

NEW YORK COURT OF APPEALS ROUNDUP

COURT DECIDES NUMEROUS CRIMINAL APPEALS AND DISCUSSES FOIL REQUESTS

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The Court of Appeals is deciding an increasing number of criminal cases. We discuss two of those decisions below, one concerning the admission of testimony from an expert on eyewitness identification and the other concerning whether a deportee has a right to pursue the appeal of his conviction. At the end of this column we also note briefly some of the other criminal decisions handed down last month. In addition, we discuss an opinion in a matter that arose under the Freedom of Information Law that is notable for the Court's plea to agencies to respond to requests under the statute with both the purpose of the law and efficiency in mind.

Eyewitness Testimony Experts

The Court established the standards by which trial courts must exercise their discretion in deciding whether to permit testimony of an eyewitness expert in [*People v. LeGrand*](#), 8 N.Y.3d 449 (2007), and has since had occasion to rule upon the application of those standards.¹ It did so again last month and unanimously held in *People v. Santiago* that the trial court abused its discretion in excluding such testimony.²

LeGrand established a two-step inquiry. First, the trial court should determine whether the case "turns on the accuracy of an eyewitness identification and there is little or no corroborating evidence." 8 N.Y.3d at 452. The Court has since clarified that additional identifications may constitute corroboration of an eyewitness identification for these purposes. If the answer to the first inquiry is "no," the trial court need not proceed further. If it is "yes," however, the court must proceed to the second inquiry and apply four factors: whether the proposed testimony is (1) relevant to the witness'

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identification; (2) based upon principles generally accepted within the relevant scientific community (the *Frye*³ test); (3) proffered by a qualified expert; and (4) on matters beyond the ken of average jurors.

In *Santiago*, the victim of an assault on a subway platform—a non-Hispanic white woman—was only able to see a portion of her attacker's face because it was partially covered. She was nonetheless able to provide the police with a description at the scene, including that the man who assaulted her was Hispanic, and the following day worked with a police artist to develop a sketch of her assailant. She later identified the defendant from a six-photo array and, after that, from a six-person lineup, and in both of those instances, she claimed she was certain of her identification.

On the evening of the crime, the police located two other eyewitnesses at the subway station, Edwin Rios and Pablo Alarcon. Both provided descriptions of the attacker generally in line with the victim's, and both relayed that they had seen the man carrying a knife. When Rios was shown the police artist's sketch, he stated that it was "more or less accurate." Subsequently, he selected the defendant from a police line-up. Alarcon had seen only part of the attacker's face. He failed to identify the defendant from a photo array or lineup. Shortly thereafter, Alarcon saw a photograph of the defendant in handcuffs in a newspaper that reported the defendant had been identified by the victim. Following that, Alarcon identified the defendant to (in his words) an 80 percent certainty. He stated that he had recognized the defendant during the lineup, which occurred before he saw the defendant in the newspaper, but had lied to the police because he was concerned about his immigration status.

The prosecution at first intended to offer at trial only the victim's testimony. Defense counsel filed a motion in limine to admit the testimony of an expert to testify about 12 psychological factors that can impact that accuracy of eyewitness identification. These include cross-ethnic inaccuracy, i.e., that non-Hispanic Caucasians' identifications of Hispanics are less accurate than their identification of other Caucasians, and that the presence of a weapon can affect the ability to observe and remember a perpetrator. The trial court denied the motion without conducting a *Frye* hearing. Among other reasons for excluding the expert testimony, the court stated that the case did not involve "cross-racial" identification and noted that the victim had never seen a weapon.

The prosecution changed its plans, and at trial the victim, Rios and Alarcon testified, and each identified the defendant. The defense again sought to introduce the testimony of an eyewitness identification expert, but the request was denied.

The Court analyzed the trial judge's two rulings on the admissibility of the expert testimony separately. Pre-trial, the prosecution intended to rely upon the testimony of the victim with absolutely no corroboration, making the second step of the *LeGrand*

process necessary. The Court analyzed the four *LeGrand* factors, and made clear that the relevance factor must be applied to each aspect of the expert's proposed testimony. The Court agreed that testimony concerning weapon impact was irrelevant because the victim was unaware her attacker was carrying a knife, and that certain other areas of potential testimony also were irrelevant. However, the Court held, the trial court should have ruled that testimony was admissible as to cross-ethnic identification, the impact that post-event information can have on an eyewitness' memory, and the principle that an eyewitness' confidence level is not a good predictor of accuracy. The Court also held that the trial court should have given "more adequate consideration" to some of the other principles to which the defendant's expert proposed to testify.

Turning to defense counsel's motion at the close of the evidence, the Court rejected the government's argument that the Rios and Alarcon identifications constituted sufficient corroboration of the victim's so as to obviate the need to apply the four *LeGrand* factors. The Court pointed out potential problems with the eyewitnesses' identifications, including that Rios may have been influenced by being shown a police sketch and Alarcon may have been influenced by a newspaper photograph of the defendant. "Taking into account all these circumstances, we do not consider the corroborating evidence sufficient to obviate the second stage of the *LeGrand* analysis," Judge Eugene F. Pigott Jr. wrote in his opinion for the Court.

The Court ruled that the second-stage analysis called for admission of expert testimony at trial on the factors that can influence identifications discussed above, and stated that the trial court should also have given specific consideration to the impact of unconscious transference, which was relevant to the Rios and Alarcon identifications. Concluding that the trial court's abuse of discretion in excluding the expert testimony was not harmless error, the Court ordered that defendant be given a new trial.

Deportees' Right to Appeal

In [*People v. Ventura*](#) and [*People v. Gardner*](#), the Court had before it the question of whether the Appellate Division had abused its discretion in dismissing the defendants' direct appeals from judgments of conviction prior to the appeals being heard and decided. Both defendants had filed timely notices of appeal and briefs, but before the appeals were argued both men were deported. The prosecution moved to dismiss the appeals based on the defendants' unavailability and thus inability to obey the mandate of the Appellate Division when issued. The motions were granted, and defendants were granted leave to appeal to the Court.

In an opinion for a majority by Judge Theodore T. Jones, the Court reversed, and remitted the appeals to the Appellate Division for consideration of their merits. Judge Susan P. Read, in a spirited dissenting opinion joined by Judges Pigott and Victoria A.

Graffeo, voted to affirm the dismissal of the appeal in *Ventura* and concurred in the reversal in *Gardner*.

In reversing, the majority acknowledged the inclination of courts to dismiss appeals where defendants have "voluntarily absconded," but concluded that the "fugitive disentitlement doctrine" did not apply in these cases since the defendants were unavailable because they had been involuntarily deported.

Of even greater importance to the majority of the Court was that the dismissal of the appeals resulted in the total loss of the defendants' absolute right to appeal in a criminal case and, in particular, their right to have the Appellate Division, with its power to review issues of fact and law, and to reach even unpreserved issues in the "interest of justice," to review the matter.

The dissent relied on, inter alia, the broad authority conferred upon the Appellate Division by CPL 470.60 to dismiss appeals for a wide array of reasons, subject only to legal error and abuse of discretion. In addition, the dissent urged that the absence of any connection between a conviction that is the subject of an appeal and a defendant's ultimate immigration status renders a dismissal justified. And it was precisely because of the presence of such a connection in *Gardner* that the Appellate Division's dismissal of that appeal was an abuse of discretion. Accordingly, the minority concurred in the majority's decision to send *Gardner* back for review on the merits.

FOIL and Common Sense

The holding of [*Matter of Schenectady County Society for the Prevention of Cruelty to Animals, Inc. v. Mills*](#) is not terribly surprising. The decision instead stands out because the Court felt it necessary to make a plea that agencies responding to public records requests be mindful of their statutory duty and apply common sense in carrying out that duty.

The simple facts are as follows. The Schenectady County Society for the Prevention of Cruelty to Animals made a Freedom of Information Law (FOIL) request of the Education Department for a list of the names and business addresses of licensed veterinarians in the county. The Department agreed to provide the names of the veterinarians but not their addresses on the basis that its computer system storing the information did not identify the addresses as either business or residential, and that home addresses are the type of private information exempted from disclosure under FOIL. Litigation ensued.

The Supreme Court denied the Society's Article 78 petition to compel production of both names and addresses. The Appellate Division, Third Department, reversed 3-2,

and one of the dissenting judges granted the department leave to appeal. The Court of Appeals unanimously affirmed.

It is well established that when a FOIL request seeks an existing record that contains both responsive information and information exempt from disclosure, the agency must redact the exempt information and produce the balance of the record if it can do so without unreasonable difficulty. But the Education Department refused to redact the information that it considered exempt and that the petitioner did not seek—home addresses—because it could not identify those addresses using its computer system. It did not maintain that determining which addresses on its system were residential would have been difficult, however. For example, the Court suggested, department employees could simply have called the 72 veterinarians and accomplish that task in a few hours.

Judge Robert S. Smith's opinion for the Court pointed out that such an exercise would have involved far less effort and cost than fighting the petition in three courts, "demanding the attention of 13 judges, generating judicial opinions and resulting in a delay in disclosure of almost four years." The opinion continued, "[i]t is our hope that the Department, and other agencies of government, will generally comply with their FOIL obligations in a more efficient way." Under the circumstances, it is our view that the Court expressed this sentiment in a most restrained manner.

Criminal Decisions, Briefly

In October, the Court divided 4-3 over whether a jury verdict convicting two men of assault with a weapon but acquitting them of criminal possession of a weapon should be reversed as inconsistent, holding that the verdicts were valid, *People v. Muhammad*; and 4-3 over whether a bank robber's note stating that he had a gun constituted sufficient evidence that he was in possession of a weapon, holding that it was not sufficient, *People v. Grant*. The Court addressed evidentiary issues in several cases, two of which involved the admission of prior consistent statements alleging sexual abuse, *People v. Rosario* and *People v. Prada*, finding the evidence was inadmissible in the former case and admissible in the latter. In *People v. Porco*, the Court found it unnecessary to resolve whether the defendant's Confrontation Clause right was violated, holding that even if error was committed, it was harmless.

The Court reversed two convictions on the ground the defendants were not adequately advised of the dangers and disadvantages of representing themselves, *People v. Crampe* and *People v. Wingate*. Finally, it considered whether the People's actions should have been deemed a dismissal of charges submitted to a grand jury, thereby barring further grand jury action, in three cases. In *People v. Credle*, charges against two co-defendants were presented to a grand jury, which indicted one of them, but the prosecutor was

unable to muster sufficient votes to indict the other and instead obtained a vote of "no affirmative action." Because the government did not obtain court permission before presenting the charges to a second grand jury, the indictment was dismissed. In both *People v. Davis* and *People v. McIntosh*, the government withdrew its case from the grand jury due to witness unavailability. The Court held such action was not the functional equivalent of a dismissal in either case.

Endnotes:

1. See [*People v. Abney*](#) and *People v. Allen*, 13 N.Y.3d 251 (2009).
2. In fairness to the trial court, we note that *LeGrand* had not yet been decided by the Court of Appeals at the time of the trial court's rulings in *Santiago*.
3. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

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