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Right to Counsel

RIGHT TO COUNSEL

N.Y. CONST. art. I, § 6

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 . . . .

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. LoPizzo[741]
(decided May 13, 1991)

The defendant, Salvatore LoPizzo, appealed his conviction of attempted robbery in the first degree upon his guilty plea, on the ground that he was denied his constitutional[742] right to counsel at the line-up in which he was identified. The court held that defendant was, in fact, denied his right to counsel and reversed the conviction.[743]

Prior to the line-up, LoPizzo informed police that he was represented by counsel and requested counsel's presence at the line-up. Counsel subsequently informed police, over the telephone, that he was out of town, would be unable to attend, and requested a one day delay so that he could be present. The police refused to wait an additional day, proceeded with the line-up, and LoPizzo

741. 570 N.Y.S.2d 307 (2d Dep't 1991).

742. *See* N.Y. CONST. art. I, § 6; U.S. CONST. amend. VI. The court did not explicitly differentiate between federal and state law, but decided the case under New York law. *See LoPizzo*, 570 N.Y.S.2d at 308.

743. *Id.*

was identified.[744]

The court recognized that "[i]t is well settled that an accused does not have a right to counsel at investigatory lineups as a matter of Federal or State constitutional law."[745] The court cited the New York Court of Appeals decision in *People v. Hernandez,*[746] which expressly articulated this rule.[747] The court then relied on *People v. Hawkins,*[748] which stated that police need not delay the line-up to ensure counsel's presence if delaying the line-up would cause significant inconvenience to the identifying witnesses, or "would undermine the substantial advantages of a prompt identification confrontation."[749]

However, there are exceptions to these rules. If a suspect is already represented by counsel at the time of the line-up, counsel's presence cannot be excluded from the proceeding.[750] The *LoPizzo* court quoted the New York Court of Appeals, which stated that:

> [W]hen the police are aware that a criminal defendant is represented by counsel and the defendant explicitly requests the assistance of his attorney, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording him or her an opportunity to appear.[751]

It is undisputed that LoPizzo was represented by counsel at the time of the line-up. Further the *LoPizzo* court reasoned that since the line-up took place seven months after the crime, there was no need for expediency in identification. Also, the court noted that

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744. *Id.*

745. *Id.*

746. 70 N.Y.2d 833, 517 N.E.2d 1328, 523 N.Y.S.2d 442 (1987).

747. *Id.* at 835, 517 N.E.2d at 1330, 523 N.Y.S.2d at 444.

748. 55 N.Y.2d 474, 435 N.E.2d 376, 450 N.Y.S.2d 159, *cert. denied*, 459 U.S. 846 (1982).

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

750. *Id.*; *see also* People v. Blake, 35 N.Y.2d 331, 338, 320 N.E.2d 625, 630, 361 N.Y.S.2d 881, 889 (1974) ("When an accused, at any stage, before or after arraignment, to the knowledge of the law enforcement agencies, already has counsel, his right or access to counsel may not be denied.").

751. *LoPizzo*, 570 N.Y.S.2d at 308 (quoting People v. Coates, 74 N.Y.2d 244, 249, 543 N.E.2d 440, 442, 544 N.Y.S.2d 992, 994 (1989)).

there was no indication that a twenty-four hour delay would have significantly inconvenienced the identifying witness.[752] Based upon the foregoing and the fact that LoPizzo's decision to plead guilty may have been influenced by the result of the line-up at which he was denied the right to counsel, the court reversed LoPizzo's conviction.[753]

On the federal level, the rule is quite clear when applying the right to counsel under the Sixth Amendment of the United States Constitution.[754] The right to counsel attatches and cannot be violated once formal proceedings have begun against the defendant on the particular matter in question.[755] In *Kirby v. Illinois*,[756] the United States Supreme Court noted that "while members of the Court have differed[, in prior cases,] as to the existence of the right to counsel . . . *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings . . . ."[757] The Court declined to extend the Sixth Amendment constitutional right to counsel, afforded to a post indictment pre-trial line-up,[758] to a pre-indictment police station show up that had occured before any formal proceedings had commenced. The Court reasoned that:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive

752. *Id.*

753. *Id.* at 309.

754. U.S. CONST. amend. VI.

755. *See* Brewer v. Williams, 430 U.S. 387, 398 (1977) (stating that the sixth amendment right to counsel attaches "at or after the time that judicial proceeding have been initiated against him . . . ."); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (listing the types of adversarial judicial criminal proceedings as "formal charge, preliminary hearing, indictment, information, or arraignment.").

756. 406 U.S. 682 (1972).

757. *Id.* at 689 (citations omitted).

758. *See* United States v. Wade, 388 U.S. 218 (1967).

and procedural criminal law.[759]

The fact that an attorney had not yet been retained by defendant was inapposite because the Court concluded that the right to have an attorney present does not attach until formal proceedings have commenced.

Further, in *Moran v. Burbine*,[760] the Supreme Court rejected defendant's argument that "the Sixth Amendment protects the integrity of the attorney-client relationship regardless of whether the prosecution has in fact commenced 'by way of formal charge, preliminary hearing, indictment, information or arraignment.'"[761] The fact that defendant was represented by counsel on the charge for which he was being held, did not mean that he could not be interrogated on another wholly unrelated matter for which formal proceedings had not yet commenced.

The Court held that the Sixth Amendment right to counsel attaches only after the initiation of formal charges, at which point the government shifts its role from "investigation to accusation."[762] Moreover, the Court wrote:

> More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purposes of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal prosecution" . . . the accused shall not be left to his own devices in facing the "prosecutorial forces of organized society."[763]

Thus, a defendant does not have the right to counsel at investigatory line-ups under either the state or federal constitutions without the presence of other factors. The New York rule turns

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759. *Kirby*, 406 U.S. at 689.

760. 475 U.S. 412 (1986).

761. *Id.* at 428-29 (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)).

762. *Id.* at 430.

763. *Id.* (citations omitted).

upon whether the defendant has retained counsel for the matter in question, while the federal rule turns upon whether formal proceedings have commenced against the defendant for the particular charge upon which he or she is asked to participate in a line up.

SUPREME COURT

NEW YORK COUNTY

People v. Goldfinger[764]
(decided January 25, 1991)

The defendant, Judith Goldfinger, sought to suppress secretly tape recorded statements made by her to an agent of the New York County District Attorney. Goldfinger claimed that her New York State constitutional right to counsel[765] was violated because the statements were obtained out of the presence of her attorney who she had previously retained to defend her in federal civil proceedings, the subject matter of which was based upon the same transactions and occurences as the matter being investigated by the district attorney's office. She claimed that this constitutional violation should result in the suppression of her tape recorded statements. The court held that her statements should be suppressed because, although no formal criminal proceedings had yet begun, her retention of counsel related to all matters concerning the transactions and occurences in question and, therefore, she could not be questioned about them out of the presence of her attorney.[766]

In 1988, Goldfinger's employer, Cosmos Forms Ltd. (Cosmos), filed a federal civil suit under the Racketeer Influenced and Corrupt Organizations Act (RICO)[767] against Guardian Life Insurance Co. (Guardian), one of its corporate

764. 149 Misc. 2d 765, 565 N.Y.S.2d 993 (Sup. Ct. New York County 1991).

765. N.Y. CONST. art. I, § 6.

766. *Goldfinger*, 149 Misc. 2d at 771, 565 N.Y.S.2d at 997.

767. 18 U.S.C. § 1961 (Supp. 1990).