Table of Contents

Table of Contents

IDENTIFICATION TESTIMONY: SUGGESTIVE I.D., CONFIRMATORY I.D. AND INEPENDENT BASIS.

Thomas P. Franczyk

Mentor-at-Large to the

Assigned Counsel Program

April 12th, 2022

INTRODUCTION

During every criminal instruction following summations of counsel, judges inform the jury that the People must not only prove every element of the crime charged but they must also establish the defendant's IDENTITY as the perpetrator of the offense beyond a reasonable doubt.

Presumably, the People will have offered trial testimony from one or more witnesses who have IDENTIFIED the defendant in court as the perpetrator, and in the rare case where there is no such witness, they most likely will have relied on circumstantial evidence such us as the defendant's D.N.A. found on the victim or on a weapon, or other incriminating physical evidence discovered at the scene, in the defendant's car or home, or some other relevant location. They may also offer admissions made by the defendant, if any, and point to evidence of motive and opportunity to commit the crime.

THE LAW IS A LITTLE LEARY OF CASES BASED ONLY ON IDENTIFICATION TESTIMONY:

Where the prosecution's case is based mostly (if not entirely) on eyewitness identification testimony, courts will instruct jurors to take a hard look at such evidence to make sure that it has sufficient indicia of RELIABILITY to support a verdict of guilty beyond a reasonable doubt.

As the CJI explains, "our system of justice is DEEPLY CONCERNED that no person who is innocent of a crime be convicted of it. To avoid that, a jury must consider identification testimony with GREAT CARE, (especially where the only evidence identifying the defendant comes from one witness."). (See CJI at nycourts.gov).

To ensure that any guilty verdict is based on evidence of SUFFICIENT QUALITY to meet the reasonable doubt standard, the CJI instructs jurors to consider a variety of factors concerning the witness (e.g., age, intelligence, capacity for observation and recall), the circumstances of the encounter (e.g., it's duration, distance and vantage point of observation, lighting conditions, obstacles to a clear view, opportunity to observe the perpetrator, description of the perpetrator given to police compared to the defendant's actual appearance, any prior familiarity or observation of the perpetrator) and any post crime activity including THE IDENTIFICATION OF THE DEFENDANT AND WHETHER IT WAS, IN ANY WAY, SUGGESTED BY LAW ENFORCEMENT.

PRIOR IDENTIFICATION PROCEDURES AND COURT PROCEEDINGS

Truth be told, the in-court identification of the defendant as the perpetrator, however dramatic it may sometimes seem, is usually just the tip of the iceberg below which is a much larger mass of IDENTIFICATION PROCEDURES (e.g., show-up, line-up, photo-array) and previous COURT PROCEEDINGS (including motions to suppress and hearings) to determine whether the witness' in-court identification would be ADMISSIBLE in the first place.

For example, was the identification tainted by any unduly suggestive procedures by law enforcement (e.g., showing a witness only one photograph, statements or conduct unfairly implying that the person about to be viewed is the perpetrator) and if, so, did the witness have an INDEPENDENT BASIS for making the identification that would render any suggestiveness in the identification proceedings ineffectual. (See US v Wade, 38 US 218 216 [1967]. People v Chipp, 75 NY2d 327 [1990])).

Courts may also, in appropriate cases, consider whether the identifying witness has a PRIOR RELATIONSHIP and is so familiar with the perpetrator as to be immune to any suggestive police practices or procedures. (People v Rodriguez, 79 NY2d 445 [1992]).

And, in cases involving in-person encounters between police and suspects (e.g., buy-bust/drug sales followed by subsequent observations and identification of the defendant by the undercover officer), the courts will examine the nature, circumstances, and duration of the initial encounter and the time between it and the ensuing identification to determine whether it was CONFIRMATORY (i.e., simply ensuring that the right person was brought into custody and arrested) or so removed in time and place as to be susceptible to the risks of MISIDENTIFICATION. (See People v Gissendanner, 48 NY2d 543 [1979], People v Wharton, 74 NY2d 921 [1989], People v Mato, 83 NY2d 406 [1994], People v Boyer, 6 NY3d 427 [2006]).

PROCEDURAL PROTECTIONS

The importance of litigating and determining the admissibility of in-court identification testimony BEFORE TRIAL (People v Newball, 76 NY2d 587 [1990] is reflected in CPL 710.30 (1), (2) which requires the People to serve notice within 15 days after arraignment (or later but only upon a showing of good cause), of their intention to offer at trial (b) "testimony regarding an OBSERVATION of the defendant either at the TIME OR PLACE OF THE COMMISSION OF THE OFFENSE or UPON SOME OTHER OCCASION RELEVANT TO THE CASE, to be given by a WITNESS WHO HAS PREVIOUSLY IDENTIFIED HIM/HER (or a pictorial, photographic, electronic, filmed or video recorded reproduction of him/her) as such.

The failure to provide timely notice (which specifies the evidence intended to be offered) will result in PRECLUSION of the unnoticed identification testimony. (See People v Kahley, 214 AD2d 960 [4th Dep't 1995]). (Counsel must be careful at any suppression hearing not to OPEN THE DOOR to otherwise precludable identification testimony by inquiring about the suggestiveness of any unnoticed prior identifications).

ONLY POLICE-ARRANGED IDENTIFICATION PROCEEDINGS ARE SUBJECT TO CHALLENGE

While the reliability of any in-court identification may always be contested at trial (whether or not there was any police involvement in any pre-trial identifications), only those former identifications shown to have been the product police-initiated or arranged procedures (that the defendant claims were unduly suggestive) are subject to a motion to suppress. (See People v Marte, 12 NY3d 583. 586-590 [2009])

So, if a witness runs into the defendant by happenstance (People v Dobbs, 194 AD2d 996 [3d Dep't 1993]), sees the defendant's face on a "WANTED" poster (People v Guilbault 256 AD2d 632 [3d Dep't 1988]), finds the defendant's driver's license left behind at the scene (People v Kavanaugh, 207 AD2d 917 [1st Dep't 1994]) or points the defendant out to the police without prompting (People v Spruill, 232 AD2d 278 [1st Dep't 1996]), there will likely be no basis for a Wade hearing.

PURPOSE OF THE CPL 710.30

The purpose of such notice is to alert the defendant to the People's intent to offer identification evidence at trial so that he/she may take appropriate steps, if warranted, to make a motion to SUPPRESS such evidence on the grounds of undue suggestiveness.

MOTION TO SUPPRESS

CPL 710.20 (6) states that upon motion of a defendant who "claims that IMPROPER IDENTIFCIATION TESTIMONY MAY BE OFFERED AGAINST HIM IN A CRIMINAL ACTION, the court MAY…order that such evidence be SUPPRESSED or EXLUDED on the ground that it consists of POTENTIAL TESTIMONY REGARDING AN OBSERVATION OF THE DEFEDNANT EITHER AT THE TIME OR PLACE OF THE COMMISSION OF THE OFFENSE OR UPON SOME OTHER (RELEVANT) OCCASION…WHICH POTENTIAL TESTIMONY WOULD NOT BE ADMISSIBLE (AT TRIAL)…OWING TO AN IMPROPERLY MADE PREVIOUS IDENTIFICATION OF THE DEFENDANT (or of a pictorial, photographic, electronic filmed or video recorded reproduction of the defendant) by the prospective witness."

PROCEDURE FOR THE MOTION TO SUPPRESS

Pursuant to CPL 710.60 (1) a motion to suppress identification evidence must be in WRITING and upon REASONABLE NOTICE to the People with an opportunity to be heard. It must state the GROUND(S) upon which it is based (e.g., undue police suggestiveness) but (unlike, for example, a motion to suppress tangible property) does NOT require sworn allegations of fact in support of such grounds. (CPL 70.60[3]). That does not necessarily mean, however, that counsel should not allege such facts, whether upon personal knowledge information and belief, if they are known.

It is worth noting that a motion to suppress identification testimony may be made DURING TRIAL and either in writing or orally in open court, with a hearing, if warranted, conducted outside the jury's presence. (See CPL 710.60 [5]).

The BETTER PRACTICE, it would seem, is to make the suppression motion pre-trial and hopefully get the identification testimony suppressed altogether rather than try to stuff the cat back in the bag during trial. Sometimes, however, counsel may be unaware of a prospective in-court identification because the

People may have believed (correctly or not) that a particular prior identification did not require notice because it was either not police-arranged or it was confirmatory in nature. The new discovery rules requiring the People to promptly disclose the names of all persons known to have relevant information (including whether they MAY be called as witnesses) (CPL 245.20 [1][c]) should help to eliminate most trial day surprises.

Counsel should be mindful, however, that the People may refuse to disclose the identify of certain prospective witnesses (e.g., 911 caller, sex crime victim under PL Art 130, confidential informant). (CPL 245.20 [1][c]). In such case, the People must inform the defense that such information is being withheld.

If the People claim that a 710.30 notice was not necessary, the defense should consider moving to PRECLUDE the in-court identification on the ground that notice was required, thus placing the burden on the People to show that the identification was based on the witness' close familiarity with the defendant (People v Rodriguez, supra), thus rendering him/her impervious to police suggestion, or was otherwise confirmatory. (People v Wharton supra).

CONFIRMATORY IDENTIFICATION …OR NOT.

In People v Gissendanner, 48 NY2d 543 (1979), the Court of Appeals addressed the question of whether the People had to provide a 710.30 notice with respect to separate observations of the defendant made by two officers (one of whom had prior contact with the defendant) a month after their observations of her during the drug transaction which resulted in an indictment charging her with Criminal Possession of a Controlled Substance 3d degree.

One of the officers arrested her and the other happened to see her in handcuffs at the police station following her arrest.

The Court noted, first, that CPL 710.30 was the Legislature's response to the problem of suggestive or misleading pre-trial identification procedures, typically involving, showups, line-ups or photo arrays used for the purpose of identifying the perpetrator of the crime. Where identification is NOT in issue, the Court observed, or the protagonists are well known to each other, suggestiveness is not a concern and CPL 710.30 does not come into play. (Citing People v Bullock, 45 AD2d 902 [3rd Dep't 1974]).

The Court held that since neither officer had previously identified the defendant within the meaning of CPL 710.30, and since their identifications of her were based on their observations of her during the crime, the defendant's objection to their in-court identification testimony was properly overruled.

PEOPLE V WHARTON 79 NY2D 921 (1989): SUMMARY DENIAL OF WADE HEARING UPHELD

In Wharton, the Court of Appeals affirmed the lower court's denial of a Wade Hearing because the station-house identification of the defendant as the seller of drugs by a trained undercover officer (UCO) who had bought them from the defendant three hours earlier was CONFIRMATORY and therefore, not subject to a risk of suggestiveness.

The Court, citing, inter alia, People v Morales, 37 NY2d 262 (1975), held that the post-crime viewing of the defendant occurred at a time and place that were SUFFICIENTLY CONNECTED AND

CONTEMPORANEOUS WITH THE ARREST ITSELF as to constitute the ORDINARY AND PROPER COMPLETION OF AN INTEGRAL POLICE PROCEDURE.

In this case, the undercover officer (UCO) purchased two packets of cocaine from the defendant whom he promptly described by radio transmission to his back-up team after the transaction was concluded. Within five minutes, the UCO, of his own accord, drove by the scene and observed the defendant at the curb in handcuffs with the arresting officers. The UCO later identified the defendant at the police station through a one-way mirror as the seller of the cocaine.

The Court found that the identification by the officer who had engaged in a hand-to-hand transaction with the seller and who was expected to observe him carefully for purposes of later identification to confirm that the back-up officers arrested the right person (and to complete his duties) was free of the risks of suggestibility and mistaken identity sometimes associated with show-up identifications by civilian witnesses. (Citing, People v Gissendaner, supra, at 543).

And while the Court was careful to avoid any categorical rule that would exempt confirmatory identifications from Wade hearings by simply labelling them as such, especially where the nature and circumstances of the encounter and identification call for one, the majority was satisfied that the trial court did not err as a matter of law in refusing to grant a hearing to this defendant.

DISSENTING OPINION

The dissenting justice, (Hon. Vito J. Titone), argued that a Wade hearing should have been granted to determine whether the identification of the defendant was tainted by suggestiveness, especially since the UCO had no prior acquaintance with the defendant and his encounter with this stranger was fleeting. (Citing, inter alia, People v Collins, 60 NY2d 214 [1983]). In the dissenter's view, absent any other realistic method of ruling out the possibility of undue suggestiveness, a Wade hearing should be held to ensure that the station-house identification (whether or not it is called confirmatory), was not the product of factors other than the UCO'S own observations of the defendant.

In People v Mato, 83 NY2d 406 (1984), the Court of Appeals held that it was ERROR to deny the defendant a Wade hearing where the UCO's identification of the defendant as the go-between in a drug-deal took place more than three weeks after the transaction for which the defendant had been indicted.

On July 12th, the UCO approached the suspect outside a building at 523 W. 160th St in Manhattan and was directed to a second-floor apartment where he purchased cocaine from another person. After the transaction, the UCO wrote down 527 and later obtained a search warrant a week later for that incorrect address.

After realizing the error upon execution of the warrant, the UCO obtained a second warrant which was executed at the right address on August 7th. Before that warrant was carried out, the UCO saw the defendant standing outside and exchanged mutual glances of recognition and brief conversation. The UCO then went inside the building and made a drug purchase from others in a transaction that did not involve the defendant.

The UCO spoke again briefly with the defendant on his way out after which the warrant was executed and then the defendant was arrested (in a hallway) for the 7/12 transaction. Shortly afterward, the UCO observed the defendant outside under arrest and later identified him at the police station.

The lower court denied the defendant's motion for a Wade hearing, and at trial, the UCO testified to the 7/12 and to his observations and identification of him 26 days later. The Appellate Division AFFIRMED, finding that the 8/7 identification was CONFIRMATORY.

The Court of Appeals REVERSED, holding that it was ERROR to deny the defendant a WADE hearing. In the Court's assessment, the defendant was entitled to a Wade hearing because, as in People v Newball, 76 NY2d 587 (1990), there was a significant time gap between the initial encounter (which lasted minutes only on 7/12) and the subsequent identification on 8/7. (Citing People v Wharton, supra). The Court also noted that the UCO got the wrong address.

The first encounter on 8/7 was similarly brief and the defendant took no part in the drug purchase on this date. The UCO then saw him again in cuffs and shortly thereafter at the station. In view of the passage of time, the address error and "suggestiveness" of the identification, the Court concluded that it fell far short of Wharton and REMITTED the case to the lower court for a Wade hearing.

The majority also found that testimony regarding the 8/7 identification violated CPL 60.30 because it didn't relate back to the 7/12 transaction. The Court observed that given the "precarious nature of the process of identifying individuals in the fast-paced environment of drug transactions, …misidentifications must be TIRELESSLY AVOIDED to prevent ensnaring innocent individuals in the criminal process despite the well-meaning intentions of trained police officers." (Citing People v Gordon, 76 NY2d 595 [1990]).

ANOTHER DISSENT

The dissenting justice (Hon Howard A. Levine) agreed with both the trial court and Appellate Division that the UCO'S observations of the defendant on 8/7 (before and after the transaction, and the self-initiated post-arrest observation of the defendant at the scene followed by the station-house identification) were CONFIRMATORY in nature.

The dissenter noted that the actual identification of the defendant (as the facilitator of the 7/12 transaction) took place when the UCO saw the defendant and exchanged glances and brief words before entering the building on 8/7.

In the dissenter's view, this was a spontaneous encounter/identification untainted by risk of misidentification associated with police-orchestrated identification procedures. Similarly, the officer returned to the scene of his own accord and observed the defendant after the arrest, and the subsequent identification at the station was just confirmatory of the earlier observation which was, in fact, clearly related to (i.e., confirmatory of) the 7/12 transaction.

While the majority's concern over the 26-day time lapse was well taken, the dissenter noted that a Wade hearing is not intended to prevent all misidentifications but to exclude only those stemming from suggestive police procedures. (Citing US v Wade, supra). In contrast, the spontaneous identification of the defendant on 8/7 was free of both police arrangement and suggestiveness.

Similarly, the Court held in People v Pacquette, 25 NY3d 575 (2015) that it was ERROR (albeit harmless in view of the otherwise overwhelming evidence of guilt) for the trial court to allow a surveilling officer (of a drug transaction involving another UCO) to identify the defendant at trial and testify about an arrest-scene identification of him (where he was in custody of other officers) in the absence of a CPL 710.30 notice and opportunity to challenge the identification at a Wade hearing.

In this case, the officer observed a suspect sell crack for $200.00 in pre-arranged buy money to a UCO who was across the street about 40 feet away. The officer communicated his observations to a back-up unit. After the deal, the UCO described the suspect to the back up officers as a tall, black male in a light-colored hoodie and dark baseball cap.

As the back-up team approached the scene, the suspect took off and was later apprehended a short distance away. The observing officer arrived and said, "that's him." Buy money was found on the defendant's person.

While the People served notice of the UCO'S identification of the defendant, they did not so with respect to the observer. When the People announced in opening statement that the jury would hear from a "second identifying officer," the defendant moved to preclude such testimony for lack of notice. The People argued that no notice was needed because it was merely a confirmatory identification and the trial court agreed.

The Appellate Division agreed and affirmed as did the Court of Appeals but only because the error (In not providing notice of the second officer's arrest-scene identification) was, as noted above, harmless.

The Court (in an opinion by Hon Eugene F. Pigott), said that the mandate of CPL 710.30 "COULD NOT BE CLEARER." (Citing People v Boyer, 6 NY3d 427 [2006]). That is, where the People intend to offer trial testimony regarding an observation of the defendant during the crime or at some other relevant occasion, from a witness WHO HAS PREVIOUSLY IDENTIFIED HIM as such, the statute requires NOTICE OF INTENT to offer such testimony (within 15 days of arraignment) so that the defendant can make a motion to suppress and explore the circumstances (i.e., suggestiveness) of the prior identification at a Wade hearing. (Citing People v Briggs, 38 NY2d 319 [1975]).

The Court also noted that, unlike the face-to-face encounter in People v Wharton, supra, the surveillance of the transaction from across-the-street was not so clear as to eliminate the possibility of mistake and undue suggestiveness. (Citing People v Boyer, supra at 432). Consequently, it was error not to include it in the 710.30 notice. (The Court also noted that its absence, according to the People, was inadvertent).

Nevertheless, the error did not require reversal because this identification was deemed to be cumulative (of the UCO'S identification) and of other inculpatory evidence (including the defendant's possession of the buy money upon arrest and his flight from the scene) which, in the court's view, was overwhelming.

In People v Boyer, 6 NY3d 427 (206), the Court of Appeals held that the People's failure to provide notice of an officer's arrest-scene identification of the defendant while in the custody of other officers (as the person he observed for two-to-four seconds, a half-hour earlier, on the fire escape of a building (into which he attempted to enter unlawfully) should have warranted preclusion because it was NOT, as the People alleged, MERELY CONFIRMATORY.

The investigation began with a 911 call from a neighbor who observed a suspect (described as a black or Hispanic male wearing a red sweater or shirt, dark pants, and dark hat) on a fire escape, fiddling with windows of a building across a courtyard.

The officer in question, one of several who responded, stated that he and the suspect had looked at each other before he climbed to the top of the building and disappeared. The officer called in a description of a Hispanic male with facial hair wearing a dark jacket and dark pants.

Subsequent radio calls from other officers described a black or Hispanic male in dark clothes and a red shirt running on or in the direction of Broadway and another street. The defendant was apprehended and found to be sweating and out-of-breath. The officer who saw the suspect on the fire escape arrived at the arrest scene and identified the defendant as the person that he had observed on the fire escape.

At a Huntley hearing, the officer mentioned his identification of the defendant near Broadway. The defendant moved to preclude it for want of 710.30 notice, but the People contended, and the court agreed that no such notice was required because it was confirmatory.

On appeal of the defendant's attempted burglary conviction, the Appellate Division affirmed, agreeing that it was a confirmatory identification.

The Court of Appeals, however, REVERSED the conviction, granted the defendant's motion to preclude and ordered a new trial.

The Court noted that there are only TWO EXCEPTIONS to the notice requirement including situations where the protagonists are so well-known to each other as to be immune to any amount of police suggestiveness (People v Rodriguez, supra), and were a police identification of a suspect following a face-to-face encounter is so connected in time and place as to constitute a continuation and completion of an integral police procedure. (People v Wharton, supra).

In this Wharton-type scenario, the Court stressed that the QUALITY OF THE INITIAL ENCOUNTER IS A CRITICAL FACTOR in assessing the risk of suggestibility of the ensuing identification. And, where there is a risk that the quality of the initial observation has ERODED OVER TIME, police identifications DO NOT ENJOY ANY EXEMPTION FROM THE STATUTORY NOTICE AND HEARING REQUIREMENTS. (Citing, inter alia, People v Mato, supra at 406).

Here, the Court could not comfortably conclude that the circumstances of the initial observation (which was short-lived and from a significant vertical distance) were such that, as a matter of law, the subsequent identification could not have been the product of undue suggestiveness. (Citing People v Gordon, supra at 601).

In People v Reeves, 2016 NY Slip Op 04502 (4th Dep't 6/10/16), the FOURTH DEPARTMENT held the appeal (of the defendant's convictions for criminal possession and sale of a controlled substance 3d degree) and REMITTED for a hearing per CPL 710.60 (4) to test the reliability (actually, the suggestiveness) of a police identification of the defendant as the seller of cocaine to a UCO during a transaction that occurred ONE YEAR BEFORE the defendant's arrest.

On April 25th, two UCO'S met with the defendant to purchase cocaine. Minutes before the transaction, one of the officers viewed a photo of the defendant (presumably on information form a CI) and did so again after-the-fact.

In the incident report prepared the following day, the UCO listed the suspect's name as "unknown." He also memorialized the before-and after photo identifications of the defendant.

The defendant was arrested upon a warrant for the above-mentioned crimes by a different police agency on May 12th of the following year. On the identification potion of the arrest report, "NONE" was checked. The court noted that unlike the usual "buy-bust" operation followed by a post-arrest station house identification (by the officer involved in the transaction), no effort was undertaken here to ensure that the other police agency arrested the person whom the UCO intended. (Citing People v Morales, 37 NY2d 262 [1975]).

Although the defendant's discovery demand requested any photographs shown to any prospective witnesses, the People replied, "none known to exist." The defendant then moved to suppress identification testimony and requested a hearing which was summarily denied because the court deemed any such identifications to be confirmatory.

The Fourth Department found the time lapse here to be in stark contrast to the comparatively close-in-time identifications that are usually made on the heels of garden variety undercover drug deals which are generally deemed to be unburdened by the risks of undue suggestiveness. (Citing People v Irving, 162 AD2d 280 [1st Dep't 1990]). As with People v Boyer, supra, the identification of the defendant could not be said to possess the same assurances of reliability as in People v Wharton, supra to support a summary denial of the defendant's request for a Wade hearing.

The concurring justice (Hon. Stephen K. Lindley) agreed that the trial court erred in summarily denying a Wade hearing but disagreed with the majority that the purpose of such hearing would be to test the RELIABILITY of the identification (a task reserved to the factfinder at trial) but rather its ADMISSIBILITY based on whether the circumstances resulting in the identification were unduly SUGGESTIVE.

As this justice observed, "the rule excluding improper pre-trial identifications is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police, not to ensure that trial witnesses give accurate testimony." (Citing People v Adams, 53 NY2d 241 [1981]).

SOME MORE CASES

In People v Kahley, 214 AD2d 960 (4th Dep't 1995), the court held, in this murder case, that the CPL 710.30 notice was INSUFFICIENT because it did NOT name the identifying witnesses nor set forth the time, place and manner of the identifications. The People claimed that the witnesses all knew the defendant and made confirmatory identifications which did not require notice.

Noting the limited exceptions to the notice requirement (citing, inter alia, People v Tas, 51 NY2d 915 [1980]), the court said that the record was insufficient to enable it to determine the degree of each witness' prior acquaintance with the defendant (who denied having any close relationship with any of them). The court held that where the applicability of CPL 710.30 depends on whether the identification was confirmatory, the proper remedy is to REMIT the matter to the lower court to determine whether the defendant knew the defendant so well that no amount of police suggestiveness could have tainted the identification. (Citing People v Rodriguez, supra at 413.

PEOPLE V RODRIGUEZ, 79 NY 2D 445 (1992)

In Rodriguez, the Court of Appeals held that where a civilian claimed to have seen the defendant numerous times (in a neighborhood grocery store where the witness worked as a clerk), and the defendant denied any familiarity with him, it was ERROR to deny the defendant's suppression motion (and request for a Wade hearing) out-of-hand because the witness' claims did NOT establish such familiarity with the defendant as to eliminate the hazard of police suggestiveness as a matter of law.

On the date of the crime (shooting homicide), the witness looked out of his apartment window and saw two men among a crowd of others arguing and shoving each other whereupon one pulled out a handgun and shot the other.

The eyewitness reported his observations to the local police who showed him three photos from which he made no identification. Three days later, a detective showed the witness a SINGLE PHOTO from which he identified the defendant as the shooter. In the grand jury, he testified that he had seen the defendant "at least four dozen times" either in the store or in the neighborhood, (but during trial, it was only "a few times").

The defendant moved multiple times for a Wade hearing which the People opposed, and the lower court denied because the identification confirmatory based on the witness' frequent sightings despite his admitted lack of any personal acquaintance with the defendant.

The Appellate Division affirmed the defendant's murder and weapons' convictions, holding that the identification of the defendant was confirmatory. The Court of Appeals, however, modified and REMITTED the case for a hearing, noting that a court's reliance on the CONFIRMATORY IDENTIFICATION EXCEPTION is tantamount to a conclusion that the witness is so familiar with the defendant that there is little or no risk that police suggestiveness could lead to a misidentification. (Citing, inter alia, People v Tas, supra).

While the exception may well apply in cases where the protagonists are related, are friends or long-term cohabitants, such is not the case where the claimed familiarity arises from a brief encounter. (People v Newball, supra a 587).

The Court found this case to fall somewhere between full and fleeting familiarity, and considering the witness' varying claims of frequency of observation, admitted lack of relationship (and the defendant's claimed lack of any familiarity with the witness), there was no basis for the lower court to conclude that the witness was so impervious to police suggestion as to eliminate the need for a hearing.

The Court noted that a hearing was warranted and that at such proceeding the People bear the initial burden of establishing that the identification was merely confirmatory. The court also stressed that the issue of prior familiarity SHOULD NOT BE RESOLVED FOR THE FIRST TIME AT TRIAL but rather, should be ADDRESSED PRE-TRIAL when it is alleged that an improper police identification procedure occurred.

The People argued that the defendant did not raise a factual issue warranting a hearing in his moving papers. The Court noted that while the defendant did not expressly deny having been seen by the witness several times (indeed, he may not have been aware of it), he did not concede the point, and he did allege that he had no familiarity with the identifying witness which, in the court's view, provided the basis for a hearing (since known as a Rodriguez hearing) to determine the extent of the claimed familiarity to see whether the identification was, in fact confirmatory.

The majority concluded therefore, that the trial court should conduct a witness familiarity hearing and depending on the outcome, either follow up with a Wade hearing to determine suggestiveness or make a finding that a Wade hearing was not required based on the witness' familiarity with the defendant.

DISSENTING OPINION

The dissenting justice, (Hon. William Bellacosa), argued that the majority extended the procedural protections CPL 710.30 too far upon an unsupportable interpretation of law that rewarded the defendant's claimed unfamiliarity with the identifying witness, even though he did not dispute the People's claim that the witness had observed him in the neighborhood and in the grocery store on many occasions before the shooting.

In the dissenter's view, "who claimed to know whom" was not so important as the witness' uncontroverted claim that he recognized the defendant based on several previous observations of him around their neighborhood. Moreover, the majority rewarded the defendant with a hearing based upon an unsubstantiated (and dubious) claim of unfamiliarity which could open to door to hearings any time the defendant claims, "I don't know that person."

FOURTH DEPARTMENT CASES

In People v Bell, 2021 NY Slip Op 05422 (4th Dep't 10/8/21), the AD rejected the defendant's argument that County Court erred in refusing to preclude identification testimony from an eyewitness to the homicide because the People established AT A HEARING that the witness had known the defendant for at least nine months beforehand, thus making the identification confirmatory. (Citing People v Rodriquez, supra and People v Carter, 107 AD3d 157 [4th Dep't 2013]).

In People v Colon, 2021 NY Slip Op 04394 (4th Dep't 7/9/21), the AD rejected the defendants' argument that the lower court erroneously denied him a Wade hearing with respect to an eyewitness to the homicide who subsequently viewed a surveillance video and pointed out the shooters depicted therein by their clothing and size but did not identify the defendant or the co-defendant. The court said that the issue was not preserved because the defendant did not object to the trial court's determination that a Wade hearing was unwarranted. (In any event, see People v Gee, 99 NY2d 158 [2002]: In viewing a video tape of a drug store robbery, the clerk did not "previously identify the defendant as such" within the meaning of CPL 710.30 [1]).

With respect to a second witness who did identify the defendant, the AD was satisfied that it was confirmatory because the detective testified that this witness and the defendant had known each other for about a year and had frequent contact before the crime date. (Citing People v Gambale, 158 AD3d 1051 [4th Dep't 2018]).

In the first appeal in People v Gambale, 150 AD3d 1667 (4th Dep't 2017), the AD held that the trial court had erred in concluding that the identification procedure employed by the police was not suggestive.

In the second appeal referenced above, the AD remitted the case to County Court to determine whether the parole officer's identification of the defendant as the robber (from a surveillance video) was confirmatory. (That aspect had been left unaddressed). The lower court found that the identification was, in fact, confirmatory, and the AD AFFIRMED based on evidence that the parole officer had supervised the defendant for several years. (Citing People v Lewis, 292 AD2d 814 [4th Dep't 2002] and People v Tas, 51 NY2d 915 [1980]: There was no 710.30 violation where the victim and the defendant (who shred the same cell for about a month) were well known to each other.

In People v Pequero-Castillo, 74 AD2d 1026 (4th Dep't 1991), the AD remitted the case for a hearing to determine whether the identifying officers' ability to identify the defendant was the result of "pooled surveillance" information that was shared by the surveilling officers (cross examination of whom had been severely curtailed by the trial court).

The officers had surveilled a number of suspects as they drove their bikes to and from three different locations (suspected stash site and sale sites) during an on-going drug investigation. The defendant was arrested, and drugs and paraphernalia were found at one of the locations. Some of the officers identified the defendant (and others) as they were handcuffed to the floor at the police station.

The officers compared their surveillance notes and incorporated the pooled information into a formal report (after which their individual notes were destroyed).

The defendant was unaware of the station-house identification of him until the trial. He asked for a Wade hearing at which the People balked, claiming that it was confirmatory. The trial court held a hearing and agreed that the identification was confirmatory. The court precluded defense counsel's cross examination of the officers with respect to whether their identifications were based on the pooled information or upon their own individual observations during the surveillance.

The AD held that since the trial court foreclosed inquiry into the very points necessary to determine whether the stationhouse identifications were unduly suggestive, the case should be sent back to the trial court to resolve that issue.

But see People v Allah, 57 AD3d 1115 (3d Dep't 2008) where the Third Department upheld the identification of the defendant (as the person who tossed a gun into a car and fled) by an officer who pulled over the vehicle (belonging to the defendant's sister) after which the defendant fled on foot.

When the defendant got out, he looked at the officer (who was a few feet away) and then turned and tossed an object (which turned out to be a stolen, semi-automatic handgun) below the driver's seat before taking off.

The officer went to the police station where, about three hours later, he got a print-out of the defendant's license after which he identified the defendant as the driver from a single, color photograph on his computer screen. The defendant was arrested a month later.

After the Wade hearing, the trial court upheld the stationhouse identification as confirmatory, but the AD disagreed saying that it did not fall into the exceptions to the notice and hearing requirements under CPL 710.30. However, the court was satisfied that the officer had an independent basis for the identification.

FINAL OBSERVATION

Whenever handling a case in which identity is in issue (whether or not an alibi defense is asserted), counsel should, through discovery and independent investigation, identify every potential identifying witness and determine whether his/her relationship to the defendant is that of relative, friend, acquaintance, or stranger.

Counsel should also carefully review the 710.30 notice to see who the People claim are witnesses who previously identified the defendant whether at a show-up, line-up, photo array or line-up. While the People may not list some identifying witnesses (believing that any identification by them was confirmatory based on familiarity (People v Rodriguez, supra) or a face-to-face encounter promptly followed by an identification (People v Wharton, supra), prosecutors may hedge their bets and list the identification anyway to avoid preclusion should the court take a different view.

If they do provide notice and still claim "confirmatory identification," counsel should argue that if the People sincerely believed that they would not have given notice in the first place. In any event, where the People claim familiarity between the protagonists (and the defendant says that he does not know or recognize the witness), counsel should press for a Rodriguez hearing to explore the true nature of the relationship and the extent of contact between them. If nothing else, counsel may get an early crack at cross examination.