

**People v Wilson**

2016 NY Slip Op 30734(U)

April 20, 2016

Supreme Court, Bronx County

Docket Number: 3089/2014

Judge: Ralph A. Fabrizio

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY, PART H92**

-----X  
**THE PEOPLE OF THE STATE OF NEW YORK**

**Indictment No. 3089/2014  
Decision and Order**

**-against-**

**DEON WILSON,**

**Defendant**

-----X  
**FABRIZIO, J.**

This decision memorializes an in limine ruling denying the defense application to cross-examine an expert witness called by the People, Dr. Eileen Treacy, about a purported past judicial finding that witness not credible.

Defendant is charged with Course of Sexual Conduct in the First Degree, and related crimes. The child, who alleges defendant sexually abused her over a three year period, first reported one incident of abuse to her mother within hours of its alleged occurrence. Then, in a “piecemeal” fashion, the child reported other instances of alleged sexual contact by defendant, who is the father of the child’s brother. The child reported about fifty different instances of alleged sexual abuse, over a number of years, beginning when the child was nine years old.

Prior to trial, the People made their own in limine application, requesting permission to call Dr. Treacy as an expert witness. The People asked the Court to permit her testimony in order to explain to the jury factors that might cause a child to fail to make either a prompt report of sexual abuse, or to report abuse in a “piecemeal” fashion, in an inter-familial setting. The People would not ask Dr. Treacy for her opinion about whether the child had been had been sexually abused. In fact, Dr. Treacy had

never interviewed the child, or the child's mother, or reviewed any records or reports connected with this criminal case.

Defendant opposed the application, arguing, inter alia, that Dr. Treacy would "bolster" the child's credibility. The People argued that the defense should not be able to argue to the jury that the failure to make a prompt report, or her making of more detailed "piecemeal" reports, would make the child less credible. Since the manner of reporting was a factor to be considered by the jury in the case in assessing the credibility of the child witness, the Court ruled, in accordance with well-established precedent, that Dr. Treacy could offer limited testimony, along the lines of an expert in Child Abuse Sex Syndrome, as an aid to the jury on the issue of the victim's delayed and piecemeal reporting of alleged sexual abuse in the inter-familial setting of this case. See, e.g. People v. Carroll, 95 NY2d 375, 385-87 (2000); see also People v. Goodman, 21 AD3d 906, 906 - 07 (2<sup>nd</sup> Dept 2005); see generally CJI 2<sup>nd</sup> NY (2016) (Expert on a Crime Victim Syndrome).

After the child and her mother testified, defendant informed the Court that he wished to cross-examine Dr. Treacy, who was the next witness, about what was characterized as a finding made by another court that Dr. Treacy had used unethical procedures and as a result been found incredible by that court. The case is State v. Michaels, 625 A.2d 489 (NJ Super Ct), aff'd, 642 A.2d 1372 (NJ Sup Ct 1994). In that case, a teacher was convicted after a jury trial of committing more than 100 sexual offenses of children at a day care center. Those convictions were reversed. Dr. Treacy testified as an expert at the trial. The scope of her testimony was discussed, at length, in the decision of the New Jersey Superior Court. She was permitted to offer expert

opinion testimony that the overall behavior of the children involved was “consistent with” their having been abused. It was the scope of her testimony that was at issue. The court found when the trial judge allowed Dr. Treacy to offer this opinion evidence, the ruling exceeded the legal bounds for admission of testimony by an expert witness in a criminal child sex abuse case.

This ruling does not, in and of itself, provide a basis for “impeachment” questioning of Dr. Treacy about her testimony in that case. First, a defendant is not automatically entitled to cross-examine a witness about a ruling made in another case that the same witness was incredible. That type of questioning is rooted in hearsay. Nonetheless, prior judicial rulings concerning the credibility of a witness can be probative of that witness’s credibility in a different case. See United States v. White, 692 F. 3d 235, 248 - 49 (2<sup>nd</sup> Cir 2012). Federal Courts have considered admitting such testimony under the Federal Rules of Evidence. For example, in United States v. Ceden, 644 F.3d 79, 83 (2<sup>nd</sup> Cir 2011), the court delineated a number of factors a judge can and should utilize in determining whether a prior judicial determination that a witness was not credible could be used to cross-examine the witness at a different trial. Among the factors are whether there was a connection between the testimony in the two proceedings and whether the finding had been one related to the general credibility of the witness. Id. at 82. The court also suggested the judge deciding the application consider, “for example: (1) whether the lie was under oath in a judicial proceeding or was made in a less formal context; (2) whether the lie was about a matter that was significant; (3) how much time had elapsed between the time the lie was told and whether there had been any intervening credibility determination regarding the witness;

(4) the apparent motive for the lie and whether a similar motive exist[s] in this proceeding; and (5) whether the witness offered an explanation for the lie and, if so, whether the explanation was plausible.” Id. at 83 (citing United States v. Dawson, 434 F3d 956, 959 (7<sup>th</sup> Cir 1996), affi’g on reh’g, 425 F3d 389 (7<sup>th</sup> Cir 1995); United States v. Whitmore, 359 F3d 609, 619 (D.C. Cir 2004); Hynes v. Coughlin, 79 F.3d 285, 293-94 (2d Cir 1996); United States v. Terry, 702 F2d 299, 316 (2d Cir 1983)).

Contrary to defendant’s argument, there was no judicial finding in the Michaels case that Dr. Treacy lied or that her testimony was not credible. The finding was that there was an insufficient foundation to support admission of her unobjected-to opinion that the behavior of the child victims in that case was consistent with their having been sexually abused. Michaels, 626 A..2d at 598 - 99. The decision criticized the trial judge for not limiting Dr. Treacy’s testimony to “explaining why these children would delay reporting the abusive incidents, or why they would recant and then reassert claims that defendant abused them,” which were acceptable areas for her opinion. Id. at 603. The appellate court found that the trial judge had “permitted [Dr. Treacy] to offer testimony” which “validated the children’s reports of sexual abuse” in that criminal matter; the wrongly admitted opinion evidence suggested to the jury that her validation “process was rooted in science and thus was a reliable means of determining sexual abuse.” Id. at 604. The error of admitting such seemingly scientifically supported validation testimony was found to be sufficient, in and of itself to have an “overwhelming” impact in the case, and this error alone “require[d] reversal.” Id. at 605.

Ironically, the Michaels court was not at all troubled by the testimony offered by Dr. Treacy which did explain factors that jury could consider to assess credibility of the

alleged victims in terms of their delayed reporting. That is precisely the expert testimony proffered in this matter. The Court has already limited the scope of Dr. Treacy's testimony to this area. Thus, the past ruling by the Michaels court has no impeachment value whatsoever. If anything, this line of cross-examination, if permitted, would tend to confuse the jury. At most, the Michaels ruling is a rebuke of the trial judge to allow a witness to offer legally inadmissible opinion testimony. This ruling has no impact on Dr. Treacy's general credibility, let alone to her specific credibility concerning the subject matter of her proffered testimony in this case.

Even if some reading of the Michaels opinion supports a finding that Dr. Treacy used methods in 1985 that were not generally then recognized as valid in the scientific community, and that would have some relevance to the credibility of her methodology as an expert, the ruling still has no relevance to this case. Unlike the Michaels case, Dr. Treacy interviewed no one in this matter. Moreover, defendant has not reported any other instance where a court has not permitted Dr. Treacy to offer expert testimony in the area found relevant by this Court, or found her to be incredible in general. Dr. Treacy consults with both prosecutors and defense attorneys in child sex abuse matters. By her estimate, she has testified over 450 times as an expert in child sex abuse cases in criminal and family court cases during the past thirty years. Thus, in regard to all the Cedeno factors, any potential relevance of the Michaels ruling to Dr. Eileen Treacy's credibility has long since evaporated.

**Dated: April 20, 2016**

---

**Hon. Ralph Fabrizio**