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Perry v. New Hampshire: **Due process does not require a pretrial hearing if allegedly suggestive circumstances of identification of defendant does not involve police action**

No. 10-8974 (USSC Jan. 12, 2012)

In *Perry v. New Hampshire*, the defendant contended that the trial court denied him due process by not holding a pre-trial hearing on his contention that an out-of-court identification of him was tainted by suggestive circumstances. The evidence showed that a law enforcement officer responded to a call that an African-American male was breaking into cars at an apartment complex. The officer encountered Perry when he arrived. Perry had in his possession two car-stereo amplifiers that he claimed he found on the ground. The officer asked Perry to remain in the parking lot while he went to talk to a potential witness. The officer went to the fourth floor of the apartment complex and spoke to the witness. She stated that around 2:30 a.m., she saw from her kitchen window a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man circled a car, opened the trunk, and removed a large box. The officer asked her for a more specific description of the man. The witness then pointed to her kitchen window and said the person she saw breaking into the car was standing in the parking lot, next to a police officer. Perry's arrest followed this identification. About a month later, the police showed the witness a photographic array that included a picture of Perry and asked her to point out the man who had broken into the car. The witness was unable to identify Perry.

The Court stated that due process provides a check on the admission of eyewitness identification when police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime. But, an identification infected by improper police influence is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pre-trial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

Perry urged that the Court to extend due process to include pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. The Court declined to do so. The Court stated that due process turns on the presence of state action and aims to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. The Court held that when no improper law enforcement activity is involved, it suffices to test reliability through the rights and opportunities generally designed for that purpose: The presence of counsel at post-indictment lineups; vigorous cross-examination; protective rules of evidence; and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

The opinion is a defeat for those interest groups relying on studies purportedly showing that the vast majority of eyewitness testimony is unreliable and calling for greater judicial activism in the area.