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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 118

DEAN PACQUETTE,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
June 04, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

CARL S. KAPLAN, ESQ.  
CENTER FOR APPELLATE LITIGATION  
Attorneys for Appellant  
120 Wall Street  
New York, NY 10005

BRIAN S. POULIOT, ADA  
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorneys for Respondent  
One Hogan Place  
New York, NY 10013

Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 118.

2 Counsel, do you want any rebuttal time?

3 MR. KAPLAN: Yes. Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two minutes, go  
5 ahead.

6 MR. KAPLAN: Good afternoon, Carl Kaplan  
7 from the Center for Appellate Litigation for  
8 appellant Mr. Pacquette. Your Honor, I'm going to  
9 cut to the chase because I'm - - - we're the last  
10 argument. Detective Vanacore's - - -

11 CHIEF JUDGE LIPPMAN: Thank you, counsel.  
12 Go ahead.

13 JUDGE RIVERA: A wise course.

14 MR. KAPLAN: Detective Vanacore's  
15 nonnoticed showup identification was not  
16 confirmatory, because it fell far below the standard  
17 that this court articulated in Boyer.

18 JUDGE STEIN: Does it have to be face-to-  
19 face, up-front close? Is - - - is that - - - is that  
20 a bright-line test?

21 MR. KAPLAN: That is the gold standard,  
22 Your Honor. I'm not making a categorical argument  
23 that it has to be face-to-face.

24 JUDGE STEIN: This wasn't even close?

25 MR. KAPLAN: But this was not close. I

1 would say it has to be face-to-face or pretty darn  
2 close to face-to-face.

3 CHIEF JUDGE LIPPMAN: Well, Boy - - - Boyer  
4 is narrower than our earlier, like Wharton and - - -

5 MR. KAPLAN: Yes. But I think the  
6 rationale - - -

7 JUDGE READ: This falls somewhere in  
8 between?

9 MR. KAPLAN: Excuse me, Your Honor?

10 JUDGE READ: This falls somewhere in  
11 between Wharton and Boyer?

12 MR. KAPLAN: This case?

13 JUDGE READ: Yes. Or you say no, you say  
14 it's outside of them?

15 MR. KAPLAN: This case is - - - Boyer  
16 covers this case. Boyer, the standard in Boyer, I  
17 believe, was not a new standard; it's just reaffirmed  
18 the standard that because we're talking about an  
19 exception to the notice requirement, the exceptions  
20 have to be very limited.

21 JUDGE ABDUS-SALAAM: Well, counsel, in this  
22 case - - -

23 MR. KAPLAN: It has to be - - -

24 JUDGE ABDUS-SALAAM: I'm sorry. You - -  
25 you're - - - you're saying that this was not face-to-

1 face, but maybe the terminology's changed since I sat  
2 on the trial court, but - - - but Officer Vanacore  
3 was acting - - - Detective Vanacore was acting sort  
4 of as the ghost, correct?

5 MR. KAPLAN: He was somewhat - - -

6 JUDGE ABDUS-SALAAM: And - - -

7 MR. KAPLAN: - - - of a ghost. Yes, Your  
8 Honor.

9 JUDGE ABDUS-SALAAM: Yeah. And - - - but  
10 he was the one who actually called in the description  
11 of the seller to the backup team, correct?

12 MR. KAPLAN: Correct, Your Honor.

13 JUDGE ABDUS-SALAAM: And so his description  
14 was accurate enough for the backup team to apprehend  
15 Mr. Pacquette.

16 MR. KAPLAN: Correct, Your Honor.

17 JUDGE ABDUS-SALAAM: It was. And he saw  
18 Mr. Pacquette running when the backup team arrived on  
19 the scene, and he was wearing the same clothing that  
20 Detective Vanacore had - - - and had the same  
21 description, six foot, six foot two, same weight, all  
22 of that, within a - - - a very short period of time.  
23 So that doesn't sound exactly like Boyer to me.

24 MR. KAPLAN: Well, Boyer was not a buy-and-  
25 bust operation. But the - - -

1 JUDGE ABDUS-SALAAM: Exactly.

2 MR. KAPLAN: But the principle - - - well,  
3 I have lots of things to say in response, Your Honor.  
4 First of all, the principle of Boyer applies, I  
5 wanted to get that out, which is that the critical  
6 factor is the initial viewing. It has to be so clear  
7 that the subsequent identification cannot be  
8 mistaken. That's a quote from Boyer, "cannot be  
9 mistaken". Zero chance or risk of mistake due to  
10 possible suggestiveness. That's an extremely high  
11 standard that is satisfied by a face-to-face  
12 encounter, that's the gold standard, or something  
13 factually similar. In Boyer, the - - - the officer,  
14 it was forty to fifty feet away. In Newball, it  
15 wasn't a ghost officer, but it got to the - - - the  
16 identifying - - -

17 JUDGE STEIN: Well, but there's always some  
18 risk of - - -

19 MR. KAPLAN: - - - officer was in a car  
20 fifty feet away. Yes, Your Honor?

21 JUDGE STEIN: There's always some risk of  
22 mistake. I mean, even if you're face-to-face it - -  
23 - it could be, you know, your identical twin, right?

24 JUDGE RIVERA: Well, the mistake is not  
25 just a mistake, right? It's a mistake based on - - -

1 MR. KAPLAN: I'm sorry, Your Honor?

2 JUDGE RIVERA: The mistake is of a  
3 particular category based on some suggestive - - -  
4 right, based on suggestive - - - based on the - - -  
5 the circumstances, it might seem - - -

6 MR. KAPLAN: It cannot be mistaken based on  
7 - - - it cannot be the product of suggestiveness.

8 JUDGE ABDUS-SALAAM: Well, that's the - - -  
9 that's my point.

10 MR. KAPLAN: There - - - there has to be  
11 zero risk of that.

12 JUDGE ABDUS-SALAAM: That's my point,  
13 counsel. Detective Vanacore saw this man allegedly  
14 selling drugs, called in his description, he was  
15 there to look and observe at drug dealing, unlike the  
16 detective or the police officer in Boyer who had been  
17 called on the scene by a civilian. The whole point  
18 of this was more like Wharton where this was a buy-  
19 and-bust operation.

20 MR. KAPLAN: Correct. But in Wharton, the  
21 - - - the - - - the critical fact in Wharton was it  
22 was a face-to-face encounter by the purchasing  
23 undercover. This court has never held that there's  
24 an exception, the Wharton exception is expanded to a  
25 ghost officer who's forty to fifty feet away across

1 the street. Your Honor, what we're saying I think is  
2 - - - and I think this is what my - - - my learned  
3 friend is saying, it's a question of degree.

4 JUDGE ABDUS-SALAAM: Um-hum.

5 MR. KAPLAN: And I would say the degree has  
6 to be extremely high, because we're talking about an  
7 exception to the notice requirement. Let them give  
8 notice or reverse and go back and then they can do an  
9 independent source hearing and they can make that  
10 argument to the independent source hearing. That - -  
11 -

12 JUDGE READ: What about harmless error in  
13 this case? I mean - - - and it didn't all depend on  
14 Vanacore, right?

15 MR. KAPLAN: No, Your Honor.

16 JUDGE READ: The undercover who had a - - -  
17 who had a face-to-face interaction - - -

18 MR. KAPLAN: Right.

19 JUDGE READ: - - - testified, right?

20 MR. KAPLAN: Right.

21 JUDGE READ: So why isn't it harmless  
22 error, even if you're right, even if we accept that -  
23 - - even if we accept your argument?

24 MR. KAPLAN: Thank you, Your Honor.

25 JUDGE RIVERA: And he runs, so it appears

1           you've got the consciousness of guilt?

2                   MR. KAPLAN: I'm sorry. I can't hear you.

3                   JUDGE RIVERA: And he runs as soon as the  
4 police identify themselves?

5                   MR. KAPLAN: Yes. But the - - - the - - -

6                   JUDGE RIVERA: It's consciousness of guilt?

7                   MR. KAPLAN: He ran when the off - - - the  
8 officer was in plain clothes.

9                   JUDGE ABDUS-SALAAM: Pre-recorded buy money  
10 too. Not to - - - not to mention that he has the  
11 pre-recorded buy money in his pocket - - -

12                   MR. KAPLAN: He has pre-recorded buy money  
13 on him.

14                   JUDGE ABDUS-SALAAM: - - - when he was  
15 arrested.

16                   MR. KAPLAN: Yes, Your Honor. I have a lot  
17 of - - -

18                   JUDGE READ: That's pretty strong evidence,  
19 isn't it?

20                   MR. KAPLAN: - - - bullets flying at me  
21 right now.

22                   JUDGE RIVERA: And the diner's giving up a  
23 lot of singles.

24                   MR. KAPLAN: Right.

25                   JUDGE RIVERA: That's a little unusual,

1           too.

2                       MR. KAPLAN: There are two - - - two prongs  
3 to the harmless error requirement. The evidence here  
4 was not so overwhelming as to reduce - - - neg - - -  
5 negate the error. There were no drugs found on him.  
6 The - - - if you take away Vanacore's testimony, you  
7 have one identification, it's a single-identification  
8 case. He was - - - the - - - the officer who  
9 identified who him was a four-month rookie in  
10 narcotics. He testified that during the transaction,  
11 he was staring primarily at the seller's hands, which  
12 is understandable. I would do the same thing, but  
13 that is a credibility deficit.

14                      JUDGE RIVERA: But he said he looked up,  
15 did he not?

16                      MR. KAPLAN: Excuse me, Your Honor?

17                      JUDGE RIVERA: Didn't he say, I looked at  
18 the hands but I look up at his face.

19                      MR. KAPLAN: He also said he - - -

20                      JUDGE RIVERA: Did he not say that?

21                      MR. KAPLAN: He said but he focused on his  
22 hands. I'm not saying he didn't look at his face,  
23 but his focus was on his hands. He testified that he  
24 couldn't remember his JD name initially, couldn't  
25 remember the color of the hat. So yes, he had pre-

1 recorded buy money, but my client had an explanation  
2 of why he had the pre-recorded buy money. He went to  
3 buy food in the diner.

4 I want to focus the court's attention, if I  
5 can, on the second prong, which is that Vanacore's  
6 testimony infected the verdict to a considerable  
7 degree. Now, we can argue - - - and I'll take a  
8 question whether it's Constitutional error or  
9 nonconstitutional error. Under either standard, I  
10 think we win. Vanacore was a ten- or eleven-year  
11 narcotics veteran, he had gravitas, he was an  
12 excellent witness. That is why the People put  
13 Vanacore on the stand as a repair job because the  
14 first officer, I - - - I - - - I say, if you read the  
15 transcript - - -

16 JUDGE RIVERA: I thought that they - - -

17 MR. KAPLAN: - - - was not such a great  
18 witness.

19 JUDGE RIVERA: Did they announce him during  
20 - - - during the opening? Did they not - - -

21 MR. KAPLAN: Yes. He - - - yes.

22 JUDGE RIVERA: - - - refer to him during  
23 the opening? So before the testimony, they had  
24 already made that decision.

25 MR. KAPLAN: Yes. But presumably the - - -

1 the ADA knew that he was not going to be - - -

2 JUDGE RIVERA: In preparation.

3 MR. KAPLAN: - - - was not going to be a -  
4 - - a - - - a great witness, and counsel said, when  
5 he objected to the nonnotice, I'm surprised, I'm  
6 shocked, I'm - - - I'm astounded.

7 So I think - - - I think Vanacore's  
8 testimony bolstered the weak testimony of the  
9 undercover, the purchasing officer, and infected the  
10 verdict.

11 I wanted to say I don't think the record  
12 shows, Your Honor, that Vanacore saw the gentleman  
13 running, my - - - my - - - defendant running. My - -  
14 - my understanding of the record was that after the  
15 set, the purchasing undercover went that way and  
16 Vanacore, whose primary job was to watch his back - -  
17 -

18 JUDGE ABDUS-SALAAM: But - - - but I think  
19 the record - - -

20 MR. KAPLAN: - - - went with him that way  
21 and saw - - - said he saw, as he was walking, he  
22 turned around and he saw my guy. But not that he was  
23 running. I think he said he saw a police van  
24 approaching and that was it.

25 JUDGE ABDUS-SALAAM: I - - - I think the

1 record does show that he saw him start to run when -  
2 - - when the backup team arrived on the set.

3 MR. KAPLAN: Um-hum.

4 JUDGE ABDUS-SALAAM: And - - - and it is -  
5 - - and - - - and - - - and I - - - I don't think we  
6 can forget, counsel, that I know there are quick  
7 change artists out there who can change their clothes  
8 in a second, but your client had on the same clothes  
9 that were in the description - - -

10 MR. KAPLAN: Right.

11 JUDGE ABDUS-SALAAM: - - - of the seller.

12 MR. KAPLAN: But the description, Your  
13 Honor, as Vanacore had testified during the ad hoc  
14 warrant hearing, "a male, black, who is tall, wear a  
15 light-colored sweatshirt and a dark baseball hat."  
16 This is on a summer night near Washington Square  
17 Park. That is somewhat generic.

18 JUDGE ABDUS-SALAAM: May 17th; not summer  
19 up here. I'm telling you. This is - - - this is  
20 cold here.

21 MR. KAPLAN: It - - - it is - - - it is  
22 somewhat generic.

23 JUDGE ABDUS-SALAAM: Or down there or in  
24 the city, either.

25 MR. KAPLAN: And he didn't see his face,

1 and even in the Boyer case, which I think is - - -  
2 our case is even weaker factually, a better case.

3 JUDGE FAHEY: Real - - - really? You - - -  
4 you think - - -

5 MR. KAPLAN: Yes. Because in Boyer, the -  
6 - - the detective, I think his name was Cremin's - -  
7 -

8 JUDGE FAHEY: Um-hum.

9 MR. KAPLAN: - - - said that he saw his  
10 facial hair. He had facial hair.

11 JUDGE FAHEY: But he - - - but he - - - he  
12 seems him for a few seconds on a fire escape, I  
13 thought, in where he - - -

14 MR. KAPLAN: But he saw who - - - he - - -  
15 in this case Detective Vanacore nowhere in the  
16 description, the radio description or the testimony,  
17 did he say - - - he described the - - - the seller's  
18 face.

19 JUDGE FAHEY: Um-hum.

20 MR. KAPLAN: Whether there was hair or not.  
21 I mean, really, if you're going to depart from the  
22 notice requirement, it's got to be a really tight  
23 exception, and in Wharton and - - - and Rodriquez,  
24 the two factual situations, it's the nature of the  
25 prior relationship, a brother identifying a sister, a

1 face-to-face up-close encounter that could not be  
2 mistaken. It - - - there was - - - there's zero risk  
3 and then the court should adhere to that. I'm not  
4 saying that a ghost could never make a confirmatory  
5 ID, but it would be the rare case.

6 CHIEF JUDGE LIPPMAN: Okay, counsel,  
7 thanks.

8 MR. KAPLAN: Thank you, Your Honor.

9 CHIEF JUDGE LIPPMAN: You'll have your  
10 rebuttal.  
11 Counsel.

12 MR. POULIOT: Good afternoon, Your Honors.  
13 May it please the court, Brian Pouliot on behalf of  
14 the People.

15 JUDGE READ: Where - - - does Boyer - - -

16 CHIEF JUDGE LIPPMAN: Counsel, do - - - go  
17 ahead, Judge.

18 JUDGE READ: Does Boyer control this?

19 MR. POULIOT: Your Honor, I don't believe  
20 that Boyer is - - - is any way analogous to this  
21 case. As - - - as the court has realized, in Boyer,  
22 the police officers were not on the scene as part of  
23 a planned buy-and-bust procedure to locate and  
24 identify suspects as they were here. Rather, they  
25 were responding to a 911 call. They get to the scene

1 and they're trying to figure out what's going on in  
2 these rapidly unfolding events. They see defendant -  
3 - -

4 JUDGE PIGOTT: But your cap-off point, if I  
5 understand it, is that 710.30's definite. It - - -  
6 it doesn't provide any exceptions. You have to give  
7 notice. And then a couple exceptions have popped up  
8 where obviously if a - - - if it's a spousal assault  
9 or something or a brother-sister, you know, where  
10 there's just no doubt, we've made this - - - this  
11 exception. He wants a zero tolerance or - - - and  
12 what's wrong - - - what's wrong with notice? I - - -  
13 I don't understand why.

14 A 710.30 notice would have listed both of  
15 these officers. They would have made the argument,  
16 you know, that they want a Wade. The judge would  
17 have listened to you or, you know, to the People  
18 argue one side or the other, and he says no, you  
19 don't get a Wade. But - - - but to stop a trial in  
20 the middle because somebody didn't - - - didn't tell  
21 them that - - - that this officer was coming and then  
22 - - - and then we accommodate. We accommodate the  
23 fact that the People did not do a 710.30 on this and  
24 we have a - - - we have a Wharton hearing. It's  
25 wholly unnecessary and didn't have to be done, or if

1 was going to be done, as the statute provides, would  
2 have been done speedily, early, as pre - - - pre-  
3 trial pursuant to the statute.

4 MR. POULIOT: Your Honor, if your question  
5 is why 710.30 notice wasn't given, I - - - I don't  
6 think it is required as - - -

7 JUDGE PIGOTT: No. I'm saying - - - I'm  
8 saying why don't you do it? And - - - and I  
9 understand you're going to say it's not required.

10 MR. POULIOT: Okay, Your Honor.

11 JUDGE PIGOTT: And - - - and we just keep  
12 frittering away. I don't know if this - - - how - -  
13 - how this - - - we don't know if - - - if police  
14 lie. There's rumors on occasion that they will - - -  
15 they will strain the truth or they will - - - or that  
16 they will absolutely not tell the truth, and if we're  
17 going to say, well, you know, the police officer said  
18 I had a clear view, absolutely the defendant, no  
19 question about it, then why have a 710.30 at all?  
20 And it just seems to me you're better off doing the  
21 710.30, having the hearing promptly, and then going  
22 to trial.

23 MR. POULIOT: Your Honor, I can tell you  
24 that our policy is to give 710.30 notice, which is  
25 why we gave it as to the primary undercover. It

1 appears from the record that this was just an  
2 oversight as to the second officer. But what I can  
3 say is that as soon as it be - - - it came to light  
4 the court, as you said, stopped, had a Wharton  
5 hearing, and at that Wharton hearing, I think - - -

6 JUDGE PIGOTT: But - - -

7 JUDGE READ: Because you're saying it's not  
8 a policy to not give the notice if you don't think  
9 it's strictly required. It just didn't happen here  
10 because of a - - - an oversight?

11 MR. POULIOT: Your Honor, yes. I'm saying  
12 that the - - - the policy of our specific office, the  
13 Manhattan DA's office, is - - - is to give - - -

14 JUDGE PIGOTT: If it's an oversight, don't  
15 you have fifteen days or you're precluded?

16 MR. POULIOT: Fifteen days to give notice,  
17 Your Honor?

18 JUDGE PIGOTT: You're precluded if it says,  
19 "In the absence of service of notice upon defendant  
20 as prescribed in this section, no evidence of any  
21 kind specified in subdivision one may be" dec - - -  
22 "may be received against him."

23 MR. POULIOT: That's correct, Your Honor,  
24 but as - - - as we recognize there's no requirement  
25 for notice if the notice is confirmatory. We - - -

1 we - - - our policy is - - -

2 JUDGE PIGOTT: Mr. Pouliot, you're missing  
3 - - - I - - - I know you're not missing my point, and  
4 it - - - it just seems to me that statute says what  
5 it says and - - - and as - - - as Mr. Kaplan is  
6 saying, we've done a couple things. We've said, you  
7 know, obvious - - - what it's - - - it's just a waste  
8 of time. I'm not even sure you shouldn't give it  
9 then, but if it's - - - if it's a waste of time and -  
10 - - and even in the - - - in - - - in the cases we've  
11 had, we're - - - we're arguing about whether or not  
12 there should have been a Wade. I - - - I - - - that  
13 is a decision when - - - by the judge when all of - -  
14 - when all the cards are on the table, when you say  
15 this is our - - - these are our witnesses and the - -  
16 - and the defense can argue, you know, against them  
17 rather than being - - - you know, having them come  
18 out later on and then file something.

19 MR. POULIOT: I apologize if I'm not  
20 addressing your question. I am trying to, Your  
21 Honor. If you're asking why we didn't give 710.30  
22 notice, I - - - I - - - I am - - -

23 JUDGE PIGOTT: You did that.

24 MR. POULIOT: - - - afraid to respond again  
25 that we weren't required to. But I do know the

1 statute says we're required to give notice, but I  
2 would direct you to Boyer where this court said that  
3 in - - - under these circumstances where an  
4 identification is confirmatory, the court said - - -

5 CHIEF JUDGE LIPPMAN: But - - - but - - -  
6 wait a second. But under Boyer, the initial viewing  
7 is what's most important. You - - - you're saying  
8 this case has no relationship to Boyer?

9 MR. POULIOT: I am, Your Honor. As - - -  
10 as I was making my point earlier - - -

11 CHIEF JUDGE LIPPMAN: What - - - what case  
12 does it have a relationship to?

13 MR. POULIOT: I think this case is Wharton.  
14 As - - - as stressed in Wharton - - -

15 CHIEF JUDGE LIPPMAN: It - - - it's Wharton  
16 if you never heard of Boyer.

17 MR. POULIOT: I don't believe so, Your  
18 Honor.

19 CHIEF JUDGE LIPPMAN: Boyer didn't change  
20 the whole equation in these kind of identifications?

21 MR. POULIOT: I don't think so, Your Honor,  
22 and I believe my adversary, as he said, Boyer - - -  
23 he - - - he even believes Boyer didn't change it.  
24 Boyer just maybe put a gloss on it - - -

25 CHIEF JUDGE LIPPMAN: Boyer is a - - - is a

1 much narrower view of this whole area and emphasizes  
2 the initial viewing and the quality of that initial  
3 viewing. Anyone reading it would recognize that. I  
4 think you recognize that.

5 MR. POULIOT: I do recognize it.

6 CHIEF JUDGE LIPPMAN: The initial viewing  
7 is very important, how far it was. The - - - you  
8 know, there is a relationship to Boyer. You may want  
9 to say it's in between, I - - - I - - - but Boyer  
10 sets the stage for our present law on these kind of  
11 confirmatory situations.

12 MR. POULIOT: Your Honor, I do recognize  
13 that Boyer stresses the quality of the viewing, and I  
14 think the only relation to Boyer that we have here is  
15 the distance. It's not face-to-face. That's the  
16 only way in - - - in which this case is similar to  
17 Boyer.

18 CHIEF JUDGE LIPPMAN: But that's the most  
19 important thing in Boyer. It's the quality of the  
20 initial viewing.

21 MR. POULIOT: Yes, Your Honor. But I don't  
22 think that distance alone is - - - is what leads to  
23 quality of viewing. Here we have an undercover, as I  
24 said, who's - - - who's on the scene to - - - to  
25 identify him. He may have been across the street,

1 but this is a one-lane street. We're talking about a  
2 one-lane street - - -

3 CHIEF JUDGE LIPPMAN: But I - - - but I get  
4 it all. I get it. I understand your arguments. But  
5 as - - - as Judge Pigott mentioned before, it's a  
6 rare thing that we do it without notice. It really  
7 has to be a total no-brainer that it's just  
8 confirmatory in order to not have to follow what's  
9 the normal procedure that's there for a reason,  
10 because sometimes there's too much suggestiveness,  
11 and that's what this is all about.

12 MR. POULIOT: Your Honor, I would - - - I  
13 would argue that this case was a no-brainer, much  
14 like Wharton. And to - - - to also clarify my point,  
15 I believe we cited in our brief several cases from  
16 the different Appellate Divisions that have said that  
17 ghosts can make confirmatory IDs. I think that's the  
18 real question here. Is Wharton going to be  
19 constrained only to the face-to-face purchasing  
20 officer?

21 JUDGE PIGOTT: Notice; I - - - I absolutely  
22 agree with you. I - - - I think if - - - if - - - if  
23 there'd been a 710.30 notice here and Vanacore's name  
24 was on it, and you had an argument with - - - before  
25 the judge, he or she may very well have said this is

1 confirmatory, that's it, and then you'd go to trial.

2 MR. POULIOT: Your Honor, if I may quote  
3 Boyer for one second.

4 JUDGE PIGOTT: Sure.

5 MR. POULIOT: Not relating to the quality  
6 of viewing, but just quoting Boyer. "We have  
7 recognized, however, two instances when as a matter  
8 of law the identification at issue could not be the  
9 product of undue suggestiveness. Under such  
10 circumstances, the defendant is not entitled to a  
11 Wade hearing, and thus the people are not obligated  
12 to provide notice pursuant to CPL 710.30." That is  
13 saying that if we believe this confirmatory - - - if  
14 an identification is confirmatory, excuse me, then  
15 the notice requirement does - - - doesn't apply.

16 JUDGE PIGOTT: Which leaves - - - which  
17 leaves to you, as opposed to the judge, the - - - the  
18 right to determine when 710.30s are going to be given  
19 and when - - - and if the - - - the - - - the invest  
20 - - - the ID is - - - is confirmatory. And I don't  
21 think you would want that responsibility, and since  
22 the law says give them notice and then you go into  
23 the judge and say, judge, it's confirmatory, we're  
24 done, let's go pick, it's over, as opposed to what  
25 happened here where you're in the middle of a trail

1 and you got to have a Wharton hearing.

2 MR. POULIOT: I don't believe so. I don't  
3 believe that it - - - it leaves us the burden, the -  
4 - - the responsibility of burden or - - - or - - - I  
5 believe what it leaves us is the risk, and I think  
6 that that's one reason that this - - -

7 JUDGE PIGOTT: Well, that's - - -

8 MR. POULIOT: - - - thing is not going to  
9 be overused.

10 JUDGE PIGOTT: The part you didn't cite in  
11 - - - in - - - is what Judith Kaye - - - Judge Kaye  
12 said in the beginning. She said, "People ask us to  
13 extend the confirmatory identification exception  
14 derived in Wharton to a situation where a police  
15 officer's initial encounter with a suspect and  
16 subsequent identification of suspect are temporarily  
17 related, such that the two might be considered part  
18 of a single police procedure. To do so, however, we  
19 would run afoul of 710.30. Moreover, such an  
20 exception would eliminate the protections offered by  
21 a Wade hearing even when the initial police viewing,  
22 albeit part of a single police procedure, was  
23 fleeting, unreliable, and susceptible to  
24 misidentification."

25 JUDGE READ: Would you like to talk about

1 harmless error for a while?

2 MR. POULIOT: Your Honor, may I answer your  
3 question first?

4 JUDGE PIGOTT: No. You can skip me. Go  
5 ahead.

6 JUDGE READ: That wasn't a question.

7 MR. POULIOT: Your Honor, I would argue  
8 that this is not a situation, as outlined in our  
9 brief, that was fleeting, unreliable, and susceptible  
10 to misidentification. As I stated, I think this is  
11 Wharton. I think the factors stressed in Wharton  
12 were, quote, "that the identification was not of a  
13 kind ordinarily burdened by forbidden  
14 suggestiveness." And as Wharton stated, "that is  
15 because it's a trained undercover narcotics officer  
16 at a time and place sufficiently connected and  
17 contemporaneous to the arrest as to constitute the  
18 ordinary and proper completion." I do understand  
19 that Boyer stresses the quality of viewing, but I do  
20 not think that this Boyer.

21 CHIEF JUDGE LIPPMAN: Be a good idea to go  
22 to harmless error.

23 MR. POULIOT: Thank you, Your Honor. I do  
24 believe if there's any error in the court's ruling  
25 here, it was harmless. As the court has realized, we

1 also have identification, both confirmatory and in  
2 court, from the face-to-face officer, which even my  
3 adversary indicates is sort of gold standard. You  
4 can - - -

5 JUDGE STEIN: Did he - - -

6 CHIEF JUDGE LIPPMAN: Is the mark - - - is  
7 the marked bills - - -

8 MR. POULIOT: The defendant is - - -

9 CHIEF JUDGE LIPPMAN: - - - the real key  
10 here?

11 MR. POULIOT: I - - - I don't know if it's  
12 the key. I do think it certainly adds - - - adds to  
13 the weight of the evidence. The defendant was found  
14 with the exact same twenty dollars in pre-recorded  
15 buy money on his person that was used by the  
16 undercover.

17 JUDGE RIVERA: Can I just clarify. Are  
18 they marked bills, as the Chief Judge said, or is it  
19 just the denomination matches?

20 MR. POULIOT: They were pre-recorded. I  
21 believe the serial numbers were recorded, Your Honor.

22 JUDGE RIVERA: Okay. So it is - - -

23 MR. POULIOT: Yeah.

24 JUDGE RIVERA: - - - the same money that  
25 transacted.

1 MR. POULIOT: Absolutely, Your Honor.

2 JUDGE RIVERA: Okay. That's all I got.

3 MR. POULIOT: And while the defendant did  
4 provide some explanation as - - - as defense counsel  
5 suggested, I don't think the explanation made much  
6 sense. He - - - he says that in the interim, he had  
7 time to go to the diner and get change. And in  
8 court, he was also adamant that he received twenty-  
9 nine singles in change, whereas here we're talking  
10 about a - - - a ten and - - - a ten, a five, and - -  
11 - and five ones.

12 JUDGE RIVERA: Um-hum.

13 MR. POULIOT: We also do have the  
14 consciousness of guilt evidence, he's running away.  
15 And the police officers collectively, I'd point out,  
16 never lost sight of the defendant. Vanacore did see  
17 him start running, and he ran in response to another  
18 officer who was approaching.

19 CHIEF JUDGE LIPPMAN: Okay, counsel,  
20 thanks.

21 MR. POULIOT: Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

23 MR. KAPLAN: Thank you, Your Honor. Judge  
24 Pigott, I was going to read Judge Kaye's quote. You  
25 beat me to the punch. There is no exception for

1 because the officer is a veteran or that the - - -  
2 the - - - the - - - the initial viewing and the  
3 subsequent transaction were temporarily related. I  
4 mean, if the detective is in a fog, it doesn't  
5 matter. It's all - - - it's all - - -

6 CHIEF JUDGE LIPPMAN: What - - - what about  
7 the - - - the - - - let's go to the harmless.

8 MR. KAPLAN: The harmless error?

9 CHIEF JUDGE LIPPMAN: What about the - - -  
10 the marked bills and all of that?

11 MR. KAPLAN: He did have pre-recorded buy  
12 money on him, Your Honor. That is not a good fact  
13 for the defense. He did give an explanation in the  
14 case, which Fernandez (ph.) at the - - - Rodriguez at  
15 the prosecutor cited that this was a doom - - - you  
16 know, the - - - the - - - the kiss of doom.

17 My count - - - my client gave an  
18 explanation why he had the money. He said he - - -  
19 he bought - - - but I do want to focus the court's  
20 attention on the second prong. Because even if the  
21 evidence - - - if this court were to find that the  
22 evidence is overwhelming, under the second prong, if  
23 it infected the verdict to a considerable degree - -  
24 - and I want to argue, and it's in footnote 3 of my  
25 reply, that it's a Constitutional error. The 710.30

1 statute facilitates and is designed to enact  
2 protections, due process - - -

3 CHIEF JUDGE LIPPMAN: Do you think it's so  
4 important, that - - - that piece, the second  
5 identification?

6 MR. KAPLAN: The second identification, I  
7 think, bolstered the first - - - the purchasing  
8 officer and - - -

9 CHIEF JUDGE LIPPMAN: And even despite the  
10 other evidence that's the - - - that you think that?

11 MR. KAPLAN: Yes. I don't think the jur -  
12 - - I - - - I really don't think the jury would have  
13 found him guilty. That's why the People put him on,  
14 Your Honor.

15 JUDGE RIVERA: Here are you arguing for a  
16 per se reversible rule?

17 MR. KAPLAN: No.

18 JUDGE RIVERA: You're not.

19 MR. KAPLAN: I'm not arg - - - I'm saying  
20 in this case, because the purchasing officer's  
21 testimony, the remaining testimony, is weak.

22 JUDGE RIVERA: Um-hum.

23 MR. KAPLAN: And there's an explanation for  
24 the prerecorded buy money. And Vanoker (sic)  
25 [Vanacore] was such an excellent witness and that his

1 testimony - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MR. KAPLAN: - - - infected the verdict.

4 Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay. Thank you  
6 both. Appreciate it.

7 (Court is adjourned)

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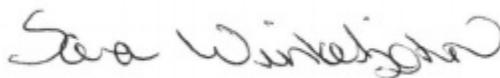
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dean Pacquette, No. 118 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: June 9, 2015