

Excerpts of Trial Transcripts, dated May 18, 1994:
Testimony of Randy Humphrey, pp. 62-67, 71-75, 78-80, 82-84 & 90-93

EXHIBIT 1

Duplicate Pg 1-208

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ERIE : CRIMINAL TERM : PART 12

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

Indictment #91-1510-001

BENJAMIN CASTRICONE,

JURY TRIAL

Defendant.

VOLUME I

Erie County Hall
Buffalo, New York
May 18, 1994

B e f o r e : HONORABLE PENNY M. WOLFGANG,
Supreme Court Justice

A p p e a r a n c e s :

KEVIN M. DILLON, ESQ.
Erie County District Attorney
By: PATRICIA I. CARRINGTON
Assistant District Attorney
Appearing for the People

JOHN J. CARNEY, III, ESQ.
Appearing for the Defendant

Liliana G. Cirulli
Official Supreme
Court Reporter

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ERIE COUNTY
CLERK'S OFFICE

A. Yes.

Q. What do you recognize that to be?

A. This is also the line-up.

Q. And is that the second phase of the line-up?

A. Yes.

Q. And did you pick someone in that line-up?

A. Yes.

Q. And who was that?

A. Four.

Q. And does that fairly and accurately depict the way that the Defendant and the others appeared on October 30th of 1991?

A. Yes.

MS. CARRINGTON: Your Honor, at this time I would ask that People's 13 and 14 for identification be admitted into evidence.

MR. CARNEY: No objection.

THE COURT: They may be marked in evidence.

(Whereupon, People's Exhibits 13 and 14 were marked in evidence.)

MS. CARRINGTON: Thank you. I have nothing further of this witness.

CROSS-EXAMINATION BY MR. CARNEY:

A. Yes.

Q. And the police at some point shows you this photo array and asks you if anyone looked familiar, correct?

A. Correct.

Q. And how long after the time that you were able to get this glance at this man were you looking at this photo array?

A. I don't remember.

Q. Was it a day?

A. How long was I looking at this?

Q. How long after you first got the glance at the man, how long after that time did the police come to you with this?

A. I don't remember. A while.

Q. An hour? A week?

A. No, it was a few days.

Q. Okay. A day? Was it the next day?

A. I don't remember.

Q. Okay.

A. Two and a half years ago.

Q. Well, we'll go from there. Now, you told the police this number two sort of looked like the guy, correct?

1 A. Yes, I said it resembled him somewhat. Someone
2 that had been in the restaurant.
3

4 Q. Not necessarily the individual that was in the
5 restaurant at that particular time though, correct?

6 A. Correct. I told them I wasn't a hundred
7 percent sure. I said it just resembled someone that had
8 come in that night.

9 Q. Okay. Now, the individual, if I'm correct, you
10 got this glance and you were able to see just a general
11 look at his face and body, correct?

12 A. Correct.

13 Q. And you were mostly going by the build of the
14 individual, correct?

15 A. The build and I did see his face. I can't
16 describe -- I couldn't describe what his eyebrows, what
17 size his eyebrows were or anything --

18 Q. You got a glance at his face, correct?

19 A. Yes.

20 Q. So this number two is not necessarily the
21 individual that you saw in the restaurant looking at the
22 counter for those few seconds, correct?

23 MS. CARRINGTON: Objection to the form of
24 the question.

25 THE COURT: On -- what do you mean?

MS. CARRINGTON: I think that's a difficult question to answer yes or no.

THE COURT: Not necessarily, you mean? Overruled.

Q. Do you remember the question, Randy?

A. Could you repeat it?

Q. Yes. This isn't necessarily the individual that you saw in the restaurant on that occasion, correct?

THE COURT: I guess I agree with her. We don't know what you mean by necessarily. You have to rephrase it.

Q. This may be the individual and it may not be the individual, correct?

A. As far as I said, it resembled the guy that was in there.

Q. If it resembled him, then that's another way of saying --

A. It could be.

Q. You really don't know, correct?

A. No.

Q. Okay. And yet on previous occasions the prosecutor asked you if you saw the individual that you noticed in the restaurant and you pointed to Mr.

1 Randy Humphrey - Cross - Carney 65
2 Castricone and you said, that's the individual, correct?

3 A. Yes.

4 Q. What you meant to say was, he looks like the
5 man?

6 A. No, I --

7 MS. CARRINGTON: Objection to what he
8 meant to say.

9 THE COURT: Sustained.

10 Q. Well, we're clear that just shortly after the
11 robbery, about a day or so, the best you could do was to
12 say this resembles the man, correct?

13 A. Correct.

14 Q. Then much later at a proceeding in court you
15 indicated that that was the man, correct?

16 A. Correct.

17 Q. And now here in court you're indicating that
18 that is the man, correct?

19 A. Correct.

20 Q. Now, when you -- and you viewed these
21 photographs with the police. Number six, he's much
22 older and balding, correct?

23 A. Correct.

24 Q. So he couldn't possibly have been the
25 individual, right?

MS. CARRINGTON: Objection, Your Honor.

MR. CARNEY: Because obviously the one --

THE COURT: Overruled. Go ahead.

Q. You know enough to know that the man wasn't that age, correct? He is a younger man?

A. Correct.

Q. And none of those other individuals even remotely resembled the individual that you saw, correct?

MS. CARRINGTON: Objection, Your Honor.
The exhibit speaks for itself.

THE COURT: Overruled. You can answer.

MR. CARNEY: None of those other individuals --

THE COURT: You'll have an opportunity to recross.

Q. None of those other individuals even remotely resembled the individual that you saw in the restaurant, correct?

A. Not really.

Q. Am I correct, then?

MS. CARRINGTON: Objection.

THE COURT: Wait a minute. Now, we don't understand what the answer is.

MR. CARNEY: I'm asking you if I'm correct

when I say that none of those other individuals in your mind resembled the other individual that you saw, correct?

THE WITNESS: Correct.

Q. Now even remotely, correct?

A. No, correct.

Q. Thank you, Randy. You assumed that the police had a suspect when they were going to show you this, correct?

MS. CARRINGTON: Objection.

THE COURT: Overruled. You can answer.

Q. I mean, there was a purpose --

A. Yes, there was a purpose for it. They didn't show it to me --

Q. You assumed that the police felt that one of the individuals in the robbery was in one of those photographs, correct?

A. Yes.

Q. It would be foolish to think otherwise, wouldn't it?

A. Pretty much, yes.

Q. They wouldn't be wasting your time, would they?

A. I don't think so.

Q. Okay. And so the assumption was that the

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A. Correct.

Q. And you viewed a line-up, correct?

A. Correct.

Q. And none of the individuals that you saw in these photographs were in the line-up except for Mr. Castricone; is that correct?

A. I believe so.

Q. Okay. And this line-up, you then saw Mr. Castricone as being the same person that you previously studied the picture of, correct?

A. No. I saw him as the person that had been in the store.

Q. Well, you had the benefit of seeing the photograph before you saw the line-up though, correct?

A. Correct.

Q. That could not have hurt your picking Mr. Castricone out, could it?

MS. CARRINGTON: Objection.

THE COURT: Sustained.

Q. That helped you to some extent because your being able to see his hair, his eyes, his eyebrows, his nose, his mouth, facial hair, whereas you couldn't see that at the time that you originally saw the man, correct?

1 Randy Humphrey - Cross - Carney

2 MS. CARRINGTON: Objection to the form of
3 the question.

4 THE COURT: Overruled.

5 Q. When you first saw the man, you have already
6 testified that you didn't see his eyes, you did not see
7 his nose, you did not see his mouth, you did not see his
8 hairstyle, you did not see the sideburns, right?

9 A. Right.

10 Q. But in the photograph you could see his hair,
11 you could see his eyes, you could see all those things
12 correct?

13 A. Correct.

14 Q. Therefore, the photograph was in your mind and
15 the details in it and the features that we have just
16 discussed were in your mind when you saw the line-up?

17 MS. CARRINGTON: Objection.

18 THE COURT: Overruled.

19 THE WITNESS: Well, it's not like I
20 studied the photograph.

21 Q. No. This is a yes or no answer, Randy.

22 A. No, I didn't really remember that.

23 MS. CARRINGTON: Objection.

24 THE COURT: He said no, he didn't.

25 Overruled.

Q. Okay. So you don't think that seeing the photograph, the photo array influenced your picking him out at all at the line-up, correct?

A. Correct.

Q. Even though you already testified that you were being asked if you hadn't seen these photographs, correct?

A. Correct.

Q. Assume that, then you would have been asked to pick out someone in a line-up, whom you didn't see the eyes, the hair, the mouth, scars --

MS. CARRINGTON: Objection, Your Honor, to the form of the question.

THE COURT: What do you mean by didn't see? Is that what you are --

MR. CARNEY: Well, he's already testified he wasn't able to see those things.

THE COURT: The objection is sustained.

Q. Randy, isn't it true that we recognize someone by these features?

A. Yes.

Q. And by features we mean eyes, nose, hair, scars, facial hair, things like that, correct?

A. Yep.

Q. So isn't it possible that since you don't know anything about --

A. Well, I couldn't describe -- I couldn't describe every bit of detail, but I did see him when he walked in.

Q. If you could allow me to ask the question.

A. All right.

Q. Thank you. Since you have already testified that you got a glance for a few seconds, that you couldn't really see his eyes and nose and ears, and you don't know whether he had facial hair, you can't tell us whether he had sideburns, you don't know what the shape of his eyes were, you don't know what kind of eyebrows he had, you can't even say whether the man had acne or didn't have acne or had scars on his face or pock marks, you can't tell us that?

A. Right.

Q. Correct?

A. Correct.

Q. Then it seems to me that the man that you picked out in the line-up might not be the man that you saw originally in the restaurant, correct?

MS. CARRINGTON: Objection.

THE COURT: Sustained. It seems to you is

not a proper question, Mr. Carney.

MR. CARNEY: The man that you picked out in the line-up may not be the man that you saw in the restaurant, correct?

THE WITNESS: Then why did I pick him out at the line-up?

Q. Well, unfortunately, it's my job to ask questions, Randy, and it's your job to answer them. So we'll try one more time and with all due respect, I do respect that you're here. I'm not being facetious. It is possible that in view of all we have gone through, of the glimpse that you got of the man and the fact that you don't know about sideburns and all those other important things that we distinguish someone by, it then is possible that the man you picked out in the line-up, Mr. Castricone, is not the man that you saw in the restaurant, correct?

MS. CARRINGTON: Objection.

THE COURT: Overruled. You can answer.

THE WITNESS: It is possible.

Q. Okay. And it's possible, Randy, because people resemble sometimes one another if they have similar features, correct?

A. Correct.

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Q. Well, Randy, think about it.

A. I saw the photographs and then it was like -- I think it was like a month or so was when I saw the line-up, and I didn't get a great look at the photographs, either, there. I saw them, I looked at them, I said, that resembles some guy that was in here that day and then he took the photo array away.

Q. Uh-hum. Well, isn't it a fact, though, that you were given all the time that you wanted to look at these photos?

A. Yes.

Q. Are you now saying that it's impossible here that this photograph here influenced your judgment at the line-up?

A. No, it's not impossible.

Q. So it could have?

A. I guess so.

Q. Could it be that a trick was played on your mind, in effect, that the figure in the photograph got to be what you started to remember when you looked at the line-up, that was what was triggered; is that a possibility?

MS. CARRINGTON: Objection. A trick played on his mind.

THE COURT: Overruled. It's just a phrase.

Q. Is that a possibility?

A. It could be a possibility, but --

Q. Okay, thank you. The prosecutor asked you if you saw the man in the restaurant and you pointed to Mr. Castricone here in court, correct?

A. Correct.

Q. And now in all fairness what you are actually saying is this man resembles the man in the restaurant? You can't be sure?

MS. CARRINGTON: Objection.

THE COURT: Sustained.

Q. You can't be sure just after the robbery, right?

A. Right.

Q. Right, we know that.

MS. CARRINGTON: No one questioned him just after the robbery.

THE COURT: Sustained.

Q. You couldn't be sure when the police showed you the photograph, right? That was, would have been within days of the robbery?

A. Right.

Q. But you want the jury to believe you're sure now?

MS. CARRINGTON: Objection.

MR. CARNEY: Is that what you want --

THE COURT: Sustained.

MR. CARNEY: Are you sure now this is the man?

THE WITNESS: Yeah.

Q. No?

A. I said yeah.

Q. How can you be sure now? Is your memory better now?

A. No.

Q. Two years after the robbery? Was your memory better a day or two after the robbery?

A. Memory better than what?

Q. Was your memory of the face better two days after the robbery than two years after the robbery?

A. Yeah.

Q. So what you said to the police originally, this resembles the man, this sort of looks like the man, that's probably more accurate than what you are saying now, correct?

A. Yeah.

MS. CARRINGTON: Objection.

THE WITNESS: No.

THE COURT: You can answer.

THE WITNESS: Doesn't make any difference to me.

MR. CARNEY: Okay. Then why is it that you were so hesitant to admit --

THE COURT: Did you get that it doesn't make any difference to me?

MR. CARNEY: Why were you so hesitant to admit that this may not be the individual?

THE WITNESS: I guess --

MS. CARRINGTON: Objection.

THE COURT: Sustained.

Q. Well, you're not hesitant to admit it anymore, you've just stated this might not be the man you saw in the restaurant, correct?

MS. CARRINGTON: Objection.

THE COURT: Sustained.

MR. CARNEY: This might not be the man you saw in the restaurant; isn't that correct?

MS. CARRINGTON: Objection.

THE COURT: Overruled.

MR. CARNEY: Isn't that correct?

THE WITNESS: I guess so. I saw --
well --

Q. Please, just --

A. This is two and a half years later.

Q. Please, Randy, it's a yes or no response that
-- from you. The prosecutor can ask all the questions
she wants.

A. All right.

Q. This might not be the man you saw in the
restaurant, yes or no?

A. Yes.

Q. Okay. Why is it so tough, Randy? Do you feel
that you have to pick him out and be certain?

A. No.

MS. CARRINGTON: Objection.

THE COURT: Overruled.

Q. Is somebody making you feel you have to say
this is the guy or you're going to blow the case?

A. No.

Q. Don't you want to be fair?

A. I'm just trying to think back and remember.

Q. Okay. Don't you want to be fair to this man?

A. Oh, yeah.

MS. CARRINGTON: Objection.

THE COURT: All right, that's enough, Mr. Carney.

Q. Randy, isn't it a fact that when you went to the line-up, you were basically looking for the build of the man?

A. Basically.

Q. And that's because as we have already said, you didn't get a clear look at his facial features, correct?

A. Correct.

Q. So if Mr. Castricone had a similar build to the man, this would make you think that that man in the line-up was the man, correct?

A. Correct, I guess.

Q. Okay. Please don't guess. It's correct, right?

A. (Indicating.)

Q. Now, showing you People's Exhibit -- well, there is a lot of markings here. People's Exhibit 13, it's a photograph of a line-up, correct?

A. Correct.

Q. Number five, he's much taller, you can see he's almost six foot four, correct? We've got the markings there --

A. Correct.

1
2 did, correct?

3 MS. CARRINGTON: Objection. Time frame.

4 MR. CARNEY: During the time that you were
5 qualified, that -- during the same week that
6 you were looking at those photo arrays, it came
7 to your attention that other witnesses also
8 picked out Mr. Castricone, correct?

9 THE WITNESS: Correct.

10 Q. And this, then, made you more certain that you
11 must have found the correct individual since other
12 people shared your opinion, correct?

13 MS. CARRINGTON: Objection.

14 THE COURT: Overruled.

15 MR. CARNEY: Correct?

16 THE WITNESS: Well, yeah, I guess. Yes,
17 yes, I didn't mean to guess.

18 Q. So there were those types of influences on your
19 ultimate decision, the fact that the other people picked
20 him out as well, the fact that you saw the photograph
21 before the line-up, the fact that you saw him in court,
22 all those things influenced your ultimate decision of
23 whether this is or is not the man, correct?

24 MS. CARRINGTON: Objection.

25 THE COURT: Overruled.

THE WITNESS: Can you repeat that?

MR. CARNEY: Yes.

THE WITNESS: I just got confused.

Q. The fact that you saw the photo array, and the fact that you saw the line-up, the fact that you have seen him on several occasions, the fact that other individuals picked him out as resembling the individual from the photo array, that all has an influence upon your ultimate decision of whether you feel this is the man or not, correct?

A. Correct, yeah.

Q. Okay.

A. It could have, yes.

Q. Yes? Thank you. Thank you. I don't want to put words in your mouth. Now, you said the man was wearing a dark T-shirt, not a white T-shirt, correct?

A. Correct.

Q. Are you certain of that?

A. Yeah, I remember him wearing dark clothes, just like dark T-shirt, dark pants.

Q. All right. Well, you couldn't say what kind of shirt it was though, right?

A. No.

Q. You couldn't say what kind of pants they were?

A. No.

Q. You couldn't say what fabrics they were, correct?

A. No.

Q. Couldn't say what footwear he was wearing, correct?

A. Correct.

Q. Now, when you looked at the photo array, did you tell the officers, I looked at the array and I didn't really get an excellent shot of him; I actually didn't look at him, but I said that number two sort of looked like the guy, isn't that what you told the officer?

MS. CARRINGTON: Objection, Your Honor, to the form of the question. I don't know when he's referring to. It appears Mr. Carney is reading from something.

THE COURT: Are you asking about some specific --

MR. CARNEY: I was very specific, Judge, at the time he looked at the photo array. Yes or no, Randy?

THE COURT: Overruled.

THE WITNESS: I told them that.

Q. Yes?

A. Yes.

Q. Now, you've testified that you told them that you felt he resembled the man. You actually told them, you said that number two sort of looked like the guy, correct?

A. Correct.

Q. And you're certain about that, correct?

A. That was what I had said before.

Q. Yes?

A. Right.

Q. One more question. You actually told the officer you couldn't be sure this was the man, right?

A. When I saw the photo?

Q. Yes.

A. Yeah.

Q. But you want the jury to believe now, a few years later, that you're sure this is the man?

MS. CARRINGTON: Objection.

THE COURT: Sustained. We'll let the jury make its own decision.

MR. CARNEY: Nothing further.

REDIRECT EXAMINATION BY MS. CARRINGTON:

Q. Randy, did you take any notice of the