Buffalo Law Review

Volume 13 | Number 2 Article 21

1-1-1964

Criminal Law—Inculpatory Statements Given Before Arraignment Where Consultation with Counsel Refused, Now Inadmissable.

James B. Denman

in the instant case for there are no disputed facts.[34] The claimant has possession of the appellant's check. The State admittedly owes the claimant the sum demanded, and thus the purpose of the statute of limitations is not being served. On the other hand, the purpose of the constitutional provision limiting claims to those which would not be barred if occurring between private citizens is to prevent grossly unjust claims from being allowed by a special act of the Legislature.[35] In the instant case, there is no reason to believe that this is such a claim. The contract was faithfully performed by claimant for his work. The Court's decision, then, does not appear to follow the spirit of either the statute of limitations or the constitutional provision. To hold otherwise, however, the Court would have had to disregard the clear mandate of both.

George P. Doyle

CRIMINAL LAW—INCULPATORY STATEMENTS GIVEN BEFORE ARRAIGNMENT WHERE CONSULTATION WITH COUNSEL REFUSED, NOW INADMISSABLE.

Defendant Donovan was arrested as a suspect in connection with the killing of a guard shot during a payroll robbery. The arrest was accomplished at about 7:30 p.m. on Thursday, May 11, 1961.[1] Defendant was thereafter questioned continuously until 3:00 a.m. of May 12.[2] Interrogation was resumed later the same morning, and, at 10:00 a.m., Donovan admitted complicity in the crime.[3] In mid-afternoon of the same day, counsel retained by defendant's family requested access to the defendant but was turned away by the officers in charge.[4] On the heels of this incident, an assistant district attorney conducted a question and answer session with the defendant.[5] This conversation yielded a lengthy inculpatory statement which the defendant signed in the closing hours of the day.[6] On the morning of May 13, approximately one and one half days after arrest, defendant was arraigned. All evidence acquired during this period, including defendant's written statement, was admitted at trial. The jury returned a verdict of guilty against Donovan and one co-defendant without recommendation of leniency.[7] Both defendants were then sentenced to death. On direct appeal to the Court of Appeals, *held*, reversed, with three judges joining in the majority opinion, one concurring and three dissenting. Under the New York Constitution, both the provision assuring right to counsel and the guarantee of due process, require exclusion of inculpatory statements given by the accused during informal, pre-arraignment proceedings if, prior to the time the damaging statement was

34. Instant case at 510, 191 N.E.2d at 456, 240 N.Y.S.2d at 974.
35. Cayuga County v. State, 153 N.Y. 279, 47 N.E. 288 (1897).

1. Record, vol. 1, pp. 179-80.
2. Record, vol. 2, p. 992.
3. Record, vol. 1, pp. 233-39.
4. Record, vol. 2, pp. 1017-18.
5. Record, vol. 2, p. 787.
6. Record, vol. 2, pp. 790-91.
7. Record, vol. 1, pp. 15-16.

given, consultation with counsel has been refused either to the accused or to the attorney himself.[8] *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

In this case, and in several recent related decisions, the Court of Appeals has sought to develop standards which will minimize the impairment of a defendant's constitutional safeguards at trial through informal and frequently unconscionable methods of pre-trial interrogation.[9] The rights impaired are said to be those of due process,[10] right to counsel,[11] and freedom from "testimonial compulsion."[12] Changes in the law have deliberately implemented the rule which long stood in both the New York and federal jurisdictions, holding that statements not voluntarily given are not admissable.[13] This rule has been supplemented in the federal jurisdiction by making inadmissable any statements, regardless of voluntariness, if made by the defendant while illegally detained (*McNabb-Mallory* rule).[14] Detention becomes illegal, for purposes of this rule, where there has been an unnecessary delay in arraignment.[15] Although the New York Court of Appeals has expressed some sympathy for *McNabb*,[16] the majority has declined to accept the rule, preferring instead to let the jury treat delay in arraignment as a factor affecting the voluntariness of the statement.[17] This position is consistent with the requirements of due process under the fourteenth amendment;[18] federal constitutional protection does not mandate an acceptance of the higher standard expressed by the *McNabb-Mallory* rule.[19]

New York has also implemented the voluntariness rule, but it has chosen to do so by extending an accused's right to counsel to post-arraignment,[20] and

8. N.Y. Const. art. I, § 6.
Note that the case is susceptible of a narrower holding since the relevant events occurred after there had been an unreasonable delay in arraignment. The Court, however, would seem to say that the right could inure from the moment of arrest.

9. Spano v. New York, 360 U.S. 315 (1959); People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962); People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962); People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961); People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

10. Instant case at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843.

11. Cases cited note 9 *supra*.

12. *Ibid.* "Testimonial compulsion" probably should be subsumed under due process, the privilege against self-incrimination not extending beyond the witness stand. See 49 Cornell L.Q. 146 n.7 (1963); 3 Wigmore, Evidence § 844 (3d ed. 1940).

13. Wilson v. United States, 162 U.S. 613, 623 (1896); People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961); People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932).

14. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943); Fed. R. Crim. P. 5(a); see N.Y. Code Crim. Proc. § 165; N.Y. Penal Law § 1844 (misdemeanor where police unnecessarily delay arraignment).

15. Mallory v. United States, *supra* note 14, at 453.

16. People v. Lane, 10 N.Y.2d 347, 354, 179 N.E.2d 339, 341, 223 N.Y.S.2d 197, 200 (1961) (concurring opinion).

17. People v. Lane, *supra* note 16; People v. Elmore, 277 N.Y. 397, 14 N.E.2d 451 (1938).

18. Fikes v. Alabama, 352 U.S. 191 (1951); Watts v. Indiana, 338 U.S. 49 (1949); Brown v. Mississippi, 297 U.S. 278 (1936).

19. Cicenia v. Lagay, 357 U.S. 504, 508 (1958); Crooker v. California, 357 U.S. 433, 439 n.4 (1958).

20. Cases cited note 9 *supra*.

(through the instant case) to informal pre-arraignment proceedings. It was first held, in a capital case, that post-arraignment questioning in the absence of counsel was an unconstitutional denial of one's right to counsel.[21] This holding has since been extended to felony cases generally,[22] the rule now being more fully articulated as follows: "It is the interrogation, in the absence of counsel, after the criminal proceeding has been commenced, whether by grand jury indictment or by a charge placed before a magistrate following an arrest, which is forbidden."[23] The federal courts have held that the requirement of due process under the fourteenth amendment does not extend this far;[24] due process does require a right to counsel at trial,[25] but in pre-trial proceedings there is satisfaction if the defendant is not ". . . so prejudiced thereby as to infect his subsequent trial with an absence of . . . 'fundamental fairness'. . . ."[26] Pre-trial denial of counsel may, however, for purposes of the fourteenth amendment, be relevant in evaluating the voluntariness of a statement.[27]

In the present case, a bare majority held that in pre-arraignment proceedings, where conference with counsel has been refused, any inculpatory statements thereafter made by the accused are not admissable.[28] Refusal of conference with counsel arises either where the accused has requested and has been refused counsel, or where an attorney retained on behalf of the accused has been denied access to his client.[29] It should be emphasized that the holding adverts repeatedly to the fact that the inadmissable statements were made during a period of unlawful detention. Whether, however, the Court would require this additional element as a prerequisite to right of counsel is not made explicit in the opinion. It should further be noted that this holding does not extend the existing New York post-arraignment rule (excluding statements made merely in the *absence* of counsel)[30] to pre-arraignment proceedings. Three judges dissented separately, agreeing with one another however, that evidence obtained under the circumstances of this case should be excluded only if involuntarily given.[31] The dissenting judges note in particular that the majority holding tends to favor those who,

21. People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).
22. People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).
23. People v. Rodriguez, 11 N.Y.2d 279, 284, 183 N.E.2d 651, 652, 229 N.Y.S.2d 353, 355 (1962).
24. Cases cited note 19 *supra*; United States *ex rel.* Morrison v. LaVallee, 206 F. Supp. 679 (N.D.N.Y. 1962).
25. Herman v. Claudy, 350 U.S. 116 (1956); Chandler v. Fretag, 348 U.S. 3 (1954); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).
26. Crooker v. California, 357 U.S. 433, 439 (1958) (arrestee a former law student); see Lisenba v. California, 314 U.S. 219, 236 (1941). The New York Court of Appeals thus holds that a denial of counsel in pre-trial proceedings is conclusive of consequent prejudice at the trial.
27. Watts v. Indiana, 338 U.S. 49 (1949).
28. Applying the holding to the facts, it is apparent that Donovan's oral admission of complicity would be admissable, but that his signed statement would not be.
29. In this case the attorney requested an interview with the accused. Instant case at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 842.
30. People v. Meyer, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).
31. See People v. Noble, 9 N.Y.2d 571, 175 N.E.2d 451, 216 N.Y.S.2d 79 (1961).

through some fortuity such as wealth, habitual contact with the law, or intelligence, retain counsel either before or immediately after arrest.

The dissenting opinions unfortunately do not refer to one remarkably compelling argument with which the Court was faced in this case: that is, had the police officers not unlawfully delayed arraignment,[32] the conviction would have been summarily reversed on the authority of the post-arraignment right-to-counsel rule of *People v. Meyer*.[33] This irony must have called irresistably for reversal, but the Court, in so doing, has perhaps extended its ruling farther than conscience required. It would be sufficient to confer a right of counsel only where there has been an unlawful delay in arraignment.[34] If the Court has indeed so ruled, the conflict with efficient law enforcement which the dissenting judges foresee in their more liberal interpretation of the case,[35] would be moderated some. Yet this narrower holding does not alter the tendency of the present rule to favor persons with ready access to counsel over those with limited access. Said differently, the rule favors grand scale crime over petty crime, and this, of course, is an undesirable result. The three possible defects of the present rule (inequality of application, favoritism of large scale crime, and unnecessary interference with law enforcement) should evoke some reconsideration.

James B. Denman

REAL AND PERSONAL PROPERTY—PROCEEDS OF FIRE INSURANCE POLICY ON REAL PROPERTY HELD BY THE ENTIRETY MAY BE DIVIDED AS OF RIGHT.

Husband and wife were owners as tenants by the entirety of real property with improvements thereon. A dwelling house, covered by a fire insurance policy owned and held by them, was totally destroyed by fire. Upon execution of notice of claim by the owners the insurance company issued a draft payable to husband, wife, and another who was mortgagee of the property. Husband, who had been separated from the wife for some time, refused to endorse the draft. Upon wife's action for injunctive and other relief, husband moved to dismiss on the grounds that the proceeds were impressed with the same quality of inseverability as the estate they replaced. The Supreme Court granted the motion,[1] which was affirmed without opinion by the Appellate Division, Fourth Department. The Court of Appeals, two judges dissenting without opinion, reversed; *held*, the proceeds of a standard fire insurance are personal property which may be divided upon demand regardless of the nature of the estate they replace. *Hawthorne v. Hawthorne*, 13 N.Y.2d 82, 192 N.E.2d 20, 242 N.Y.S.2d 50 (1963).

32. N.Y. Code Crim. Proc. § 165; N.Y. Penal Law § 1844.
33. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962). See Brief for Appellant, p. 37.
34. See note 28 *supra*.
35. Instant case at 159, 193 N.E.2d at 634, 243 N.Y.S.2d at 849.

1. Hawthorne v. Hawthorne, 24 Misc. 2d 508, 208 N.Y.S.2d 79 (Sup. Ct. 1960).