State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, November 17, 2015

No. 195 People v Kaity Marshall

Kathleen Rison was riding on a city bus in Brooklyn in July 2008 when she was assaulted by a woman she had never met. The woman had stepped on her foot and, when she refused to apologize, Rison criticized her for poor manners. The woman began punching Rison in the face. When Rison took off her shoe to strike her assailant, the woman took a knife from her purse and brandished it, then fled from the bus. In September 2008, Rison saw Kaity Marshall at Kings County Hospital and, believing she was her assailant, called the police, who arrested Marshall.

In January 2010, about 16 months after the arrest and 9 months before trial, a newly-assigned prosecutor showed Rison a photo police had taken of Marshall after her arrest. The prosecutor disclosed the photo display at a court appearance the next day and, saying he had been trying to clarify his understanding of the descriptions Rison gave police on the day of the assault and the day of Marshall's arrest, argued the display was not an identification procedure, but instead was permissible "trial preparation" under People v Herner (85 NY2d 877 [1995]). Marshall argued the display was an unduly suggestive identification procedure that would taint any in-court identification by Rison.

After a Herner hearing, Criminal Court ruled the photo display was not an identification procedure warranting a Wade hearing. It said, "The hearing testimony of Ms. Rison established that the viewing of the photograph took place as part of trial preparation," in which the prosecutor was permitted "to use exhibits." Marshall was convicted of third-degree attempted assault, fourth-degree attempted criminal possession of a weapon, menacing and harassment, and was sentenced to seven days of community service and an anger management program.

The Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed, saying, "The prosecutor had been assigned to the case the day before he met with the victim. Moreover, the victim was unable to identify the person depicted in the photograph, which the victim described as blurry and not clear...." Even if Rison had identified the photo as Marshall's, "because the victim had previously identified defendant upon defendant's arrest, the photographic identification would not have tainted her in-court identification of defendant...."

Marshall asks the Court to reconsider Herner, saying the trial preparation exception stands "in apparent tension" with New York's "well-defined regime" for defendants to challenge the admission of suggestive identification procedures under CPL 710.30. "Under the trial preparation doctrine that has developed, ... pre-trial procedures that would normally be regarded as suggestive and would certainly be subject to careful scrutiny at a full Wade hearing have been defined as outside the ambit of CPL 710.30's definition of an 'identification procedure.'" Even under Herner, she argues she was entitled to a Wade hearing because the "trial preparation display ... did not involve a photo of a non-suggestive lineup, but rather a single photo showup" of her arrest photograph; and because Rison "had never selected appellant in any non-suggestive identification procedure."

For appellant Marshall: Richard Joselson, Manhattan (212) 577-3451
For respondent: Brooklyn Assistant District Attorney Camille O'Hara Gillespie (718) 250-2000

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No. 196 People v Todd Holley

In May 2010, a man tried to snatch a purse from a woman's shoulder in Manhattan's Prince Street subway station, but she and a friend wrested it away from him. Two other women who witnessed the incident stayed with them to talk with the police. Before any officers arrived, the man returned and punched two of the women, then fled the station. The witnesses told a detective their assailant was a black man about 6'0" to 6'2" tall, 30 to 40 years old, with unkempt hair and wearing a black jacket and blue knit cap. Two of them also said he was "skinny."

Three days later, the detective called one of the witnesses to his office to try to identify the assailant in a computer-generated photo array. The detective ran a search for photos of black men ranging from 6'0" to 6'4" tall and 30 to 40 years old who had been arrested in Manhattan from 2007 to 2010. He did not enter any weight range. The search returned about 3,000 arrest photos, which were displayed six at a time. On the second page, the witness identified Todd Holley as the assailant. She went on to pick out two more photos of Holley on pages 13 and 14. After Holly's arrest, the detective held a line-up for two of the witnesses. Both identified Holley.

Holley's attorney moved to suppress the photo and line-up identifications on the ground they were unduly suggestive, saying the detective's failure to enter any information about the suspect's weight in the photo array search created a risk that Holley would stand out "as a tall skinny person." He argued that, because the police failed to preserve the photo array, Holley was entitled to a presumption that it was suggestive. He said the line-up was suggestive because Holley was significantly lighter than the five fillers and he was the only one in his 30s.

Supreme Court denied the suppression motion, saying the photos "were not suggestive in any way" and noting the witness "kept identifying the same person." It said a photo of the line-up showed "there is nothing that highlights the defendant which would suggest to a witness to pick him out." Holley was convicted at trial of third-degree attempted robbery and assault and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, finding the photo identification procedure was not unduly suggestive. "The fact that the police failed to preserve the arrays ... does not warrant a different conclusion...," it said. "We also conclude that the detective entered sufficient information about the description of the perpetrator to ensure that the computer generated a fair selection of photos." Regarding the line-up, it said, "Any differences between defendant and the other participants, including an age disparity not fully reflected in the participants' actual appearances, and a weight disparity that was minimized by having the participants seated, was not so noticeable as to single defendant out...."

Holley argues the prosecution's failure to preserve the photo array entitles him "to an inference or presumption that it was unduly suggestive, and the evidence adduced at the hearing did not establish that there existed sufficient safeguards against suggestiveness to rebut that inference or presumption." He says the line-up was unduly suggestive because he "stood out like a sore thumb as the only person who matched the description of the suspect."

For appellant Holley: Andrew C. Fine, Manhattan (212) 577-7989
For respondent: Manhattan Assistant District Attorney Joshua L. Haber (212) 335-9000

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No. 197 People v Dennis P. Smalls

Dennis Smalls was charged in a misdemeanor information with criminal possession of a controlled substance in the seventh degree in 2011 after he was searched by a police officer in the Bronx. In a deposition, the arresting officer said he found in a pocket of Smalls' jacket "one (1) glass pipe containing a tar-like substance. Deponent further states that based upon his training and experience, which includes training in the recognition of controlled substances and their packaging, the aforementioned substance is alleged and believed to be CRACK-COCAINE RESIDUE."

Smalls moved to dismiss the charge as jurisdictionally defective, arguing that the allegation he possessed "a 'glass pipe containing a tar-like substance' is facially insufficient without a laboratory report" confirming the substance was cocaine. After Supreme Court denied his motion to dismiss, Smalls pled guilty to the charge and was sentenced to 30 days in jail.

The Appellate Division, First Department affirmed, ruling the criminal information was not jurisdictionally defective. "Nonhearsay allegations established every element of the charged offense, notwithstanding the absence of a laboratory report (see People v Kalin, 12 NY3d 225 [2009])," it said. "Based on the allegation that defendant possessed a glass pipe containing 'a tar-like substance' that, based on the officer's 'training in the recognition of controlled substances and their packaging, ... [he] believed to be crack-cocaine residue,' an inference can be drawn that defendant knew that he was in possession of cocaine...."

Smalls argues that Kalin, which said a laboratory report identifying the drugs was not necessary to set forth a prima facie case of possession, is distinguishable because the heroin and marijuana in Kalin were "commonly recognizable *unconsumed* drugs contained in signature packaging ... and accompanied by drug paraphernalia.... Here, in contrast, the police officer observed a 'tar-like substance' in a glass pipe, and the officer's boilerplate assertion of unspecified 'training' made no reference to any training in identifying burned substances.... The 'substance' was not contained in any packaging ... and was unaccompanied by any drug paraphernalia -- the police officer did not contend that the glass pipe was identifiable as a 'crack pipe.' Most importantly, as it was a 'tar-like substance,' likely the byproduct of some kind of smoking or burning, it was impossible to determine by naked observation whether the substance still contained, or ever contained, crack cocaine."

For appellant Smalls: Lawrence T. Hausman, Manhattan (212) 577-7989
For respondent: Bronx Assistant District Attorney Marianne Stracquadanio (718) 838-6100

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To be argued Tuesday, November 17, 2015

No. 198 Matter of Suarez v Williams *(papers sealed)*

Ricardo and Laura Suarez, the paternal grandparents of a 13-year-old boy, are seeking custody of their grandson, who was born in August 2002 and lived primarily with them for the first ten years of his life. The boy visited with his mother, Melissa Williams, several times a week, including overnight visits at her home about 12 miles away, but he lived with the Suarezes in Barneveld and later in Syracuse, where they enrolled him in the Syracuse City School District in 2007. They provided virtually all of his financial support, including his daycare, medical and education expenses. Soon after he was born, his father and Williams signed a statement that read, "This is to certify that [the Suarezes] have any and all decision making power regarding our son.... This is in effect at all times and has no expiration date." In 2006 and on a later unspecified date, Williams signed two more statements giving the Suarezes "permission to make any and all medical and educational decisions as needed" for her son, although the Suarezes regularly discussed his schooling and activities with her. In 2006, in a separate proceeding that did not involve the Suarzes, Williams and the father stipulated to an order awarding them joint legal custody of the boy and awarding primary physical custody to Williams. She did not exercise that right until 2012, when she told the Suarezes she intended to enroll her son in the school district where she had moved and have him live with her. The Suarezes then filed this petition to modify the 2006 custody order and grant primary physical custody to them. The boy's father consented to and joined the petition, which is supported by the attorney for the child.

Family Court, Onondaga County granted the petition, awarding the Suarezes joint legal custody and primary physical custody, subject to visitation with Williams and the father. Based on Domestic Relations Law § 72, which governs custody petitions by grandparents, it found the Suarezes showed there were "extraordinary circumstances" warranting a modification in the best interests of the child. The statute provides that an "extended disruption of custody ... shall constitute an extraordinary circumstance," and it defines such a disruption as including "a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided" with the grandparents. The court said, "The evidence ... demonstrates that the child has been in the care of the Grandparents since shortly after his birth, thereby constituting an extended disruption of custody between the Mother and her child.... In addition, the evidence amply demonstrated that Mother voluntarily relinquished care and control of [her son] both by written instruments and her behavior with respect to him."

The Appellate Division, Fourth Department reversed, saying the Suarezes failed to satisfy the standard set by Matter of Bennett v Jeffreys (40 NY2d 543), which held, "The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." The court said, "Here, while the mother allowed petitioners to have primary physical custody of the child for a prolonged period, there were no other factors to show the existence of extraordinary circumstances." Rejecting arguments by the Suarezes and attorney for the child that section 72 does not require proof that a parent "relinquished 'all' care and control of the child" or that it "in any way eases a grandparent's burden of showing extraordinary circumstances," the court said "Bennett and cases decided thereafter remain good law.... [P]etitioners failed to meet this high bar, where their own witnesses testified that the mother maintained a presence in the child's life consistently, even while he was living primarily with petitioners...."

For appellants Suarez: Linda M. Campbell, Syracuse (315) 428-9393
For the child: Patrick J. Haber, Syracuse (315) 472-5827
For respondent Williams: Christopher M. Judge, Syracuse (315) 422-1311