

ON THE EXCITED-UTTERANCE EXCEPTION AND SALVAGED-AIRBAGS SALES

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The vacancy on the Court of Appeals created when Judge Richard C. Wesley left the Court to sit on the Second Circuit Court of Appeals has been filled by Judge Robert S. Smith, whose appointment was unanimously confirmed last month by the State Senate. Judge Smith's confirmation brings to five the number of Judges of the Court of Appeals appointed by Governor George E. Pataki.

The recent decisions of the Court that we address this month are *People v. Robert Johnson*, in which the Court addressed the excited utterance exception; *People v. James Johnson*, in which the Court suppressed a gun found in the glove compartment of a car immediately after the driver's arrest, finding the explanation that the search was an inventory search was pretextual; and *NYAAD, Inc. v. State of New York*, in which the Court interpreted a statute to prohibit the sale of salvaged airbags because the Commissioner of Motor Vehicles had never promulgated regulations governing the sale of such airbags, as the statute had anticipated the Commissioner would do.

Excited Utterance

Whether a statement made an hour after a stabbing constituted an excited utterance and whether its admission constituted harmless error were the two issues in *People v. Robert Johnson*.

The background of the case is as follows. The police came upon two men struggling. One was holding a bloody ice pick. The other had been stabbed twice in the eye and upon seeing the police screamed, "he stabbed me, he stabbed me." The victim made other statements to the police, one near the scene one or two minutes after the police arrived, another in the ambulance ride to the hospital, and another during a police interview at the hospital approximately an hour after the attack in which the victim stated he struggled with the defendant and the defendant stabbed him. The victim (a homeless man) could not be located to testify at trial and the People sought to admit his prior statements. All statements were admitted at trial over objection based upon the excited utterance exception to the hearsay rule. On appeal, the defendant challenged only the admission of the statement made at the hospital.

The Court in an opinion by Chief Judge Judith S. Kaye outlined the excited utterance exception. It applies to out-of-court statements "made under the stress of excitement

caused by an external event, and not the product of studied reflection and possible fabrication." The Court observed that this seemingly simple rule can be difficult to apply because it requires determination of the declarant's mental state, a fact-intensive inquiry.

Considering the facts before it, the Court determined that the victim may have had the capacity for reflection and deliberation at the time of his hospital statement. An hour had elapsed between the event and the statement. Despite the fact that the victim was in pain, his hospital records reflected that he was "awake, alert and oriented . . . able to follow complex instructions." Further, when the officer who took the statement was asked whether the victim had paused in answering questions, the officer testified that there had been "moments of reflection." Thus, the Court ruled, the victim's hospital statement did not fall within the excited utterance exception and should have been excluded from evidence.

With respect to the issue upon which the Court divided, the majority concluded that, given the other evidence of guilt, the admission of the hospital statement was harmless error beyond a reasonable doubt. Judge George Bundy Smith dissented, arguing that although there was evidence the defendant had stabbed the victim, without the hearsay statements there would not have been sufficient evidence that the defendant had done so intentionally, as opposed to accidentally during a struggle.

Judge Smith pointed out that the admission of hearsay without the ability to cross-examine the declarant implicates a defendant's rights under the confrontation clauses of the federal and New York State constitutions, and asserted that a confrontation clause violation "may also constitute a violation of the right of due process and fair trial" under those two constitutions. The dissent stated that hearsay may only be admitted consistent with the confrontation clause when two conditions are met. First, the prosecution must establish the witness' unavailability. Second, the statement must be "trustworth[y]."

In this case, the victim's hospital statement did not even fall within a hearsay exception and thus clearly violated defendant's confrontation clause rights. The dissent asserted that such error was not harmless, arguing that the appropriate test was whether the wrongly admitted evidence "contribute[d] to the conviction." The dissent also discussed the hearsay statements that defendant had not challenged on appeal, namely those made during the struggle, immediately thereafter and in the ambulance. Noting that the victim had a motive to lie (the victim believed the defendant had previously thrown a metal trash can at him) and that there were indications the victim may have been under the influence of alcohol at the time, the dissent maintained that the earlier statements "did not bear a sufficient indication of reliability" to be trustworthy.

Vehicle Search and Seizure

Defendant James Johnson was driving recklessly and was pulled over by the police. As one of the officers left his car he observed the defendant open and then close the glove compartment. The officer then ran a check that revealed defendant's license was suspended, and made an arrest. The officer looked in the glove compartment of defendant's car, found a loaded handgun and then replaced the gun in the glove compartment. The vehicle was taken to the station where defendant's wife picked it up. The car was never vouchered.

Defendant moved to suppress the gun as the fruit of an illegal search. The People contended that the search had been an inventory search, but the hearing court concluded that the claim of an inventory search was merely a pretext and granted the suppression motion. The Appellate Division, First Department reversed, finding the search a "valid preliminary and limited inventory search at the scene." The Court of Appeals reversed.

The Court, in a unanimous opinion by Judge George Bundy Smith, took a strong stand against pretextual searches stating, "[w]hile incriminating evidence may be a consequence of an inventory search, it should not be its purpose." Inventory searches of impounded vehicles are permitted, of course, but they must serve the legitimate objectives of such searches: to protect the defendant's property, protect the police against claims of lost property, and protect the police and others from dangerous instruments. To ensure that the search fulfills these purposes and is not "a ruse for a general rummaging in order to discover incriminating evidence,"¹ an inventory search should be carried out pursuant to "an established procedure clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably."²

In *Johnson*, the People failed to introduce evidence to establish that the officer's search was conducted in accordance with established procedures or that there were police procedures designed to meet the legitimate objectives of an inventory search. Moreover, the facts suggested that the search was not conducted for inventory purposes. For example, the officer never created an inventory list and did not take possession of the gun, but placed it back into the glove compartment. Thus, the Court held that the gun had correctly been suppressed by the hearing court.

a. Sales of Salvaged Airbags

In 1996, the State Legislature enacted the Airbag Safety and Anti-Theft Act. It provided that an airbag that had been activated in a crash or had been stolen from a vehicle could only be replaced by a newly manufactured one or a salvaged airbag. Under the statute, however, the salvaged airbag, effective March 1, 1998, had to be certified before it was offered for sale in accordance with "standards" recognized by a competent nationally recognized organization approved by New York's Commissioner of Motor Vehicles in consultation with the Superintendent of Insurance.

While the law by its terms took effect on January 1, 1997, it provided that the Commissioner before that date would promulgate rules and regulations necessary to implement it. The problem was that the Commissioner never did promulgate rules and regulations by the date fixed by the law, or the extended deadline of March 1999 fixed by the Legislature.

When the law was passed there were no recognized “standards” for salvaged airbags and apparently there are none in existence even today. But in December 1999, the Commissioner published a notice that effective March 2000 only newly manufactured airbags could be installed in vehicles where the original airbag had been “deployed.” This notice published by the Commissioner created a dilemma for salvaged airbag providers, who had continued to sell their used product. They brought a declaratory judgment action challenging the Commissioner’s notice requiring installation of only new airbags and his interpretation of the law.

The Supreme Court, Albany County, granted the salvagers’ motion for a preliminary injunction in *NYAAD, Inc. v. State of New York*. A year later, after discovery, the defendants moved for summary judgment and NYAAD cross-moved for similar relief. The motion court ruled again for the plaintiffs on the basis that the Legislature intended the installation of salvaged airbags and the Commissioner’s failure to promulgate regulations was “fatal” and rendered a nullity the law’s prohibition of the sale of uncertified salvaged airbags. The Appellate Division, Third Department, reversed, holding that the effective date for the promulgation of regulations in the statute was not a condition precedent so that the failure of the Commissioner to create such regulations didn’t render the law a nullity, and dismissed the complaint. Leave to appeal was granted by the Court.

The Court unanimously affirmed in an opinion by Judge George Bundy Smith. In doing so, the Court looked to the language of the statute and its legislative history. The Court held that the language clearly showed the intent to permit the sale of salvaged airbags only if specified conditions were met and that if they were not met only new airbags were permitted to be sold. Because no standard for the sale of salvaged airbags had been set, the condition for their sale had not been met.

The legislative history, the Court held, supported the same result. It showed, among other things, that the law was not intended to be effective only upon the promulgation of regulations by the Commissioner fixing the “standard” and that the salvagers had been given the time and opportunity to create the requisite competent recognized national certifying body, but had not done so. Salvaged airbags are therefore impermissible in New York.

¹ Quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990).

² Quoting *People v. Galak*, 80 N.Y.2d 715, 719 (1980).