

NYS Court of Appeals Criminal Decisions for December 14, 2017

People v. Boone

This is a welcomed decision. Judge Fahey wrote for the court, with Judge Garcia concurring. Judge Wilson did not participate. The AD is reversed, and a new trial is ordered. At issue are two Brooklyn robberies committed by a black male (or males) two days apart. Both victims were white. The first robbery had the perpetrator threatening with a knife; during the second incident, the victim was actually stabbed. Trial counsel unsuccessfully requested a jury instruction regarding the perils of cross-race identification. The trial court believed that there had to have been expert testimony at trial on the topic as a prerequisite. Also, the court observed that there was no cross-examination regarding the cross-race issue. Moreover, an extensive ID instruction was given to the jury.

In 2011, the NYS Justice Task Force endorsed a new Pattern Jury Instruction regarding cross-race identifications, instructing juries that witnesses may have greater difficulty in accurately making such an ID. The Court of Appeals held here that where identification is at issue, where the identifying witness and the defendant are of different races and a cross-racial ID charge is requested, the instruction must be given to the jury. Neither expert testimony nor cross-examination on the issue is required. A witness that erroneously identifies a suspect will not necessarily display bias. Honesty and accuracy are different categories that the jury may use in evaluating testimony. The Whalen (59 NY2d 273 [1983]) and Knight (87 NY2d 873 [1995]) decisions, which affirmed trial courts' discretionary authority in determining whether to grant a request for an expansive ID instruction, according to the majority, were not disturbed by the present holding. The better practice continues to be for trial courts to grant expansive ID instructions when requested.

The court acknowledged the empirical data supporting the fact that mistaken identity is common when made by a single eye-witness in a cross-race scenario. Indeed, there is acceptance in the scientific community for the principle known as the cross race effect. Only about a third of jurors, however, are thought to have accepted this concept. Three other states (New Jersey, Hawaii and Massachusetts) require this jury instruction. For cross-race ID cases, a new approach from the deferential Whalen and Knight holdings is necessary.

Judge Garcia, in concurrence, was not buying the majority's claim that trial court's still had discretion in whether the cross-race instruction was to be given; the holding here effectively made it mandatory. The concurrence agreed that it was reversible error at bar, but that the majority went too far. There were already systematic protections in place to

guard against wrongful ID's (i.e., pre-trial hearings, trial courts' weighing of probative versus prejudicial value of evidence before its admission, cross-examination, expert ID testimony and *discretionary* jury instructions). Trial courts, according to Judge Garcia, are the proper gatekeepers in shielding the jury from misleading, unwarranted or irrelevant ID instructions and should have genuine discretion in deciding on whether to give such a charge.

NYS Court of Appeals Criminal Decisions for December 19, 2017

People v. Smith

This is a 4 to 3 decision authored by Judge Rivera; a People's appeal. The DA appealed from the AD's reversal, vacating a guilty plea for manslaughter. The defendant had a state and federal constitutional right to the presence of counsel during the People's motion to compel the taking of a buccal swab for DNA. This evidence was to be used for comparison with DNA recovered at the crime scene. The AD, however, improperly dismissed the indictment without prejudice; it should be remitted pursuant to CPL 470.20 as a necessary and appropriate corrective action. As modified, the matter is affirmed.

A defendant has the right to the effective assistance of counsel at every "critical" stage of the proceedings, which means a proceeding that holds significant consequences for the accused. Here, counsel was relieved from the case after consenting to the DNA motion on the record; the motion for the buccal swab then went ahead in his absence. This was despite defendant indicating that he had not consulted with counsel regarding the motion, was not consenting to the procedure and was also seeking an attorney for assistance at that point. The court, unfortunately, acted as a *de facto* attorney, advising on the record that there was no reason for defendant to contest the People's motion. The motion was then granted.

Judge Garcia wrote for the three-judge dissent, which included Judges Stein and Fahey. The court below had already signed the order for the buccal swab at the time of the exchange in court with defendant (after counsel had been relieved). The subsequent attorney on the case after the exchange in court did not contest the People's DNA motion. Though an adjournment would have been the better practice, this was not a critical stage of the proceedings.