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Tuesday, February 5, 2008

COUNTY COURT DECLINES TO PERMIT EXPERT TESTIMONY ON **FALSE
CONFESSIONS** AT TRIAL

People v. Tracy Crews

SUFFOLK

Judge Hinrichs

Legal_Briefs

Evidence

2353A-2006, Decided 01/24/08, County Court. See article, Jan. 31, page 1.

DEFENDANT SOUGHT permission from the court to call an expert witness at trial to testify regarding research on the subject of **false confessions**. Prosecutors opposed the application. The court stated the threshold question when expert testimony was proffered was whether the particular subject of the proposed testimony was within the ken of a typical juror. It stated New York courts have consistently answered that threshold question in the negative, with the exception of *People v. Kogut*. The court held that the subject of whether a person falsely confessed did not depend on professional, scientific knowledge or skill not within the range of ordinary training or intelligence. It stated the evaluation of the truthfulness of a statement was a subject from which jurors may easily draw on their day-to-day experiences, common observations and everyday knowledge. Thus, the court concluded there was no occasion to resort to expert testimony, and denied defendant's application seeking to call an expert witness regarding research on **false confessions**.

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Decision of Interest

DOI

SUFFOLK COUNTY COURT

Judge C. Randall Hinrichs

County Court Declines to Permit Expert Testimony on **False Confessions** at Trial

PEOPLE v. TRACY CREWS, 2353A-2006, Decided 01/24/08 --

Hon. Thomas J. Spota

Suffolk County District Attorney Attorney

Kerriann Kelly, Esq.

Assistant District Attorney

Michael J. Brown, Esq.

for Defendant

Courthouse Corporate Center

Defendant has submitted a written Application seeking permission to call an expert witness at trial to testify regarding research on the subject of **false confessions**. The People oppose the application. Specifically, defendant seeks to call Dr. Solomon Fulero as an expert witness to 'educate the trier of fact about the scientific research on **false confessions**, the fact that they occur, and some of the reasons why they occur.' (Defendant's Application, at page 1.) Defendant submits that 'jurors might be expected to assume that an innocent person will not confess to a crime he did not commit. Therefore, a study based upon generally accepted social psychology principles, establishing that the phenomenon of **false confessions** does occur, should be admissible to explain behavior that might appear unusual to a lay juror not familiar with the phenomenon.' (Application, at page 14.)

In arriving at the instant decision the Court has received and considered the written Application filed by defendant, the People's Affidavit in Opposition with attached exhibits and accompanying Memorandum of Law, and defendant's Reply Affirmation. The Court also heard oral arguments from counsel on December 11, 2007 and January 8, 2008. In response to certain questions posed by the Court during oral arguments on December 11, 2007, the defendant also submitted a written 'Reply to Additional Court Inquiry' together with attached exhibits.

The instant indictment was assigned to this Court following the retirement of the previously assigned judge, the Honorable Michael F. Mullen. On May 17, 2006, following a combined Huntley, Wade and Dunaway hearing conducted on April 17, 2006, Judge Mullen issued a written decision ruling, among other holdings, defendant's written statement admissible at trial as having been voluntarily made.

The admissibility and bounds of expert testimony are matters addressed to the sound discretion of the trial court. [People v. Cronin, 60 NY2d 430 \(1983\)](#) . 'It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.' [Id. at 433.](#)

The threshold question when expert testimony is proffered is whether the particular subject of the proposed testimony is within the ken of a typical juror. With the apparently singular exception of [People v. Kogut, 10 Misc3d 305, 806 NYS2d 366 \(Supreme Court, Nassau County, 2005\)](#) New York courts have consistently answered this threshold question in the negative regarding the subject of **false confessions**. See, for example, [People v. Days, 31 AD3d 574, 817 NYS2d 535 \(2nd Dept, 2006\)](#) ; [People v. Shepard,](#)

[259 AD2d 775, 687 NYS2d 196 \(3rd Dept, 1999\)](#) ; [People v. Green, 250 AD2d 143, 683 NYS2d 597 \(3rd Dept, 1998\)](#) ; [People v. Lea, 144 AD2d 863, 534 NYS2d 588 \(3rd Dept, 1988\)](#) and *People v. Wiggins*, 2007 NY SlipOp 51715U, 16 Misc3d 1136A (Supreme Court, Bronx County, 2007.)

See also, *Curry v. Burge*, 2007 US Dist LEXIS 78360 (SDNY, 2007) wherein United States Magistrate Judge Andrew J. Peck noted as follows in a Report and Recommendation that Curry's writ of habeas corpus be denied: 'Moreover, Curry's habeas counsel did not cite a single case in his post-hearing brief to demonstrate that New York courts would have allowed **false confession** expert testimony at the time of Curry's trial in 1998, nor that such testimony would be allowed -- much less required for counsel to be effective -- since. To the contrary, this Court's research reveals that New York State cases at the time of Curry's trial (and since) have not allowed **false confession** expert testimony.' Curry, *id* at page 68, footnote 25. [Emphasis added, internal transcript reference omitted.] United States District Court Judge Lewis A. Kaplan adopted Judge Peck's Report and Recommendations at *Curry v. Burge*, 2007 U.S. Dist. LEXIS 84860 (SDNY, 2007.)

This Court holds that the subject of whether a person has falsely confessed 'does not depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence,' and therefore, 'there is no occasion to resort to expert testimony.' Shepard, *supra* at 777.

The Court is, of course, well aware of the Court of Appeals decision in [People v. LeGrand, 8 NY3d 449 \(2007\)](#) which held that expert testimony on the subject of the reliability of eyewitness identifications 'in the appropriate case, may be admissible in the exercise of a court's discretion. Moreover, there are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications. ' [Id. at 456.](#)

Significantly, the LeGrand Court held that the existence of sufficient corroborating evidence may lead to a trial court exercising its discretion to disallow expert testimony on the subject of reliability of eyewitness identifications. In LeGrand the Court of Appeals noted, at page 453, that the 'People's case rested solely on identifications made nearly seven years after the crime.' Here, defendant's two co-defendants, one of whom is a cousin of the defendant, have plead guilty and agreed to testify against the defendant at trial. Even if this Court were to conclude that expert testimony on the subject of **false confessions** is admissible in the appropriate case, as the LeGrand Court concluded on the subject of eyewitness identifications, this Court specifically rules, in its discretion, that

the co-defendants' guilty pleas and agreements to testify against the defendant provide ample corroboration to warrant excluding expert **false confession** testimony in this case. In arriving at this discretionary decision, the Court is also considering this defendant's age, 34 years old, at the time of the making of the alleged statements.

More important, however, this Court concludes that expert testimony on the subject of **false confessions** is not of the same character as expert testimony on the subject of eyewitness identifications. The Court, having read the extensive filings of the defendant, as well as additional research on the subject, concludes, as has virtually every court in the state aside from the court in Kogut, that this is not a subject outside a typical juror's knowledge such that expert testimony would be helpful. Rather, the Court is of the opinion that the evaluation of the truthfulness of a statement is a subject for which jurors may easily draw on their day-to-day experience, their common observation and their everyday knowledge. Indeed, New York's Criminal Jury Instructions CJI2d [NY] regarding credibility factors states, in pertinent part:

'There is no particular formula for evaluating the truthfulness and accuracy of another person's statements or testimony. You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used in this case when evaluating the testimony.' CJI2d [NY] Credibility of Witnesses -- Credibility Factors

CJI2d [NY] also contains extensive jury instructions on the evaluation by a jury of admissions and confessions. These instructions make clear that the evaluation of the truthfulness of a confession is a subject well within a typical juror's knowledge and experience. The following excerpt from the Criminal Jury Instructions regarding 'Promise by the Police' clearly anticipates that a juror can reach a determination on his or her own on the issue of whether a defendant might falsely incriminate himself.

'Under our law, a statement of a defendant is not voluntarily made when it is obtained from the defendant by a public servant engaged in law enforcement activity [or by a person then acting under his/her direction or in cooperation with him] by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself/herself.

Under the law, a promise or statement of fact made to a defendant does not by itself render the defendant's subsequent statement involuntary. A defendant's statement would be involuntary only if the promise or statement made to him/her created a substantial risk

that he/she might falsely incriminate himself/herself.' CJI2d [NY] Statements (Admissions, Confessions) -- Promise by the Police.

A portion of Exhibit D (attached to the December 26, 2007 submission by defense counsel) addresses the issue that the Court is focusing on here. (See pages 210 -- 212 of Dr. Saul M. Kassin's article entitled 'Expert Testimony on the Psychology of Confessions: A Pyramidal Framework of the Relevant Science '). The article addresses the question of whether an expert's testimony in this area would, in fact, assist a trier of fact. The article mentions three reasons why jurors are unable to evaluate confession evidence without assistance. The three reasons cited in the article why jurors need the assistance of expert testimony in this area are:

1) First, generalized common sense leads us to trust confessions, a behavior that breaches self-interest in a profound way (most people believe they would never confess to a crime they did not commit and they cannot image the circumstances under which anyone would do so.)

2) A second basis for pessimism is that people are typically not adept at deception detection.

3) A third basis for pessimism is that police-induced confessions, unlike other types of verbal statements, are corrupted by the very process of interrogation that elicits them -- designed for persuasion, even if false.

The Court finds these rationale are totally unpersuasive as to the need for jurors to receive expert testimony on this subject. The reasons set forth ignore the fundamental foundation upon which our adversarial system of justice is based. As already discussed, the Criminal Jury Instructions clearly contemplate that these are areas which jurors are fully capable of evaluating. The issues and arguments that are cited by Dr. Kassin are potential areas to cross examine a law enforcement witness that is testifying about an admission or confession.

In fact, the Kogut decision, *supra*, which the defense argument relies heavily upon, recognizes that the psychological underpinnings of the proposed expert testimony are within the experience of lay jurors. The opinion states, '[t]he fact that psychological techniques of influence and persuasion have long been recognized by the courts suggests that such techniques are within the experience of lay jurors.' [10 Misc3d at 311](#) . While the Kogut decision goes on to conclude that expert testimony in this field is appropriate in this context, in this Court's opinion a trial juror is 'able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their

knowledge' without the need for 'the specialized knowledge of an expert witness.' Cronin, *supra*, at 433 (1983.)

All of the literature supporting expert testimony in this area is premised on an erroneous assumption that jurors cannot believe **false confessions** occur. The above-mentioned excerpt from the Criminal Jury Instructions clearly belies this premise by recognizing that under certain circumstances a defendant could falsely incriminate himself. In addition, the Criminal Jury Instructions could be further modified to take into account the circumstances of any particular **false confession** claim.

In that the Court holds that the proposed testimony is within the ken of the average juror and, therefore, expert testimony on the subject is unnecessary and inadmissible, the People's request for a Frye hearing on the subject is moot.

Accordingly, for the reasons stated herein, defendant's application seeking permission to call an expert witness at trial to testify regarding research on the subject of **false confessions**, is denied. This memorandum shall constitute the decision and Order of the Court.

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