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Touro Law Review

Volume 18
Number 2 *New York State Constitutional Decisions: 2001 Compilation*

Article 17

March 2016

Supreme Court, Monroe County, People v. Dejac

Danielle Marks

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Recommended Citation

Marks, Danielle (2016) "Supreme Court, Monroe County, People v. Dejac," *Touro Law Review*: Vol. 18 : No. 2 , Article 17.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol18/iss2/17

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SUPREME COURT OF NEW YORK
MONROE COUNTY

People v. Dejac[1]
(decided February 2, 2001)

Defendant, Kurt Dejac, was charged with the felony of driving while intoxicated ("DWI").[2] At a joint probable cause/*Huntley* hearing[3] and chemical test refusal hearing, Dejac asserted that his state constitutional right to counsel[4] was violated because he was not advised of his right to have an attorney present before making the decision not to submit to a breath test.[5] Additionally, he argued that he was not given the required Commissioner's warnings[6] prior to the time he refused to take the chemical test.[7] On these grounds, Dejac filed a motion to suppress evidence obtained by police, which included his refusal to take a breath test, his statements made at the scene, and the field test results.[8]

Dejac hit a parked car and then sped off to a nearby parking lot.[9] A witness notified the police of the incident and after a preliminary inquiry, the police formally arrested Dejac for

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[1] 187 Misc. 2d 287, 721 N.Y.S.2d 492 (Sup. Ct. Monroe County 2001).

[2] *Id.* at 287, 721 N.Y.S.2d at 492.

[3] *See* People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 848 (1965) (requiring that, before trial, a hearing must be conducted to determine the voluntary nature of a confession prior to the admission of the confession to the jury, and the judge must find voluntary nature beyond a reasonable doubt).

[4] N.Y. CONST. art I, §6 states in pertinent part: "the accused shall be allowed to appear and defend in person and with counsel . . . no person shall be deprived of life, liberty or property without due process of law."

[5] *Dejac*, 187 Misc.2d at 288, 721 N.Y.S.2d at 493.

[6] *Id.*; N.Y. VEH. & TRAF. LAW § 1194 (2)(b)(1) (McKinney 2001) states in pertinent part: that if after having "been requested to submit to . . . a chemical test and after having been informed that a person's license or permit to drive . . . shall be immediately suspended and subsequently revoked . . . for refusal to submit to such chemical test."

[7] *Id.*

[8] *Id.*

[9] *Id.*

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DWI.[10] Two minutes later, Dejac was read the required Commissioner's warnings from a "refusal form" which stated, in essence, that a person refusing to submit to a police requested chemical test risks the immediate suspension and subsequent revocation of his driver's license.[11]

When one of the arresting officers asked Dejac if he understood the warnings, he replied "absolutely."[12] Dejac was then asked to submit to a breath test.[13] He responded that he would like to speak to a lawyer.[14] When the arresting officers told him that they did not have a telephone, Dejac told the police that he had a cellular phone in his trunk.[15] One of the arresting officers retrieved Dejac's phone, and dialed the telephone number that Dejac said was his lawyer's telephone number.[16] However, one of Dejac's "in-laws" answered the phone instead of his lawyer.[17] About an hour later, Dejac was read the Commissioner's warning a second time, and again he refused to take a breath test.[18]

At the combined probable cause/*Huntley* hearing and chemical test refusal hearing, the court denied Dejac's motion to suppress the evidence and his motion to suppress the refusal of the breath test.[19] The New York Supreme Court, Monroe County found that Dejac was given the required Commissioner's warnings on the consequences of his refusal.[20] The court reasoned that the "privilege of access of counsel" rule[21] provides

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[10] *Id.*

[11] *Dejac,* 187 Misc. 2d at 288, 721 N.Y.S.2d at 493; *see supra* note 6.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Dejac,* 187 Misc. 2d at 288, 721 N.Y.S.2d at 494.

[17] *Id.* at 289, 721 N.Y.S.2d at 494.

[18] *Id.*

[19] *Id.* at 288, 721 N.Y.S.2d at 494.

[20] *Id.* at 289, 721 N.Y.S.2d at 494.

[21] *See* People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416,418 (1968) (holding that "law enforcement officials may not, without justification, prevent access between the criminally accused and his

defendants with the right to consult an attorney before deciding whether to take a chemical test.[22] However, the court also stated that the "privilege of access to counsel" rule is a "'qualified' statutory right and does not involve a constitutional right to counsel, nor even a prophylactic measure to assure a reviewing court that other constitutional rights will be observed by police."[23] Therefore, defendants do not have a constitutional right to refuse a breath test until their lawyer arrives at the scene.[24] The court held that Dejac was afforded an adequate opportunity to consult with counsel and stated that the arresting officer had made an effort to comply with the request, but failed because the defendant provided the police the wrong information.[25]

In its analysis, the *Dejac* court relied on *People v. Shaw,*[26] a New York Court of Appeals case, where the defendant was arrested for DWI and consented to take a breath test.[27] In *Shaw*, the defendant made a pre-trial motion to suppress the test results.[28] He argued that his federal[29] and state[30] constitutional right to counsel were violated because he was not advised of his right to counsel when the police requested he take the breath

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lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand").

[22] *Dejac,* 187 Misc. 2d at 289, 721 N.Y.S.2d at 494; *Gursey,* 22 N.Y.2d 224, 239 N.E. 2d 351, 292 N.Y.S.2d 416.

[23] *Dejac,* 187 Misc. 2d at 291, 721 N.Y.S.2d at 494; *see also* People v. Shaw, 72 N.Y.2d 1032, 1033, 531 N.E.2d 650, 651, 534 N.Y.S2d 929, 930 (1988).

[24] *Dejac,* 187 Misc.2d at 289, 721 N.Y.S.2d at 494.

[25] *Id.*

[26] 72 N.Y.2d at 1032, 531 N.E.2d at 650, 534 N.Y.S.2d at 929.

[27] *Id.* at 1033, 531 N.E.2d at 650, 534 N.Y.S.2d at 929.

[28] *Id.*

[29] U.S. CONST. amend. VI, which states in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense"; *see* Miranda v. Arizona, 384 U.S. 436 (1966) (holding when an individual is taken into custody and subjected to questioning he must be warned before any questioning that he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires).

[30] *See supra* note 4.

test.[31] The defendant claimed that he should have been informed of his right to counsel at the time the arresting officer asked him to take the breath test, because it constituted a "critical stage" in the proceeding.[32] He urged that he needed an attorney to make an informed choice of whether or not to take the breath test.[33]

The New York Court of Appeals held that although a defendant in New York has the right to consult with an attorney before deciding whether to take a chemical test, the Sixth Amendment to the United States Constitution does not require that the defendant be afforded counsel at that stage in the proceeding.[34] The court reasoned that "in this State, a defendant who has been arrested for driving while intoxicated, but not formally charged in court, generally has the right to consult with a lawyer before deciding whether to consent to a sobriety test, *if he requests* the assistance of counsel."[35] Since the defendant did not request an attorney's assistance, he was not entitled to suppress the results of his test.[36]

In addition, the court in *Dejac* relied on *People v. O'Rama*[37] and *People v. Kearney*.[38] These cases stand for the proposition that it is the defendant's burden to prove that the efforts by police did not afford him "adequate opportunity to consult with counsel"[39] and that the efforts by the police were not "reasonable and sufficient under the circumstances."[40] Accordingly, the Dejac court applied these holdings to the facts and found that Dejac did not produce enough evidence to prove that the arresting officer's efforts to contact defendant's counsel were not reasonable and sufficient under the circumstances.[41]

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[31] *Shaw*, 72 N.Y.2d at 1033, 531 N.E.2d at 650, 534 N.Y.S.2d at 930.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Shaw*, 72 N.Y.2d at 1033-34, 531 N.E.2d at 651, 534 N.Y.S.2d at 930; *see also Gursey*, 22 N.Y.2d at 224, 239 N.E.2d at 351, 292 N.Y.S.2d at 416.
[36] *Shaw*, 72 N.Y.2d at 1033-34, 531 N.E.2d at 651, 534 N.Y.S.2d at 930.
[37] 78 N.Y.2d 270, 579 N.E.2d 189, 574 N.Y.S.2d 159 (1991).
[38] 261 A.D.2d 638, 691 N.Y.S.2d 71 (2d Dep't 1999).
[39] *O'Rama*, 78 N.Y.2d at 280, 579 N.E.2d at 194, 574 N.Y.S.2d at 164.
[40] *Id.*
[41] *Dejac*, 187 Misc. 2d at 292, 721 N.Y.S.2d at 496.

The court reasoned that Dejac did not prove that the police had any more information in their possession other than the telephone number that the arresting officer had already dialed, "from which the [arresting officers] might have continued a further 'reasonable and sufficient' effort to contact an attorney."[42] Therefore, the court held that the defendant was afforded an adequate opportunity to consult with counsel.[43]

The scope of the United States Constitution's right to counsel was articulated by the United States Supreme Court in *Kirby v. Illinois*.[44] The Court in *Kirby* addressed the issue of when a defendant accused of a crime should be afforded his Sixth Amendment right to counsel.[45] In *Kirby*, two police officers stopped the defendant and his companion and asked to see their identification.[46] The defendant produced a wallet containing the contents of another man's wallet that had been reported stolen the day before.[47] The police officers arrested the defendant and his companion and brought them to the police station.[48] The defendant did not have a lawyer present in the room, nor was he advised to any right to counsel.[49] The police brought the wallet robbery victim to the station and he positively identified the two defendants as the men who robbed him two days earlier.[50] More than six weeks later, the men were indicted for robbery.[51] Upon arraignment, counsel was appointed to represent them.[52] At trial, the jury found them guilty.[53] On appeal, the Illinois Supreme Court rejected their argument that an absolute constitutional guarantee be imported into a routine police investigation.[54]

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[42] *Id.*
[43] *Id.*
[44] 406 U.S. 682 (1972).
[45] *Id.* at 689. *See supra* note 29.
[46] *Id.* at 684.
[47] *Id.*
[48] *Id.* at 685.
[49] *Kirby*, 406 U.S. at 685.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Kirby*, 406 U.S. at 686.

The United States Supreme Court affirmed the Illinois court's decision and held that the defendants did not have a right to counsel for pre-indictment confrontations.[55] The Court relied on the firmly established principle that a person's Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him and that a defendant's pre-indictment confrontation does not amount to a judicial proceeding.[56] The Court defined the commencement of the adversary judicial criminal proceeding as those "points of time at or after a formal charge, preliminary hearing, indictment, information, or arraignment."[57] The Court reasoned that this is the point at which "the government has committed itself to prosecute . . . and this point, therefore, marks the commencement of the 'criminal proceeding' to which alone the explicit guarantees of the Sixth Amendment are applicable."[58]

In New York, a person who asks for a lawyer when faced with the decision of whether or to submit to a breath test also does not have a constitutional right to have an attorney present. At this point, the defendant is not at a "critical stage" in the proceeding "within the meaning of the Sixth Amendment."[59] In this respect, the federal and state constitutional standards are the same.

However, a defendant in New York has a statutory right to "telephone his lawyer or consult with a lawyer present in the station house or immediately available there, [if] no danger of delay is posed which might nullify the statutory procedure requiring drivers to choose between taking the [breath] test and a license suspension."[60] If the defendant requests an attorney, it is his burden to prove at the hearing or trial that the arresting

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[55] *Id.* at 688.

[56] *Id.* at 690.

[57] *Id.* at 689.

[58] *Id; see also* Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (holding that the petitioners were entitled to counsel at the preliminary hearing because it was a critical phase of the proceeding).

[59] *Shaw*, 72 N.Y.2d at 1033, 531 N.E.2d at 650, 534 N.Y.2d at 930.

[60] *Dejac*, 187 Misc. 2d at 290, 721 N.Y.S.2d at 494 (quoting *Gursey*, 22 N.Y.2d at 229, 239 N.E.2d at 362, 292 N.Y.S.2d at 418).

officer did not make a "reasonable and sufficient" effort to afford him with "adequate opportunity to consult with counsel."[61] Dejac did not meet his burden because he failed to prove that he provided the arresting officers with information other than his "in-law's" telephone number which he represented was his lawyer's phone number.[62] Nor did Dejac prove that he desired more than the initial call made by the arresting officer.[63] Therefore, Dejac was afforded adequate opportunity to consult with counsel in compliance with his statutory right. In addition, since Dejac had no constitutional right to consult with an attorney at the time of his decision to take a breath test, Dejac's motion to suppress the evidence obtained by police, his refusal to take the breath test and the field test results were properly denied.

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[61] *Shaw*, 72 N.Y.2d at 1033-34, 531 N.E.2d at 651, 534 N.Y.S.2d at 930.
[62] *Dejac*, 187 Misc. 2d at 292, 721 N.Y.S.2d at 496.
[63] *Id.*

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