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Thursday, November 3, 2011

Supreme Court weighs reliability of eyewitness testimony

For the first time in three decades, justices consider the reliability of visual identification

By Robert lafolla

WASHINGTON - Herman Atkins had never heard of Lake Elsinore before he was accused of assaulting and raping a woman in that California resort town.

The victim fingered Atkins as her attacker after seeing his face on a poster hanging in a police station marking him a wanted man for an unrelated shooting incident. Due in part to the victim's identification, a jury convicted the 21-year-old Atkins. He served more than a quarter of his 47-year sentence in Folsom Prison before that identification was proved wrong. DNA evidence exonerated Atkins and he was released in 2000.

Atkins is one of several exonerated defendants whose stories are told in an amicus brief warning the U.S. Supreme Court that suggestive circumstances can generate identifications that, while sincere, are inaccurate and may lead to wrongful convictions.

'If it's not limited to suggestive circumstances created by the police, why is unreliable eyewitness identification any different from unreliable anything else?' - Justice Antonin Scalia

The court took up the subject of eyewitness testimony for the first time in three decades during oral argument Wednesday. The justices considered whether identifications merit special due process safeguards whenever they arise out of circumstances that lead a witness to believe a suspect is the perpetrator.

Justices on the right- and left-wings of the court aggressively questioned why eyewitness testimony should be treated differently than other types of evidence. They also worried special protections to screen out misidentifications would undermine the role of the jury and usher in a major change to how criminals are prosecuted.

The issue stems from a case brought against Barion Perry for allegedly breaking into a parked car. A woman claiming to have seen the thief from her apartment window identified Perry, who happened to be standing near a group of police in the parking lot at the time. Police responding to the break-in call had found Perry holding radio amplifiers, which he said he had found on the ground. He also claimed to have seen the perpetrators leave the lot before the police arrived. *Perry v. New Hampshire*, 10-8974.

The witness was later unable to identify Perry in an array of photographs, but she testified at the trial that resulted in his conviction. He appealed, arguing the trial court shouldn't have denied his motion to suppress the identification. New Hampshire's high court upheld the conviction, ruling that due process protections for eyewitness testimony only kick in when police orchestrate suggestive circumstances.

U.S. Supreme Court Supreme Court weighs reliability of eyewitness testimony

The U.S. Supreme Court took up eyewitness identifications for the first time in three decades Wednesday to consider whether they merit special due process safeguards to prevent juries from hearing unreliable testimony.

Litigation Orders could spark more digital music complaints

Two key orders this week in cases against UMG Recordings Inc. could drive thousands of musicians to file complaints of their own. At issue is whether digital music sales should be considered "records sold" or "masters licensed."

Law Practice Sheppard takes field for rugby venture

Sheppard Mullin Richter & Hampton LLP has been retained to assist a sports and entertainment company with the formation of a new rugby sport in a joint venture with USA Rugby.

Criminal Law enforcement increases use of social media

Some police and sheriff agencies say Twitter and Facebook are effective investigative tools but privacy advocates are crying foul.

Law Practice Gibson expands by two in Hong Kong

In Gibson Dunn & Crutcher LLP's efforts to play catchup with its fellow United States-based competitors that have more expansive offices in Asia, the Los Angeles-based firm just capitalized on two lateral hires in Hong Kong.

Court reporter disappears with his notes

A contract court reporter who vanished with his notes from a grand jury hearing in a closely watched San Francisco murder case, has been disciplined before for failing to produce court transcripts.

Environmental SunPower settles with environmentalists

Solar panel maker SunPower announced Wednesday it settled a lawsuit over the environmental impacts of its planned solar farm on the Carrizo Plain near San Luis Obispo.

Manson v. Brathwaite, 432 U.S. 98 (1977).

"Many things have happened since the Supreme Court last looked at [eyewitness testimony]," said Elizabeth F. Loftus, a UC Irvine psychologist who has challenged the reliability of eyewitness testimony and is not involved in the case before the Supreme Court. "Tons of scientific research has elucidated conditions under which eyewitness testimony is more or less reliable. The greatest development - and it's tragic in a way - is that DNA exonerations show eyewitness misidentification is a major cause of wrongful convictions."

Mistaken identifications were involved in 190 out of 250 convictions overturned by DNA evidence in a study by University of Virginia School of Law professor Brandon L. Garrett.

Perry's advocate at the Supreme Court, New Hampshire public defender Richard Guerriero, argued eyewitness identification made under suggestive circumstances - as in the case with Perry, where his proximity to police in the parking lot may have created the wrong impression on the witness who fingered him - creates a unique danger for mistakes, regardless of whether the police intentionally arranged the suggestion. Such situations should be "red-flagged" so the trial judge can evaluate the identification's reliability because sincere eyewitness testimony can be very convincing to juries, even if the witnesses are actually mistaken, he said.

But the court seemed resistant to Guerriero's argument.

"If it's not limited to suggestive circumstances created by the police, why is unreliable eyewitness identification any different from unreliable anything else?" Justice Antonin Scalia asked.

Justices Stephen G. Breyer and Ruth Bader Ginsburg pointed to existing safeguards against prejudicial evidence. Attorneys can cross-examine witnesses and judges can exclude testimony or instruct juries to consider problems with its reliability, they said.

Justice Anthony M. Kennedy worried about "usurping the province of the jury," while Justice Samuel A. Alito Jr. said barring testimony because of suggestive circumstances would be a "drastic change" to criminal trials.

Chief Justice John G. Roberts Jr. disagreed with Guerriero's notion of suggestiveness, defined as conduct that says to a witness: "that's the man."

"But whenever the witness is asked [about a suspect], at least there is a suggestion that 'this might be the man,'" Roberts said. "And I don't know why you would think that's any greater than 'this is the man.'"

New Hampshire Attorney General Michael A. Delaney argued that prior Supreme Court decisions on eyewitness testimony focused on due process problems created by police manipulation. The existing safeguards are chiefly meant to deter police from "stacking the deck" against a defendant, not to keep out unreliable testimony, he said.

Justices Sonia Sotomayor was the only justice to forcefully push back against Delaney's deterrence argument, saying it means judges must deduce police officers' states of mind to determine if they meant to manipulate witnesses.

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Mergers & Acquisitions

Freedom Communications clears its debt

After a few rocky years of bankruptcy and indebtedness, Irvine-based Freedom Communications Inc. has made a clean break after selling its broadcast assets to Maryland-based Sinclair Broadcast Group Inc. for \$385 million in cash.

Law Practice

Baker Botts partner leaves for Ovidian Group

Another prominent patent attorney has left a big law firm to take a position at Ovidian Group, an intellectual property business services company that aims to capitalize on the growing interest in buying and selling patent assets.

Irvine lawyer combines forces with firm

An Irvine lawyer who won a \$43 million business fraud verdict in 2008 has joined forces with a small firm that includes a practicing doctor among its partners.

Real Estate

Real Estate Deals

Hot apartment market leads to \$95 million multifamily sale in San Clemente An institutional investment fund sold a 368-unit San Clemente apartment complex for \$95 million.

U.S. Court of Appeals for the 9th Circuit Obama taps Arizona justice to 9th Circuit

President Barack Obama on Wednesday nominated an Arizona Supreme Court justice to serve on the 9th Circuit.

Government

Trial date in municipal outsourcing case set

A trial date has been set in a case that could determine whether Costa Mesa and other general law cities have authority to outsource local services to private contractors.

Corporate

How gaming companies can protect innovation from litigation

For social gaming companies, internal disputes can have crippling effects. By Benedict Hur of Keker & Van Nest LLP

Intellectual Property

Web hosts: Handle notices of infringement with care

Ignoring or improperly responding to a notice of infringement can cost a company millions. By Gene Folgo of McDermott Will & Emery LLP

Labor/Employment

Employee or independent contractor: One