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## 2001 Survey of Rhode Island Law: Cases: Criminal Procedure

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**Criminal Procedure.** *City of Warwick v. Adams*, 772 A.2d 476 (R.I. 2001). The Rhode Island supreme court held that: (1) the statute that allows bail commissioners to accept pleas of not guilty in misdemeanor cases is valid and does not conflict with the district court's rules; (2) the petitioner had a unilateral right to withdraw waiver of trial by jury before the expiration of the ten-day period that began to run after his initial appearance before the district court or judge of that court, but not after his initial appearance before the bail commissioner; and (3) the absence of counsel during a proceeding before the bail commissioner constituted good cause to revoke waiver of jury trial after the expiration of the ten-day period.

#### FACTS AND TRAVEL

Petitioner Mark Adams waived his right to a jury trial during a preliminary hearing at the Warwick police station, where he was charged with assault.<sup>1</sup> After consulting with an attorney, Adams attempted to revoke his waiver in district court within ten days of the preliminary hearing, but was not allowed to do so.<sup>2</sup> Defendants charged with misdemeanors are usually given the opportunity to waive their right to a jury trial when they appear before a bail commissioner.<sup>3</sup> According to the Attorney General, most district court judges are reasonable in allowing a defendant to withdraw a waiver of jury trial, before or after the ten days following the defendant's initial court appearance, and that this instance was an anomaly.<sup>4</sup>

#### BACKGROUND

Rhode Island General Laws section 12-10-2 enumerates the powers of bail commissioners.<sup>5</sup> Under this section, they are authorized to "accept pleas of not guilty," and then "schedule a pre-trial conference date before a judge of the district court."<sup>6</sup> Further, an administrative order by the chief judge of the district court specifies the procedures bail commissioners must follow "when

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1. *City of Warwick v. Adams*, 772 A.2d 476, 477 (R.I. 2001).
  2. *Id.*
  3. *Id.* at 478.
  4. *Id.*
  5. R.I. Gen. Laws §12-10-2 (1997).
  6. *Id.* at § 2-10-2(b).

conducting arraignments in misdemeanor cases and initial appearances in felony cases."<sup>7</sup>

Adams presented three issues in his request for certiorari from the Rhode Island Supreme Court. First, he argued that a bail commissioner may not conduct the arraignments set out in the administrative order, contending that the administrative order that grants bail commissioners "full-fledged power to arraign" is unauthorized.<sup>8</sup> Therefore, he argues, there was a conflict between the statute and the administrative order.<sup>9</sup>

The petitioner argued that these initial proceedings before the bail commissioners should not be considered arraignments because they are not held in open court.<sup>10</sup> Further, Adams contends that as a matter of public policy, defendants should not be allowed to waive jury rights outside of court.<sup>11</sup>

#### ANALYSIS AND HOLDING

The state supreme court found that the administrative order does not extend the powers of bail commissioners beyond those provided in section 12-10-2.<sup>12</sup> Relying on the fact that bail commissioners may only accept pleas of not guilty in misdemeanor cases (thus leaving discretion to the courts on pleas of guilty or *nolo contendere*), it states that "[a]lthough the administrative order refers to this process as a 'special arraignment,' it does not constitute an arraignment as that term is used in the district court's Rules of Criminal Procedure because it does not occur 'in open court.'"<sup>13</sup>

Further, the district court Rules leave room for statutory adjustment in the way in which the defendant can make an initial appearance after arrest as is provided in section 12-10-2, and, to obtain release on bail.<sup>14</sup> Although the district court Rules do not specifically provide for all the bail commissioners' authority given

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7. *Adams*, 772 A.2d at 478 (citing District Court Administrative Order 88-18).

8. *Id.* at 478.

9. *Id.* at 479.

10. *Id.*

11. *Id.*

12. *Id.* at 478.

13. *Id.*

14. *Id.* at 479.

under section 12-10-2, the court found there was no necessary conflict between them.<sup>15</sup>

Finally, Adams requested that the state supreme court find that his initial appearance before the bail commissioner was invalid, that he had a unilateral right to revoke his waiver within the ten-day period after that appearance, and that absence of the opportunity to consult with counsel prior to executing the waiver constituted good cause to allow him to waive the right after ten days.<sup>16</sup>

The request to invalidate the bail commissioner proceedings was denied. The court did rule that Adams had the unilateral right to withdraw his jury trial waiver at any time before the ten day period began to run after his initial appearance before the district court, but not after the bail commissioner hearing. However, the court did find that the absence of counsel during the bail commissioner proceeding constituted good cause to revoke the jury trial waiver after the ten-day period.<sup>17</sup>

#### CONCLUSION

In *City of Warwick v. Adams*, the Rhode Island Supreme Court held that the statute that allows bail commissioners to accept not guilty pleas in misdemeanor cases does not conflict with the district court's rules and is therefore valid. The petitioner had a unilateral right to withdraw his jury trial waiver before expiration of ten-day period after an appearance before the district court but not after an appearance in front of the bail commissioner. The absence of counsel during a bail commissioner proceeding constituted good cause to revoke jury trial waiver after the expiration of the ten-day period.

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15. *Id.* at 481.

16. *Id.*

17. *Id.*

**Criminal Procedure/Evidence.** *State v. Lynch*, 770 A.2d 840 (R.I. 2001). The Rhode Island Supreme Court held that: (1) pre-trial photo identification procedure was not unduly suggestive; (2) jury instruction on victim's identification testimony was sufficient; (3) now-deceased declarant's statement to police officer was admissible under excited utterance exception to the hearsay rule; (4) jury instruction on flight was sufficient; and (5) defendant was not entitled to a jury instruction on the use of force to retain property already peacefully taken.

#### FACTS AND TRAVEL

On September 19, 1994 at approximately 7:30pm, the defendant, David Lynch, attacked a young woman as she was leaving a gas station in Providence.<sup>1</sup> Lynch held a knife to her throat and demanded that she give him her backpack.<sup>2</sup> The victim, who was in shock, stared at the defendant for approximately 10-15 seconds before the defendant reached into the car and took the backpack.<sup>3</sup> The victim then proceeded to chase the defendant on foot.<sup>4</sup> At one point, the defendant turned and ran towards the victim before dropping the backpack and continuing to run.<sup>5</sup> The victim stopped to pick up her belongings and waited for the police to arrive.<sup>6</sup>

An eyewitness to the events chased the defendant to a nearby post-office.<sup>7</sup> During the struggle between them, the defendant stabbed the witness in the hand.<sup>8</sup> When the police officer arrived at the scene, the witness explained what had happened.<sup>9</sup> Because the defendant appeared almost unconscious from the struggle, the police officer put him in the back of the police car without handcuffs or restraints.<sup>10</sup> The officer then proceeded to search the area for the knife the defendant had used in the robbery and stabbing.<sup>11</sup> At this point, the police officer got into the cruiser, and started the

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1. *State v. Lynch*, 770 A.2d 840, 842 (R.I. 2001).
  2. *Id.*
  3. *Id.* at 842-43.
  4. *Id.* at 843.
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.*
  10. *Id.* at 843, 848.
  11. *Id.* at 843.

car with the intent of taking the defendant to a line-up for identification.<sup>12</sup> Before he could leave, however, an ambulance arrived and the officer left his cruiser to speak with the paramedics.<sup>13</sup> The defendant climbed into the front of the cruiser and fled the scene.<sup>14</sup> The defendant hit the officer in the knee with the car, and the officer fired shots at the defendant.<sup>15</sup> After crashing into a utility pole two-tenths of a mile from the post-office, the defendant was again apprehended and required hospitalization, and thus the victim did not have the opportunity to view a line-up at that time.<sup>16</sup> The victim later identified Lynch as the man who attacked her from a photo array before she testified before the grand jury.<sup>17</sup> Following a jury trial, Lynch was convicted of robbery in the first degree, assault with a deadly weapon against the officer, robbery of the officer in the second degree, and escape from lawful custody.<sup>18</sup>

#### ANALYSIS AND HOLDING

The defendant raised several issues on appeal. First, he contends that the trial justice erred in denying his motion to suppress the victim's identification testimony.<sup>19</sup> The Rhode Island Supreme Court employed a two-pronged analysis to determine whether an out-of court identification violates a defendant's due process rights.<sup>20</sup> Relying on *State v. Gardiner*,<sup>21</sup> the court stated that the first step is to determine "whether the identification procedure used was unnecessarily suggestive."<sup>22</sup> The court further stated that the procedure was not unnecessarily suggestive; the trial judge does not need to proceed to the second prong.<sup>23</sup> The defendant claims that the photo array procedure was unnecessarily suggestive because it was made ten weeks after the incident and that the defendant was depicted with more facial hair than the other

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 843, 845.

17. *Id.* at 844.

18. *Id.*

19. *Id.*

20. *Id.*

21. 636 A.2d 710, 715 (R.I. 1994).

22. *Lynch*, 770 A.2d at 844.

23. *Id.*

photos.<sup>24</sup> This court ruled that the photo array was not unduly suggestive because the lapse of time between the incident and the identification goes to the weight given the identification, not to the suggestiveness.<sup>25</sup> The court further stated that the photos were a fair comparison that in no way infringed upon Lynch's due process rights.<sup>26</sup> The court also noted that the victim had adequate opportunity to look at Lynch while he held the knife to her throat, and further that the defendant was unavailable for a line up because of his hospitalization.<sup>27</sup>

The defendant also claims that the instruction given to the jury regarding the identification was erroneous.<sup>28</sup> The defendant objected because the trial justice did not include specifically requested language, which instructed the jury that it must take into account the victim's level of certainty that Lynch was the perpetrator.<sup>29</sup> The court stated that under Rhode Island law, there is no requirement for particular language to be used in jury instructions.<sup>30</sup> The law only requires the trial justice to instruct the jury on the applicable law in the case, regardless of the words he or she chooses to do so.<sup>31</sup> As a result, the court concluded that the trial justice's instruction was sufficient.<sup>32</sup>

The next issue on appeal is the statement that the eyewitness, who died before trial, made to the police officer at the post office.<sup>33</sup> The defendant claims admission of this statement amounted to reversible error because the statement lacked reliability.<sup>34</sup> The trial court relied on Rule 804(c) of the Rhode Island Rules of Evidence,<sup>35</sup> and allowed the statement in as a declaration.<sup>36</sup> The court found that the statement contained adequate reliability because it satis-

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24. *Id.*

25. *Id.* at 845.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 846 (citing R.I. Gen. Laws §8-2-38 (1997)).

31. *Id.* at 846.

32. *Id.* at 846-47.

33. *Id.*

34. *Id.*

35. R.I. R. Evid. 804(c) (stating "A declaration of a deceased person shall not be made inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant.").

36. *Lynch*, 770 A.2d at 847.

fied the requirements of an excited utterance under Rule 803(2).<sup>37</sup> The court relied on the testimony of the police officer, which described the witness as being excited and out of breath at the time he made the statement.<sup>38</sup> Further, the defendant attempted to impeach the credibility of the declarant by introducing evidence of the declarant's criminal record.<sup>39</sup> Thus, the court stated, the jury had the benefit of this information in determining whether the statement was reliable, and the admission of the statement did not constitute reversible error.<sup>40</sup>

The next challenge brought by the defendant was against the jury instruction on flight with respect to his leaving the scene.<sup>41</sup> Lynch contended that the trial justice committed reversible error for not explaining that consciousness of guilt is not the only potential reason for flight.<sup>42</sup> The court rejected this argument, stating that the evidence of flight in this case was overwhelming.<sup>43</sup> The court further stated that the instruction on flight was consistent with this evidence and that the jury was properly instructed that a permissible, but not mandatory, inference of consciousness of guilt could be drawn.<sup>44</sup>

Finally, the defendant argued that the trial justice erred in rejecting the defendant's requested jury instruction regarding the robbery of the police car.<sup>45</sup> The requested instruction stated, "a defendant's use of force to retain property already peacefully taken, or attempt to escape, is not the force essential to satisfy the element of force required for robbery."<sup>46</sup> However, the trial justice rejected this instruction because they determined the car was not peacefully taken.<sup>47</sup> Specifically, the trial court relied on the fact that despite his injuries, Lynch got into the front seat of the car,

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37. *Id.* at 847 (citing R.I. R. Evid. 803(2), defining an excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.").

38. *Id.* at 847.

39. *Id.*

40. *Id.* at 847-48.

41. *Id.* at 848.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 849.



and drove toward the officer, hitting him in the process.<sup>48</sup> The Rhode Island Supreme Court agreed that this was highly suggestive of the exertion of force necessary to satisfy the element of force in robbery.<sup>49</sup> As a result, the defendant's conviction was affirmed and his appeal was denied and dismissed.

#### CONCLUSION

Defendant was convicted of robbery in the first degree, assault with a deadly weapon against a police officer, robbery of the officer in the second degree, and escape from lawful custody of the Providence police. The Rhode Island Supreme Court held that: (1) the victims' pretrial photo identification procedure was not unduly suggestive; (2) jury instruction on victim's identification testimony was sufficient; (3) now-deceased declarant's statement to police officer was admissible under the excited utterance exception to hearsay rule; (4) jury instruction on flight was adequate; and (5) defendant was not entitled to a jury instruction on the use of force to retain property already peacefully taken because the trial court determined the property was not peacefully taken.

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48. *Id.* at 848.

49. *Id.* at 848-49.