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Touro Law Review

Volume 10 | Number 3

Article 63

1994

Right to Counsel: People v. Caviano

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Recommended Citation

(1994) "Right to Counsel: People v. Caviano," *Touro Law Review*: Vol. 10 : No. 3 , Article 63.
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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.

The defendant was on active duty in the Navy at the time of the murder investigation, and was therefore questioned by New York City detectives in Illinois.[1944] Testimony at the lower court level indicated that the "defendant voluntarily agreed to be interviewed, was fully advised of his *Miranda* rights, freely and voluntarily gave his statement to the detectives, never invoked his right to counsel, and did not request a telephone call . . . prior to the completion of the interview."[1945] Furthermore, the interview was interrupted by periodic breaks, was not excessively lengthy, included refreshment, and was characterized by the defendant remaining calm and relaxed throughout.[1946] Such conditions pale in comparison to those described in *People v. Cooper*.[1947] In that case, defendants confession was suppressed as a result of twelve hours of continuous interrogation whereby defendant was deprived of both sleep and dialysis.[1948]

In *Caviano*, however, the defendant maintained that the alleged violation of his right to counsel required that his statements be suppressed.[1949] He relied on the New York Court of Appeals decision in *People v. Harris*[1950] which held that "statements

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1944. *Id.*

1945. *Id.*

1946. *Id.* The court determined that the defendant had not been subjected to a custodial interrogation. *See* People v. Hicks, 68 N.Y.2d 234, 240, 500 N.E.2d 861, 864, 508 N.Y.S.2d 163, 166 (1986). In *Hicks*, the court determined that defendant "could not reasonably have believe he was under arrest" when he was not handcuffed, was permitted to park his own car, and was detained only briefly. *Id.*; People v. Yukl, 25 N.Y.2d 585, 591, 256 N.E.2d 172, 175, 307 N.Y.S.2d 857, 862 (1969). In *Yukl*, the defendant voluntarily came to the police station, voluntarily answered questions and voluntarily gave up his clothing, thus he could not be said to be in custody. *Id.*; *see also* People v. Claudio, 85 A.D.2d 245, 447 N.Y.S.2d 972 (2d Dep't 1982) (questioning occurring in defendant's home in presence of his family was not custodial and any statements made were therefore admissible).

1947. 101 A.D.2d 1, 175 N.Y.S.2d 660 (4th Dep't 1984).

1948. *Id.* at 14-15, 475 N.Y.S.2d at 669-70.

1949. *Id.* at 14, 475 N.Y.S.2d at 669.

1950. 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1, *rev'd on other grounds*, 495 U.S. 14 (1991). In *Harris*, police, without obtaining a warrant, entered defendant's home and elicited oral, as well as written, confessions, implicating defendant in the murder of his girlfriend. 72 N.Y.2d at 617, 532

obtained from an accused following an arrest made in violation of *Payton*[1951] . . . are not admissible under the State Constitution if they are a product of the illegality."[1952] The court reasoned that in addition to defendant's concession that the rule in *Payton*, prohibiting warrantless and nonconsensual entries was not violated, neither the holding in *Harris* nor its rationale applied to the case at bar.[1953] The court held that such misplaced reliance did not warrant suppression of defendant's incriminating statements.[1954]

The federal case law indicates that an individual's right to counsel attaches when formal proceedings have been initiated against a defendant.[1955] In *Moran v. Burbine*,[1956] a defendant having no knowledge that his sister had retained counsel for him

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N.E.2d at 1230, 536 N.Y.S.2d at 2. The court held the subsequent arrest illegal, and ordered all confessions suppressed. *Id.* at 623, 532 N.E.2d at 1234, 536 N.Y.S.2d at 6.

1951. Payton v. New York, 445 U.S. 573 (1980). In *Payton*, the Supreme Court held that warrantless, nonconsensual entries into a suspect's home for the purposes of securing an arrest violates the Fourth Amendment. Therefore, any evidence gained as a consequence of these illegal entries must be suppressed. *Id.* at 589-90.

1952. *Caviano*, 194 A.D.2d at 430, 599 N.Y.S.2d at 253 (quoting *Harris*, 77 N.Y.2d at 440, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706). The "illegality" in this statement refers to warrantless and nonconsensual entries into a suspect's home by police. *Caviano*, 194 A.D.2d at 430, 599 N.Y.S.2d at 253.

1953. *Id.* at 431, 599 N.Y.S.2d at 253.

1954. *Id.* at 430-31, 599 N.Y.S.2d at 253. *Payton* addressed the Fourth Amendment prohibition against warrantless and nonconsensual entries into a suspect's home during an arrest. The defendant in the case at bar conceded that no such violation of *Payton* occurred. *Id.* Therefore, neither *Payton* nor *Harris*, which reiterates the importance of *Payton* in New York, is applicable to the case at hand. *Id.*

1955. *See* Moran v. Burbine, 475 U.S. 412, 428 (1986) ("[T]he defendant has the right to the presence of an attorney during an interrogation occurring after the first formal charging proceeding . . . ."); Brewer v. Williams, 430 U.S. 387, 398 (1977) ("[A] person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ."); Kirby v. Illinois, 406 U.S. 682, 689 (1972). In *Kirby*, the court described the initiation of adversarial, judicial proceedings as "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*

1956. 475 U.S. 412 (1986)

on a breaking and entering charge, signed written admissions after being interrogated on suspicion of murder.[1957] The United States Supreme Court refused to suppress these statements since no formal murder charges had been initiated against the defendant.[1958] If the *Moran* Court could not find that formal proceedings had begun, then applying federal law to the instant case, defendant in *Caviano* could not sustain a claim that formal proceedings had been initiated where he was only questioned on the alleged violation. Therefore, defendant's statements were clearly not protected under either the Federal or State Constitutions.

CRIMINAL DIVISION

BRONX COUNTY

People v. Rivera[1959]
(decided November 22, 1993)

Defendant, Ernesto Rivera, in a "hybrid form of representation"[1960] attempted to proceed *pro se* and have his criminal indictment dismissed, based on New York's speedy trial provision.[1961] The court had to determine under what

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1957. *Id.* at 417.

1958. *Id.* at 430-31.

1959. ___ Misc. 2d ___, 605 N.Y.S.2d 822 (Sup. Ct. Bronx County 1993).

1960. *Id.* at ___, 605 N.Y.S.2d at 822. Hybrid representation occurs where a defendant proceeds *pro se* and also receives standby counsel. *Id.* at ___, 605 N.Y.S.2d at 823.

1961. *Id.* at ___, 605 N.Y.S.2d at 822; *see also* N.Y. CRIM. PROC. LAW § 30.30 (McKinney 1992). This section states in part:

1. Except as otherwise provided in subdivision three, a motion made pursuant to paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one of section 210.20 must be granted where the people are not ready for trial within:
   (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony;