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

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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. Wilson⁹⁷
(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 testimony⁹⁹ 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.

identification was obtained in violation of his right to counsel under the Federal¹⁰⁰ and New York State¹⁰¹ Constitutions.

The Appellate Division, Second Department, reversed the lower court's denial of a new trial¹⁰² and the New York Court of Appeals affirmed the Appellate Division's decision to grant defendant a new trial.¹⁰³ The court held that "[a] defendant has no right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution at a lineup that occurs prior to the initiation of formal prosecutorial proceedings."¹⁰⁴ Furthermore, the court held that similar to the Federal Constitution "there is generally no independent basis in the State Constitution for requiring counsel at investigatory lineups, although a right to counsel does arise after the initiation of prosecutorial proceedings."¹⁰⁵ However, "if a suspect already

¹⁰⁰ U.S. CONST. amend. VI. The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall have the right...to have the assistance of counsel for his defence." *Id.* U.S. CONST. amend. XIV, § 1. Section I of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." *Id.*

¹⁰¹ U.S. CONST. amend. VI. The Sixth Amendment states in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel for his defence." *Id.* U.S. CONST. amend. XIV, § 1. Section One of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . ." *Id.* N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part: "[T]he party accused shall be allowed to appear and defend in person and with counsel . . ." *Id.*

¹⁰² *Wilson*, 89 N.Y.2d at 757, 680 N.E.2d 599, 658 N.Y.S.2d 227. *See* *People v. Wilson*, 219 A.D.2d 164, 641 N.Y.S.2d 846 (2d Dep't 1996).

¹⁰³ *Id.* at 760, 680 N.E.2d 602, 658 N.Y.S.2d 229.

¹⁰⁴ *Id.* at 757. 680 N.E.2d 599, 658 N.Y.S.2d at 228 (citing *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972)). In *Kirby*, a robbery victim was permitted to testify at trial concerning his showup identification of petitioner, when petitioner was not represented by counsel. *Id.* The court held that the showup at the police station took place after petitioner's arrest but before he had been formally indicted or otherwise formally charged with any criminal offense, so was not a 'criminal prosecution' at which there is a constitutional right to be represented by counsel. *Id.*

¹⁰⁵ *Id.* (citing *People v. Hawkins*, 55 N.Y.2d 474, 487, 435 N.E.2d 376, 378, 450 N.Y.S.2d 159 (1982)). In *Hawkins*, defendants in four unrelated criminal prosecutions claimed a deprivation of the right to the assistance of

has counsel, his attorney may not be excluded from the lineup proceedings.”¹⁰⁶

On July 26, 1990, defendant was arraigned in Brooklyn, New York, on charges of criminal possession of a weapon, which was identified as the same weapon that was used in a murder in Queens earlier that morning.¹⁰⁷ On June 28, 1990 defendant's picture was picked by an eyewitness to the Queens shooting and the witness indicated that defendant had participated in the shooting.¹⁰⁸ Defendant appeared in Brooklyn Criminal Court on June 9, 1990 for a preliminary hearing on the charges pending in Brooklyn.¹⁰⁹ At the hearing, defendant was represented by a Legal Aid defense attorney.¹¹⁰ After the case had been called, the defense attorney noticed that Queens detectives who were interested in his client were in the courtroom.¹¹¹ Consequently, the attorney informed the detectives he “was defendant's counsel and that defendant should not be questioned or placed in a lineup without his presence.”¹¹² The defense attorney later learned that defendant's weapons possession charge was going to be dismissed.¹¹³ Defendant then stated that he wanted the attorney to continue his representation and did not wish to be questioned regarding the Queens murder or to participate in a lineup without counsel's presence.¹¹⁴ The attorney informed the court of defendant's request and warned the Queens detectives of his continued representation of the defendant when they came to take

counsel at a lineup and the court held that there was no basis in the Federal Constitution, along with the New York State Constitution for requiring counsel at investigatory lineups. *Id.*

¹⁰⁶ *Wilson*, 89 N.Y.2d at 757, 680 N.E.2d at 600, 658 N.Y.S.2d at 228. (citing *Hawkins*, 55 N.Y.2d at 487, 435 N.E.2d at 376, 450 N.Y.S.2d at 159 (1982)).

¹⁰⁷ *Id.* at 756, 680 N.E.2d at 599, 658 N.Y.S.2d at 226.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 756, 680 N.E.2d at 600, 658 N.Y.S.2d at 227.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

defendant into custody.¹¹⁵ At the Queens precinct, a detective asked defendant whether he wanted an attorney to be present at a lineup.¹¹⁶ Defendant answered that he had no attorney and waived his Miranda rights.¹¹⁷ A lineup was conducted and the eyewitness identified defendant as the man who shot the victim.¹¹⁸ There was no evidence of any attempt by the police to contact the defense attorney.¹¹⁹

At the suppression hearing; defendant's motion to suppress the lineup identification was denied.¹²⁰ The court held that the contested identification was not a violation of defendant's right to counsel because the attorney-client relationship between defense counsel and defendant had terminated when the Brooklyn charges were dropped.¹²¹ The court concluded that defendant's right to counsel at the Queens lineup never separately attached.¹²² The Appellate Division reversed¹²³ and appeal was made to the Court of Appeals.¹²⁴

The Court of Appeals explained that the United States Constitution does not guarantee a right to counsel absent the formal initiation of a judicial proceeding.¹²⁵ However, despite the general lack of independent basis for a right to counsel at a lineup, the Court of Appeals explained further that once an attorney has been obtained, the attorney cannot be excluded from a lineup.¹²⁶

In *Kirby v. Illinois*,¹²⁷ defendant was identified by an eyewitness at a police station showup immediately after his arrest.¹²⁸

¹¹⁵ *Id.* at 757, 680 N.E.2d at 601, 658 N.Y.S.2d at 227.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 758, 680 N.E.2d at 602, 658 N.Y.S.2d at 228.

¹²⁷ 406 U.S. 682 (1972).

¹²⁸ *Id.*

Defendant's robbery conviction was appealed under the contention that his federal constitutional right was violated when he was not advised of his right to counsel at the identification.¹²⁹ The conviction was affirmed on the ground that "it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that the adversary judicial proceedings have been initiated against him."¹³⁰ Hence, the Supreme Court did not deem a lineup as a formal proceeding and in *Kirby* reiterated the need for a "per se exclusionary rule upon testimony concerning an identification lineup."¹³¹ This rule draws the line at an arraignment or pretrial hearing as the formal institution of a judicial proceeding that guarantees a right to counsel under the United States Constitution.¹³²

In construing the protection afforded under the New York State Constitution, the New York cases cited to by the *Wilson* court held that the right to counsel may not be denied if the suspect already has an attorney.¹³³

In *People v. LaClere*,¹³⁴ defendant was convicted of attempted murder after witness identification testimony was admitted at a jury trial.¹³⁵ Defendant's counsel was not present during the identification lineup.¹³⁶ His arrest took place subsequent to a court appearance with counsel on an unrelated matter and the attorney made a request to the presiding judge that the judge advise the arresting officers that he also represented defendant on the matter for which he was subsequently being arrested.¹³⁷ Further, the attorney requested that defendant not be questioned

¹²⁹ *Id.*

¹³⁰ *Id.* at 688.

¹³¹ *Id.* at 689.

¹³² *Id.*

¹³³ *People v. Wilson*, 89 N.Y.2d 474, 487, 435 N.E.2d 376, 383, 450 N.Y.S.2d 159, 166 (citing *People v. LaClere*, 76 N.Y.2d 670, 564 N.E.2d 640, 563 N.Y.S.2d 30 (1990)).

¹³⁴ *LaClere*, 76 N.Y.2d at 670, 564 N.E.2d at 640, 563 N.Y.S.2d at 30.

¹³⁵ *Id.* at 671, 564 N.E.2d at 641, 563 N.Y.S.2d at 31.

¹³⁶ *Id.*

¹³⁷ *Id.*

in his absence.¹³⁸ The New York Court of Appeals held that the statement to the judge that counsel represented the defendant in the other case, along with the request to inform the arresting officers, was sufficient to create the right to counsel at a lineup.¹³⁹

In *People v. Hawkins*,¹⁴⁰ the court ruled that “[t]he lifeblood of the New York rule is that once the right to counsel has indelibly attached, the defendant can effectively waive right to counsel only if counsel is present.”¹⁴¹ The *Hawkins* court also stated that “if a suspect already has counsel, his attorney may not be excluded from lineup proceedings.”¹⁴²

In *People v. Wilson*,¹⁴³ the court was again faced with the issue of whether defendant had a right to counsel in a lineup.¹⁴⁴ Following the precedent of the earlier New York decisions, the court concluded that the attorney’s actions in the Brooklyn courtroom were sufficient to establish a retention of counsel by the defendant.¹⁴⁵ Therefore, defendant’s right to counsel at the lineup was in place and could not have been waived in the attorney’s absence.¹⁴⁶

A comparison of the state cases and the federal case referred to by the *Wilson* court illustrates that there is no constitutional basis for the right to counsel at an investigatory lineup. The federal courts apply this principle narrowly and stringently.¹⁴⁷ However, the New York courts have extended the right to include the right to have counsel present at lineups conducted prior to the commencement of formal proceedings when counsel has previously been retained.¹⁴⁸

¹³⁸ *Id.* at 672, 564 N.E.2d at 641, 563 N.Y.S.2d at 31.

¹³⁹ *Id.*

¹⁴⁰ 89 N.Y.2d 474, 435 N.E.2d at 376, 450 N.Y.S.2d at 159 (1982).

¹⁴¹ *Id.* at 483-84, 435 N.E.2d at 381, 450 N.Y.S.2d at 163.

¹⁴² *Id.* at 487, 435 N.E.2d at 383, 450 N.Y.S.2d at 166.

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

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 758, 680 N.E.2d at 601, 658 N.Y.S.2d at 228.

¹⁴⁶ *Id.*

¹⁴⁷ See *Kirby v. Illinois*, 406 U.S. 682 (1972).

¹⁴⁸ See *People v. LaClere*, 76 N.Y.2d 670, 564 N.E.2d 640, 563 N.Y.S.2d 30 (1990); *People v. Hawkins*, N.Y.2d 754, 680 N.E.2d 598, 658 N.Y.S.2d 225 (1982).