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Supreme Court, Kings County, People v. Nunez

Cover Page Footnote

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Pollack: Assistance of Counsel
SUPREME COURT OF NEW YORK

People v. Nunez¹
(decided March 19, 2004)

John Nunez was charged with “attempted murder in the second degree, assault in the first and second degree, criminal possession of a weapon in the second and third degree and reckless endangerment in the first and second degree.”² The indictment alleged that while trying to kill Edwin Cachola, the defendant caused serious physical injury to a two-year-old girl.³ A *Wade* hearing⁴ was then conducted before the court pursuant to Section 710.60(4)⁵ of New York Criminal Procedure Law as the defendant moved to suppress the evidence from a pre-arraignment line-up conducted at the precinct.⁶ Two issues were before the court. The first was “whether the identification procedures employed by law enforcement in this case were unduly suggestive,”⁷ which the court concluded were not.⁸ The second issue was the basis of the defendant’s constitutional claim, which was “whether [he] was denied his right to counsel at his pre-arraignment line-up.”⁹ The court granted the defendant’s motion to suppress the evidence in

¹ No. 35-2003, 2004 WL 556591 at *1 (N.Y. App. Div. Mar. 19, 2004).

² *Id.*

³ *Id.*

⁴ BLACK’S LAW DICTIONARY 1610 (8th ed. 2004) defines a *Wade* hearing as: “A pretrial hearing in which the defendant contests the validity of his or her out-of-court identification.”

⁵ N.Y. CRIM. PROC. LAW § 710.60(4) (McKinney 1995) states when the court must conduct a hearing and make findings of fact essential to the determination of granting or denying a motion.

⁶ *Nunez*, 2004 WL 556591, at *1.

⁷ *Id.*

⁸ *Id.* at *1 n.2.

⁹ *Id.*

the line-up identifications stating that “ ‘without some notice or other legally recognized excusal of counsel’s presence, the police took the risk that the adduced evidence would not be allowed.’ ”¹⁰

On December 29, 2002, defendant surrendered to the 75 Precinct accompanied by his attorney, Mr. Murphy.¹¹ Mr. Murphy helped facilitate the defendant’s surrender and upon their arrival at the precinct, he told the police that he represented the defendant.¹² Thereafter, Mr. Murphy waited four hours while the police prepared a series of lineups before notifying the police that he had another appointment and had to leave.¹³ He “left the precinct shortly before 1:00 PM and within twenty minutes of his leaving, all eight line-ups had been conducted.”¹⁴ While there was conflicting testimony as to whether Mr. Murphy had left his business card with the police, the record showed that the police in no way attempted to contact Mr. Murphy after he left the precinct and before the lineups were conducted.¹⁵

The defendant’s motion to suppress the lineup identification evidence was based on his right to counsel granted in both the United States Constitution¹⁶ and the New York State

¹⁰ *Id.* at *6 (quoting *People v. Wilson*, 680 N.E.2d 598, 601 (N.Y. 1997)).

¹¹ *Nunez*, 2004 WL 556591, at *4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *3.

¹⁵ *Id.*

¹⁶ U.S. CONST. amend. VI provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” U.S. CONST. amend. XIV provides in pertinent part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

Constitution.¹⁷ The court recognized that the defendant did have a right to counsel but had to determine when that right attaches.

The United States Supreme Court defined when a defendant's right to counsel attaches in *Kirby v. Illinois*.¹⁸ In *Kirby*, the victim reported that he had been robbed of his wallet.¹⁹ The defendant was arrested the next day when he was found with the victim's possessions.²⁰ The victim was called in to identify his assailant and he identified the defendant as one of the men who robbed him.²¹ There was no lawyer present at the identification proceedings nor did the defendant ask for legal advice or obtain advice of any right to the presence of counsel.²² The defendant was indicted for robbery and his motion to suppress the identification evidence by both the trial and appellate courts was denied.²³ The Illinois appellate court held that "the *Wade-Gilbert per se* exclusionary rule is not applicable to pre-indictment confrontations."²⁴ The Supreme Court granted certiorari limited to the holding of the appellate court and affirmed its decision.²⁵

¹⁷ N.Y. CONST. art I, § 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him."

¹⁸ 406 U.S. 682 (1972).

¹⁹ *Id.* at 684.

²⁰ *Id.*

²¹ *Id.* at 684-85.

²² *Id.* at 685.

²³ *Kirby*, 406 U.S. at 686-87.

²⁴ *Id.* at 686.

²⁵ *Id.* at 691.

In the companion cases *United States v. Wade*²⁶ and *Gilbert v. California*²⁷ the Supreme Court held that:

[A] post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.²⁸

This holding created the *Wade-Gilbert per se* exclusionary rule “to assure that law enforcement authorities will respect the accused’s constitutional right to the presence of his counsel at the critical lineup.”²⁹ In *Kirby*, the Supreme Court declined to extend that rule to an identification that took place before the start of a prosecutorial proceeding.³⁰ The Supreme Court noted “that a person’s Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.”³¹ Such adversary judicial proceedings include a “formal charge, preliminary hearing, indictment, information, or arraignment.”³²

The *Nunez* court heavily relied on two New York Court of Appeals’ cases in rendering its judgment in the instant case.

²⁶ 388 U.S. 218 (1967).

²⁷ 388 U.S. 263 (1967).

²⁸ *Id.* at 272.

²⁹ *Id.* at 273.

³⁰ *Kirby*, 406 U.S. at 690.

³¹ *Id.* at 688.

*People v. Hawkins*³³ consolidated four cases to determine the issue of “whether a suspect has a right to counsel at an investigatory lineup.”³⁴ In *Hawkins*, all four of the defendants stood in their lineups without the assistance of counsel but before formal adversarial proceedings.³⁵ Two of the defendants had made requests for counsel before entering their lineups but neither request was granted.³⁶ The defendants relied on *People v. Cunningham*³⁷ that held “once a suspect in custody requests the assistance of counsel, he may not be questioned further in the absence of an attorney . . . [and] an uncounseled waiver of a constitutional right will not be deemed voluntary if it is made after the right to counsel has been invoked.”³⁸ Concerning the other two defendants in *Hawkins*, the police knew that each had prior pending charges against them and that these defendants were represented by counsel.³⁹ These defendants relied on *People v. Bartolomeo*⁴⁰ in seeking to have their identification evidence suppressed.⁴¹ In *Bartolomeo*, the Court of Appeals held that “[k]nowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the

³² *Id.* at 689.

³³ 435 N.E.2d 376 (N.Y. 1982).

³⁴ *Id.* at 378.

³⁵ *Id.* at 378-80.

³⁶ *Id.* at 378-79.

³⁷ 400 N.E.2d 360 (N.Y. 1980).

³⁸ *Id.* at 361.

³⁹ *Id.* at 379-80.

⁴⁰ 423 N.E.2d 371 (N.Y. 1981), *overruled by* *People v. Bing*, 558 N.E.2d 1011 (N.Y. 1990) (holding that questioning on unrelated crimes does not violate constitutional rights).

⁴¹ *Hawkins*, 435 N.E.2d at 381.

absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney.”⁴²

The Court of Appeals examined the importance of a defendant’s right to counsel in determining whether that right had been violated in regards to any of the defendants in *Hawkins*. The reasoning of New York’s “indelible” right to counsel rule is “to ensure that an individual’s protection against self incrimination is not rendered illusory during pretrial interrogation.”⁴³ However, the court noted that the role of counsel is much more limited at identification confrontations than it is at interrogations.⁴⁴ The counselor may not actively advise his client during the lineup and his role is mainly that of a passive observer.⁴⁵ On the other hand, there is a certain need to have a lineup conducted in as close a period of time to the incident under investigation. This is to ensure the witness’ ability to recall the incident, diminish the possibility of mistaken identification, ensure that an innocent suspect is released after only minimal delay, and assist the police as to whether they should continue their search in the area of the crime.⁴⁶

The court in *Hawkins* concluded that “the limited benefits provided by counsel at investigatory lineups are far outweighed by the policy considerations militating against requiring counsel at

⁴² *Bartolomeo*, 423 N.E.2d at 374 (citing *People v. Miller*, 425 N.E.2d 879 (N.Y. 1981); see *People v. Rogers*, 397 N.E.2d 709 (N.Y. 1979)).

⁴³ *Hawkins*, 435 N.E.2d at 381.

⁴⁴ *Id.* at 382 (citing *People v. Hobson*, 348 N.E.2d 894, 898-99 (N.Y. 1976)).

⁴⁵ *Id.* (citing *People v. Blake*, 320 N.E.2d 625, 630 (N.Y. 1974)).

[the lineup] stage of the investigatory process.”⁴⁷ Therefore, the right to counsel only arises after formal prosecutorial proceedings have been initiated.⁴⁸ Further, even if a suspect requests counsel, the police have no obligation to secure counsel if the suspect is only being placed in an investigatory lineup.⁴⁹ However, the court recognized that “if a suspect already has counsel, his attorney may not be excluded from the lineup proceedings”⁵⁰ unless the arrival of counsel would cause unreasonable delay.⁵¹

The other case the court heavily relied upon in rendering its decision in *Nunez* was *People v. Wilson*.⁵² In this case, the New York Court of Appeals again examined the “interrelationship of an investigatory lineup and a suspect’s right to counsel.”⁵³ The defendant was represented by an attorney on charges of criminal possession of a stolen vehicle and weapon.⁵⁴ The defendant said that he did not want to speak to any detectives or participate in a lineup without his attorney being present.⁵⁵ The defendant’s request was then relayed to the police by the attorney who told them not to put his client in a lineup unless he was present.⁵⁶ The charges for the stolen vehicle and weapon were dismissed, but later

⁴⁶ *Id.* See *Blake*, 320 N.E.2d at 630; *United States v. Sanchez*, 422 F.2d 1198, 1200 (2d Cir. 1970).

⁴⁷ *Hawkins*, 435 N.E.2d at 382

⁴⁸ *Id.*

⁴⁹ *Id.* at 383.

⁵⁰ *Id.* (citing *Blake*, 320 N.E.2d at 631).

⁵¹ *Id.*

⁵² 680 N.E.2d 598 (N.Y. 1997).

⁵³ *Id.* at 599.

⁵⁴ *Id.*

⁵⁵ *Id.* at 600.

⁵⁶ *Id.*

that day the defendant was put in a lineup for charges of homicide.⁵⁷ The defendant was informed of his *Miranda* rights, which he waived, and was later identified by the witness as the man who shot the victim.⁵⁸ The police never attempted to contact the defendant's attorney.⁵⁹

The New York Court of Appeals noted that "there is generally no independent basis in the State Constitution for requiring counsel at investigatory lineups, although a right to counsel does arise after the initiation of formal prosecutorial proceedings."⁶⁰ The fact that the defendant waived his right to counsel was ineffective since the defendant actually was represented by counsel.⁶¹ "[T]he right to counsel at an investigatory lineup is not absolute or abstract, and may be overridden if exigent circumstances necessitate that the procedure be conducted without counsel's presence."⁶² In *Wilson*, the court found that no exigent circumstances existed to preclude the attorney's presence at the lineup.⁶³

The exigent circumstances discussed in *Wilson* were examined more thoroughly by the *Nunez* court. The basic premise behind all of these circumstances is based on the possibility of unreasonable delay in assembling the lineup. In *People v. Riley*,⁶⁴

⁵⁷ *Wilson*, 680 N.E.2d at 600.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 601 (citing *Hawkins*, 435 N.E.2d at 382).

⁶¹ *Id.* (citing *People v. Settles*, 385 N.E.2d 612, 618 (N.Y. 1978)).

⁶² *Wilson*, 680 N.E.2d at 602 (citing *LaClere*, 564 N.E.2d at 641-42).

⁶³ *Id.*

⁶⁴ 551 N.Y.S.2d 537 (N.Y. App. Div. 1990).

the defendant was represented by an attorney, who was known to the police, but the attorney had to leave before the lineup was ready.⁶⁵ After finding out that the lineup was ready, the attorney requested that it be adjourned.⁶⁶ The court denied the defendant's motion to suppress the evidence since the police were not required to suspend the lineup if it was going to cause unreasonable delay.⁶⁷ However, in *Nunez*, the police never called the attorney to notify him that the lineup was ready.⁶⁸

Similarly, in *People v. McRae*,⁶⁹ the defendant's attorney made a request to have the lineup adjourned for the following day.⁷⁰ The police told the attorney that they had been preparing the lineup for several hours in assembling the witnesses and fillers, and that the identification witnesses could not be there the following day.⁷¹ The court denied the defendant's motion to suppress the evidence holding that:

[E]ven where the right to counsel for preaccusatory lineup purposes has so attached, the right is not absolute. Rather, the police are merely required to notify counsel of an impending lineup, if possible, and provide a reasonable opportunity to attend. The police are not, however, required to accede to requests that counsel attend if it would cause "unreasonable delay."⁷²

⁶⁵ *Id.* at 537.

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *Hawkins*, 435 N.E.2d at 383).

⁶⁸ *Nunez*, 2004 WL 556591, at *5.

⁶⁹ 607 N.Y.S.2d 624 (N.Y. App. Div. 1994).

⁷⁰ *Id.* at 626

⁷¹ *Id.*

⁷² *Id.* at 629 (citing *LaClere*, 564 N.E.2d at 641-42; *Hawkins*, 435 N.E.2d at 383).

The *Nunez* court distinguished the instant case from *McRae* in three ways. First, the police never inquired to find out if the witnesses could return at a later date.⁷³ Second, the police never called Mr. Murphy to see if he could return for the lineup.⁷⁴ Lastly, the lineup was carried on with as though the defendant's right to counsel never attached.⁷⁵

The *Nunez* court also cited two cases where the defendants' convictions were reversed due to improper lineup proceedings. In *People v. LoPizzo*,⁷⁶ the defendant's attorney told the police he represented the defendant and that he would be out-of-town on the day of the lineup, thereby requesting a one day adjournment.⁷⁷ The police conducted the lineup without the attorney being present.⁷⁸ The court found that there was less of a necessity to conduct the lineup on the day in question since the lineup was conducted seven months after the crime.⁷⁹ In *Nunez*, the police gave no reason why the lineup had to be conducted on that day except the fact that all the witnesses were present at the time.⁸⁰

In *People v. Davis*,⁸¹ the court found that the identification evidence should be suppressed due to circumstances surrounding the lineup. Here, the attorney for the defendant told the police that

⁷³ *Nunez*, 2004 WL 556591, at *5.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 570 N.Y.S.2d 307 (N.Y. App. Div. 1991).

⁷⁷ *Id.* at 308.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Nunez*, 2004 WL 556591, at *5.

he wanted to be present at the lineup.⁸² The police complied by calling the attorney three times, however those calls occurred “well after the close of business.”⁸³ The lineup ended up being conducted after midnight, in the absence of the defendant’s attorney.⁸⁴ As in *LoPizzo*, the court did not find a necessity for the lineup to be conducted at that time since the crime had occurred nine months before the lineup.⁸⁵

The final case discussed by the *Nunez* court was *People v. Cherry*.⁸⁶ In *Cherry*, the defendant gave the detective his attorney’s card, which the detective used to leave several messages with the attorney’s office over the following two hours.⁸⁷ The court upheld the defendant’s conviction stating that “the officer made repeated attempts to notify defendant’s attorney of the impending lineup, *which is all that the law required*.”⁸⁸ In the instant case, the police made no attempts to contact Mr. Murphy after his request to be present at the lineup.⁸⁹

Therefore, the *Nunez* court concluded that the lineup identification evidence should have been suppressed due to the circumstances surrounding the procedure.⁹⁰ The defendant’s attorney had made a request to be present at the lineup and waited

⁸¹ 567 N.Y.S.2d 880 (N.Y. App. Div. 1991).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 554 N.Y.S.2d 884 (N.Y. App. Div. 1990).

⁸⁷ *Id.* at 884.

⁸⁸ *Id.* at 885 (citing *People v. Coates*, 543 N.E.2d 440, 442 (N.Y. 1989)) (emphasis added).

⁸⁹ *Nunez*, 2004 WL 556591, at *6.

four hours before leaving the precinct.⁹¹ The police conducted the lineup shortly after Mr. Murphy left the precinct and made no attempt to contact him to see if he could attend.⁹² Furthermore, there was no attempt on the behalf of the police to inquire if any of the witnesses could appear at a later date to conduct the lineup.⁹³ In looking at the exigent circumstances, there was no “legally recognized excusal of counsel’s presence” and “the police took the risk that the adduced evidence would not be allowed.”⁹⁴

In conclusion, there is no *per se* rule as to when the right to counsel attaches in New York and each case must be judged on its facts. “The lifeblood of the New York rule is that once the right to counsel had indelibly attached, the defendant can effectively waive the protections of counsel only if counsel is present.”⁹⁵ Under the United States Constitution, Nunez’s right to counsel would not have been violated unless a surrender was found to be an adverse judicial proceeding. However, based on the exigent circumstances of the case, the New York court found that the defendant did have a right to counsel at his lineup. Some of the major factors considered by the court included police knowledge that defendant was represented by counsel, the absence of any effort of the police to contact the defendant’s attorney about when the lineup was being conducted, and the failure of the police to see if the

⁹⁰ *Id.* at *7.

⁹¹ *Id.* at *3.

⁹² *Id.*

⁹³ *Id.* at *5.

⁹⁴ *Nunez*, 2004 WL 556591, at *6 (citing *Wilson*, 680 N.E.2d at 601; quoting *LaClere*, 564 N.E.2d at 641).

witnesses would be able to attend at another time. In this case, it seems that the court found that there would not have been an unreasonable delay in assuring the attorney's presence at the lineup.

The New York Constitution has been defined through caselaw to give more protection to a defendant's right to counsel than the United States Constitution. The United States Supreme Court has created the *Wade-Gilbert per se* exclusionary rule that ensures a defendant's right to counsel once formal judicial proceedings have been initiated against him. New York will look at the circumstances of each case to determine whether or not the right to counsel has attached and that right may be invoked, in certain situations, prior to formal judicial proceedings being initiated against a defendant.

Yale Pollack

⁹⁵ *Hawkins*, 435 N.E.2d at 381.

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