Touro Law Review

Volume 14 | Number 3 Article 42

1998

Right to Counsel, Court of Appeals: People v. Cohen

Thus, the Court of Appeals held that this was not a violation of the defendants' right to counsel. The defendant's final argument for the reversal of his conviction due to the missing Rosario material by the State, was put to rest because the Court of Appeals found that the instructions to the jury cured any prejudice that may have effected the defendant.

People v. Cohen[41]
(decided October 30, 1997)

The defendant, Benjamin E. Cohen, was convicted in 1996 in the County Court, Warren County upon entering a plea of guilty to murder in the second degree.[42] The plea was entered "after the County Court denied his omnibus motion to suppress physical evidence and his inculpatory statement pertaining to the murder of a store clerk"[43] and the defendant was sentenced to a prison term of twenty-five years to life.[44]

Defendant appealed the denial of the suppression motion to the Appellate Division, which unanimously affirmed[45] and then was granted leave to appeal to the New York State Court of Appeals.[46] Defendant argued that the physical evidence should have been suppressed because the warrant that authorized the seizure was invalid as it was obtained based on a false statement given by an informant.[47] He also argued that his right to counsel under the New York State Constitution[48] had been violated when

---

[41] 90 N.Y.2d 632, 687 N.E.2d 1313, 665 N.Y.S.2d 30 (1997).

[42] People v. Cohen, 226 A.D.2d 903, 640 N.Y.S.2d 921 (3d Dep't 1996). The New York Statute for murder in the second degree is embodied in New York Penal Law § 125.25. N.Y. PENAL LAW § 125.25 (McKinney 1998).

[43] *Id.* at 903, 640 N.Y.S.2d at 922.

[44] *Id.* at 906, 640 N.Y.S.2d at 924.

[45] *Id.*

[46] People v. Cohen, 90 N.Y.2d 632, 634-35, 687 N.E.2d 1313, 1314, 665 N.Y.S.2d 30, 31 (1997).

[47] *Id.* at 636, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.

[48] U.S. CONST. amend. VI. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state

police obtained a confession knowing that he was represented by counsel.[49] The New York Court of Appeals, in reversing the Appellate Division, held that while the defendant's motion to suppress the physical evidence was properly denied;[50] the defendant's confession should have been suppressed as his right to counsel had been violated.[51]

On December 7, 1993 a burglary was committed at Thompson's Garage, a gas station, in Lake George Village and three handguns were stolen.[52] The guns consisted of "a Ruger Blackhawk .357 caliber revolver, a Charter Arms .22 caliber revolver and a P38 Walther semiautomatic pistol."[53] The defendant, although not charged, was a suspect in the burglary and had retained an attorney.[54] In the spring of 1994 the defendant's attorney had personally advised the Sheriff's Department Investigator, Snyder and New York State Police Investigator, Huskie, that the defendant was not to be questioned in regard to the burglary except in the attorney's presence.[55]

Almost a year later, on November 27, 1994 a store clerk of a Citgo service station in the Town of Lake George was shot and killed during a robbery.[56] After laboratory analysis, it was

---

> and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Id. N.Y. CONST. art. I. § 6. This section provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him." *Id.*

[49] *Cohen,* 90 N.Y.2d at 636, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.

[50] *Id.* at 638, 687 N.E.2d at 1316, 665 N.Y.S.2d at 33.

[51] *Id.* at 642, 687 N.E.2d at 1319, 665 N.Y.S.2d at 36.

[52] *Id.* at 635, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.

[53] *Id.*

[54] *Id.* at 636, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.

[55] *Id.*

[56] *Id.* at 636, 687 N.E.2d at 1314, 665 N.Y.S.2d at 31.

determined that the bullet fired was from an older model .22 caliber gun.[57]

The police obtained a written statement from an informant, Christopher Mackrodt, that he was shown "an older looking .22 caliber revolver, black-colored with a wooden handle; a .357 caliber revolver; and a third gun" while "visiting the home of codefendant David McColloch and in the presence of [the] defendant and codefendant Francis Anderson."[58] Informant Mackrodt stated that in several subsequent occasions at McColloch's home that the defendant, McColloch, and Anderson advised him that they had "stolen the three guns from Thompson's Garage" and "were thinking of robbing the Citgo station [in the Town of Lake George]."[59]

The police used Mackrodt's statement and the test results on the recovered bullet to obtain a warrant to search the McColloch residence and seize the weapons and robbery proceeds.[60] On December 1, 1994 several police officers including Snyder and Huskie encountered the defendant while executing the search warrant at the McCulloch residence.[61] The County Court in a suppression hearing found that the defendant had willingly accompanied the officers to the Lake George Police Substation and was properly advised of his Miranda rights upon arrival.[62]

The interview of the defendant, by Snyder and Huskie, commenced with questions regarding his involvement in the gun theft from Thompson's Garage.[63] Further on, questions regarding the robbery-murder of the Citgo store clerk were raised.[64] This interrogation continued for several hours until the defendant gave a full written confession.[65] The search of the McColloch's residence "resulted in the discovery of the .357 caliber revolver,

---

[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 636, 687 N.E.2d at 1315, 665 N.Y.S.2d at 32.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

the P38 Walther pistol and, secreted in the attic, a blue nylon gym bag containing the .22 caliber revolver, ammunition and United States currency in a clear plastic bag."[66]

Defendant and codefendants were indicted for "intentional and felony murder, and robbery, first degree."[67] Subsequently, the informant Mackrodt was arrested and charged with the Thompson's Garage burglary-theft and subsequently moved to suppress the confession and physical evidence pursuant to the search warrant.[68] Cohen argued that the informant's arrest, on the day of the suppression hearing for the Thompson's Garage burglary, "demonstrated the falsity of his statement and thereby invalidated the search warrant."[69] Defendant further argued that the confession should be suppressed as "the officers' interrogation violated his [s]tate constitutional right to counsel which had indelibly attached in connection with Thompson's Garage criminal investigation."[70]

In determining the validity of the search warrant the court relied on *Franks v. Delaware*.[71] In *Franks*, The United States Supreme held that:

> The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having mislead the magistrate, then was able to remain confident that the ploy was worth while.[72]

---

[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] 438 U.S. 154 (1978) (holding the Fourth Amendment requires that where a substantial showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and the false statement was necessary to the finding of probable cause, that at defendant's request a hearing as to the validity of the warrant shall be held).
[72] *Id.* at 168.

The court in *Cohen*, "expressly limited this avenue of suppression to instances of deliberate falsity or reckless disregard on the part of law enforcement affiants."[73]

The court found the record devoid of any evidence that, at the time of the warrant application, the police had knowledge of or recklessly disregarded evidence of Mackrodt's involvement in the Thompson's Garage theft[74] and noted that the police did not swear to or affirm the veracity of Mackrodt's statement, nor were they required to.[75] The court held that defendant failed to sustain the burden of proof that the police knowingly or recklessly submitted false statements as a basis for obtaining the search warrant[76] and therefore defendant's motion to suppress the physical evidence was not erroneously denied.[77]

The court's analysis of the defendant's motion to suppress the confession based on an infringement of the right to counsel involved two separate lines of precedent.[78] The first line of precedent involved analyzing whether the two crimes were so intertwined that questioning by the police in regard to the murder-robbery at Citgo would elicit incriminating statements in regard to the Thompson's Garage theft for which the defendant was represented by counsel.[79] The court cited to *People v. Townes*[80] in which that defendant was "arrested, assigned counsel and then indicted on charges of attempted murder, assault, resisting arrest and weapons possession, all arising out of a violent street confrontation with police"[81] and filed a post-indictment police brutality complaint.[82] The court in *Townes* held that statements

---

[73] *Cohen*, 90 N.Y.2d at 637, 687 N.E.2d at 1316, 665 N.Y.S.2d at 33 (citing Franks v. Delaware, 438 U.S. 154, 171 (1978)).

[74] *Id.* at 637, 687 N.E.2d at 1316, 665 N.Y.S.2d at 33.

[75] *Id.* (citing People v. Sullivan, 56 N.Y.2d 378, 437 N.E.2d 1130, 452 N.Y.S.2d 373 (1982)).

[76] *Id.* at 638, 687 N.E.2d at 1316, 665 N.Y.S.2d at 33 (citing People v. Trambe, 71 N.Y.2d 492, 522 N.E.2d 448, 527 N.Y.S.2d 372 (1988)).

[77] *Cohen*, 90 N.Y.2d at 638, 687 N.E.2d at 1316, 665 N.Y.S.2d at 33.

[78] *Id.*

[79] *Id.*

[80] 41 N.Y.2d 97, 104, 359 N.E.2d 402, 407, 390 N.Y.S.2d 839, 899 (1976).

[81] *Id.*

[82] *Cohen*, 90 N.Y.2d at 639, 687 N.E.2d at 1317, 665 N.Y.S.2d at 33.

made without the benefit of counsel to a police officer investigating the brutality complaint were not admissible as evidence in the prosecution.[83] The court further stated:

> [T]he subject of the criminal charges are so inextricably interwoven . . . that any interrogation concerning the arrest would . . . involve some . . . incriminating discussion . . . of the crime itself. To separate the arrest from the crime itself and more importantly, to ask the defendant [without the benefit of counsel] to make that distinction is too seek to draw to fine a line.[84]

In the case at bar, the court held that the Thompson's Garage theft and the Citgo robbery-murder were not "so thoroughly interrelated" that "the police officers would not have been wholly barred from questioning the defendant on the Citgo crimes merely because he was already represented by counsel on the Thompson's Garage investigation."[85]

The court utilized a second line of precedent in reversing the Appellate Division, determining the defendant's right to counsel had been infringed upon.[86] This line of precedent involves crimes which are not "intimately connected, but where the police were aware that the defendant was actually represented by an attorney" and "the interrogation actually entailed an infringement of the . . . right to counsel by impermissible questioning on the represented crime."[87] The court relied on *People v. Ermo*[88] in

---

[83] *Id.*

[84] *Townes*, 41 N.Y.2d at 104, 359 N.E.2d at 407, 390 N.Y.S.2d at 899. *See also* People v. Vella, 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967) (suppressing a confession obtained by the Suffolk County Police regarding the burglary and theft of property which the defendant had previously been charged and assigned counsel for possession of the same stolen property in New York County); People v. Carl, 46 N.Y.2d 806, 386 N.E.2d 828, 413 N.Y.S.2d 916 (1978) (holding right to counsel was violated where defendant was represented by counsel for burglary of a store and the police questioned defendant in regard to a subsequent burglary one week later at the same location).

[85] *Cohen*, 90 N.Y.2d at 640, 687 N.E.2d at 1317, 665 N.Y.S.2d at 34.

[86] *Id.*

[87] *Id.*

which "the defendant was interrogated in the same session about a March 1992 sexual assault, on which he was already assigned an attorney, and an August 1971 sexual assault/homicide."[89] The *Ermo* court affirmed the reversal of the conviction and suppression of the confession holding that "that the Appellate Division 'was correct in evaluating the police interrogation as an integrated whole, in which impermissible questioning as to the assault was not discrete or fairly separable.'"[90] The *Ermo* court was persuaded "that the questioning on the represented charge was used 'as an crucial element' in securing the defendant's confession" and "specifically grounded [it's] affirmance on the 'critical factor' that police 'exploited concededly impermissible questioning' in order to advance their interrogation regarding the . . . charge . . . which the defendant was unrepresented."[91]

The Court of Appeals analogized this precedent to the case at bar and determined "[t]he interference with an existing attorney-client relationship in violation of the . . . State constitution . . . was flagrant and intentional here; the . . . officers acknowledged . . . actual awareness . . . having been personally instructed . . . by defendant's attorney not to question [defendant] on [the] Thompson's Garage crimes."[92] The court held that "the concession by the officers in their testimony at the suppression hearing demonstrate as a matter of law that the questioning on the Thompson's Garage matter was purposely exploitive"[93] and "'designed to elicit statements on the Citgo

---

[88] 47 N.Y.2d 863, 392 N.E.2d 1248, 419 N.Y.S.2d 65 (1979).

[89] *Cohen*, 90 N.Y.2d at 640, 687 N.E.2d at 1317, 665 N.Y.S.2d at 34.

[90] *Id.* (quoting People v. Ermo, 47 N.Y.2d 863, 392 N.E.2d 1248, 419 N.Y.S.2d 65 (1979)).

[91] *Id.* at 640, 687 N.E.2d at 1318, 665 N.Y.S.2d at 35 (quoting People v. Ermo, 47 N.Y.2d 863, 392 N.E.2d 1248, 419 N.Y.S.2d 65 (1979)). *see also* People v. Miller, 54 N.Y.2d 616, 425 N.E.2d 879, 442 N.Y.S.2d 491 (1981) (holding a police interrogation involving a represented crime and an unrepresented crime is reviewed as an integrated whole and as the impermissible questioning was not fairly separable the confession must be suppressed).

[92] *Id.* at 641, 687 N.E.2d at 1318, 665 N.Y.S.2d at 35.

[93] *Id.* at 642, 687 N.E.2d at 1318, 665 N.Y.S.2d at 35 (citing People v. West, 81 N.Y.2d 370, 615 N.E.2d 968, 599 N.Y.S.2d 484 (1993)).

crimes.'"[94] In reversing the Appellate Division the court stated that the People failed to sustain the "heavy burden to demonstrate that defendant's confession to the Citgo robbery and murder was uninfluenced by the taint of the violation of the defendant's State constitutional right to counsel."[95]

The statutory language in the federal law and the state law, involving a defendant's right to counsel, is similar. The courts have interpreted that both laws recognize, when analyzing the potential exclusion of a confession involving the violation of a constitutional right, the People must sustain "the heavy burden to demonstrate that defendant's confession . . . was uninfluenced by the taint of the violation of defendant's constitutional right."[96]

People v. Wilson[97]
(decided May 6, 1997)

Defendant, Eric Wilson, was convicted "of two counts of second degree murder, robbery" in the first and second degree, attempted robbery in the first and second degree, and criminal possession of a weapon in the second degree.[98] The Supreme Court, Queens County, had previously denied his motion to suppress lineup identification testimony[99] and defendant appealed, claiming the conviction should be set aside on the ground that

---

[94] *Id.* at 642, 687 N.E. 2d at 1319, 665 N.Y.S.2d at 36 (citing People v. Ruff, 81 N.Y.2d 330, 615 N.E.2d 611, 599 N.Y.S.2d 221 (1990)).

[95] *Id.* (citing Brown v. Illinois, 422 U.S. 590 (1975); People v. Bethea, 67 N.Y.2d 364, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986); People v. Chapple, 38 N.Y.2d 112, 341 N.E.2d 243, 378 N.Y.S.2d 682 (1975)).

[96] *Cohen*, 90 N.Y.2d at 642, 687 N.E.2d at 1319, 665 N.Y.S.2d at 36 (citing Brown v. Illinois, 422 U.S. 590 (1975)).

[97] 89 N.Y.2d 754, 680 N.E.2d 598, 658 N.Y.S.2d 225 (1997).

[98] *Id.* at 757, 680 N.E.2d at 599, 658 N.Y.S.2d at 227. *See* N.Y. PENAL LAW §§ 125.25, 160.15, 160.10, 265.03. These sections set forth the penal law for second degree murder, first degree robbery, second degree robbery and criminal possession of a weapon, respectively. *Id.*

[99] *Wilson,* 89 N.Y.2d at 757, 680 N.E.2d at 600, 658 N.Y.S.2d at 227.