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Right to Counsel: People v. West

charges to which his counsel rights have attached, this will violate the Sixth Amendment and, thus, be inadmissible. In short, while the federal courts do not distinguish between whether or not there has been a waiver of counsel for pending charges, the New York courts draw the distinction as evidenced in the *Kazmarick* line of cases.

People v. West[1893]
(decided June 8, 1993)

The criminal defendant claimed that his right to counsel under the State Constitution[1894] attached indelibly when counsel entered his appearance at defendant's lineup and instructed law officials not to question his client.[1895] In addition, defendant claimed that his state right to counsel was violated when law officials used an informant to surreptitiously tape-record incriminating statements he had made.[1896] In deciding these issues, the court had to determine the precise meaning of "indelible attachment."

The New York Court of Appeals reversed the decision of the appellate division and held that since defendant's right to counsel had "attached indelibly," the taped statements were taken in violation of the defendant's right to counsel.[1897] Consequently, a new trial was ordered.[1898]

In this case, the defendant was convicted of murder in the second degree in the Supreme Court, New York County, and that conviction was affirmed by the Appellate Division, First Department.[1899] Defendant was part of a three-man drug operation, based in Manhattan.[1900] On June 15, 1982, there was a fight in front of the house and Sylvester Coleman was

1893. 81 N.Y.2d 370, 615 N.E.2d 968, 599 N.Y.S.2d 484 (1993).

1894. N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part: "In any trial in any case whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions . . . ." *Id.*

1895. *West*, 81 N.Y.2d at 372, 615 N.E.2d at 969, 599 N.Y.S.2d at 485.

1896. *Id.* at 372, 615 N.E.2d at 969-70, 599 N.Y.S.2d at 485-86.

1897. *Id.* at 373, 615 N.E.2d at 970, 599 N.Y.S.2d at 486.

1898. *Id.*

1899. People v. West, 183 A.D.2d 419, 583 N.Y.S.2d 396 (1st Dep't 1992).

1900. *West*, 81 N.Y.2d at 372, 615 N.E.2d at 969, 599 N.Y.S.2d at 485.

killed.[1901] On June 30, 1982, police placed defendant in a lineup in connection with the murder.[1902] The results of the lineup were inconclusive and the defendant was not charged.[1903] At the time of the lineup, the defendant was represented by counsel.[1904]

Three years later, Michael Davenport was arrested for unrelated crimes.[1905] Michael admitted that he was involved in the murder and also implicated defendant in the matter.[1906] In exchange for leniency, he agreed to cooperate with the prosecution. Michael's twin brother, Mark Davenport, wishing to assist in his brother's defense, was directed by law enforcement officials to tape record various conversations with the defendant.[1907] The police, however never determined whether the defendant was still represented by counsel before they made arrangements with Mark to tape the conversations.[1908] As a result of the conversations, the defendant made statements indicative of guilt.[1909] The lower court denied suppression of the tape-recorded conversations. At trial, these recorded statements of the defendant played a significant part in the prosecution's case-in-chief. Consequently, the jury convicted the defendant.[1910]

On appeal the appellate division deemed that the "investigation for which the defendant had obtained counsel had been terminated and that the taped statements were made as part of a new investigation."[1911] Furthermore, the court deemed the taped conversations to be noncustodial in nature.[1912]

The court of appeals, however, disagreed with the appellate division and held that the taped statements "were taken in

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1901. *Id.*
1902. *West*, 81 N.Y.2d at 372, 615 N.E.2d at 969, 599 N.Y.S.2d at 485.
1903. *Id.*
1904. *Id.*
1905. *Id.*
1906. *Id.*
1907. *West*, 81 N.Y.2d at 372, 615 N.E.2d at 969-70, 599 N.Y.S.2d at 485-86.
1908. *Id.*
1909. *Id.*
1910. *Id.* at 373, 615 N.E.2d at 970, 599 N.Y.S.2d at 486.
1911. *Id.*
1912. *Id.*

violation of the defendant's right to counsel."[1913] Chief Justice Kaye, writing for the majority, explained that the "defendant's right to counsel was violated when the police sent an informant to surreptitiously record incriminating statements about the counseled matter without regard to their knowledge that the defendant had a lawyer in the case."[1914] The court stated that law enforcement officials could not simply ignore defendant's right to counsel.[1915] Police knew the defendant was represented at the prior lineup and they should have made an inquiry to determine whether the attorney-client relationship still existed with respect to the issue under investigation.[1916] Finally, the court reasoned that the passage of three years did not automatically eradicate the defendant's right to counsel.[1917]

There are two situations in which the right to counsel attaches indelibly. The first is, "upon the commencement of formal proceedings whether or not the defendant has actually retained or requested a lawyer."[1918] The second is, "where an uncharged individual has already retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter."[1919] The court of appeals determined that it was the second principle which was at issue.[1920]

1913. *Id.*

1914. *Id.* at 379, 615 N.E.2d at 974, 599 N.Y.S.2d at 490.

1915. *Id.*

1916. *Id.* On the other hand, the dissent argued that the defendant must prove actual representation "at the time of interrogation." *West*, 81 N.Y.2d at 385, 615 N.E.2d at 978, 599 N.Y.S.2d at 499 (Simons, J., dissenting). According to the dissent, it would seem evident that unless the defendant was represented by an attorney at the time, the police could not have been guilty of interfering with an attorney-client relationship by questioning him. *Id.* (Simons, J., dissenting). Therefore, there must be a determination of whether the defendant had any rights at the time of the interrogation, not on what police thought at the time of questioning. *Id.* at 381, 615 N.E.2d at 975-76, 599 N.Y.S.2d at 491-92 (Simons, J. dissenting).

1917. *Id.* at 379-80, 615 N.E.2d at 974-75, 599 N.Y.S.2d at 490.

1918. *Id.* at 373, 615 N.E.2d at 970, 599 N.Y.S.2d at 486.

1919. *Id.* at 373-74, 615 N.E.2d at 970, 599 N.Y.S.2d at 486.

1920. *Id.* at 374 , 615 N.E.2d at 9771, 599 N.Y.2d at 487.

Eventually, the second principle was extended non-custodial questioning as well. For example, in *People v. Skinner*[1921] the issue before the court was whether a person who retained an attorney for a specific matter could be questioned about the matter in a noncustodial environment, despite the fact that the attorney instructed the police not to interrogate his client unless he was present.[1922] The New York Court of Appeals answered in the negative.[1923] The court stated that by retaining an attorney, the defendant manifested a belief that he was unable to deal with the coercive power of the authorities without legal assistance.[1924] The court ruled that the state could not derogate that right by subjecting the individual to questioning.[1925] As a result, any statements obtained from defendant could not be used by the state, unless the right to counsel had been waived in the presence of the defendant's attorney.[1926]

Thereafter, in *People v. Knapp*,[1927] the court of appeals applied *Skinner* to a set of facts similar to the case at bar. The *Knapp* court reaffirmed the prohibition against non-custodial questioning of a represented suspect, even when the suspect did not know that the state was questioning him.[1928] In *Knapp*, the police instructed defendant's employer to act as their informer.[1929] At the time, police were aware that defendants attorney had directed police not to question defendant regarding the matter at hand. The court held that where police were "chargeable with knowledge of the direction given by defendant's attorney to . . . police that defendant was not to be questioned," but nonetheless used defendant's employer as their agent, defendant's right to counsel had been violated.[1930]

1921. 52 N.Y.2d 24, 417 N.E.2d 501, 436 N.Y.S.2d 207 (1980).
1922. *Id.* at 26, 417 N.E.2d at 502, 436 N.Y.S.2d at 208.
1923. *Id.*
1924. *Id.* at 29, 417 N.E.2d at 503, 436 N.Y.S.2d at 209.
1925. *Id.* at 31, 417 N.E.2d at 505, 463 N.Y.S.2d at 211.
1926. *Id.* at 29, 417 N.E.2d at 503, 436 N.Y.S.2d at 209.
1927. 57 N.Y.2d 161, 441 N.E.2d 1057, 455 N.Y.S.2d 539 (1982).
1928. *Id.* at 173-74, 441 N.E.2d at 1061, 455 N.Y.S.2d at 543.
1929. *Id.* at 169-70, 441 N.E.2d at 1059, 455 N.Y.S.2d at 541.
1930. *Id.* at 173, 441 N.E.2d at 1061, 455 N.Y.S.2d at 543.

With these precedents in mind, the majority in *West* stated that once a suspect has obtained representation in the matter at issue, the suspect has "activated his constitutional right to interpose an attorney between himself and the overwhelming power of the State."[1931]

Similarly, federal case law provides that Sixth Amendment protections apply when a person, at the direction of a law enforcement official, elicits incriminating statements from the defendant without the benefit of counsel.[1932] In *Maine v. Moulton*,[1933] the United States Supreme Court recognized that the assistance of counsel cannot be limited to participation in a trial.[1934] The Court found that the right to counsel attaches at earlier "critical" stages in the criminal process.[1935] Further, the Sixth Amendment also imposes on the state a duty to honor and preserve the accused's choice to seek this assistance.[1936] Consequently, once the right has attached, it prohibits law enforcement personnel, and those acting in concert with them, from "deliberate elicitation of statements from an accused in the absence of counsel."[1937]

In *United States v. Terzado-Madruga*, the Eleventh Circuit echoed the New York courts' finding that law enforcement officials who know that a right to counsel has "indelibly attached," may not question individuals on the matter without counsel present.[1938] The court held that "once the right to counsel has attached, the law enforcement authorities must take

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1931. *West*, 81 N.Y.2d at 376, 615 N.E.2d at 972, 599 N.Y.S.2d at 488.

1932. *See* United States v. Terzado-Madruga, 897 F.2d 1099, 1105 (11th Cir. 1990).

1933. 474 U.S. 159 (1985).

1934. *Id.* at 170.

1935. *Id.*

1936. *Id.*

1937. *See* Massiah v. United States, 377 U.S. 201, 204-07 (1964). In *Massiah*, the Court held that "petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206.

1938. *Id.* at 1109.

no action that 'circumvents and thereby dilutes' the protection afforded by the right to counsel."[1939]

It appears that the Federal courts and the New York Court of Appeals are in harmony on this issue. The right to counsel protected by the Federal and New York State Constitutions is violated when a government informant (without determining whether the defendant was represented by an attorney) actively engages a defendant in conversation which is likely to elicit incriminating statements about the defendant's upcoming trial.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Caviano[1940]
(decided June 17, 1993)

The defendant, Sean Caviano, appealed his conviction of attempted murder in the second degree, and robbery in the first degree, on the ground that his constitutional[1941] right to counsel[1942] was violated when he was questioned by New York City detectives without an attorney being present. In affirming the lower court's decision, the appellate division disagreed with defendant's contentions, and held that his right to counsel was not violated, due to the voluntariness of his statement and his failure to invoke his right to counsel.[1943]

1939. *Id.*

1940. 194 A.D.2d 429, 599 N.Y.S.2d 251 (1st Dep't 1993).

1941. The court, in rendering the decision, did not specify whether the "right to counsel" referred to federal or state constitutions. The case, however, was decided solely under the auspices of New York State case law.

1942. N.Y. CONST. art. I, § 6. Section 6 provides in pertinent 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 . . . ." *Id*; U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." *Id.*

1943. 194 A.D.2d at 430, 599 N.Y.S.2d at 252.