
ID: 746 (Exam Number)
Exam Name: Fall 2006 - Criminal Procedure (Anderson-Goldstein)
Instructor: Anderson - Goldstein

Grade: 3.3

*GOOD ISSUE SPOTTING &
ANALYSIS OF DISCOVERY & DUE PROCESS*

1)

Excessive Bail

The 8th amendment of the constitution forbids excessive bail. Defendants (D) Harris and Smith has their bail set at five million dollars, which is five times the amount of the local bail schedule. Although the constitution does not require, nor give a right to bail, excessive bail is forbidden. Solerno In this case neither (D) had a criminal record. The Judge stated on the record that the bail was set high because of public outrage. Public outrage does not justify setting bail at five times the local bail schedule. This bail is likely to be held excessive which would be a violation of the (D)'s constitutional rights against excessive bails.

Identification

In-Court ID of Smith

The live line-up at the jail was a Wade violation. The right to counsel had attached. (D) Smith was already formally charged. A live line-up requires the assistance of counsel under Wade. Smith's attorney didn't show up, and as a result the line-up cannot take place. It is not relevant Public Defender Dan who was representing Harris was there. Smith has a right to have counsel at the live line up, and without counsel there is a violation. Although substitute counsel is permissible under Wade the (D) needs to have counsel at the live line-up. Smith did not have counsel at this line-up and as a result there was a Wade violation.

When there is a Wade violation because the (D)'s attorney was not present for a live line-up, and the attorney objects at trial to the in-court identification the burden shifts to the Prosecution, P, to show by "clear and convincing" evidence that there is an independent source for the in-court line-up. Attorney Rogers objected to the in court identification as soon as he learned, for the first time, that the live line-up proceeded without his presence. The Judge denied his request. This is a violation. Once Attorney Rogers objected to the line-up the burden shifted to the P to show an independent source for the in court identification. Without an independent source shown by "clear and convincing evidence" the in court line up must be excluded. Wade was violated when the Judge overruled Attorney Rogers objection to the identification. Additionally under Gilbert the live line-up without counsel is per se inadmissible against the (D).

ID of Harris

(D) Harris was identified in the hallway, at the prelim, and later in court. The identification in the court hallway was not a violation. This was similar to the show-up identification in Kirby. There is not need for counsel here because there was no P presence in the court. The identification was made by chance encounter in the courthouse. As a result this identification of Harris does not violate his rights because he had no right to counsel at that identification even though he was already the "accused" under the sixth amendment.

This identification is not governed by Wade or Gilbert because there was no right to counsel. Stoval provided the standard for identifications where counsel is not required. Under Stoval the identification cannot be 1) unnecessarily suggestive and 2)

not conducive to irreparable misidentification. In this case the identification was not unnecessarily suggestive because Harris was presented to the victim. Although the two (D) were in chains and jail uniforms it does not appear that they were intentionally presented to the victim. She was there by chance. Additionally the identification was not conducive to irreparable mis-identification. In Brathwaite & Biggers the court determined that identifications that are reliable even if only one (D) is shown can be sufficient. Although the lights were off in the room and the attack lasted only 3 minutes the victim was able to make the ID, so it is unlikely that she mis-identified Harris.

Effective Assistance of Counsel

Both Public Defender Dan and Attorney Rogers are lawyers with several years of experience. Under Strickland an ineffective assistance of counsel claim requires 1) unreasonable conduct of the attorney and 2) a reasonable likelihood but for the attorneys unreasonable conduct there would have been a different result. A high degree of deference is given to strategy decisions of counsel, and there are very few per se ineffective assistance of counsel cases. Neither defense counsel objected at the preliminary hearing to the identifications made by the victim. Smith's attorney did not know the victim could not identify the (D) in the hallway, nor was he aware of the previous live line-up because he was not there. His failure to object is not unreasonable. Harris' attorney also did not know of the previous hallway identification. He was present at the in person line-up in which his client was identified, but he was not there in his capacity representing his client. Although he should have known that this could have been a violation it is unlikely that there would have been a different result

even if he objected. There was an independent source for the preliminary identification other than the live line-up because the victim already made the hallway ID. As a result the failure to object at the preliminary hearing is unlikely to be sufficient for an ineffective assistance of counsel claim.

The failure of Defender Dan to cross-examine the victim at the pretrial is also a questionable strategy, but due to the high deference of strategic decisions given to defense counsel it is unlikely to be sufficient for an ineffective assistance of counsel claim. The cross examination could have revealed the prior questionable IDs the victim made, but neither counsel was aware at the time of this. Under Wiggins failure to investigate exculpatory defenses is per se ineffective assistance of counsel, but failure to cross examine does not rise to the level of failing to explore an insanity defense as in Wiggins.

Self Representation

Under Ferratta a (D) has a right to represent himself. The right to counsel under the sixth amendment includes the right to represent oneself. In order for the court to allow a (D) to represent himself the (D) must make an "unequivocal" assertion of his right to represent himself. Smith told the court directly that he didn't like his lawyer and he thought it would be a "good idea" for him to be his own lawyer. Although "good idea" is not unequivocal, the court should have explored whether or not he was truly asserting his right to self representation. In this case the court "ignored" the (D) statement. If a (D) asserts or tries to assert a constitutional right, the court should not "ignore" it. The court should have determined whether the (D) was making a knowing

and intelligent waiver of a known right or privilege. The (D) need only understand what he is giving up, not whether or not he is capable of making a good lawyer for himself. Similar to accepting a plea under Boykin the court must determine whether or not the (D) is making a knowing and voluntary waiver. In this case the court ignored him.

The assertion of this right by Smith was prior to trial. He later re-asserted his right to self-representation in a much more unequivocal manner at the end of the trial when he stated "I want to represent myself," but this was not timely. The previous assertion was not unequivocal and the second assertion was untimely. Nevertheless the court should have further inquired instead of ignoring this assertion. If the (D) right to self representation is violated then that is sufficient to overturn a conviction. In this case Smith has a good argument for a violation of his right to self-representation.

Discovery

Prior to trial both attorneys made requests for all exculpatory and relevant information. Under Brady the P is required to give the (D) all materially exculpatory information without request. Under Brady the materiality of information is determined by whether there is a reasonable likelihood of a different outcome if the suppressed evidence was given to the (D). In this case the P knew of the identification in the hallway but failed to disclose that information to the (D)s. That evidence is unlikely to be material for Harris because the victim identified him, but it is very probative and exculpatory for Smith. The victim could not identify Smith in the hallway. Her later statements that she was "really sure" at the preliminary hearing could have been attacked had the attorney for the Smith known about her failure to identify in the

Hallway. It would also have helped at trial because it could be used for impeachment on cross of the victim. Under Brady the P should have disclosed the information about the hallway identification at least for (D) Smith because it is reasonable that if the attorney knew that the victim could not identify his client he could have exposed her weakness in identification and achieved a different result.

Other than the materially exculpatory information required under Brady the court must look to the totality of circumstances to determine if the P has a duty to disclose information. The P failure to disclose in this case is likely a violation of both her duty to disclose with and without a discovery request.

Jury

The constitution protects the (D) right to a jury when charged with a "serious" crime. Duncan v. Louisiana The (D)'s right to a jury includes the right to a fair cross section of the community. The P cannot use his peremptory challenges in a discriminating manner. Under Batson the (D) must show a pattern of behavior by P that creates an inference of discrimination. The equal protection violation can be challenged by a person not of the same race as those being excused. Powers v. Ohio. In this case the P struck the only six Hispanic jurors. Six peremptory challenges against all Hispanics leaving no Hispanics left of in the pool is sufficient to create an inference of discrimination.

Once the inference of discrimination is shown under Batson the P must give a race neutral reason for her use of the challenges. In this case the P did not give a race neutral reason for his challenges. The P stated that since the (D) were not Hispanic

neither had a right to question her use of peremptory challenges. This is incorrect under Powers. The court in Powers allowed a white (D) to challenge the use of peremptory challenges to exclude black jurors. Hernandez held that Batson was extended to Hispanics. As a result the P made an incorrect statement of the law. Her doing so also resulted in a failure to show a race neutral reason for her use of peremptories. Since the burden shifted to the P once the inference of discrimination was shown by the (D) upon a pattern of discrimination, the P failed to meet her burden when she did not give justified reason for her challenges against all the Hispanics in the pool. Therefore, the P use of peremptory challenges in a discriminatory manner resulted in a violation of the (D) rights to a fair cross section of the community. This is a constitutional violation.

Joinder of defendant (D) - Bruton violation

Both Harris and Smith were tried jointly for this crime. Although there is a possible Bruton violation when the joinder of (D) can prevent adequate representation, it does not appear that such a violation resulted in this case. The (D) were tried together, and although neither confessed and implicated the other, a conflict arose when Harris' attorney cross examined the victim. Harris' attorney brought out on cross examination of the victim that she was less than certain at the live line-up where she identified Smith. That identification was per se excludable under Gilbert, because Smith's attorney was not present. Although the Harris' attorney is free to bring up the identification on cross, that identification prejudiced Smith and was inadmissible against Smith. Therefore a possible Bruton violation occurred when Harris' attorney offered

testimony that was inadmissible yet inculpatory toward Smith. This is a Bruton violation. Two juries or severance should have been ordered.

Mistrial Request

Attorney Roger's request for mistrial was denied. The (D) has a right to have the sworn in jury decide his case. A mistrial can only be granted with "manifest necessity." Illinois v. Sommerville. The violation of Wade and Gilbert could be enough for "manifest necessity" but the Judge is given great latitude and discretion in declaring a mistrial. There were several constitutional violations in this case, but a Judge is rarely required to order a mistrial. "Manifest necessity" is necessary in order to order a mistrial, but there is no requirement for mistrial, since the (D) has a right to the jury. The Judge could have ordered the mistrial, but his failure to do so is not an independent violation of the (D) constitutional rights.

END OF EXAM