Case Western Reserve Law Review

Volume 18 | Issue 5

1967

Criminal Law--Confessions--Custodial Interrogation [*United States v. Davis*, 259 F. Supp. 496 (D. Mass. 1966)]

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CRIMINAL LAW — CONFESSIONS — CUSTODIAL INTERROGATION

United States v. Davis, 259 F. Supp. 496 (D. Mass. 1966).

A plain reading of *Miranda v. Arizona*[1] demands that its holding be applied beyond the precise facts found in the case and used to delineate a procedural code which will guide police and courts in the use of a defendant's pre-trial admissions against interest.[2] If this code is not to be emasculated as were the ones announced in *Escobedo v. Illinois*[3] and *McNabb v. United States*,[4] then it must not be limited to the precise facts of police-station custody presented in *Miranda* and the three companion cases which were reversed for lack of warnings.[5] Applying an exclusionary rule based upon the fifth and sixth amendments, the United States Supreme Court said:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way.[6]

By this language the Court obviously did not mean to limit "custodial interrogation" to interrogation-room questioning but to

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[1] 384 U.S. 436 (1966).

[2] "Admissions against interest" is the preferred term because the court in *Miranda* stresses that no distinction shall be made between inculpatory and exculpatory statements. *Id.* at 477.

[3] 378 U.S. 478 (1964). The case holds that when the interrogation process becomes accusatory and its purpose is to elicit a confession, the accused must be permitted to consult with his lawyer. For restrictive interpretations, see United States v. Cone, 354 F.2d 119 (2d Cir. 1965); People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33, *cert. denied*, 380 U.S. 961 (1964); State v. Fox, 131 N.W.2d 684 (Iowa 1964); State v. Howard, 383 S.W.2d 701 (Mo. 1964); People v. Gunner, 15 N.Y.2d 852, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965); State v. Puckett, 201 N.E.2d 86 (C.P. Ohio 1964). See generally Herman, *The Supreme Court and Restrictions on Police Interrogations*, 25 OHIO ST. L.J. 449, 494 (1964). See also Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 31 (1965).

[4] 318 U.S. 332 (1943). For restrictive interpretations, see cases collected in Hogan & Smee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 6 (1958). See, *e.g.*, Metoyer v. United States, 250 F.2d 30 (D.C. Cir. 1957); United States v. Haupt, 136 F.2d 661, 671 (7th Cir. 1943).

[5] *Miranda v. Arizona* and the three cases decided with it, *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*, all dealt with interrogation at the police station.

[6] 384 U.S. at 444. "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Id.* at 444 n.4.

impose constitutional limitations upon all questioning of persons who have been placed in a compelling atmosphere by being deprived of their freedom of action in any significant way.[7]

The recent decision in *United States v. Davis*[8] ignored *Miranda's* broad application and limited its definition of custodial interrogation. The court upheld the admissibility of incriminating statements made by the defendant while he was being questioned by customs officers even though he had not been warned of his rights to silence and counsel.[9]

Defendant Davis was a citizen and a crew member on a United States ship re-entering the country. Customs officers boarded the ship to make a routine search for contraband[10] and found two envelopes containing marijuana in an overhead vent. Later the customs officers searched the defendant's cabin in his presence and found a marijuana cigarette in his locker. While the officers continued their search, the defendant asked permission to go to the bathroom. He was first searched, then allowed to go, but only under escort by a customs officer. Further search, with the defendant present, revealed a package of marijuana cigarettes. The officers questioned the defendant as to where he had purchased the cigarettes and were told that he had bought them in Mexico. The detention and questioning lasted approximately an hour and a quarter, after which the defendant was told that he was free to move about the ship but not to leave.[11] The customs officers left the ship, procured an arrest warrant, and returned, going straight to the defendant's cabin. Without showing their arrest warrant, they asked him if he had paid tax on the marijuana. He replied that he had not and was told that he was under arrest for violation of the narcotics

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[7] *Cf.* Jones v. Cunningham, 371 U.S. 236 (1963), where a paroled prisoner's liberty was held to have been sufficiently restrained to find him "in custody" within the meaning of the federal habeas corpus statute, even though he was free to come and go as he pleased or change residences, subject to his parole officer's consent.

[8] 259 F. Supp. 496 (D. Mass. 1966).

[9] The cautionary warnings required by *Miranda* are: "He must be warned prior to questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning." 384 U.S. at 479.

[10] The search was authorized by 14 Stat. 178 (1866), 19 U.S.C. § 482 (1964); 46 Stat. 747 (1930), as amended, 19 U.S.C. § 1581 (1964); 46 Stat. 748 (1930), 19 U.S.C. § 1582 (1964).

[11] For the Supreme Court's interpretation of a similar fact situation, see Jones v. Cunningham, 371 U.S. 236 (1963). For a discussion of the case see note 7 *supra.*

laws of the United States.[12] At this point, after having obtained all necessary admissions, the officers told the defendant that anything he said could be used against him and that he had the right to retain counsel.[13]

The court refused to hold that the delay in advising the defendant of his rights to silence and counsel required the sustaining of a motion to suppress the admissions against interest. Although the court conceded that Davis had been "under detention" during his questioning,[14] it refused to find that he had been "deprived of his action in a significant way" so as to call for the application of the exclusionary rule announced in *Miranda*.[15] This reasoning confines *Miranda* to its precise fact situation despite the Supreme Court's broad statement that "There can be no doubt that the fifth amendment serves . . . to protect persons *in all settings in which their freedom of action is curtailed* from being compelled to incriminate themselves."[16] It seems obvious that a compelling atmosphere is present whether the setting is in a police interrogation room or on a ship. It is not the physical location that is important but rather the detention. Therefore, it is submitted that "custodial interrogation" was improperly limited by the court in *United States v. Davis*.

There are two approaches that the courts might take in the future to determine the existence of custodial interrogation — they might employ either an objective or a subjective standard.[17] The objective test would look to the police officer's testimony relating to his intention to make an arrest, plus the circumstances surrounding the interrogation. This would indicate whether a suspect in such a setting would feel that he was in custody and therefore compelled to answer questions. The subjective test would look further and consider the individual suspect's personality, that is, whether a person having his background and character traits would feel he was in custody and compelled by the setting to answer questions.

The New York courts have applied the objective test to deter-

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12 68A Stat. 563 (1954), 26 U.S.C. § 4751 (1964); 68A Stat. 564 (1954), 26 U.S.C. § 4753 (1964); 68A Stat. 565 (1954), 26 U.S.C. § 4755 (1964).

13 259 F. Supp. at 497.

14 *Ibid.*

15 *Id.* at 498.

16 384 U.S. at 467. (Emphasis added.)

17 This writer's denotation of "subjective" and "objective" should not be confused with those of Judge Sobel in People v. Allen, 50 Misc. 2d 897, 905, 272 N.Y.S.2d 249, 256-57 (Sup. Ct .1966).

mine the existence of custodial interrogation and have looked to whether the suspect was free to go during questioning by police.[18] If he was not, then the four-fold warning of *Miranda* must have been given if the suspect's statements are to be admissible. In *People v. Reason*[19] the court held that the questioning of two burglary suspects on the street was custodial interrogation when three officers formed a circle around the suspects, and one officer testified that he would have restrained the suspects had they tried to move away.[20] In *People v. Allen*,[21] statements given to a police officer in the suspect's home without prior warnings were held inadmissible on the basis of the police officer's testimony that he went to the suspect's home to apprehend him and that the suspect would not have been free to leave voluntarily.[22] The court in *Allen* interpreted *Miranda* to require warnings before questioning a suspect "so long as the defendant was not at such time free to go."[23]

Inclusion of a subjective test seems necessary to meet many situations. For example, the police may not intend to arrest a man when they question him, so that their testimony will not show an intent to detain; nevertheless, the suspect may be subjectively aware of a compelling atmosphere.[24] Thus, the individual suspect's background must be considered to determine his susceptibility to the pressure of police presence. This is a necessary part of applying *Miranda*, since the Supreme Court has reaffirmed the subjective basis of the fifth amendment privilege in *Davis v. North Carolina*,[25] a post-*Miranda* case. *Davis* tends to show that the fifth amendment privilege is personal to the defendant and is not grounded solely in deterring offensive police practices.[26] This necessitates looking to the individual defendant to determine whether the lack

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18 See *id.* at 900, 272 N.Y.S.2d at 252.

19 276 N.Y.S.2d 196 (Sup. Ct. 1966).

20 *Id.* at 199.

21 50 Misc. 2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966).

22 *Id.* at 899-900, 272 N.Y.S.2d at 251-52.

23 *Id.* at 900, 272 N.Y.S.2d at 252.

24 See Judge Sobel, commenting in *ibid.*, that this will be the more difficult and recurring situation. *Cf.* Catalanotte v. United States, 208 F.2d 264 (6th Cir. 1953), where statements made by the defendant to police permitting them to search his house were held not to constitute consent because the defendant had probable cause to consider himself under duress or arrest at the time he made the statements.

25 384 U.S. 737 (1966); see Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

26 See Johnson v. New Jersey, 384 U.S. 719 (1966). See also Linkletter v. Walker, 381 U.S. 618 (1965).

of warnings would tend to make him subjectively aware of a compelling atmosphere.[27]

In *United States v. Davis*, the court could have found custodial interrogation from the objective factor of an hour and a quarter of questioning accompanied by detention during which the suspect was not even free to go to the bathroom without a police escort. The defendant's subjective awareness of compelling circumstances would require an inquiry which was not shown in the record as to defendant's individual traits.

The *Davis* court's strict construction of custodial interrogation can be understood after reading its cursory consideration of pre-*Miranda* interrogation rules. In a brief paragraph the court states that prior to *Miranda* no federal or common law rule required exclusion of a suspect's statement taken without warnings.[28] The court cited two early cases to support its holding: *Powers v. United States*[29] and *Wilson v. United States*.[30] Thus, the court ignored *Haynes v. Washington*[31] which made the absence of warnings a factor to consider,[32] and turned its back on the controversy in the courts over the meaning of *Escobedo*.[33] It rejected what one distinguished legal writer had said was the narrowest construction possible of *Escobedo v. Illinois*: "At the very least, *Escobedo* . . . overrules, sub silentio, *Powers v. United States* and *Wilson v. United States*."[34] This slight examination of the pre-*Miranda* area of police interrogations further weakens the *Davis* court's analysis of *Miranda*.

One line of reasoning which the court did not follow, but which might be tried in future cases involving questioning by customs officers, is to analogize custodial interrogation to "border searches."[35]

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[27] See Davis v. North Carolina, 384 U.S. 737 (1966); Culombe v. Connecticut, 367 U.S. 568 (1961); *cf.* Betts v. Brady, 316 U.S. 455 (1942).

[28] 259 F. Supp. at 498.

[29] 223 U.S. 303 (1912).

[30] 162 U.S. 613 (1896).

[31] 373 U.S. 503 (1963).

[32] *Id.* at 516-17.

[33] *Compare* People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), *with* People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). See also People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33, *cert. denied*, 380 U.S. 961 (1964); State v. Fox, 131 N.W.2d 684 (Iowa 1964); State v. Howard, 383 S.W.2d 701 (Mo. 1964).

[34] Herman, *supra* note 3, at 475 n.154.

[35] See generally 18 W. RES. L. REV. 1007 (1967). Border searches may be made upon mere suspicion according to statute. 14 Stat. 178 (1866), 19 U.S.C. § 482 (1964).

A long line of cases has established a rule allowing customs officers far wider discretion in search and seizure procedures than is allowed any other state or federal police agency.[36] This has never been extended to questioning procedures, but it could easily be attempted in a case such as *Davis*. The reason, however, for elasticizing the fourth amendment during border searches is absent in cases concerning the fifth amendment. In the search and seizure instance, the courts reason that no right of privacy exists as to property on which no duty has been paid, and therefore the government has a primary right to possession of such property.[37] However, the government cannot be said to have any primary right to a suspect's admissions of guilt. Therefore, it would seem that customs officers can have no greater discretion than other police to withhold *Miranda*-type warnings.

A conviction based on Davis' pre-arrest confession would have been difficult to sustain, whatever reason the court had chosen. Further case law, it is submitted, will not support the court's holding of no custodial interrogation. The United States Attorney's decision not to introduce the defendant's statements at trial[38] is thus welcomed as a realization that the court's interpretation of *Miranda* was incorrect.[39] It is hoped that other courts will not be misled by the *Davis* decision.

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[36] Carroll v. United States, 267 U.S. 132 (1925); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 381 U.S. 920 (1965); Blackford v. United States, 247 F.2d 745 (9th Cir.), *cert. denied*, 356 U.S. 914 (1957).

[37] Boyd v. United States, 116 U.S. 616, 623-24 (1886); Corngold v. United States, 367 F.2d 1, 15 (9th Cir. 1966). See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965).

[38] United States v. Davis, Criminal No. 66-68, W.D. Mass., Dec. 22, 1966.

[39] *Cf.* State v. Silvacarvalho, 180 Neb. 755, 145 N.W.2d 447 (1966), holding that admissions obtained in violation of *Miranda* would not vitiate a conviction when the statements were not introduced into evidence.