The Burger Court Opinion Writing Database

Manson v. Brathwaite

432 U.S. 98 (1977)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 11, 1977

PERSONAL

5

Re: 75-871 - Manson v. Brathwaite

Dear Harry:

My "delay" in this case is to have a few words on the subject of the earlier cases that removed from the fact and credibility triers crucial powers to determine the facts and credibility. I will agree with you but on the ground NO eyewitness should ever be excluded. (Almost never!)

Regards,

WEB

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 8, 1977

Re: 75-871 Manson v. Brathwaite

Dear Harry:

I join.

Regards,

WEB

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 8, 1977

RE: No. 75-871 Manson v. Brathwaite

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 21, 1977

5

76-871 - Manson v. Brathwaite

Dear Harry,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 21, 1977

Re: No. 75-871 - Manson v. Brathwaite

Dear Harry:

I join your opinion in this case, although I would prefer that you make clear that the in-court identification is admissible as well.

Sincerely,

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 21, 1977

Re: No. 75-871 - Manson v. Brathwaite

Dear Harry:

Your suggested footnote is o.k. with me.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 13, 1977

Re: No. 75-871, Manson v. Brathwaite

Dear Harry:

I shall circulate a dissent in due course.

Sincerely,

T. M.

Mr. Justice Blackmun

cc: The Conference

June 7, 1977

No. 75-871, Manson v. Brathwaite

MR. JUSTICE MARSHALL, dissenting.

Today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); and Stovall v. Denno, 388 U.S. 293 (1967). But it is still shocking to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

I.

The magnitude of the Court's error can be seen by analyzing the cases in the Wade trilogy and the decisions following it. The foundation of the Wade trilogy was the Court's recognition of the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1977]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in *United States* v. *Wade,* 388 U. S. 218 (1967); *Gilbert* v. *California,* 388 U. S. 263 (1967); and *Stovall* v. *Denno,* 388 U. S. 293 (1967). But it is still distressing to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

I

The magnitude of the Court's error can be seen by analyzing the cases in the *Wade* trilogy and the decisions following it. The foundation of the *Wade* trilogy was the Court's recognition of the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness identification evidence at criminal trials. *United States* v. *Wade, supra,* 388 U. S., at 228. Relying on numerous studies made over many years by such scholars as Professor Wigmore and Mr. Justice Frankfurter, the Court concluded that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Ibid.* It is, of course, impossible to control one source of such errors—the faulty perceptions and unreliable memories

STYLISTIC CHANGES THROUGHOUT.

14, 17

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1977]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 4/12/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *Neil* v. *Biggers*, 409 U. S. 188 (1972), are particularly implicated.

I

Jimmy D. Glover, a full-time trooper of the Connecticut State Police, in 1970 was assigned to the Narcotics Division in an undercover capacity. On May 5 of that year, about 7:45 p. m. while it was still daylight, Glover and Henry Alton Brown, an informant, went to an apartment building at 201 Westland, in Hartford, for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer. Cicero, it was thought, lived on the third floor of that apartment building. Tr. 45, 68.[1] Glover and Brown entered the build-

[1] The references are to the transcript of the trial in the Superior Court of Hartford County, Conn. The United States District Court, on federal

pp. 1, 14, 17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 4/15/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *Neil* v. *Biggers*, 409 U. S. 188 (1972), are particularly implicated.

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[1] The references are to the transcript of the trial in the Superior Court of Hartford County, Conn. The United States District Court, on federal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 21, 1977

Re: No. 75-871 - Manson v. Brathwaite

Dear Byron:

The suggestion contained in your note of April 21 is a good one. If acceptable to you, I propose the insertion of the following footnote at the end of the second sentence of the second paragraph on page 11:

> —/ Although the per se approach demands the exclusion of testimony concerning unnecessarily suggestive identifications, it does permit the admission of testimony concerning a subsequent identification, including an in-court identification, if the subsequent identification is determined to be reliable. 527 F. 2d, at 367. The totality approach, in contrast, is simpler: if the challenged identification is reliable, then testimony as to it and any identification in its wake is admissible.

Sincerely,

HAB

Mr. Justice White

cc: The Conference

pp. 10, 11, 12, 14, 17

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 4/26/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *Neil* v. *Biggers*, 409 U. S. 188 (1972), are particularly implicated.

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[1] The references are to the transcript of the trial in the Superior Court of Hartford County, Conn. The United States District Court, on federal

V

pp. 7, 8, 11, 15, 16, 17, 18

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 10 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *Neil* v. *Biggers*, 409 U. S. 188 (1972), are particularly implicated.

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file

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-871 - Manson v. Brathwaite

On Saturday I asked that this case not come down today. It should be ready for Thursday.

HAB.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 13 1977

pp. 8, 19

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court's decisions in *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *Neil* v. *Biggers*, 409 U. S. 188 (1972), are particularly implicated.

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Jimmy D. Glover, a full-time trooper of the Connecticut State Police, in 1970 was assigned to the Narcotics Division in an undercover capacity. On May 5 of that year, about 7:45 p. m. E. D. T. and while there was still daylight, Glover and Henry Alton Brown, an informant, went to an apartment building at 201 Westland, in Hartford, for the purpose of purchasing narcotics from "Dickie Boy" Cicero, a known narcotics dealer. Cicero, it was thought, lived on the third floor of that apartment building. Tr. 45, 68.[1] Glover and Brown entered the building, observed by back-up Officers D'Onofrio

[1] The references are to the transcript of the trial in the Superior Court of Hartford County, Conn. The United States District Court, on federal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 16, 1977

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 75-871 - Manson v. Brathwaite

There are two holds for Manson:

1. No. 75-1654 - Branch v. North Carolina. Petitioner and one Sullivan plotted to do away with petitioner's husband. They got in touch with a hit man, Whealton, and agreed to pay him $5,000 for the deed. The hit man met only once with petitioner face to face. The negotiations were handled by Sullivan. The killing was accomplished, and Whealton was arrested. He agreed to testify against petitioner and Sullivan in return for a life sentence. Before trial, a deputy sheriff showed Whealton a number of photographs of petitioner. No photographs of persons other than petitioner were shown. Whealt recognized the person shown in the photographs to be one of those wh had hired him.

At trial, Whealton at first was unable to identify petitioner, but readily identified Sullivan. Over a luncheon break, the deputy sheriff, in violation of the sequestration rule, again showed the same photographs to Whealton. After the recess the witness identified petitioner in open court and stated that he had recognized her when he saw her profile during the recess.

Petitioner and Sullivan were both convicted and sentenced to life imprisonment. The North Carolina Supreme Court, on appeal, affirmed. It concluded that the identification procedures were indeed permissibly suggestive, but that other factors in the case (the profile view and petitioner's having changed her appearance) worked against "a very substantial likelihood of irreparable misidentification."

This case presents a particularly extreme instance of improper identification procedures. With the Sullivan identification not under challenge, and with petitioner's conceded change in appearance, however, it is unlikely that the impropriety has occassioned any miscarriage of justice. And the North Carolina Court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 13, 1977

No. 75-871 Manson v. Brathwaite

Dear Harry:

Please join me.

Sincerely,

Lewis

Mr. Justice Blackmun

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 27, 1977

Re: No. 75-871 - Manson v. Brathwaite

Dear Harry:

Please join me.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 18, 1977

Re: 75-871 - Manson v. Brathwaite

Dear Harry:

Your reasons for finding the identification reliable are most persuasive, but I believe I will wait for Thurgood's dissent before finally voting.

Respectfully,

JPS

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1977

Re: 75-871 - Manson v. Brathwaite

Dear Harry:

Please join me.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: June 7, 1977

Recirculated: _____

75-871 - Manson v. Brathwaite

MR. JUSTICE STEVENS, concurring.

While I join the Court's opinion, I would emphasize two points.

First, as I indicated in my opinion in United States ex rel. Kirby v. Sturges, 510 F.2d 397, 405-406 (CA7 1975), the arguments in favor of fashioning new rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony carry substantial force. Nevertheless, for the reasons stated in that opinion, as well as those stated by the Court today, I am persuaded that this rulemaking function can be performed "more effectively by the legislative process than by a somewhat clumsy judicial fiat," id., at 408, and that the Federal Constitution does not foreclose experimentation by the States in the development of such rules.

Second, in evaluating the admissibility of particular identification testimony it is sometimes difficult to put other

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 9 1977

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-871

John R. Manson, Commissioner of Correction of Connecticut, Petitioner, *v.* Nowell A. Brathwaite.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June —, 1977]

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Second, in evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side.* MR. JUSTICE BLACKMUN's

*In this case, for example, the fact that the defendant was a regular visitor to the apartment where the drug transaction occurred tends to confirm his guilt. In the *Kirby* case, *supra*, where the conviction was for robbery, the fact that papers from the victim's wallet were found in the possession of the defendant made it difficult to question the reliability of the identification. These facts should not, however, be considered to support the admissibility of eyewitness testimony when applying the criteria identified in *Biggers*. Properly analyzed, however, such facts would