The New York Times https://www.nytimes.com/2011/11/03/us/supreme-court-weighs-eyewitness-reliability.html

Justices Weigh Judges' Duties to Assess Reliability of Eyewitness Testimony

By Adam Liptak
Nov. 2, 2011

WASHINGTON — Though studies and lower court decisions have found that eyewitness testimony can be both unusually problematic and unusually persuasive, the Supreme Court on Wednesday did not seem inclined to rule that the Constitution requires judges to view such evidence with special skepticism. Ordinary trial procedures, several justices suggested, should be adequate to address the potential unreliability of eyewitness identifications.

"I understand you have very good empirical evidence which should lead us all to wonder about the reliability of eyewitness testimony," Justice Elena Kagan told Richard Guerriero, a lawyer for Barion Perry, a New Hampshire man convicted of theft based in part on the testimony of a woman who said she saw him from a distance late at night.

But Justice Kagan and other members of the court appeared troubled by the solution Mr. Perry proposed. He said the Constitution's due process clause should have allowed him to seek a hearing before a judge to decide whether eyewitness evidence against him should be kept from the jury.

The court's precedents allow such hearings when the eyewitness identification at issue was the product of a suggestive police lineup or similar official conduct. Mr. Perry said there was similarly problematic suggestiveness in how he was identified, while he was held by the police in a parking lot near stolen goods. But he conceded that the suggestiveness was the product of happenstance and not official conduct.

Most of the justices did not seem inclined to order a hearing in such circumstances, in part because of the lack of a limiting principle. Why stop with eyewitness evidence that was the product of suggestion? Why stop with eyewitness evidence at all?

Or, as Justice Antonin Scalia put it, “Why is unreliable eyewitness identification any different from unreliable anything else?”

Mr. Guerriero responded that eyewitness evidence is “probably the leading cause of miscarriages of justice” and should be treated with special care.

But Justice Kagan said the problems with such evidence may not be unique.

“Eyewitness testimony is not the only kind of testimony which people can do studies on and find that it’s more unreliable than you would think,” Justice Kagan said.

Mr. Guerriero responded that if other forms of evidence can be shown to have contributed to 75 percent of wrongful convictions, as eyewitness evidence has, they might also warrant a closer look.

Justice Ruth Bader Ginsburg also seemed skeptical about the need for a special constitutional rule.

“What about all the other safeguards that you have?” she asked. “You can ask the judge to tell the jury, ‘Be careful; eyewitness testimony is often unreliable.’ You can point that out in cross-examination.”

“You can say something about it in your summation to the jury,” she went on, adding that the rules of evidence, as opposed to the Constitution, also allow the exclusion of some kinds of unreliable evidence.

“Why aren’t all those safeguards enough?” Justice Ginsburg asked.

Justice Anthony M. Kennedy said that “you teach the jury” about how hard it is to make an accurate identification by reminding jurors of a typical experience at a restaurant.

“Has it ever happened to you that midway in the meal you say, is that our waiter?” he said a good lawyer might ask.

Justice Samuel A. Alito Jr. asked a hypothetical question about a woman raped by a masked man in the dark. Weeks later, he continued, the woman sees a photograph in a newspaper of a man arrested for a different rape and recognizes him as her assailant.

Under Mr. Perry’s theory, Justice Alito said, a judge could keep the woman from testifying. “Now, maybe that’s a good system, but that is a drastic change, is it not, from the way criminal trials are now conducted?” he asked.

The justices also mused about other forms of evidence and information, including fingerprints, DNA, crystal balls, tea leaves and information obtained through torture. But they seemed persuaded by a lawyer for the federal government, Nicole A. Saharsky, who argued in support of state prosecutors in the case.

“Taking the question of reliability away from the jury,” Ms. Saharsky said, “would be a very big change in our system.”

The primary point of excluding eyewitness identifications that were prompted by the police, said Michael A. Delaney, New Hampshire’s attorney general, was to deter police misconduct rather than to address unreliable evidence more generally.

Justice Kagan disagreed. “Well, it’s both,” she said. “The court has certainly talked about deterrence, but the court also has very substantial discussions in all of these opinions about reliability. And from the criminal defendant’s point of view, it doesn’t really much matter whether the unreliability is caused by police conduct or by something else.”

By the end of the argument in the case, Perry v. New Hampshire, No. 10-8974, it seemed unlikely that the court was leaning toward adopting the criminal defendant’s point of view.

A version of this article appears in print on , Section A, Page 20 of the New York edition with the headline: Justices Weigh Judges’ Duties to Assess Reliability of Eyewitness Testimony