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Right to Confrontation

RIGHT TO CONFRONTATION

N.Y. CONST. art. I, § 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person . . . and be confronted with the witnesses against him.

U.S. CONST. amend. VI:

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

APPELLATE DIVISION, SECOND DEPARTMENT

People v. Bridges[1155]
(decided June 5, 1992)

The defendant, convicted of rape, claimed that his right of confrontation under the state[1156] and federal[1157] constitutions was violated by the prosecution's admission of a hospital record, as a business record,[1158] that contained a doctor's observation of

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1155. 184 A.D.2d 1042, 584 N.Y.S.2d 360 (4th Dep't), *appeal denied,* 80 N.Y.2d 973, 591 N.Y.S.2d 142, 605 N.E.2d 878 (1992).

1156. N.Y. CONST. art. I, § 6.

1157. U.S. CONST. amend. VI.

1158. N.Y. CIV. PRAC. L. & R. § 4518(a) (McKinney 1992). The statute provides:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the Judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, *but they shall not affect its weights, but they shall not affect its admissibility.* The term business includes a business, profession, occupation and calling of every kind.

Id.

sperm.[1159] The appellate division, fourth department, held that the admission of the hospital record, while constitutional error, was nonetheless harmless error, and therefore, unanimously affirmed the defendant's conviction.[1160]

The defendant, Kevin Bridges, was arrested and charged with first-degree rape. Five days following the rape the defendant, through his attorney, indicated that he would be willing to provide a blood sample for forensic testing.[1161] The defendant, however, did not make a formal request that a secretor test be performed until three and one-half months after the rape.[1162] The court concluded that by the time the defendant did make a formal request for the secretor test, it was too late because by that time the seminal material would have decomposed.[1163]

The court addressed the issue of whether the hospital record, which contained a doctor's observations of the motile sperm, was properly admitted. It noted that the prosecution was unsuccessful in its attempts to produce the doctor who made the observations contained in the hospital record at trial. Nonetheless, the trial court, over the defendant's objections, admitted the report into

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1159. *Bridges*, 184 A.D.2d at 1043, 584 N.Y.S.2d at 362.

1160. *Id.* at 1043, 584 N.Y.S.2d at 362.

1161. *Id.* at 1042, 584 N.Y.S.2d at 361. The court found defendant's initial "request" for a forensic comparison was "merely a casual reference." *Id.*

1162. *Id.*

1163. *Id.* At trial, the forensic chemist for Monroe County testified that due to lack of manpower, secretor tests were only performed when requested by the prosecutor, defense counsel, or court order. Furthermore, he testified that the rape kit used in this action was not kept in cold storage. *Id.* The court stated that absent bad faith, "'the People's failure to preserve evidentiary material of which no more could have been tested and the result may have helped defendant does not violate the *Brady* rule.'" *Id.* (quoting People v. Scattareggia, 152 A.D.2d 679, 543 N.Y.S.2d 742, 743 (2d Dep't 1989)). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (holding unless a criminal defendant can show police acted in bad faith, the failure to preserve potentially useful evidence does not deny defendant of due process of law); People v. Allgood, 70 N.Y.2d 812, 517 N.E.2d 1316, 523 N.Y.S.2d 742 (1987) (upholding denial of defendant's motion to dismiss indictment where defendant's delay in requesting rape kit forfeited his right to demand its production, and defendant could not complain of People's failure to preserve the kit).

evidence as a business record even though the Monroe County forensic chemist's testimony rendered it unreliable. The chemist testified that any evidence of "sperm or seminal fluid in the swabs or glass slides" was lacking in the hospital record prepared by the absent doctor.[1164]

The court, determining whether the admission of the hospital record as a business record violated defendant's right of confrontation, relied primarily on the United States Supreme Court ruling in *Ohio v. Roberts*.[1165] It noted that in order for the admission of a hearsay declarant's testimony to pass constitutional muster, the prosecution must satisfy the *Roberts* two-part test.[1166] In *Roberts*, the Court held that the admissibility of hearsay evidence does not violate the right of confrontation if the prosecution establishes (1) that the declarant is unavailable at trial and (2) that the statement introduced bears sufficient "indicia of reliability."[1167] When evaluating the first prong of the test, the unavailability of the declarant, such a witness is considered to be unavailable only if the prosecution is unable, despite good faith efforts, to procure that witness' attendance at trial.[1168]

Applying the first prong of the test to the facts, the *Bridges* court found that the prosecution's unsuccessful attempts to locate the doctor did in fact constitute a "reasonable good-faith effort."[1169] However, the court found that the prosecution failed to meet the second prong requiring an "indicia of reliability" required for proper evaluation of the document without cross-examination.[1170] Noting the forensic chemist's testimony, which disputed any findings of "sperm or seminal fluid in the swabs or glass slides" prepared by the doctor, the court concluded that the hospital record lacked the particularized degree of trustworthiness

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1164. *Bridges*, 184 A.D.2d at 1043, 584 N.Y.S.2d at 362.

1165. 448 U.S. 56 (1980).

1166. *Bridges*, 184 A.D.2d at 1043, 584 N.Y.S.2d at 362.

1167. *Roberts*, 448 U.S. at 66; *see also* People v. Sanders, 56 N.Y.2d 51, 64, 436 N.E.2d 480, 486, 451 N.Y.S.2d 30, 36 (1982) (quoting *Roberts*, 448 U.S. at 66).

1168. *Roberts*, 448 U.S. at 66.

1169. *Bridges*, 184 A.D.2d at 1043, 584 N.Y.S.2d at 362.

1170. *Id.*

necessary to render the declarant worthy of belief.[1171] Therefore, the court found that the admission of the hospital record was erroneous because it violated the defendant's right of confrontation.

However, in reviewing the overwhelming evidence of defendant's guilt and other circumstances of the case,[1172] the court determined that it was not likely that the admission of the hospital record contributed to the defendant's conviction, and thus it constituted harmless error.[1173] In support of its finding of harmless error the court cited to *People v. Crimmins*[1174] and *People v. Ayala.*[1175] In *Crimmins*, the New York Court of Appeals, relying on prior United States Supreme Court decisions, stated that in order to find harmless error there must be "no reasonable possibility that the error contributed to the defendant's conviction and that it was thus harmless beyond a reasonable doubt."[1176] In *Ayala*, the court of appeals, citing to the same Supreme Court decisions, restated the rule and further noted that the defendant's guilt need not be proved "indisputably."[1177]

In *Fahey v. Connecticut*,[1178] the Supreme Court stated that erroneously admitted evidence which violates the Constitution shall be inadmissible if it is prejudicial against the defendant.[1179] The Court stated that the concern is not "whether there was suf-

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1171. *Id.*; *see Roberts*, 448 U.S. at 69; People v. Grant, 113 A.D.2d 311, 497 N.Y.S.2d 23 (1985).

1172. The court pointed to the victim's prompt report of the rape to police, the bruise on her shin, the existence of pubic hairs and sperm cells in her underwear, her positive identification of defendant, and testimony by a witness hostile to the prosecution which tended to undermine the defendant's alibi as sufficient proof to find defendant guilty. *Bridges*, 184 A.D.2d at 1043, 584 N.Y.S.2d at 362.

1173. *Id.*

1174. 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975).

1175. 75 N.Y.2d 422, 553 N.E.2d 960, 554 N.Y.S.2d 412 (1990).

1176. *Crimmins*, 36 N.Y.2d at 237, 326 N.E.2d at 791, 367 N.Y.S.2d at 218 (citing Chapman v. California, 386 U.S. 18, 23-24 (1967); Fahey v. Connecticut, 375 U.S. 85, 86-87 (1963)).

1177. *Ayala*, 75 N.Y.2d at 431, 553 N.E.2d at 960, 554 N.Y.S.2d at 416 (citing Chapman v. California, 386 U.S. 18, 23-24 (1967); Fahey v. Connecticut, 375 U.S. 85, 86-87 (1963)).

1178. 375 U.S. 85 (1963).

1179. *Id.* at 86.

ficient evidence on which the [defendant] could have been convicted without the evidence complained of[, but] . . . whether there [wa]s a reasonable possibility that the evidence complained of might have contributed to the conviction."[1180] This rule was followed in *Chapman v. California*.[1181] In *Chapman*, the Court held that in accordance with *Fahey*, the standard to be applied in determining whether a "federal constitutional error can be held harmless" is the familiar "beyond a reasonable doubt."[1182]

Therefore, under both the New York and United States Constitutions, the erroneous admission of constitutionally violative evidence will be held harmless error provided that the court may find, beyond a reasonable doubt, that the error did not contribute to the defendant's conviction.

1180. *Id.* at 86-87.
1181. 386 U.S. 18 (1967).
1182. *Id.* at 24.