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EVIDENCE-CONFESSIONS-McNABB RULE NOT APPLICABLE UNDER THE FOURTEENTH AMENDMENT

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EVIDENCE—CONFESSIONS—MCNABB RULE NOT APPLICABLE UNDER THE FOURTEENTH AMENDMENT—Defendant, detained on a vagrancy charge in Texas, voluntarily confessed to a homicide committed in Nebraska. Upon his return to the latter state, the defendant repeated his confession and was subsequently arraigned, having been in custody for twenty-five days. The confessions were introduced at the trial[1] and a conviction of manslaughter followed. Defendant, failing to gain a reversal in the state court,[2] sought review by the United States Supreme Court, charging that a failure to arraign the defendant promptly in breach of local statutes[3] was a want of due process under the Fourteenth Amendment. On certiorari, *held*, affirmed, Justices Black and Douglas dissenting.[4] Illegal detention alone is not sufficient basis under the Fourteenth Amendment for excluding confessions used in state prosecutions. *Gallegos v. Nebraska*, 342 U. S. 55, 72 S.Ct. 141 (1951).

American courts have traditionally looked upon confessions with a feeling of mistrust. Most jurisdictions thus require additional corroborating evidence,[5] and many of these further demand that such complementing facts concern the *corpus delicti*.[6] To be admitted, confessions must have been made freely and without compulsion, either physical or psychological, for it is feared that

[1] Nebraska follows the so-called Massachusetts rule by which both the judge and jury pass upon the voluntary nature of the confession, Kitts v. State, 151 Neb. 679 at 684, 39 N.W. (2d) 283 (1949). This rule has been criticized as a dilution of responsibility by McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 at 250 (1946).

[2] The confessions were found to be voluntary and properly corroborated, Gallegos v. State, 152 Neb. 831, 43 N.W. (2d) 1 (1950).

[3] 2 Neb. Rev. Stat. 1113 (1948) §29-406; Tex. Code of Criminal Procedure (Vernon, 1925) arts. 998, 999, 217.

[4] Justice Black does not place his dissent explicitly on the Bill of Rights, but he reiterated this equation of the Bill of Rights to the Fourteenth Amendment Due Process Clause eight days later in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1951). This position has been criticized in the 1951 Ross Prize Essay, Kauper, "The First Ten Amendments," 37 A.B.A.J. 717 at 780 (1951).

[5] 7 WIGMORE, EVIDENCE, 3d ed., §§2070-2073 (1940).

[6] Gallegos v. State, supra note 2.

extracted admissions are untrustworthy.[7] Furthermore, the due process clause of the Fourteenth Amendment has been invoked to reverse convictions based upon confessions obtained in a manner which "shocks the conscience."[8] Thus, on undisputed facts,[9] which show a disregard for the protected fundamental rights, an appellant can gain a reversal although the confession was found to be trustworthy by the court below.[10] These "minimal standards" of decency have been supplemented in the federal courts by the imposition of rules of evidence designed to protect against police misconduct.[11] One of these, the McNabb rule, excludes confessions obtained during a detention which is illegal for want of prompt arraignment.[12] Since Nebraska does not adhere to the *McNabb* philosophy,[13] the defendant attempted to fit the exclusionary rule within the contours of the due process clause.[14] No precedent can be found for equating these evidence rules, designed to enforce federal statutes, to a remedy for police malpractice required by the Fourteenth Amendment.[15] Even the fruits of an illegal search and seizure, held inadmissible in the federal courts to give effect to the Fourth Amendment,[16] are not excluded under the Fourteenth Amendment. In *Wolf v. Colorado*,[17] the Supreme Court found that an illegal search and seizure was an abuse of the due process guaranty, and yet it held that the introduction of evidence thus obtained in state prose-

[7] 3 WIGMORE, EVIDENCE, 3d ed., §822 (1940).

[8] Brown v. Mississippi, 297 U.S. 278 at 285, 56 S.Ct. 461 (1936).

[9] Ashcraft v. Tennessee, 322 U.S. 143 at 148, 64 S.Ct. 921 (1944), the Court is not foreclosed by the finding of the facts of the lower court, construing Lisenba v. California, 314 U.S. 219 at 238, 62 S.Ct. 280 (1941). However, Lyons v. Oklahoma, 322 U.S. 596 at 602, 64 S.Ct. 1208 (1944), indicated that the Court would not deal with disputed facts but would review disputed inferences arising therefrom.

[10] Lisenba v. California, note 9 supra at 236; Watts v. Indiana, 338 U.S. 49 at 50, note 2, 69 S.Ct. 1347 (1949).

[11] Illegal search and seizure: Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914); wire tapping: Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275 (1937); detention without prompt arraignment: McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943).

[12] McNabb v. United States, note 11 supra; Upshaw v. United States, 335 U.S. 410, 69 S.Ct. 170 (1948), recently limited in United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97 (1951), noted in 50 MICH. L. REV. 772 (1952).

[13] Gallegos v. State, note 2 supra at 839; for other states which have refused to accept the McNabb rule see 19 A.L.R. (2d) 1336 (1951).

[14] Failure of a state court to apply the McNabb rule as it existed in the federal courts held not to be a denial of equal protection of law under the Fourteenth Amendment, Lyons v. Oklahoma, note 9 supra at 597, note 2.

[15] Appeal under the due process clause for failure promptly to arraign denied, United States ex rel. Weber v. Ragen, (7th Cir. 1949) 176 F. (2d) 579 at 584; see also McNabb v. United States, note 11 supra at 340. Weiss v. United States, 308 U.S. 321, 60 S.Ct. 269 (1939), extended the effect of the wire-tapping exclusion to intrastate commerce; however, Stemmer v. New York, 336 U.S. 963, 69 S.Ct. 936 (1949), in failing to reverse a state conviction based upon wire-tap evidence, limited the Weiss case to the federal courts; see comment 2 STANFORD L. REV. 744 (1950).

[16] Weeks v. United States, note 11 supra.

[17] 338 U.S. 25, 69 S.Ct. 1359 (1949).

cutions was not a want of due process nor was exclusion thereof a sanction required by the Constitution. The majority of the court in that case was impressed with the possible probative value of such evidence, the existence of other remedies to punish the abuse, the failure of states to accept the exclusionary rule as a remedy necessary to protect the right, and the less compelling need to erect safeguards against misconduct by the state police, who, it was thought, are more sensitive to public opinion than are federal officers. By this denial of the most effective remedy for a due process violation, the court appeared to be standing against the current of previous Fourteenth Amendment cases.[18] However, the common due process attack against state criminal convictions is aimed at the conduct of the trial,[19] and a reversal thereof erases the very wrong attacked. Even in the confession cases, where the Supreme Court examines the extraction of the evidence as well as its introduction at trial, it is the use of such evidence in court, not the police malpractice before trial, which is measured against the standards imposed by the due process clause.[20] Thus, in finding the pre-trial methods abusive in the *Wolf* case, the Court was not bound by precedent to reverse because wrongfully obtained evidence was used, unless it further found that the lower court fell below due process requirements in admitting such evidence. However, eight days after the *Gallegos* case was handed down, *Rochin v. California*[21] reversed a conviction grounded upon evidence gained through the abusive use of a stomach pump. In this case the court failed to make the careful delineation between police practice and trial methods as required by the *Wolf* case, in which the arguments employed weighed against reversal here.[22] It is difficult both to reconcile *Rochin* with *Wolf*[23] and to explain why the court in the principal case avoided mention of the *Wolf* rationale,[24] which was available to it on the facts.[25] However, by finding that prompt arraignment alone fell short of being a fundamental right protected by the Fourteenth Amendment, the case stands consistent with

[18] See comment on Wolf case, 64 HARV. L. REV. 1304 (1951).

[19] Trial dominated by threats of mob violence: Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265 (1923); denial of counsel in a capital case: Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932).

[20] Brown v. Mississippi, note 8 supra at 286; Lisenba v. California, note 9 supra at 235; principal case at 65.

[21] 342 U.S. 165, 72 S.Ct. 205 (1951).

[22] (1) The evidence against Rochin appeared highly trustworthy; (2) the police officers were admittedly guilty of torts against the defendant; (3) the majority of state courts do not apply exclusionary rules against illegally obtained evidence, Rochin, note 21 supra, p. 212, although California was aided by little specific authority admitting stomach pump evidence, People v. One 1941 Mercury Sedan, 74 Cal. App. (2d) 199, 168 P. (2d) 443 (1946); and (4) the wrong essentially complained of was the pre-trial state police methods here employed.

[23] See comment 50 MICH. L. REV. 1367 (1952).

[24] The Supreme Court was not unaware of the Wolf case which it recently re-affirmed, Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118 (1951).

[25] The decided weight of authority is against the McNabb rule in the state courts, note 13 supra.

either view, for the Court was not compelled to reason beyond this initial point to a remedy. Illegal detention again was characterized as merely another factor to be weighed in measuring the quantum of abuse employed by the police in obtaining a confession. By foreclosing a due process appeal, the Supreme Court leaves the state courts free to continue their rejection of the McNabb rule without fear of reversal on that ground alone.

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