

**This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)**

Short Form Order

SUPREME COURT - STATE OF NEW YORK  
CRIMINAL TERM - PART K-18 QUEENS COUNTY

P R E S E N T: Hon. Sheri S. Roman,  
Justice

THE PEOPLE OF THE STATE OF NEW YORK:

: Ind. No.: N10931/98

:

: Motion: To Preclude  
Testimony of Expert  
Witness at Trial

-against-

:

: Motion Date: Sept.13, 2000

PHILLIP PERRY,

:

:

DEFENDANT

:

:

Hon. Richard A. Brown, D.A.  
by William Milaccio, Esq.  
For the Motion

Lori Golombek, Esq.  
Attorney for Defendant  
Opposed

After a hearing held before this court on September 13, 2000 and in the opinion of the Court herein, it is hereby ordered that the People's motion to preclude testimony by an expert witness is granted to the extent indicated in the accompanying memorandum of this date.

Date: October 6, 2000

Gloria D'Amico  
Clerk

Sheri S. Roman, J.S.C.

MEMORANDUM

SUPREME COURT QUEENS COUNTY  
CRIMINAL TERM PART K-18

----- X  
THE PEOPLE OF THE STATE OF NEW YORK :  
 : Indict.No. N10931/98  
 :  
 :  
 -against- :  
 : BY: Sheri S. Roman, J.  
 :  
 PHILLIP PERRY, :  
 :  
 Defendant : DATED: October 6, 2000  
----- X

Defendant Phillip Perry was charged in an indictment with Criminal Possession of a Controlled Substance in the Second Degree, Criminal Possession of a Controlled Substance in the Third Degree; Criminal Possession of a Controlled Substance in the Fourth Degree; Criminally Using Drug Paraphernalia in the Second Degree; Criminal Possession of a Weapon in the Fourth Degree; and Endangering the Welfare of a Child. The charges are based upon the recovery of cocaine, drug packaging and weapons from the defendant's apartment upon the execution of a search warrant on May 27, 1998.

At the trial the People introduced an inculpatory statement which the People contend was written and signed by defendant on May 28, 1998 at the police precinct in the presence of Police

Officer Sal Molino. The People called Police Officer Molino who testified that the defendant voluntarily wrote the body of the statement and signed the statement in his presence.

Defendant, however, testified at trial that although he did sign the statement albeit under duress, he did not write the body of the statement. He claimed that Police Officer Molino wrote the body of the statement.

Defendant retained a handwriting expert, Ms. Jean Peetz, to examine the written statement, to compare it to a sample of defendant's handwriting and to render an opinion as to whether the defendant wrote the body of the confession.

The People moved at trial to preclude the testimony of the handwriting expert on the ground that the handwriting exemplars upon which she based her comparison, were made by the defendant after the commencement of the criminal action. The exemplars which are the subject of this motion and which were utilized by the handwriting expert were made in open court by defendant on the day prior to the date scheduled for the testimony of the handwriting expert.

Parenthetically, the court had previously denied the use of two other sets of exemplars purportedly made by defendant. The first set was denied because the writings on the exemplar applied to the facts of the case at hand and would have been prejudicial to the People. For example, defendant wrote in this first

exemplar, "I didn't write the statement;" I asked him for a phone call and he told me that drug dealers don't have those privileges;" and "Isn't it clear to you that there is two different handwritings?"

The second set of exemplars were excluded because the writings could not be shown to be the genuine handwriting of the defendant. That set included three pages of writings dated "Tuesday, the fifth day of September" and included such statements such as "I am happy to be alive. I thank God every morning for waking me up. Amen," and, "I was blind but now I can see the light of this world is Jesus." That set also contained a page of written numbers from 1 to 100.

The People concede that there is no dispute that the last set of exemplars were written by defendant but contend that because the exemplars were made after the commencement of the criminal proceedings they are not reliable as they are self-serving and created at a time when defendant had a motive to disguise his handwriting. The People citing People v. Brady, 268 App.Div. 226 (1<sup>st</sup> Dept.1944), state that even where specimens of writings are made on the witness stand, as they are created after controversy has arisen they are in the nature of self-serving acts prepared for litigation and written for the very purpose of comparison and therefore, inadmissible unless at the instance of the adverse party. The People contend that because the exemplars

are unreliable as a matter of law that any expert opinion derived from the exemplars must be precluded.

Defendant in opposition to the motion contends that there can be no dispute that the handwriting is the genuine product of the defendant as it was made in open court. Defendant also contends that exemplars were written quickly and naturally and that because defendant wrote them in open court he did not have the opportunity to disguise his handwriting.

Pursuant to CPLR 4536 an expert is permitted to testify to a comparison of a disputed writing with an exemplar as long as the exemplar is first proved to the satisfaction of the court to be the genuine handwriting of the person claimed to have made the disputed writing. In this case there is no question that the exemplar written in court is the writing of defendant. However, in addition to genuineness there is also a requirement imposed by the Court of Appeals in People v. Molineux, 168 N.Y. 264 that the exemplar be made prior to the time the case arose at a time when the defendant had no motive to disguise his handwriting.

A search for authoritative cases reveals that since the Molineux case, which was decided in 1901, there is a dearth of case law illuminating this issue. Although there is one recent case, People v. Arroyo, 709 N.Y.S. 2d 71 (1st Dept. 2000), in which the court clearly ruled that exemplars prepared for the purpose of litigation should not be offered for the jury's

comparison, one would have to go back to 1944, in the case of Nelson v. Brady, 268 App.Div. 226 (1st Dept. 1944) cited by the People, to find another published case which appears to be on point. However, both of the two above cited cases are based upon the holding of the Court of Appeals in People v. Molineux, 168 N.Y. 264, 326 (1901). In that case, the Court of Appeals stated, "writings created *post litem motam* are inadmissible against a party creating them." The First Department, based upon this holding, held in both Nelson v. Brady, *supra*. and in People v. Arroyo, *supra*. that exemplars created after a controversy has arisen for purposes of litigation are inadmissible as they are, "created at a time when defendant had a motive to disguise his handwriting."

Accordingly, for all of the above stated reasons, the People's application to preclude the introduction into evidence of the exemplars created by defendant in court during the trial is granted. Defendant shall however be granted a brief continuance in order to locate genuine pre-controversy exemplars so that defendant may proffer the testimony of his handwriting expert at trial.

---

Sheri S. Roman, J.S.C.