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Criminal Procedure—Lineups—Right to Counsel: "Independence" of In-Court Identification of Criminal Defendant from Previous Lineup Identification Inadmissible Due to Absence of Counsel.—State v. Redmond, 75 Wash. Dec. 2d 64, 448 P.2d 938 (1968

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CRIMINAL PROCEDURE—LINEUPS—RIGHT TO COUNSEL: "INDEPENDENCE" OF IN-COURT IDENTIFICATION OF CRIMINAL DEFENDANT FROM PREVIOUS LINEUP IDENTIFICATION INADMISSIBLE DUE TO ABSENCE OF COUNSEL.—*State v. Redmond*, 75 Wash. Dec. 2d 64, 448 P.2d 938 (1968).

Virginia Rohn, alone in her beverage store, was robbed by an unmasked man who remained in the store for approximately five minutes. At a police lineup, five days later,[1] she identified defendant as the robber. Defendant's counsel filed a pre-trial motion to suppress the lineup identification because defendant had not been afforded prior opportunity to contact counsel and counsel had not been present at the lineup. After a preliminary hearing, the trial judge suppressed the lineup identification but ruled that Virginia Rohn was not legally precluded from making an in-court identification. Upon conviction, defendant appealed assigning error to the admission of her in-court identification of him. The Washington Supreme Court affirmed. *Held:* when the trial court has weighed conflicting evidence on whether an in-court identification is "independent" of an inadmissible lineup identification, its finding will not be disturbed if it is supported by substantial evidence. *State v. Redmond*, 75 Wash. Dec. 2d 64, 448 P.2d 938 (1968).

The lineup identification in *Redmond* was suppressed on the authority of *United States v. Wade*,[2] a case in which the United States Supreme Court ruled that a lineup is a "critical" stage[3] of the criminal process and that the sixth amendment right to counsel includes the right to have counsel present at a lineup. The *Wade* court held that a witness's identification made at a lineup in the absence of defense counsel is inadmissible as evidence. However, it refused to bar the

[1] The lineup took place thirteen days after the United States Supreme Court decision of United States v. Wade, 388 U.S. 218 (1967), in which it was held that the right to counsel extended to the lineup stage of pre-trial procedure (Discussed in text accompanying notes 2-7 *infra*).

[2] 388 U.S. 218 (1967).

[3] *Wade* is another in a growing line of cases holding certain pre-trial procedures as "critical" and thus requiring the presence of counsel. *See* Powell v. Alabama, 287 U.S. 45 (1932) (an arraignment where rights might be sacrificed or lost), Massiah v. United States, 377 U.S. 201 (1964) (an arranged meeting whereby federal agents could hear statements made by the defendant to an accomplice turned informer), Escobedo v. Illinois, 378 U.S. 478 (1964) (secret interrogations prior to arraignment), Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation).

same witness's in-court identification in every case, saving that issue for determination on a case-by-case basis. The Court held that the proper test to apply in determining the admissibility of an in-court identification is:[4]

> [W]hether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

In *Wade* the court struggled with two problems in extending the right to counsel to lineups: delineation of the defense attorney's role at the lineup[5] and application of the "tainted fruit" concept to in-court identifications.[6] The majority was concerned that the right to counsel

[4] United States v. Wade, 388 U.S. 218, 241 (1967), *quoting* Wong Sun v. United States, 371 U.S. 471, 488 (1963), in which this language was adopted from J. MAGUIRE, EVIDENCE OF GUILT 221 (1959).

[5] Justice Black's dissent demonstrates his doubt as to the effectiveness of counsel in the lineup procedure.

> I doubt that the Court's new rule will obviate these difficulties, or that the situation will be measurably improved by inserting defense counsel into the investigative processes of police departments everywhere.

United States v. Wade, 388 U.S. 218, 254 (1967). *See also, Lawyers and Lineups*, 77 YALE L.J. 390 (1967); *The Role of the Defense Lawyer at a Lineup in Light of the Wade, Gilbert and Stoval Decisions* (panel discussion), 4 CRIM. L. BULL. 273 (1968).

The majority apparently felt that some of the difficulty could be avoided by the adoption of statutory procedures for the conduct of lineups. United States v. Wade, 388 U.S. 218, 236 n.26 (1967), *referring to* Murray, *The Criminal Lineup at Home and Abroad*, 1966 UTAH L. REV. 610, wherein a statutory scheme is suggested. Murray's recommended statute would provide a right to counsel, a prior written description of the suspect by the witness, a minimum of six participants in the lineup (similar in appearance and dress), a written descriptive report of the lineup, a right to use voice identification, a prohibition upon police suggestions that one or more of the lineup participants has been arrested as a suspect, and a prohibition upon multiple witnesses talking to each other before and during the lineup.

Practically, such a statute would be difficult to apply for small-town police forces which deal with small jail populations. Politically, a proposal such as Murray's is not a realistically expectable reaction to the *Wade* decision; in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3502, Congress attempted expressly to overrule the *Wade* holding in federal courts. There is some doubt as to the constitutionality of this statutory provision (*see*, United States v. Barber, 291 F. Supp. 38 (D.C. Nebr. 1968)), and state legislatures, faced with *Wade*, are unlikely to make any such overt attempt to circumvent the United States Supreme Court's interpretation of what the Constitution requires. But, the federal act does give an indication that legislators, responding to a crime-fearing constituency are not likely to adopt measures aimed at controlling police behavior in the interests of due process.

[6] Factors to be considered in applying this concept were listed, including:

> The prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

at the lineup would be an empty guarantee if in-court identifications were allowed without regard to inadmissible lineup identifications.[7] On the other hand, believing that a per se rule of exclusion was unjustified, the court concluded that the government should first be given the opportunity to establish that the in-court identification was untainted by the lineup identification.

Despite testimony in *Redmond* by a psychologist that an untainted in-court identification made subsequent to an illegal police lineup would be psychologically impossible, the trial judge ruled that such an identification was legally possible.[8] This note outlines support for the psychologist's opinion, and suggests considerations which a court should emphasize in order to harmonize with the psychology of perception the determination of whether such an in-court identification is legally untainted under the guidelines of *Wade.*

Identification (recognition) has been described as the product of a perception recipe,[9] since it results from the combined existence of a number of perceptual ingredients: sensual (sight, sound, touch, taste, smell), psychological (desire to please, to accomplish a task, etc.) and cognitive (application of past experiences and learning).[10] At a lineup all ingredients of the perception recipe are brought together for a witness.[11]

United States v. Wade, 388 U.S. 218, 241 (1967). Justice Black, in his dissent, indicates that he believes the test to be unworkable.

> . . . I think the rule fashioned by the Court is unsound. The "tainted fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible.

Id. at 248.

[7] United States v. Wade, 388 U.S. 218, 240 (1967).

[8] State v. Redmond, 75 Wash. Dec. 2d 64, 67, 448 P.2d 938, 940 (1968).

[9] G. RYLE, THE CONCEPT OF MIND 218-219, 228-234, 272-279 (1949).

[10] J. SOLTIS, SEEING, KNOWING AND BELIEVING 92-125 (1966).

[11] Soltis in discussing the concept of the perception recipe used the example of a witness picking a murder suspect out of a lineup. *Id.* at 93.

In a discussion with a deputy sheriff, this writer was informed that in King County, Washington, no written procedures for lineups exist. The common practice, however, is to place the suspect in a lineup with four or five jail trustees. All participants are dressed in white trustee coveralls. The lineup is usually a "silent" lineup; the witnesses are placed in different parts of the room and mark the number of the man they think they recognize on a slip of paper. The deputy felt that the procedures were very fair. He made the observation that in his experience the suspect almost always gives himself away by his antics in attempting to be inconspicuous. This is understandable in that the suspect is often the only one appearing in a lineup for the first time and is always the only one who has anything to fear. The trustees usually have participated before and also known that if they are picked it is of no concern to them for they are not suspected.

A basic concern in *Wade* was the risk of misidentification through government manipulation at lineups of the ingredients of the perception recipe; this concern was underscored by reference to specific instances of lineup mismanagement.[12] The court's solution to the problem was to require an attorney to be at the lineup in order to observe any mismanagement of the perceptual ingredients, to disallow any evidence produced by mismanagement and to exclude lineup identifications altogether if counsel was not present. The approach is realistic in that an attorney's presence alone should lessen the likelihood of manipulative lineup procedures and the attorney's ability to use evidence of mismanagement at trial decreases the possibility that a conviction will be based on faulty lineup identification.

But, when a lineup identification is excluded as evidence, there still remains the question of how that lineup identification affects a witness's subsequent identification of the same person in court. Literature on perception and cognitive consistency[13] makes it clear that while the court may prevent the jury from considering an identification made at a lineup, the witness who made that identification will be greatly influenced by what he then perceived and decided. Post-lineup confrontations of a witness with a person identified at a lineup may result in a response exemplifying what psychologists refer to as dissonance theory. This theory[14]

> does not rest on the assumption that man is a rational animal; rather it suggests that man is a rationalizing animal—that he attempts to appear rational, both to others and to himself.

Illustrative of the theory, one team of psychologists has demonstrated that once a subject has committed himself to an erroneous decision because insufficient stimulus was provided to make the decision, the subject will ordinarily adhere to his decision even when the stimulus

[12] Instances of mismanagement listed included: a lineup in which the suspect was the only Oriental; placing a black-haired suspect among a group of light-haired persons; a tall suspect among short non-suspects; a suspect under twenty in a group of five other men all over forty; a lineup in which all participants except the suspect were known to the witness; requiring only the suspect to wear distinctive clothing which the culprit allegedly wore; pointing out the suspect prior to the lineup; asking the participants to try on an article of clothing which only fits the suspect. 388 U.S. 218, 232-233 (1967).

[13] Authorities cited notes 14 and 16 *infra*.

[14] Aronson, *Dissonance Theory: Progress and Problems*, in THEORIES OF COGNITIVE CONSISTENCY 5, 6 (1968).

is increased to the point where the subject can perceive that his first decision was wrong.[15]

> [The team] repeatedly found that when a subject makes an immediate commitment to a given identification autonomic[16] mobilization is in accord with the mistaken identification rather than with the nature of the stimulus; *the effect of the response overrides the effect of the true stimulus*! . . . This psychological response to one's own decision enables the person to create a new level of reality that may in turn be used to provide a firmer basis for validating both the wisdom and internal consistency of the decision. (emphasis in original, footnote added)

In light of the dissonance theory, it is likely that a witness's lineup identification decision will have a direct influence on the reliability of any subsequent identification. Once the witness has made a decision, it is doubtful that he will later change his mind in open court even if he has been given reason to doubt the accuracy of his initial choice.

The *Wade* court, without using the term, implicitly accepted the validity of dissonance theory, commenting that[17]

> . . . it is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.

In *Redmond* the trial judge, after declaring the lineup procedure void, looked to the witness's prior opportunity to observe the criminal act and to her own testimony relating to the independence of her in-court identification.[18] The former is a valid criterion under *Wade,* the latter clearly is not.[19]

Both psychological theory and the language of *Wade* indicate that, rather than relying on the witness's estimate of the independence of his subsequent identification, the court should give intensive consideration to the procedures used at the lineup. In *Redmond* the defendant

[15] P. ZIMBARDO, THE COGNITIVE CONTROL OF MOTIVATION 272 (1969).

[16] 1a: acting independently of violation; b: relating to affecting, or controlled by the autonomic nervous system. 2: due to internal causes or influences: spontaneous. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 60 (1963).

[17] 388 U.S. 218, 229 (1967), *quoting* Williams and Hammelmann, *Identification Parades, Part 1,* CRIM. L. REV. 479, 482 (1963).

[18] State v. Redmond, 75 Wash. Dec. 2d 64, 67, 448 P.2d 938, 940 (1968).

[19] *See* note 6 *supra.*

claimed that someone at the lineup said, "Take a good look at No. 2," and thereafter he was identified.[20] This claim should have been treated by the court as one of major importance; if believed, it would tend to show the very kind of manipulation of the perception recipe at which *Wade* was aimed[21] and which could bring into play on later confrontation the behavior described by dissonance theory. Nevertheless, the trial judge in *Redmond* said only that[22]

> [Virginia Rohn's] identification of Mr. Redmond here in court is the result of her original observation of the defendant and that it is neither influenced by nor affected by, nor in any way tainted by the things that took place at the lineup.

Virginia Rohn's assertion of the independence of her in-court identification suggests dissonance theory behavior as readily as its own truth. Nothing in the opinion indicates that the trial court considered any events at the lineup to be of particular importance on the question of taint.

The *Wade* case requires the government to establish by "clear and convincing evidence"[23] that the claimed lineup impropriety did not influence the subsequent identification. When counsel has not been present at a lineup, the trial court should be mindful that defendant's evidence relating to improper lineup procedure will be less persuasive than it would be had he been allowed the corroborative presence of counsel. Moreover, courts should avoid any tendency to proceed on the assumption that at the time of the crime the identifying witness etched in his memory a picture which became the reference point from which all subsequent identifications are made.[24] The operative refer-

[20] Brief of Respondent at 6, State v. Redmond, 75 Wash. Dec. 2d 64, 448 P.2d 940 (1968).

[21] *See* note 12 and accompanying text *supra.*

[22] State v. Redmond, 75 Wash. Dec. 2d 64, 67, 448 P.2d 938, 940 (1968).

[23] 388 U.S. 218, 240 (1967).

[24] Testimony that an identification was independently made was also mentioned in State v. Gefeller, 76 Wash. Dec. 2d 609, 613, 458 P.2d 17, 19 (1969). It is interesting to note that in *Gefeller* the lineup was objected to, not on the grounds of lack of counsel (there was waiver), but on the grounds that the use of a photo before the lineup was impermissibly suggestive. The Washington Supreme Court, citing Simmons v. United States, 390 U.S. 377 (1968), held that the procedure was not "impermissibly suggestive" and in passing mentioned that even if it were the witnesses testified that they could make the identification independent of the photograph experience. The observation of the crime was made across a four-lane street at night. The criminal was breaking into a tavern with his back to the witnesses and only turned his face to them momentarily. The witnesses identified the defendant after being shown a single photograph of the defendant and then picking him out of a lineup.

ence point may be the decision made at the manipulated lineup; major attention should be focused on what happened there. *Wade* does not authorize treating the lawyerless lineup as though it had never taken place.

If the validity of a witness's in-court identification is tested in terms of taint by or independence from an illegally conducted lineup, the test rests upon a fallacious assumption; modern psychology indicates that every such identification will be affected by the lineup to some degree. The issue for the court, then, should be whether the subsequent identification is *sufficiently* tainted to require exclusion.

Simmons v. United States[25] provides a verbal formulation for a test of sufficient taint. That case, like *Wade,* dealt with pre-trial identification, but the procedure in question was the use of photographs, not of a lineup. Under the *Simmons* rule, an in-court identification is invalid if the pre-trial procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[26] Congruent with this focus, the *Wade* court said that it is "relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the lineup."[27] If there has been such a lineup, the *Wade* court's concern with reducing the risk of misidentification is not met by a finding that the witness's in-court identification was independent of the lineup. Psychological independence is highly unlikely. The crucial consideration, then, should be *how much* the later identification was affected by the lineup.

The Washington Supreme Court in *Redmond* finessed a vigorous review of the trial court's action by treating the issue of the admissibility of an in-court identification following a lawyerless lineup as a question of fact. The criteria established by *Wade* raise questions of law.[28] An appellate court shirks its responsibility if it treats the whole problem as a factual matter governed by the substantial evidence rule.

When a lineup is conducted without a lawyer's presence, both trial

[25] 390 U.S. 377 (1968).
[26] *Id.* at 384.
[27] 388 U.S. 218, 241 (1967).
[28] The *Wade* court indicated that the admissibility of in-court identifications was not merely a fact question when it said in remanding, "We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses." 388 U.S. at 242 (1967).

and appellate courts should closely examine any allegations of improper lineup procedure in dealing with the admissibility of subsequent in-court identification by a witness who identified the defendant at the lineup. A determination that the witness can make an in-court identification on the basis of his original mental picture, unaffected by manipulative practices at the lineup, is probably ill-founded. The processes of perception and identification do not operate in such a manner. For legal analysis to comport with psychological theory, the inquiry must be into how much the in-court identification was affected by the lineup. The approach apparently followed in *Redmond* goes far toward rendering the right to counsel at a lineup an empty guarantee.