Young*, the defendant in this case had significant face- to- face encounters in broad daylight with the defendant, and was not dealing with an individual whose face was covered.

While considering these important distinctions, the Court has reviewed recent post *Young* and post *LeGrand* cases where the courts have exercised their discretion in not permitting expert testimony on the issue of identification, and the appellate courts have confirmed those decisions. Illustrative is *People v. Austin*, 46 AD3d 195 [1st Dept 2007], *leave denied*, 9 NY3d 1031 [2008]. In *Austin*, the unarmed defendant robbed the complainant of his cell phone, punched him in the face, and ran off. The complainant chased the defendant, but did not catch him. Though he filed a police report, the complainant did not view photo arrays. Five days later, the complainant observed the defendant on the street, called the police, and the defendant was apprehended. The trial court denied the defendant's application for expert identification testimony. Upon review of the case, the Appellate Division noted the significant distinctions between the facts of the case and the facts of *LeGrand*, such as the clear view of the defendant by the complainant and the lack of a photo array or line-up. The Appellate Division posed the question raised in *Young*: Could the expert educate the jury on a relevant trial issue that they did not already know about from their day-to-day experiences? The Court answered the question by stating, "In this case, we think the answer is no" (*see, Austin* at 201).

This Court also notes the significant distinctions between the case at bar and *LeGrand* and *Young*, and finds that this case falls more closely to the *Austin* case, where the trial court properly exercised its discretion and denied the defendant's application for expert testimony. Furthermore, the Court notes that while defense counsel has done significant research on this case, the Court has not been provided with any case law authority which is more directly on point than the *Austin* case. In the case at bar, where there were substantive interactions between the perpetrator and the victim, resulting in an arrest only minutes after the crime and in relatively close proximity to the place of the crime, the likelihood of an "irreparable mistaken identification" is *de minimus*. *Compare, Stovall v. Denno*, 388 US 293, 302 [1967].

Based upon the above discussion and review of the relevant and recent case law in this area, it would not be an appropriate exercise of the Court's discretion to admit into evidence at the trial of this matter expert testimony on identification reliability. The Court finds that a one-witness identification jury instruction, if otherwise warranted, is more than sufficient to instruct the jurors on the relevant factors they may consider in determining the defendant's guilt or non-guilt as to the instant charges.^[FN4] Furthermore, combined with the procedural safeguards of cross-examination and summation, as well as the jurors' life experiences, the jury will be provided with sufficient tools to assess this case. *See, People v. Carrieri*, 4 Misc 3d 307 [2004], *affirmed*, 49 AD3d 660 [2nd Dept 2008].

Accordingly, the Court hereby recalls its earlier short form order and decision dated November 15, 2007. The defendant's application to admit expert testimony on the issue of identification reliability is denied. However, this denial is without prejudice, if changed circumstances warrant it, to move before the trial judge for admissibility of expert testimony on the issue of identification in the course of the trial.^[FN5]

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to provide copies of this decision and order to the attorney for the defendant and to the District Attorney.

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WILLIAM M. ERLBAUM, J.S.C.

Footnotes

Footnote 1: A pre-trial *Wade/Dunaway* hearing was conducted in this case on June 4, 2007. The identification procedure was found not to be unduly suggestive, nor based upon an unlawful arrest (*see*, decision dated June 20, 2007).

Footnote 2: Show-ups conducted soon after the commission of a crime have been found to be "indicative of good police work aimed at apprehending the perpetrator and releasing innocent suspects as soon as possible, as the witness's memory is most fresh at that time" (*see, People v. Davis*, 134 AD2d 510 [2nd Dept 1987]).

Footnote 3: Though the cell phone and brass knuckles were not recovered from the defendant, it must be noted that the defendant fled the scene, and allegedly gave, at least the phone, to another, an unapprehended individual.

Footnote 4: The Court notes that the defense could also move to supplement the Court's jury

charge on one witness identification (*see, People v. Austin*, 46 AD3d 195 , 199 [1st Dept 2007], *leave denied*, 9 NY3d 1031 [2008]). Furthermore, if warranted, perhaps the trial court, with the aid of counsel, could fashion a jury instruction alerting the fact finders to the factors ordinarily articulated by identification experts on behalf of the defense and the prosecution.

Footnote 5: *See, People v. Austin*, 46 AD3d 195 , 198 [1st Dept 2007], *leave denied*, 9 NY3d 1031 [2008], "[p]erhaps the better practice would have been to reserve decision or deny the motion [for expert testimony] with leave to renew during presentation of the People's case, at which time both the defense and the court would have been in a better position to consider the relevance of any expert testimony proffered on the effect of various factors on the reliability of eyewitness identification".