

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

September 2016 - Vol. 1, Issue 6

This month's issue highlights a recent case out of the Connecticut Supreme Court, People v. Dickson, 322 Conn. 410, 2016 WL 444140936 (August 9, 2016). Dickson prohibits as due process violative a first-time in-court identification that is not preceded by a nonsuggestive out-of-court identification, unless the defendant's identity or the witness' ability to identify the defendant is not at issue in the case. Trial counsel should use this ruling to similarly challenge first-time in-court identifications, as discussed further below.

- If the prosecution did not conduct a pretrial procedure or the witness was unable to identify the defendant in the procedure that was conducted, make a motion in limine objecting on due process grounds to the prosecution eliciting an in-court identification from that witness. The prosecution in this instance is the state actor.
- Argue, based on Dickson, that (1) there is nothing more suggestive than placing a witness on the stand in open court, confronting this witness with the person the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime (who is sitting next to defense counsel; note any other factors that would make him/her stick out) and (2) given the obvious unfairness, a jury would naturally assume that the prosecutor wouldn't be allowed to ask the witness to identify the defendant for the first time in court unless the prosecutor and the court thought s/he could do so in a non-suggestive setting — making it a form of improper and inaccurate vouching. Remember to cite federal due process in making your arguments.

Relevant law: We all know that an in-court identification is a foregone conclusion and a total charade, but New York law holds that due process forbids an in-court identification only when the pretrial identification is shown to be the product of an unduly suggestive police procedure, and the prosecution fails to establish independent source by clear and convincing evidence. The Supreme Court of Connecticut now provides us the legal ammunition to challenge the obviously suggestive identification procedure of an in-court identification.

Dickson permits the following argument: An in-court identification by a witness violates due process and is not permissible **even when it does not result from an unnecessarily pretrial identification procedure**, if the in-court procedure is the first time the witness will be making the identification.

Thus, if the state either did not attempt a pretrial identification procedure, or the witness was unable to identify the defendant in it, the prosecution may not elicit an identification from the witness for the first time in open court.

Dickson also set forth the procedures for a court to follow, which you can adapt to your situation: (1) where there has been no pretrial identification, the prosecution must request permission to present the in-court ID from the trial court; (2) the trial court may grant such permission ONLY if there is no factual dispute as to the identity of the perpetrator or the ability of the particular eyewitness to identify the defendant is not at issue (e.g., they know each other); (3) if the court denies the request, the prosecution can request permission to conduct a nonsuggestive identification procedure but only if no procedure was attempted before; (4) if the court denies the request, the prosecution declines to conduct one, or the witness is unable to identify the defendant in the procedure, no in-court identification should be allowed, although the prosecution can ask the witness about his or observations at the time of the crime. No questions about “resemblance” should be permitted.

Again, from Dickson, if an in-court identification is not permitted, the only instruction the prosecution is entitled to is that “an in-court identification was not permitted because inherently suggesting first time in-court identifications create a significant risk of misidentification and because either the state declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one.”

With this primer, we should begin, where applicable, to challenge first-time in-court identifications on due process grounds.

General Reminders:

- When you move to dismiss at the close of the People’s case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case as to each and every element does not preserve a sufficiency issue for appeal.
- If the judge only takes objections at sidebar, or you’ve asked to approach to flesh out your objection, make sure the court reporter is recording the sidebars. It is on the attorney, not the judge, to ensure recordation, and, if not recorded, the issue will not be preserved for appeal. Alternatively, repeat your objection and the court’s ruling, on the record, at the earliest opportunity.

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