

EXTRAJUDICIAL CONFESSION FOLLOWING INDICTMENT IS ADMISSIBLE

People v. Spano,

4 N.Y.2d 256, 150 N.E.2d 226 (1958)

In February 1957 Vincent Spano, accompanied by counsel, surrendered to an assistant district attorney of Bronx County, New York. He surrendered at 7:15 p.m. pursuant to a bench warrant issued following his indictment for first degree murder. Spano's counsel then left after warning him only to divulge his name. The accused was taken to the office of the assistant district attorney and questioned. Shortly after midnight he was taken to police headquarters for booking and fingerprinting. At about 3:30 a.m. he made a full confession after having spoken with a patrolman friend for approximately an hour. He was arraigned before a county court judge promptly that morning. During his trial this confession was admitted into evidence against Spano, and he was convicted. He appealed upon grounds that the confession, though voluntarily made, was inadmissible as evidence since it was obtained by police officers after indictment and surrender, and without the presence of counsel. The conviction was upheld by the New York Court of Appeals in a four to three decision.¹

The court here was not confronted with the federal *McNabb* rule² which excludes confessions obtained during illegal detention,³ since that rule applies only to the federal courts. Nor was the court concerned with the requirement of the fourteenth amendment that a confession to be admissible must be obtained without physical or psychological coercion,⁴ since no such coercion was alleged in this case. The issue

¹ *People v. Spano*, 4 N.Y.2d 256, 150 N.E.2d 226 (1958).

² A confession made before confinement where the accused is not promptly taken before a committing officer after arrest is inadmissible. *McNabb v. United States*, 318 U.S. 332 (1943).

³ The *McNabb* rule has been further defined in recent cases: *Mallory v. United States*, 354 U.S. 449 (1957) (It is unlawful detention to hold a prisoner from afternoon until the next morning without commitment when a magistrate is readily available.); *United States v. Carignan*, note 10 *infra*; *Upshaw v. United States*, 335 U.S. 410 (1948) (A confession obtained during unlawful detention is inadmissible even though entirely voluntary.). *But see United States v. Mitchell*, 322 U.S. 65 (1944) (A confession made prior to the time the detention becomes unlawful is admissible.). For a discussion of these cases see Hennings, *Detention and Confessions: The Mallory Case*, 23 Mo. L. Rev. 25 (1958).

⁴ “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. XIV, § 1. See *Rochin v. California*, 342 U.S. 165 (1952) (pumping stomach for evidence); *Watts v. Indiana*, 338 U.S. 49 (1949) (prolonged incommunicado questioning); *Haley v. Ohio*, 332 U.S. 596 (1948) (psychological coercion); *Malinski v. New York*, 324 U.S. 401 (1945) (held incommunicado, part of the time naked); *Brown v. Mississippi*, 297 U.S. 278 (1936) (physical brutality).

was raised that the confession was obtained during unlawful detention. The court disposed of this point by showing that unlawful detention alone does not make a confession inadmissible in New York,⁵ and by establishing that the detention in this instance actually was not unlawful. What then was there about this case which caused three judges of the New York Court of Appeals to believe that the confession was improperly admitted?

There is one feature which distinguishes this case from earlier New York confession cases. This confession was obtained through police interrogation after indictment and after surrender to the court on a bench warrant, not while the accused was merely a suspect as in the previous cases. As Judge Desmond stated in the dissenting opinion: "Now we accept as evidence a confession extracted during the very course of judicial proceedings. . . ."⁶ The dissenting justices sensed the presence of what we might term a constructive involuntariness.⁷ The bench warrant provided that Spano be brought before the court to answer the indictment, and it was for that purpose that he was in police custody. In light of the existence of the indictment and bench warrant the minority is technically correct in saying that the confession was extracted after the commencement of judicial proceedings.⁸ The issue becomes whether a prisoner so detained is deprived of due process when he is interrogated without counsel concerning the crime of which he stands accused.

Spano was a defendant and not a suspect. The state had already acquired sufficient evidence for indictment, and the need for further interrogation was questionable. The bench warrant required the defendant to be brought before the court to answer the indictment. The dissenting view is that such a deviation from these instructions violates the prisoner's constitutional rights. One can sense an element of unfairness in such procedure. The majority opinion carried to its logical

⁵ The test of a confession is its voluntariness. See *People v. Alex*, 265 N.Y. 192, 192 N.E. 289 (1934); *People v. Mummiani*, 258 N.Y. 394, 180 N.E. 94 (1932); *People v. Doran*, 246 N.Y. 409, 159 N.E. 379 (1927); *People v. Trybus*, 219 N.Y. 18, 113 N.E. 538 (1916); *Balbo v. People*, 80 N.Y. 484 (1880).

⁶ *People v. Spano*, *supra* note 1, 150 N.E.2d at 231.

⁷ Applying the due process standard, the United States Supreme Court has reversed a conviction based upon a confession gleaned after thirty-six hours of relentless police questioning. Speaking for the Court, Mr. Justice Black said: "We think a situation such as that here shown . . . is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." (footnote omitted). *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). Although the instant confession was not obtained under the same conditions, the dissent certainly feels that it was taken under "inherently coercive" circumstances.

⁸ A judicial proceeding has been broadly defined as: "A general term for proceedings relating to, practiced in, or proceeding from, a court of justice; or the course prescribed to be taken in various cases for the determination of a controversy or for legal redress or relief." BLACK, LAW DICTIONARY (4th ed. 1951).

end would permit midnight interrogation by police and prosecuting attorneys even while the trial is in progress, thus seeming to infringe upon the domain of the court. Undoubtedly these judges share the opinion of Mr. Justice Frankfurter that:

Ours is the accusatorial as opposed to the inquisitorial system. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.⁹

The facts of the instant case make it an oddity. Midnight interrogation once a prisoner has been indicted is rare. Even under the strict federal rules of evidence, however, a prisoner arraigned and confined pending trial on one charge may be questioned concerning another crime of which he is suspected but for which he has not been arraigned. While awaiting trial upon a charge of assault to rape, the defendant in *United States v. Carignan*¹⁰ was taken unaccompanied by counsel to a United States marshal's office where he was questioned concerning a murder. He confessed to the murder, and the confession was later admitted into evidence against him. There, although Carignan was questioned after arraignment concerning an entirely different crime than the one for which he had been incarcerated, the interrogation did take place during the course of judicial proceedings.

There is much emphasis in the dissenting opinion upon the fact that Spano's attorney was not with him when he confessed. This is deemed to be deprivation of due process. Granted that the accused has the right to the aid of counsel in every stage of judicial proceedings in New York,¹¹ it is difficult to see in this case how Spano was deprived of this right. His attorney was with him at his surrender and subsequently advised him only to divulge his name. Spano followed this advice until after a conference with his patrolman friend. In regard to a confession made to police prior to arraignment or indictment the New Jersey Supreme Court has held that:

In answer to the argument that the defendants were not advised of their rights and privileges the law over the years in this State has been that a person is only entitled to counsel

⁹ *Watts v. Indiana*, 338 U.S. 49, 54 (1949). See note 4, *supra*.

¹⁰ 342 U.S. 36 (1951).

¹¹ "[W]hen the defendant is brought before the magistrate, the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings. . . ." N.Y. CODE CRIM. PROC. § 699 (1).

to aid him in his defense, not to save him from his own voluntary acts. . . .¹²

This would seem to be applicable to the *Spano* case.

Authorities cited in the dissenting opinion are distinguishable from the instant case upon their facts. *People v. McMahon*¹³ and *People v. Mondon*¹⁴ both involved confessions made by witnesses at coroners' inquests. These were held to be inadmissible on the theory that an oath thus administered when the mind was disturbed might prevent voluntary mental action. In *People v. Perez*¹⁵ the court indicates through dicta that it would not accept a confession obtained by deliberately jailing a person as a material witness for interrogation when there was sufficient evidence to hold him as a defendant. *Lanza v. New York State Joint Legislative Comm.*¹⁶ concerned the recording of a supposedly private conversation between an attorney and his client in a county jail.

Ohio takes the view of the majority in the instant case that the test of admissibility is the voluntariness of the confession.¹⁷ A voluntary confession has been upheld where a sixty year old defendant was taken into custody without a warrant, jailed without arraignment and was driven nearly two hundred miles at 2:00 a.m. for a lie detector test and nine hours of questioning.¹⁸

When determining the admissibility of confessions the courts are confronted with conflicting interests. They must protect the right of the accused to a fair trial, and at the same time they must not tie the hands of law enforcement officers and prosecutors whose duty it is to obtain evidence to convict criminals. New York has now admitted into evidence a confession obtained after the commencement of judicial proceedings. Whether there is a point at which the court will draw a line and hold that the judicial process is too far advanced to permit such procedure remains for future determination.

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¹² *State v. Bunk*, 4 N.J. 461, 470, 73 A.2d 249, 254 (1950), *cert. denied*, 340 U.S. 839 (1950). See also *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953); *State v. Cole*, 136 N.J.L. 606, 56 A.2d 898 (1948), *cert. denied*, 334 U.S. 851 (1948); *State v. Murphy*, 87 N.J.L. 515, 94 Atl. 640 (1915).

¹³ 15 N.Y. 384 (1857).

¹⁴ 103 N.Y. 211, 8 N.E. 496 (1886).

¹⁵ 300 N.Y. 208, 90 N.E.2d 40 (1949), *cert. denied*, 338 U.S. 952 (1950).

¹⁶ 3 N.Y.2d 92, 143 N.E.2d 772 (1957), *cert. denied*, 355 U.S. 856 (1957).

¹⁷ *State v. Yeoman*, 112 Ohio St. 214, 147 N.E. 3 (1925); *Lefevre v. State*, 50 Ohio St. 584, 35 N.E. 52 (1893); *Spears v. State*, 2 Ohio St. 583 (1853); *State v. Arnold*, 44 Ohio L. Abs. 45, 63 N.E.2d 31 (1945); *State v. Collett*, 44 Ohio L. Abs. 225, 58 N.E.2d 417 (1944), *dismissed for want of a debatable question*, 144 Ohio St. 639, 60 N.E.2d 170 (1945); *State v. Hensley*, 31 Ohio L. Abs. 348 (1939). See 15 OHIO JUR.2d *Criminal Law* §§ 400-09 (1955).

¹⁸ *State v. Collett*, *supra* note 17.