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Self-Incrimination, Supreme Court, Suffolk County: People v. Shulman

of the social interest against the weight of the individual interest.[191] Furthermore, the Supreme Court in *Byers* pointed out that, in some cases, the courts may give deference to the legislature where a state is using its police powers to regulate a legitimate state interest.[192]

SUPREME COURT

SUFFOLK COUNTY

People v. Shulman[193]
(printed December 4, 1997)

Defendant Shulman was accused of a single count of first degree murder, along with four counts of murder in the second degree.[194] The State had indicated that they would pursue a death penalty sentence upon conviction.[195] Defendant submitted several motions seeking to invalidate and declare as unconstitutional section 400.27 (14)(a)(ii), section 220.10 (5)(e), section 220.30 (3)(b)(vii), and section 220.60 (2) of the New York State Criminal Procedure Law [hereinafter "CPL"].[196] The first stated

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[191] *Sullivan,* 274 U.S. at 260.

[192] *Byers,* 402 U.S. at 432.

[193] N.Y. L.J., Dec. 4, 1997, 35 (Sup. Ct. Suffolk County).

[194] *Id.*

[195] *Id.*

[196] *Id.* N.Y. CRIM. PROC. LAW § 400.27 (14)(a)(ii) provides that:

> The defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing copying or testing, subject to constitutional limitations, the reports, documents, and other property specified in subdivision one of section 240.30.

Id. N. Y. CRIM. PROC. LAW § 220.10(5) (e) provides that:

> A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter

section of the CPL requires reciprocal disclosure of evidence intended to be used by either side at trial.[197] The remaining sections, taken collectively, provide that a defendant may not plead guilty to first degree murder unless the sentence agreed upon is imprisonment for life without parole, or something less.[198]

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such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

Id. N.Y. CRIM. PROC. LAW § 220.30(3) (b)(vii) provides that:

A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

Id. N.Y. CRIM PROC. LAW § 220.60(2) provides:

A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision three or four but subject to the limitation in subdivision five of section 220.10, or (b) a plea of not responsible by mental disease or defect to the indictment pursuant to section 220.15 of this chapter.

Id.

[197] *Id.* Sections 240.45(2) and 240.30(1) specify what materials the defendant is required to disclose as follows:

[W]ritten or recorded statements of those witnesses he/she intends to call at trial; any records of judgements of conviction or pending criminal action against such witnesses; and written reports and documents concerning mental or physical examinations or scientific tests made by defendant which he/she intends to introduce at trial.

Id.

[198] *Id.* "The sections further provide that a guilty plea is not authorized without the permission of the court and the consent of the prosecutor." *Id.*

The court denied defendant's motion on reciprocal disclosure holding that the procedure provided both "fair[ness], and the effective administration of justice."[199] It likewise denied defendant's motion as to the plea bargaining statutes, holding that they were "constitutionally acceptable."[200] Defendant claimed that CPL section 400.27 (14)(a)(ii) violated his rights as set out under the "Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I of the New York State Constitution."[201] He claimed that the article's reciprocal discovery provision was a form of self incrimination, which would force him to disclose his prospective witness list, all information pertinent to those witnesses, as well as any medical and scientific evidence he intended to introduce.[202] This would, he contends, have a "chilling effect" on his available options and strategies during the sentencing phase of his trial.[203]

The court, relying on *Williams v. Florida*[204] disagreed.[205] The Florida rule in question was similar to CPL section 240.30.[206] It

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[199] *Id* (citing People v. Copicotto, 50 N.Y.2d 222, 406 N.E.2d 465, 428 N.Y.S.2d 649 (1980)).

[200] *Id.* (citing People v. McIntosh, 173 Misc. 2d 727, 662 N.Y.S.2d 214 (Sup. Ct. Dutchess County 1997).

[201] *Id See* U.S. CONST amend. V. (stating that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . "); U.S. CONST. amend. VI (which states that the accused shall "have the Assistance of Counsel for his defense."); U.S. CONST. amend. VIII (stating that there shall be no "cruel and unusual punishments inflicted."); U.S. CONST. amend. XIV (stating that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). N.Y. CONST. art. I, § 6. Article I § 6 states in pertinent part that "No person . . . shall he be in any criminal case to be a witness against himself . . . ." *Id.*

[202] *Shulman*, N.Y. L.J., Dec. 4, 1997, at 35.

[203] *Id.*

[204] 399 U.S. 78 (1970). In *Williams*, the Supreme Court considered the constitutionality of a Florida rule which required that witness information pertinent to a claimed alibi be turned over to the prosecution. *Id* at 83. Defendant contended that this notice of alibi rule compels him in a criminal case to be a witness against himself in violation of his Fifth and Fourteenth Amendment rights. *Id.* at 79.

[205] *Shulman*, N.Y. L.J., Dec. 4, 1997, at 35.

allowed that in return for a defendant's disclosure concerning witnesses he intended to call to substantiate his alibi, the State must give notice to the defendant regarding every witness it intended to call in rebuttal.[207] Defendant contended that allowing this type of discovery by the State would inevitably deny him "due process" and a "fair trial."[208] In concluding that the statute enhanced the search for truth, the Court noted that "the privilege against self incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses."[209]

The *Shulman* court also looked for guidance from the New York Court of Appeals' decision in *People v. Copicotto*.[210] In *Copicotto*, defendants appealed their conviction for petit larceny and theft, contending that the government improperly granted discovery of certain evidence.[211] The court disagreed and concluded that the rules embodied in CPL section 240 were designed to promote justice and enhance fairness in our adversarial system.[212] While noting that care should be taken to ensure that no criminal defendant is compelled to act as a witness against his own interest, the court nonetheless held that the "Fifth Amendment privilege proscribes only testimonial compulsion, not

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[206] *Id. See Williams*, 399 U.S. at 80. Justice White interpreted the Florida rule as "in essence a requirement that a defendant submit to a limited form of pretrial discovery by the State whenever he intends to rely at trial on the defense of alibi." *Id.*

[207] *Id.*

[208] *Id.* at 81.

[209] *Id.* at 83. The United States Supreme Court remarked that "[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right to conceal their hands until played." *Id.* at 82.

[210] People v. Copicotto, 50 N.Y.2d 222, 406 N.E.2d 465, 428 N.Y.S.2d 649 (1980).

[211] *Id.* at 225, 406 N.E.2d at 467, 428 N.Y.S.2d at 467. The items in question were "sales receipts in defendants' possession, allegedly for the property which was the subject of the charge" but which "actually represented purchases made after defendants had been arrested and questioned." *Id.*

[212] *Id.* at 230, 406 N.E.2d at 471, 428 N.Y.S.2d at 655. "States are free to experiment 'with systems of broad discovery designed to achieve these goals.'" *Id.* (citation omitted).

that which merely makes a person the source of real or physical evidence."[213]

Finally, the *Shulman* court considered the proposition that a capital case should merit a heightened level of due process.[214] In *People v. Bastien*,[215] defendant made a similar due process argument.[216] Defendant was arrested and charged with first degree murder for allegedly shooting and killing a man.[217] Defendant argued that he was entitled to special consideration regarding certain discovery materials "because of the heightened due process requirements for capital cases required by the Federal and New York Constitutions."[218] The court rejected this argument entirely, noting that the defendant could not cite to a single New York case to support his claim.[219] The court closed its discussion of this subject with the definitive statement that "[i]n drafting legislation which authorizes imposition of the death penalty or life without parole in certain cases, the legislature made no provision for additional discovery procedures, and there is no other authorization for the discovery which the defendant seeks."[220]

As to the question of reciprocal discovery, it is clear that the federal and state constitutions are in congruence. As noted by Chief Judge Cooke in *Copicotto*, "[t]he criminal discovery procedure embodied in article 240 [was] adopted in substance from Rule 16 of the Federal Rules of Civil Procedure."[221] Both courts in this case are drawing their water from the same well.

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[213] *Id.* at 228, 406 N.E.2d at 469, 428 N.Y.S.2d at 654. "[N]othing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense." *Id.* at 229, 406 N.E.2d at 470, 428 N.Y.S.2d at 654 (citing *Williams*, 399 U.S. 78) (additional citations omitted).

[214] People v. Shulman, N.Y. L.J., Dec. 4, 1997 at 35.

[215] 170 Misc. 2d 103, 649 N.E.2d 979 (Sup. Ct. New York County 1996).

[216] *Id.* at 104, 649 N.Y.S.2d at 980.

[217] *Id.*

[218] *Id.* at 105, 649 N.Y.S.2d at 980.

[219] *Id.*

[220] *Id.*

[221] *Copicotto*, 50 N.Y.2d at 226, 406 N.E.2d at 468, 428 N.Y.S.2d at 652.

Defendant argued separately that CPL sections 220.10 (5)(e), 220.30 (30)(b)(vii), and 220.60 (2) which, taken as a whole, "provide that an accused may not enter a plea of guilty to the crime of murder in the first degree unless the agreed-upon sentence is either life imprisonment without parole or a lessor term of imprisonment" violates his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section 2 of the New York Constitution.[222]

Defendant argued that under the holding of *United States v. Jackson* [223] his constitutional rights were "impermissibly burdened."[224] In *Jackson*, the defendants had kidnapped and harmed their victim, and were therefore charged with a death penalty offense[225] under the Federal Kidnapping Act[226]. The statute provided that it was for to the jury to determine if death was the appropriate penalty.[227] The statute did not however, make any provision for imposing a death penalty when the defendant either pleads guilty or waives his right to a jury trial.[228] The effect of this rule was to penalize the defendant who chose to

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[222] People v. Shulman, N.Y. L.J., Dec. 4, 1997 at 35. *See also* N.Y. CONST art. I, § 2. This section provides in pertinent part that "trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever" and that "[a] jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death . . . ." *Id.*

[223] 390 U.S. 570 (1968).

[224] *Shulman,* N.Y. L.J., Dec. 4, 1997, at 35 (citing *Jackson*, 390 U.S. at 583). The death penalty statute in Jackson was part of the Federal Kidnapping Act, 18 U.S.C. § 1201 (a), which provides:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Jackson, 390 U.S. at 570-71.

[225] *Jackson*, 390 U.S. at 571.

[226] 18 U.S.C.§ 1201(a).

[227] *Id.*

[228] *Id.*

exercise his right to be tried by a jury of his peers, for only by choosing a jury trial could he conceivably be executed.[229] The Court held that such a provision inevitably caused a "chilling effect" on the Fifth and Sixth Amendment rights of the defendant, and struck it down.[230]

In *Shulman,* defendant argued that New York courts should follow the holding of *Jackson,* as the court did in *People v. Hale.*[231] In *Hale*, defendant was arrested and charged with crimes that included capitol murder, a death penalty offense.[232] Citing *Jackson*, the defendant in Hale argued that the statutory plea provisions of the New York CPL[233] effectively penalize the defendant's election of a jury trial, as opposed to negotiating a plea with the district attorney.[234] Defendant contended that he would face death only by exercising his rights under the Fifth and Sixth Amendments, and the law must therefore be unconstitutional.[235] The People attempted to distinguish the New York statutes by pointing out that there was no provision contained therein were allowed the defendant to waive his right to a jury trial.[236] Furthermore, the People argued that, unlike *Jackson,* in New York, a defendant could only plead guilty to a capital crime after securing the consent of the court and permission of the People.[237] The court found the People's

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[229] *Id.* at 581. Under the Federal Kidnapping act, therefore, a defendant who abandons his right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. *Id.*

[230] *Id.* at 585. The Court opined that "[w]hatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. *Id.* at 583.

[231] 173 Misc. 2d 140, 661 N.Y.S.2d 457 (Sup. Ct. Kings County 1997).

[232] *Id.* at 152, 661 N.Y.S.2d at 462.

[233] CPL §§ 220.10(5)(e), 220.30(3)(b)(vii)and 220.60(2).

[234] *Hale*, 173 Misc. 2d at 178-79, 661 N.Y.S.2d at 479-80.

[235] *Id.* at 179-80, 661 N.Y.S.2d at 479-80.

[236] *Id.* at 180, 661 N.Y.S.2d at 480. Therefore, the People argued, "capitol defendants are not needlessly encouraged to abandon that right . . . ." *Id.*

[237] *Id.* at 181, 661 N.Y.S.2d at 480.

reasoning to be unpersuasive.[238] Citing the New York Court of Appeals reasoning in *People v. Lee*,[239] the *Hale* court maintained that the People had failed to adequately distinguish the New York statutes, and granted defendant's motion to strike them.[240]

The *Shulman* court was unpersuaded by the *Hale* opinion[241], and instead looked to the reasoning of *People v. McIntosh*.[242] The defendant in *McIntosh* was likewise charged with a death penalty offense.[243] He too attempted to have the statutes declared unconstitutional.[244] However, the *McIntosh* court was able to see the distinction between the Federal Kidnapping Act death penalty statute and the New York State death penalty statutes.[245] It held that since a plea must be negotiated, and cannot be entered unilaterally, there is no "needless encouragement of a defendant's waivers of his/her Fifth and Sixth Amendment rights."[246] The *McIntosh* court saw this as little more than plea bargaining, a time honored and indispensable tool in the criminal justice system.[247] The *Shulman* court agreed, and ruled that the

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[238] *Id.* at 184, 661 N.Y.S.2d at 482.

[239] 58 N.Y.2d 491, 448 N.E.2d 1328, 462 N.Y.S.2d 417 (1983). Defendant was arrested and charged for carrying an open container of beer in the Village of Monticello and pled guilty to the charge, which was affirmed on appeal. The court, in dicta, stated that "[t]here can be no doubt that . . . a plea (of guilty) constitutes an effective judicial admission by a defendant . . . and waives such trial rights as the privilege against self incrimination (and) the right to trial by jury." *Id.* at 493-94, 448 N.E.2d at 1329, 462 N.Y.S.2d at 418.

[240] *Hale*, 173 Misc. 2d at 193-94, 661 N.Y.S.2d at 488. "What is forbidden is a scheme, like New York's, in which the possibility of death only arises from the defendant's exercise of his right to a jury trial." *Id.* at 182, 661 N.Y.S.2d at 481.

[241] People v. Shulman, N.Y. L.J., Dec. 4,1997, at 35.

[242] 173 Misc. 2d 727, 662 N.Y.S.2d 214 (Sup. Ct. Kings County 1997).

[243] *Id.* at 728, 662 N.Y.S.2d at 215.

[244] *Id.*

[245] *Id.* at 729, 662 N.Y.S.2d at 216.

[246] *Id.* at 730, 662 N.Y.S.2d at 216.

[247] *Id.* "Plea bargaining is now established as a vital part of our criminal justice system. . . . [I]f full trials were required in each case New York's law enforcement system would collapse." *Id.*

defendant had failed to meet his burden of proving unconstitutionality.[248]

The federal and state constitutional provisions under which the defendant in *Shulman* challenged the plea provisions of CPL sections 220.10(5)(e), 220.30(3)(b)(vii), and 220.60(2) are substantially the same.[249] The difference in outcome between the federal and state cases cited herein lies in the ability of the adjudicating magistrate to see the distinction between a statute which "impermissibly burdens" a defendants constitutional rights, as in *Jackson*,[250] and one which allows for plea negotiation and mutual decision making between the various parties involved.[251]

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[248] *Shulman*, N.Y. L.J., Dec. 4, 1997, at 36.

[249] *See, e.g.*, U.S. CONST. amend. V; N.Y. CONST. art. I, § 6.

[250] United States v. Jackson, 390 U.S. 570, 572.

[251] *McIntosh*, 173 Misc. 2d at 733, 662 N.Y.S.2d at 218. "Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Id.* at 734, 662 N.Y.S.2d at 219 (additional citation omitted).