A *Sandoval* Victory Lost and a Good Faith Basis

By John Brunetti

Most lawyers have either been taught or intuitively concluded that accrediting a witness in the beginning of direct examination is a fundamental tenet of trial advocacy. Indeed, an article published by the Association of Trial Lawyers of America asserts: "Always accredit your witness. In addition to name and address, you may inquire into educational background; work history; health history; the names, ages, and school or work locations of family members; *military service*; and club and organization memberships." When it comes to a criminal defendant who has won a favorable *Sandoval* ruling,[1] that would be bad advice.

Assume John Smith is on trial for burglary. At a pretrial meeting, the People express the intent to ask him about a criminal conviction for forgery in the third degree and a prior bad act of beating his wife that did not result in an arrest. The court rules, pursuant to *People v. Sandoval*,[2] that the probative weight as to both topics is outweighed by its prejudicial effect. The court precludes their use during cross-examination of the accused.

When Mr. Smith takes the stand, assume that after he provides name, address, occupation, and family background, the following ensues:

Q. Have you ever served in the military?

A. Yes.

Q. What branch?

A. Marine Corps.

Q. What type of discharge did your get?

A. Honorable.

During the middle of cross-examination, the prosecutor asks the following question:

Q. Isn't it a fact that on April 30, 2015, you struck your wife with an axe?

There is an objection based upon the *Sandoval* ruling and the rule that, by taking the stand at trial, a criminal defendant does not put his character in issue so as to allow proof of bad character by the People.[3]

The correct ruling on these two arguments is "Overruled"! Why?

The defendant became his own character witness and thereby opened the door to questioning that might otherwise have been precluded as a result of his successful *Sandoval* motion. Who says so? The Third Department—twice—once for a bad act and once for a conviction.

In *People v. Morehouse,* the Court ruled that "[d]uring defendant's testimony, he attested to his good character by submitting his military service record. Therefore, he opened the door to questioning concerning the prior bad act."[4] The Court cited *People v. Jones*,[5] where "[a]fter a favorable pretrial ruling on his *Sandoval* motion, the defendant took the witness stand and testified that while in the Marine Corps, serving in Vietnam, he received [a variety of awards]."

The Court ruled that since the only purpose of the military testimony was "evidence of good character," the question by the People, about the previously precluded conviction, was proper.

Proceedings in *People v. Smith* continue.

Counsel: All right, judge, but I have another objection.

Court: Yes?

Counsel: There is no good-faith basis for the question about the axe attack.

Court: Very interesting!

A witness in any civil or criminal case, whether a party or not, does not expose himself to cross-examination about a prior bad act[6] unless the cross-examiner has a good faith basis[7] to ask about it. The rule statement begs the question: exactly what constitutes a "good faith basis" for asking a prior bad act question on cross-examination?

The Court of Appeals tells us that the cross-examiner must have "some reasonable basis for believing the truth of things [s/he is] asking about,"[8] and that the judge makes that determination by ascertaining whether "the question pertains to an actual occurrence."[9] Examples of good faith bases include questions based on sworn testimony,[10] and, by extension, a description of an act alleged under oath or under penalty of a false statement prosecution. Thus, an act recounted in an affidavit, verified civil complaint, or in a police report of an interview of a person who reported an incident[11] would provide a good faith basis for asking about it, but the mere existence of a federal lawsuit naming the witness without a specific allegation of misconduct would not.[12] However, good faith bases are not limited to sworn statements. "There is no requirement that the [cross-examiner's] good-faith basis stem from evidence in admissible form."[13] Thus, even an unsworn disciplinary letter addressed to a witness by an employer fits the bill for a good faith basis.[14]

What does not constitute a good faith basis for a prior bad act question? One for which the judge rules that there is no "reasonable basis for believing the truth of things [counsel is] asking about,"[15] because the judge is not satisfied that "the question pertains to an actual occurrence."[16] Examples include an act verbally attributed to the accused by unnamed residents of a housing project[17] and an act of

misconduct at a school which was not sufficiently documented so as to satisfy the judge that the incident actually occurred.[18]

When it comes to criminal charges that did not result in a conviction, the waters get a bit murky. As a general rule, a charge for a criminal act that resulted in either an acquittal[19] or a dismissal on the merits[20] may not be asked about—a good faith basis is deemed eliminated by both results. Counsel seeking to impeach the witness by inquiring into an alleged bad act which was the subject of a criminal prosecution carries the burden of establishing that the witness was not acquitted and that a dismissal was not on the merits.[21] If counsel sustains that burden (notwithstanding sealed record provisions),[22] inquiry will be proper.[23]

It is important to remember that there are only three types of final dispositions of criminal cases: conviction, acquittal and dismissal. Unlike a conviction and an acquittal, a dismissal is often an "unexplained termination"[24] that provides no basis for determining whether the reason for the dismissal "bespeaks the absence of a reasonable basis for believing the truth of the charge."[25] Thus, the Court of Appeals has ruled that a witness may not be asked about acts underlying a charge that was dismissed at the close of the People's case,[26] yet may be asked about an incident presented to a grand jury that did not result in an indictment.[27] A criminal charge that was dismissed in satisfaction of a guilty plea to an unrelated charge would not seem not to be a dismissal on the merits[28] nor would or a dismissal in the interests of justice or an adjournment in contemplation of dismissal which leads to a dismissal.

Let's return to our scenario involving Mr. Smith. A police report of the incident recounting the spouse's allegations of assault would be enough for a good faith basis, but a mere unsworn verbal statement made by the spouse to the cross-examiner might not, depending on the judge's discretion, of course!

Endnotes

1. People v. Sandoval, 34 N.Y.2d 371 (1974).
2. People v. Sandoval, 34 N.Y.2d 371 (1974).
3. People v. Nuzzo, 294 N.Y. 227, 233 (1945) ["A defendant does not put his general character in issue by taking the stand unless he introduces affirmative proof of good character."]; People v. Kuss, 32 N.Y.2d 436, 443 (1973) ["Whether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise."].
4. People v. Morehouse, 5 A.D.3d 925, 928 (3d Dep't 2004).
5. People v. Jones, 121 A.D.2d 398, 399 (1986). Conviction.
6. People v. Sorge, 301 N. Y. 198, 200; People v. Webster, 139 N. Y. 73, 84.
7. People v. Greer, 42 N.Y.2d 170, 176 (1977) ["Scarcely necessary for repetition is the rule that a defendant who chooses to testify may be cross-examined concerning any immoral, vicious or criminal acts of his life which have a bearing on his credibility as a witness, provided the crossexaminer questions in good faith and upon a reasonable basis in fact."].
8. People v. Alamo, 23 N.Y.2d 630, 633 (1969).
9. People v. Alamo, 23 N.Y.2d at 633, citing 3 Wigmore, Evidence [3d ed.], § 988 and Fisch, New York Evidence, § 178, p. 94.
10. People v. Montgomery, 216 A.D.2d 332 (2d Dep't 1995) ["The challenged questions were based on information derived from the Grand Jury proceedings. Therefore, the prosecutor had a good-faith basis for asking them."].
11. People v. Grant, 186 A.D.2d 267 (2d Dep't 1992) ["The questions posed concerning the gasoline station attendant were predicated upon a police report reciting the attendant's recollections that a man matching the defendant's description had purchased gasoline in an anti-freeze container near the scene of the fire shortly before the conflagration erupted. Likewise, a police **report** also indicated that the defendant was acquainted with a local livery cab driver and thus, a good faith basis existed for the prosecutor's questioning concerning an alleged encounter between the defendant and this driver following the fire."].
12. People v. Andrew, 54 A.D.3d 618 (1st Dep't 2008) ["The mere existence of the federal litigation was not a proper subject for cross-examination and the defense failed to establish a good faith basis for eliciting the underlying facts as prior bad acts as the complaints and amended complaints in the federal actions did not allege, or even support an inference, that this detective personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers."].
13. People v. Sealy, 167 A.D.2d 362 (2d Dep't 1990).
14. Winant v. Carras, 208 A.D.2d 618 (2d Dep't 1994) ["The plaintiff claims that it was reversible error for defendant Epstein's counsel to question the plaintiff's expert during cross-examination with respect to the expert's alleged drug addiction which, it was contended, had caused his employer to suspend his clinical activities. The questions, which were asked in good faith and based on a letter by the expert's employer, were properly used to cross-examine the expert with regard to inconsistent statements and his character in general."].
15. People v. Alamo, 23 N.Y.2d 630, 633 (1969).
16. People v. Alamo, 23 N.Y.2d at 633, citing 3 Wigmore, Evidence [3d ed.], § 988 and Fisch, New York Evidence, § 178, p. 94.
17. People v. Hargrove, 213 A.D.2d 492 (2d Dep't 1995) ["[D]efense attorney's offer of good faith for seeking responses to the questions which he was precluded from asking, was that he had been told by some residents of the housing project where the witness resided that the witness had previously dealt in stolen goods. The information allegedly obtained from people in the housing project constituted hearsay, and the trial court did not improvidently exercise its discretion in precluding questioning on the subject."].
18. People v. Colas, 206 A.D.2d 183 (1st Dep't 1994) [Prosecutor "phrased her questions to defendant to suggest that he 'grabbed a woman,' who was a fellow student at a school he attended, and 'dragged' her 'to a spot further down in the hallway to a corner in a secluded part of that hallway'… Discussion at a Bench conference reveals that no arrest resulted from this asserted assault. The school never reported it, and it was unknown whether any internal disciplinary action was taken against defendant as a result. Finally, the court was told that the alleged victim had no recollection of the incident, which was recounted to an investigator by an administrator at the school."].
19. People v. Alamo, 23 N.Y.2d 630, 633 (1969). People v. Schwartzman, 24 N.Y.2d 241; People v. Booker, 134 A.D.2d 949 (4th Dep't 1987).
20. People v. Steele, 168 A.D.2d 937, 938 (4th Dep't 1990) ["An acquittal of the witness or a dismissal on the merits negates the good-faith and basis-in-fact requirements."].

21. People v. Plaisted, 2 A.D.3d 906, 908 (3d Dep't 2003) ["Here, because defense counsel failed to 'demonstrate that the absence of convictions for those alleged crimes was for any reason other than an acquittal or dismissal on the merits,' we agree with County Court's determination that the subject questions were improper."]; *see also* People v. Grant, 291 A.D.2d 912 (4th Dep't 2002); People v. Stabell, 270 A.D.2d 894 (4th Dep't 2000).

22. CPL 160.50 for dismissals and acquittals; CPL 160.55 for non-criminal convictions. See also People v. Hunter, 88 A.D.2d 321 (2d Dep't 1982) ["We hold that where inquiry discloses that the basis for impeachment of a witness by interrogation concerning prior criminal, vicious, immoral or wrongful acts involving moral turpitude is the improper inspection and use of police records made confidential by section 784 of the Family Court Act, the Judge presiding at the trial should inform the witness that the source of the cross-examiner's question is privileged from disclosure and that he or she may either waive the privilege and consent to answer the questions or may refuse to waive it, in which event the jury must be instructed to disregard the questions."].

23. People v. Matthews, 68 N.Y.2d 118, 123 (1986) [inquiry proper where charge "was not finally dismissed on the merits"].

24. People v. Vidal, 26 N.Y.2d 249, 253 (1970) ["The otherwise unexplained 'termination' of the assault charge is not an acquittal, which bars cross-examination of the underlying acts."].

25. People v. Korn, 40 A.D.2d 561 (2d Dep't 1972).

26. People v. Vidal, 26 N.Y.2d 249, 253 (1970) ["Nor is a 'termination' necessarily tantamount to an acquittal, as is, for example, the dismissal of a case at the close of the prosecution's case."].

27. People v. Alamo, 23 N.Y.2d 630, 633 (1969) [[T]he failure of the Grand Jury to indict defendant for the taxicab robberies did not make it improper for the prosecutor to question defendant as to the underlying fact."].

28. People v. Steele, 168 A.D.2d 937, 938 (4th Dep't 1990) ["The record reveals that the charges against Ridgeway were dismissed and that the dismissal was not the result of a plea bargain or the grant of youthful offender treatment. Defense counsel was unable to establish that the dismissal was not on the merits, and thus, failed to establish a factual or good-faith basis for further inquiry. The trial court, therefore, did not abuse its discretion in restricting that line of questioning."].

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