Perry v. New Hampshire --- U.S. --- (2012)
Decided January 11, 2012

FACTS: On August 15, 2008, at about 3 a.m., Ullon called the Nashua (NH) police to report an African-American male trying to break into cars in the apartment parking lot. When Officer Clay arrived, she found Perry near a car with a broken-out back window, holding two amplifiers. A metal bat lay on the ground. He stated he'd found the items on the ground. Ullon's wife, Blandon, had awakened a neighbor, Clavijo, to tell him she'd just seen someone break into his car. (She'd apparently been watching while her husband called the police.) While another officer was detaining Perry in the parking lot, Officer Clay met with Clavijo and then went to talk to Blandon. She explained she'd watched a man break into the car and when "asked for a more specific description," pointed out her window to Perry and identified him as the thief. However, a month later, she was unable to pick Perry out of a photo array.

Perry was charged with theft and criminal mischief. He moved for suppression of the initial identification, which was a showup. The trial court denied the motion, finding that she pointed to Perry "spontaneously" and not as the result of an "unnecessarily suggestive procedure" of the officers at the scene. Both Blandon and Clay testified about the identification.

Perry was convicted and appealed, with Perry arguing that the trial court was incorrect in "requiring an initial showing that the police arranged the suggestive identification procedure." The appellate court affirmed his conviction. Perry requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is a preliminary judicial review necessary in contested eyewitness testimony?

HOLDING: No

DISCUSSION: The Court reviewed the history of its cases "involved police-arranged identification procedures." .The Court synthesized the prior cases into Neil v. Biggers[1] and Manson v. Brathwaite[2] which are "used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement. The Court emphasized that "due process concerns arise only when law enforcement officers use an identification process that is both suggestive and unnecessary." However, even when that does occur, suppression is not the "inevitable consequence." As such, on a case-by-case basis, it was necessary to determine "whether improper police conduct created a 'substantial likelihood of misidentification.'" If the identification is reliable, it will still be admissible.

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[1] 409 U.S. 188 (1972).
[2] 432 U.S. 98 (1977).

In this case, the Court agreed that the "police engaged in no improper conduct." Perry's proposed rule "would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications." Certainly, the Court noted, "external suggestion" was not the only factor that "cast[] doubt on the trustworthiness of an eyewitness' testimony" and further, almost all identifications carry at element of suggestiveness.

The Court concluded that the "fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." The Court noted that it is the responsibility of the jury, not the judge, traditionally, to make determinations on the reliability of evidence. Further, there are "other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability." These include the "right to confront the eyewitness" and the right to an attorney "who can expose the flaws in the eyewitness's testimony during cross-examination and focus the jury's attention on the fallibility of such testimony." And, in fact, these safeguards were "at work at Perry's trial" and the attorney constantly exploited the weaknesses in Blandon's identification.

The Court held that the "Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." Perry's conviction was affirmed.

For Full Text of Opinion, see **http://www.supremecourt.gov/opinions/11pdf/10-8974.pdf**.