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Appellate Division, Third Department, People v. Young

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CONFRONTATION CLAUSE

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

New York Constitution Article I Section 6:

[I]n any trial in any any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him. . . .

SUPREME COURT, APPELLATE DIVISION THIRD DEPARTMENT

People v. Young¹
(decided July 3, 2002)

Defendant Corey Young was convicted of multiple crimes ranging from attempted murder in the first degree and attempted aggravated assault upon a police officer to robbery in the second degree.² After conviction, Young was sentenced to a term between fifty-seven years and life in prison.³ The defendant appealed and argued that the admission of two hearsay statements made by his robbery accomplice, Michael Cancer, violated his right to confrontation afforded by both the Federal⁴ and New York State Constitutions.⁵ The Appellate Division, Third Department,

¹ 296 A.D.2d 588, 746 N.Y.S.2d 195 (3d Dep't 2002).

² *Id.* at 589, 746 N.Y.S.2d at 197.

³ *Id.*

⁴ U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

⁵ N.Y. CONST. art. I, § 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him"

affirmed in part, modified in part,⁶ and held that the statements were properly introduced at trial.⁷

In February 1995, two Albany police officers were alerted to a robbery in progress.⁸ Upon arrival at the scene, the officers encountered a fleeing suspect who shot at the two officers and then escaped.⁹ The robbery and related crimes were investigated for two years, and ultimately led police investigators to North Carolina where the defendant was apprehended and arrested.¹⁰

On appeal, the defendant argued that the trial court erred for several reasons. The first alleged error was that the government was required to obtain a superseding indictment upon learning that DNA testing of organic material found at the scene of the crime belonged to a person other than the defendant.¹¹ The defendant relied on *People v. Pelchat*,¹² which held that when evidence presented before a grand jury is legally insufficient, and the prosecutor knows such information is deficient; the prosecutor then has a duty to seek a superseding indictment on the proper evidence.¹³ The appellate division rejected this claim and

⁶ *Young*, 296 A.D.2d at 589, 746 N.Y.S.2d at 197, (modifying the defendant's sentence to run concurrently rather than consecutively based on a comparison to other heinous crimes).

⁷ *Id.* at 592, 746 N.Y.S.2d at 199.

⁸ *Id.* at 589, 746 N.Y.S.2d at 197.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Young*, 296 A.D.2d at 589, 746 N.Y.S.2d at 197.

¹² 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984).

¹³ *Id.* at 107, 464 N.E.2d at 452, 476 N.Y.S.2d at 82. In *Pelchat*, the defendant pleaded guilty to criminal possession of marijuana in the first degree. *Id.* at 99, 464 N.E.2d at 448, 476 N.Y.S.2d at 80. Pelchat's arrest occurred on September 3, 1981 when police officers observed the "Miss Marge" sail into Gardiner's Bay and drop anchor off shore near an East Hampton residence. *Id.* at 100, 464 N.E.2d at 448, 476 N.Y.S.2d at 80. With the aid of night vision goggles, police observed 72 bales of marijuana being offloaded and transported via Zodiac to the East Hampton address. *Id.* At approximately 6:00 a.m., police raided the house and arrested 21 people, including the defendant. *Id.* At the Grand Jury hearing of the defendant, police officer Tuthill testified that the defendant was one of the people observed unloading the marijuana. *Id.* at 101, 464 N.E.2d at 449, 476 N.Y.S.2d at 81. In fact, however, Officer Tuthill *believed* [emphasis added] to be testifying as to an enumerated individual arrested at the scene. *Id.* Pelchat was subsequently indicted and pleaded guilty to the crime of criminal possession of marijuana in the first degree. *Id.* Before being sentenced,

distinguished this case from *Pelchat* on the basis that Young was convicted at trial whereas Pelchat had pleaded guilty.¹⁴

Young also argued that the convictions of both attempted murder and reckless endangerment were inconsistent.¹⁵ The appellate division, however, found the issue inappropriate for review based on the defendant's failure to preserve the issue before the jury was discharged.¹⁶

Young next alleged that by admitting two hearsay statements into evidence, his constitutional rights under the Confrontation Clause of both the United States Constitution and the New York Constitution were violated.¹⁷ Young's allegation rested on the fact that the statements admitted against him did not afford him the opportunity to cross-examine the declarant as required under the Confrontation Clause.

In *Ohio v. Roberts*,¹⁸ the United States Supreme Court articulated a two-part test that operates to restrict the admissibility

however, Tuthill appeared as a witness at the trial of the other defendants, where it was learned of Tuthill's error before the grand jury. *Id.*

¹⁴ *Young*, 296 A.D.2d at 589, 746 N.Y.S.2d at 197.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 590, 746 N.Y.S.2d at 198; see *supra* notes 4 - 5.

¹⁸ 448 U.S. 56 (1980). In *Roberts*, police officers arrested the defendant for forgery and possession of stolen credit cards. *Id.* at 58. At a subsequent hearing, the victim's daughter testified that although she knew the defendant, she did not give him the checks and credit cards. *Id.* Although, defendant's attorney could have declared her hostile and subjected her to cross-examination, he did not pursue those measures. *Id.* At trial, defendant testified that the victim's daughter gave him the credit cards and checks; and despite five separate subpoenas, the daughter did not report to the courtroom. *Id.* at 59. Relying on an Ohio statute, which permits the use of prior testimony of a witness that cannot be produced at trial, the government introduced a transcript of the prior testimony. *Id.* Thereafter, the defendant was convicted and appealed his conviction based on a violation of the Confrontation Clause. *Id.* The appellate court reversed based on a lack of a good-faith showing that the government attempted to secure the witness other than with the subpoenas. *Id.* at 59-60. The Ohio Supreme Court affirmed on other grounds; that the evidence was inadmissible based on the fact that defendant's attorney, although he had the opportunity to cross-examine, did not satisfy the constitutional protection of the Confrontation Clause. *Id.* at 60. The Supreme Court granted review and determined that introduction of the prior testimony was constitutionally permissible because the daughter's testimony bore sufficient indicia of

of hearsay evidence.¹⁹ The first part of the test is whether the prosecution can produce or otherwise prove the unavailability of the declarant whose statements the government wishes to use at trial in furtherance of its case.²⁰ Once the government satisfies the first part of the test, the court then scrutinizes the statement to determine the trustworthiness of the declaration.²¹

When analyzing the first factor, the Court stated that either the witness must be produced at trial, or sufficient evidence must be presented to the court to explain why the witness was unable to be called to testify.²² The reasoning behind this requirement is somewhat ideological in that the jury has a right to “look at him, and judge by his demeanor on the stand and the manner in which he gives his testimony whether he is worthy of belief.”²³ However, if the witness is unavailable, the court, contrary to the strict language of the Confrontation Clause, will allow the testimony so long as the testimony has such indicia of reliability as to rest the testimony upon such solid foundation that the evidence comports with the “substance of the constitutional protection.”²⁴

Notable, however, is the rule that comes from *United States v. Owens*,²⁵ which states that “the confrontation clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish,’”²⁶ In *Owens*, a correctional counselor at a federal prison was viciously attacked by a prisoner and suffered a fractured skull.²⁷ At the subsequent trial, the correctional counselor testified that his only recollection of the assailant came during an F.B.I. interview that occurred after the

reliability based on the rigorous examination of the witness by respondent’s attorney during the original hearing. *Id.* at 62.

¹⁹ *Id.* at 65.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Roberts*, 448 U.S. at 64.

²⁴ *Id.* at 66.

²⁵ *Id.* at 66.

²⁶ *Id.* at 559 (quoting *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Delaware v. Fensterer*, 474 U.S. 15 (1985)).

²⁷ *Owens*, 484 U.S. at 556.

attack.²⁸ The defense made the argument that because the counselor was unable to recall information regarding the assault during the trial, he was unavailable for cross-examination and therefore his testimony constituted a violation of the defendant's Sixth Amendment right to confrontation.²⁹ The Court flatly rejected defense counsel's argument and stated that counsel may be able to use summation as a device to overcome the witness's loss of memory.³⁰

Next, to determine what facts or situations satisfy the "indicia of reliability" requirement, the Court states two circumstances, either of which, if met, will satisfy this element. The first factor is whether the evidence falls within one of the firmly rooted hearsay exceptions.³¹ The Supreme Court has decided that among others, excited utterances,³² and statements made by co-conspirators,³³ fall within the category of firmly rooted hearsay exceptions. Although the United States Supreme Court has identified the general rule, the Court left the decision to the states to decide what constitutes a firmly rooted hearsay exception.³⁴ The second factor is whether there is a showing of particularized guarantees of trustworthiness.³⁵

In *Idaho v. Wright*, the Supreme Court expanded the test for trustworthiness to include an analysis of the totality of the circumstance in which the statement was made and if the declarant

²⁸ *Id.*

²⁹ *Id.* at 557.

³⁰ *Id.* at 560.

³¹ *Roberts*, 448 U.S. at 66.

³² *White v. Illinois*, 502 U.S. 346, 356 (1992).

³³ *Bourjaily v. United States*, 483 U.S. 171, 184 (1987).

³⁴ See *United States v. Hale*, 978 F.2d 1016, 1021 (8th Cir. 1992) (finding absence of public record or entry under FED. R. EVID. 803 (10) within the exception); *United States v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992) (finding adoptive admission under FED. R. EVID. 801 (d)(2)(D) within the exception); *United States v. Saks*, 964 F.2d 1514, 1525-26 (5th Cir. 1992) (finding adoptive admission under FED. R. EVID. 801 (d)(2)(D) within the exception); *United States v. Ray*, 930 F.2d 1368, 1371 (9th Cir. 1990) (finding records of regularly conducted activity FED. R. EVID. 803 (6) within the exception).

³⁵ *Roberts*, 448 U.S. at 66 (holding that prior statements made by the witness bore sufficient indicia of reliability because the statements were made in a quasi-trial-like environment, witness was under oath, the defendant was represented by counsel, and had the opportunity to cross-examine the witness).

was worthy of belief.³⁶ In *Wright*, the statements were made by a two-year-old, who alleged that her mother held her down and covered her mouth while a man had sexual intercourse with her.³⁷ The statements were made to a doctor during a subsequent examination of the child, after her father learned of the sexual abuse.³⁸ The trial court concluded that the child was too young to testify, and accordingly, the doctor was permitted to testify as to the content of the conversations with the young victim.³⁹ The trial court admitted the statements under the Idaho residual hearsay exception.⁴⁰ Wright appealed, and the Idaho Supreme Court reversed her conviction because the admission of the statement under the residual hearsay rule violated her constitutional right to confrontation.⁴¹ The United States Supreme Court later affirmed the decision of the Idaho Supreme Court.⁴² The Court found that Idaho's residual hearsay exception does not qualify as a "firmly rooted" hearsay exception,⁴³ and therefore the admittance of the statement rested on a showing that the statement satisfied the

³⁶ 497 U.S. 805, 819 (1990).

³⁷ *Id.* at 809.

³⁸ *Id.*

³⁹ *Id.* (holding the content of the conversations implicated both respondent and Giles in the criminal acts committed against the declarant and her five-year-old sister).

⁴⁰ See *Wright*, 497 U.S. at 811 (citing Idaho R. Evid. 803 (24) stating in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness. (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.).

⁴¹ *Wright*, 497 U.S. at 812.

⁴² *Id.* at 813.

⁴³ *Id.* at 817 (reasoning that the residual hearsay exception fails to qualify as a "firmly rooted" exception because the statements made under this exception do not fall under any of the other recognized exceptions and the statement therefore does not share the same reliability as the other exceptions.)

“particularized guarantees of trustworthiness” factor.⁴⁴ The Supreme Court reasoned that outside of cross-examination, a statement may be sufficiently free from inaccuracy and untrustworthiness by an examination of the circumstances surrounding the statement.⁴⁵ However, excluded from the examination is evidence that would, if admissible, both corroborate the truth of the statement and support the particularized guarantees of trustworthiness.⁴⁶ This “bootstrapping” of evidence, if allowed, would defeat the requirement that the evidence carries sufficient indicia of reliability to satisfy the Confrontation Clause; and therefore only those factors that surround the making of the statement are to be analyzed.⁴⁷

Accordingly, the Supreme Court only considered the questions: whether the child had sufficient motive to fabricate the story, and whether a child of like age could make-up such a story.⁴⁸ The Court noted the two and one-half-year-old volunteered the statement, and spontaneity may suggest that the statement was truthful. However, spontaneity is not dispositive of truth telling based on the presence of outside factors, such as prompting or other adult influence.⁴⁹ Based on the “presumptive unreliability” of the statements and the fact that leading questions were utilized, the statements lacked the “particularized guarantees of trustworthiness” required for admission.⁵⁰

The New York courts have utilized the same two-part test articulated by the Supreme Court in *Ohio v. Roberts*,⁵¹ and subsequently expanded in *Idaho v. Wright*.⁵² In *People v. James*,⁵³ the defendant was found guilty of perjury based on the admission of two statements that bore sufficient indicia of reliability under the particularized guarantees of trustworthiness analysis.⁵⁴ The

⁴⁴ *Id.* at 818.

⁴⁵ *Id.* at 819-20.

⁴⁶ *Wright*, 497 U.S. at 822.

⁴⁷ *Id.* at 823.

⁴⁸ *Id.* at 826.

⁴⁹ *Id.* at 826-27.

⁵⁰ *Id.*

⁵¹ 448 U.S. at 56.

⁵² 497 U.S. at 805.

⁵³ 93 N.Y.2d 620, 717 N.E.2d 1052, 695 N.Y.S.2d 715 (1999).

⁵⁴ *Id.* at 642-43, 717 N.E.2d at 1065, 695 N.Y.S.2d at 728.

court based its decision on the fact that the statements were made outside a custodial setting, amongst friends, unsolicited, spontaneous, self-inculpatory, and did not attempt to shift blame to persons other than the declarant.⁵⁵ Additionally, the court may consider repetition, absence of motive to fabricate, the mental state of the defendant, the unlikelihood of faulty recollection, and to whom the statements were made.⁵⁶

Similarly, in *People v. Sanders*,⁵⁷ the New York Court of Appeals discussed Confrontation Clause analysis as applied to a statement admitted under the co-conspirator exception to hearsay.⁵⁸ Sanders was indicted and subsequently found guilty of conspiracy to commit bribery and bribery in the second degree following a series of transactions involving corruption in the New York County Supreme Court.⁵⁹ The most damaging evidence used by the District Attorney against Sanders was tape-recorded conversations between Brown and Sander's co-counsel.⁶⁰ The *Sanders* court began its analysis by stating the two-part test from *Ohio v. Roberts* as follows: first, the hearsay declarant must be unavailable, and second, that statement must bear sufficient indicia of reliability.⁶¹ In this case, Brown, the declarant, died several weeks after his arrest and therefore the first requirement of unavailability was met.⁶² The court then looked at the facts surrounding the statement to decide if the indicators of reliability were present.⁶³ The court answered in the affirmative and stated that because Brown's statements were recorded on tape, made with actual knowledge, without motive to fabricate, independently corroborated, and directly connected Brown to criminal activity,

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 56 N.Y.2d 51, 436 N.E.2d 480, 451 N.Y.S.2d 30 (1982).

⁵⁸ *Id.* at 56, 436 N.E.2d at 481, 451 N.Y.S.2d at 31.

⁵⁹ *Id.* at 61, 436 N.E.2d at 484, 451 N.Y.S.2d at 34.

⁶⁰ *Id.* Abram Brown worked as a "chief opinion clerk" in Special Term, New York County and was the contact of Sanders for fixing the outcomes of cases within the jurisdiction of that court. *Id.* at 57.

⁶¹ *Id.*

⁶² *Sanders*, 56 N.Y.2d at 64, 436 N.E.2d at 486, 451 N.Y.S.2d at 36.

⁶³ *Id.*

the statements bore sufficient indicia of reliability and did not violate Sander's constitutional right of confrontation.⁶⁴

In the instant case, *People v. Young*,⁶⁵ the Third Department found certain statements admissible against the defendant.⁶⁶ The statements were made by the defendant's robbery accomplice and implicated Young's involvement in the original robbery.⁶⁷ Specifically, the accomplice, Michael Cancer, stated to a third party that he and Young were "going to get somebody," and "we robbed some guys of the[ir] coats."⁶⁸ The court, utilizing the two-part test articulated by the Supreme Court in *Idaho v. Wright*, found that the declarant was unable to testify⁶⁹ and that the statements were supported by a particularized guarantee of trustworthiness.⁷⁰ The court reasoned that the self-inculpatory nature of the statements made by Cancer, together with the environment in which the statements were made, and the absence of any blame-shifting, satisfied the constitutional requirement of indicia of reliability.⁷¹

In sum, the Federal and New York Constitutions provide that in a criminal prosecution, the accused shall enjoy the right, or be allowed to be confronted with the witnesses against him.⁷² The Federal and New York Constitutions provide for substantially similar rights with respect to the ability of a criminal defendant to confront the witnesses against him. To recapitulate, hearsay statements used by the prosecution against the accused are inadmissible as a violation of the accused's constitutional right to confrontation unless the declarant is unavailable, and the statement bears sufficient indicia of reliability; it falls within a firmly rooted

⁶⁴ *Id.* at 64, 436 N.E.2d at 487, 451 N.Y.S.2d at 36.

⁶⁵ *Young*, 296 A.D.2d at 589, 746 N.Y.S.2d at 197.

⁶⁶ *Id.* at 591, 746 N.Y.S.2d at 199.

⁶⁷ *Id.* at 590, 746 N.Y.S.2d at 198.

⁶⁸ *Id.*

⁶⁹ *Id.* at 588, 746 N.Y.S.2d at 198. The court states without any supporting evidence that Michael Cancer's "unavailability is undisputed."

⁷⁰ *Young*, 296 A.D.2d at 588, 746 N.Y.S.2d at 195.

⁷¹ *Id.* at 591, 746 N.Y.S.2d at 198-99.

⁷² See *supra*, note 4 - 5.

hearsay exception or where it is supported by particularized guarantees of trustworthiness.⁷³

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⁷³ *Young*, 296 A.D.2d at 590, 746 N.Y.S.2d at 198 (quoting *James*, 93 N.Y.2d at 641, 717 N.E.2d at 1064, 695 N.Y.S.2d at 727; *Wright*, 497 U.S. at 816; *Roberts*, 448 U.S. at 66).