No. 96

The People &c.,
Respondent,
v.
Noel Marte,
Appellant.

Paul Skip Laisure, for appellant.
Camille O'Hara Gillespie, for respondent.

SMITH, J.:

We held in People v Adams (53 NY2d 241 [1981]) that evidence of an unnecessarily suggestive police-arranged identification of a criminal suspect must be suppressed as a matter of State constitutional law. We hold today that no similar per se rule applies to an identification in which the police are not involved. While suggestiveness originating with

private citizens can create a risk of misidentification, that risk does not justify an automatic, constitutional rule of exclusion.

I

The victim, whom we will call Peter L., was robbed and shot in the chest near his home. In the months following the robbery, he looked at hundreds of photographs shown him by the police, not including defendant's. He did not identify any of the men pictured as his attacker, and eventually he gave up the effort, telling a police officer that he did not think he would be able to pick anyone out.

Peter's 14-year-old sister, whom we will call Margaret, had known defendant in junior high school. Some six months after the crime, defendant and Margaret met again at Margaret's home, and defendant told her, "I actually shot someone on this block." Margaret, who had been violating family rules by meeting defendant, kept silent for some weeks, but then (according to her testimony) told Peter that she thought she knew who shot him, and showed him defendant's picture. Peter first rejected the suggestion, then reconsidered, took the picture from Margaret, and decided that the person pictured was his attacker. Margaret reinforced this idea in a letter to her brother, quoting defendant's admission and describing defendant as "[t]he kid that everyone thinks shot you."

At this point, Peter and Margaret went to the police, who arranged a lineup, from which Peter selected defendant. At

trial, Peter again identified defendant as his attacker. Defendant's pre-trial motion to suppress identification testimony was denied, and defendant was convicted of robbery and assault. The Appellate Division affirmed, and a Judge of this Court granted leave to appeal. We now affirm.

II

In United States v Wade (388 US 218, 236-237 [1967]), the United States Supreme Court held that a post-indictment lineup is "a critical stage of the prosecution," at which a defendant is entitled to counsel. In so holding, the Court remarked that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification" (id. at 228). The Supreme Court later declined to hold, however, that the federal Due Process Clause compels the exclusion of all pretrial identification evidence resulting from an unnecessarily suggestive police-arranged procedure (Manson v Brathwaite, 432 US 98 [1977]). The Court concluded that the admissibility of such evidence should depend on its reliability, judged according to "the totality of the circumstances" (id. at 110, 114).

We have interpreted the Due Process Clause of the New York Constitution differently. In Adams, we adopted a "rule excluding improper showups and evidence derived therefrom," while allowing in-court identifications "based on an independent

source" (53 NY2d at 250-251). Adams, like most other cases imposing constitutional limits on identification procedures, involved suggestiveness originating with law enforcement officers; Adams refers specifically to "suggestive identification procedures employed by the police" (53 NY2d at 251). Defendant here argues, however, that the rule of Adams should apply even where the source of suggestion is a private citizen.

Defendant says that this broadening of Adams is justified because the exclusionary rule applicable to suggestive identifications -- unlike the rule applicable to coerced confessions, or evidence obtained in an unlawful search -- is designed not just to deter police misconduct, but to advance the search for truth -- "to reduce the risk," as we said in Adams "that the wrong person will be convicted" (53 NY2d at 251). Since a private citizen's suggestion can have the same tendency to produce wrongful convictions as a police officer's, defendant argues that the resulting evidence should be suppressed in both cases.

We reject this argument. It is true that the rule of Adams is designed to enhance the truth finding process, and to prevent wrongful convictions. It does so, however, largely through its effect on police procedures: the knowledge that evidence resulting from unnecessarily suggestive identifications will be suppressed leads the police to avoid such suggestiveness, and to conduct careful and fair lineups whenever they can. As we said in People v Logan (25 NY2d 184 [1969]), "The exclusionary

rules were fashioned to deter improper conduct on the part of law enforcement officials which might lead to mistaken identifications" (id. at 193 [citation omitted]). While the New York rule is different from the one adopted by the Supreme Court in Manson v Brathwaite, the rules have an important purpose in common: to assure that "[t]he police will guard against unnecessarily suggestive procedures ... for fear that their actions will lead to the exclusion of identifications as unreliable" (432 US at 112 [footnote omitted]).

In other words, the primary goal of Adams is not to keep evidence of flawed identifications from the factfinder, but to assure, to the extent possible, that the identifications are not flawed in the first place. This goal cannot be advanced by extending the rule of Adams to cases like this one. The family, friends and acquaintances of crime victims, unlike police officers, are highly unlikely to regulate their conduct according to rules laid down by courts for the suppression of evidence. No imaginable rule of law could have discouraged Margaret from showing Peter defendant's photograph, or from telling him her reason for doing so. A per se rule prohibiting the use of evidence that results from such private communications would deny much valuable information to the factfinder, without any corresponding gain in the fairness of the means used to identify alleged criminals.

No authority in our Court, and none in the United States Supreme Court, gives any support to defendant's theory

that rules authorizing suppression of eyewitness evidence tainted by suggestion should be applied when the suggestion did not come from law enforcement. Defendants rely, however, on several federal Court of Appeals cases: Raheem v Kelly (257 F3d 122 [2d Cir 2001]), Dunnigan v Keane (137 F3d 117 [2d Cir 1998]), United States v Bouthot (878 F2d 1506 [1st Cir 1989]), Thigpen v Cory (804 F2d 893 [6th Cir 1986]) and Green v Loggins (614 F2d 219 [9th Cir 1980]). We are not bound by these decisions, and need not decide whether we think them correct; none of them goes as far as defendant would have us go here.

In all these cases except Dunnigan, the suggestive identifications were the result of the actions of police or prosecutors. The suggestiveness was not the fault of the law enforcement officials, but the courts held that that did not immunize the identifications from scrutiny under the federal "totality of the circumstances" rule. (In Bouthot, the court emphasized the flexibility of the federal rule -- in contrast to a "per se rule" like the rule of Adams -- in justifying its holding [878 F2d at 1516].) In Dunnigan, the source of the suggestion was a private citizen, but he was a bank security official conducting an investigation. Thus it could not be said in Dunnigan, as it can here, that suppression of evidence would serve no deterrent purpose.

Defendant also cites cases from other states, including State v Chen (402 NJ Super 62, 952 A2d 1094 [App Div 2008]), State v Hibl (290 Wis 2d 595, 714 NW 2d 194 [2006]) and

Commonwealth v Jones (423 Mass 99, 666 NE 2d 994 [1996]). Again, we need not express agreement or disagreement with these cases; none of them adopts the rule of constitutional law that defendant urges here -- indeed, two of them reject it. Chen held that the defendant was not entitled to a Wade hearing where she had been identified as the result of a suggestive procedure originating with the victim's husband; the court went on to decide that a preliminary hearing on reliability should have been held, in discharge of the trial court's "gate-keeping function" under the New Jersey Rules of Evidence (402 NJ Super at 81, 952 A2d at 1105). Hibl, similarly, rejected the defendant's due process argument but required the lower court to consider whether the probative value of the identification evidence was substantially outweighed by the danger of prejudice and confusion (290 Wis 2d at 615, 714 NW 2d at 204). Jones did not decide any constitutional issue, but held that "[c]ommon law principles of fairness dictate that an unreliable identification arising from the especially suggestive circumstances of this case should not be admitted" (423 Mass at 109, 666 NE 2d at 1001).

Here, by contrast, the only issue before us is a constitutional issue. Defendant has not argued, and could not persuasively argue on this record, that the evidence he challenges should be excluded as more prejudicial than probative under common law rules of evidence (see People v Scarola, 71 NY2d 769, 777 [1988] ["Even where technically relevant evidence is admissible, it may still be excluded by the trial court in the

exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury"] [citations omitted]). Like the courts in Chen and Hibl, we decline to extend a per se constitutional rule of exclusion to cases where an identification results from a suggestive communication by a private citizen (see also State v Pailon, 590 A2d 858 [RI 1991] [finding no state action, and thus no constitutional violation, where the source of suggestion was a private citizen]; State v Holliman, 214 Conn 38, 570 Ad 680 [1990] [finding no constitutional violation, but examining identification for reliability on non-constitutional grounds]).

We acknowledge, as many courts have, the real possibility that suggestiveness that is not of police origin can contribute to misidentifications. But suggestiveness is only one of the possible sources of such mistakes. A witness to whom no one has made any suggestion can be mistaken for any one or more of many reasons -- an inadequate opportunity to observe, bias, panic, racial stereotyping, difficulty in focusing on an attacker's features, or simple bad memory, among others. Where no one in law enforcement is the source of the problem, nothing justifies the per se rule defendant seeks.

Ordinarily, where the need to regulate police conduct does not justify an exclusionary rule, our system relies on juries to assess the reliability of eyewitnesses, aided by cross-examination, by the arguments of counsel, and by whatever other

evidence supports or contradicts the witnesses' testimony (see State v Pailon, 590 A2d at 863 ["the best guarantee of due process ... would be the opportunity for cross-examination"]; United States v Zeiler, 470 F2d 717, 720 [3d Cir 1972] ["When ... there is no evidence law enforcement officials encouraged or assisted in impermissive identification procedures, the proper means of testing eyewitness testimony is through cross-examination"] [footnote omitted]). We have recently recognized, however, that where a case depends wholly or largely on eyewitness identification, the risk of error may be unacceptably large, and we have held that, in a proper case, expert evidence may be introduced about whether eyewitnesses are likely to err (People v LeGrand, 8 NY3d 449 [2007]). Perhaps other safeguards would be appropriate in particular cases, and we do not rule out the possibility that a court, in balancing probative value against prejudicial effect, may find some testimony so unreliable that it is inadmissible. The eyewitness testimony in this case was not of that description.

Accordingly, the order of the Appellate Division should be affirmed.

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Order affirmed. Opinion by Judge Smith. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Pigott and Jones concur.

Decided June 11, 2009