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Due Process

People v. Castillo[57]
(decided December 22, 1992)

Defendant claimed that his state[58] and federal[59] constitutional rights to due process and effective assistance of counsel were violated by his exclusion from participation in a suppression hearing challenging the issuance of the search warrant as well as the denial of discovery of the supporting papers and the identity of the confidential informant which formed the basis for the warrant.[60]

The New York Court of Appeals, affirming a unanimous decision of the appellate division, first department,[61] held that "a defendant's opportunity to participate in suppression proceedings must yield in some cases to the need for confidentiality,"[62] and furthermore, "under the circumstances presented . . . the trial court could, and properly did, deny defendant discovery."[63] In denying defendant access to the hearing, the court cautioned that this rule is "reserved for those cases in which the reliability of the evidence of probable cause and the necessity for confidentiality are clearly demonstrated."[64]

On April 5, 1988, two agents from the Drug Enforcement Agency (DEA) entered the defendant's apartment without permission and displayed photographs to defendant's wife of a former tenant, and asked her to identify him. She denied knowing the person and stated that only she, her husband, and their daughter lived in the apartment. She alleged that officers proceeded to look throughout the apartment, again without her per-

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57. 80 N.Y.2d 578, 607 N.E.2d 1050, 592 N.Y.S.2d 945 (1992).

58. N.Y. CONST. art. I, § 6.

59. U.S. CONST. amends. VI, XIV.

60. *Castillo*, 80 N.Y.2d at 580-81, 607 N.E.2d at 1050-51, 592 N.Y.S.2d at 945-94.

61. People v. Castillo, 176 A.D.2d 609, 610, 575 N.Y.S.2d 49, 50 (1st Dep't 1991).

62. *Id.* at 587, 607 N.E.2d at 1055, 592 N.Y.S.2d at 950.

63. *Id.* at 580, 607 N.E.2d at 1051, 592 N.Y.S.2d at 946.

64. *Id.* at 596, 607 N.Y.2d at 1055, 592 N.Y.S.2d at 950.

mission.[65] The next day, officers from the New York Police Department searched the defendant's apartment, pursuant to a search warrant, and discovered large quantities of cocaine and money as well as weapons and ammunition. The defendant, who was present during the search, was subsequently arrested.[66]

The warrant supporting the search was issued by a supreme court justice after an oral examination of the police officer filing for the warrant and the confidential informant who provided the information upon which the officer's testimony and affidavit was based.[67] The record was then ordered sealed.[68]

The defendant sought to suppress the evidence uncovered during the search on April 6th. He alleged that the initial entry into his apartment by the DEA agents was unlawful and served as the basis for the finding of probable cause in the issuance of the warrant executed the next day by the New York City police.[69] The defendant's request to inspect the warrant and challenge the determination of its issuance was denied, as was his motion to suppress the evidence.[70] The court based its determination on the fact that the "disclosure of the informant's identity and/or statements could compromise the safety of the informant or the integrity of future investigations. At subsequent hearing, again held in the defendant's absence, the suppression court determined that the April 5th search by the DEA agents was unrelated to, and did not taint, the search conducted the following day pursuant to the warrant.[71]

Upon examination of the sealed record, it was determined by both the appellate division and the court of appeals that

> there was support for the determination by the courts below that the warrant was issued upon probable cause, that the documents supporting the warrant were not perjurious and that the affidavit

65. *Id.* at 581, 607 N.E.2d at 1051, 592 N.Y.S.2d at 946.
66. *Id.* at 580-81, 607 N.E.2d at 1051, 592 N.Y.S.2d at 946.
67. *Id.* at 580-81, 607 N.E.2d at 1052, 592 N.Y.S.2d at 946.
68. *Id.* at 581, 607 N.E.2d at 1051, 592 N.Y.S.2d at 946.
69. *Id.*
70. *Id.* at 580, 607 N.E.2d at 1050, 592 N.Y.S.2d at 945.
71. *Id.*

> and oral testimony could not be effectively redacted for delivery to defendant without destroying the informant's anonymity.[72]

The court of appeals determined that the issue before it was "whether defendant has an absolute right to take part in [the suppression] hearing."[73] The court stated that resolving this issue rested upon the balance between the "defendant's right to participate in the defense and society's need to encourage citizens to participate in law enforcement by granting them anonymity when necessary for their protection."[74]

The court began its analysis by discussing the differences between the a trial and a suppression hearing. It noted that due process requirements are lessened in a suppression hearing because "'[t]he very purpose of a motion to suppress is to escape the incupatory thrust of evidence in hand,'" whereas in a trial the court is dealing with the criminal charge itself.[75] Thus, if the motion to suppress is denied, the court noted, the defendant may still exculpate himself at trial as he will be "'judged upon the untarnished truth.'"[76]

Relying on the Supreme Court's decision in *McCray v. Illinois*,[77] the court of appeals explained that in a trial the need for truth outweighs the need for confidentiality because the paramount question of guilt of the defendant is at stake.[78] Because the exclusionary rule's aim is to guard against police misconduct and not the promotion of truth, the exclusionary rule may be unavailable to the defendant in "exceptional" circumstances because of the overriding need to protect the identity of the informer or the contents of his statements so as to "encourage citizens to participate in law enforcement."[79] The court stated that this principle is implicitly recognized in its past holdings "that a suppres-

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72. *Id.* at 580, 607 N.E.2d at 1050-51, 592 N.Y.S.2d 945-46.
73. *Id.* at 582, 607 N.E.2d at 1052, 592 N.Y.S.2d at 947.
74. *Id.*
75. *Id.* (quoting McCray v. Illinois, 386 U.S. 300, 307 (1967)).
76. *Id.* (quoting *McCray*, 386 U.S. at 307).
77. 386 U.S. 300 (1967).
78. *Castillo*, 80 N.Y.2d at 582, 607 N.E.2d at 1052, 592 N.Y.S.2d at 947.
79. *Id.* at 583, 607 N.E.2d at 1052, 592 N.Y.S.2d at 947.

sion court can deny disclosure of the identity of an informant."[80] Such limitation on disclosure, the court noted, may be utilized in order to protect the interests of society.[81]

Guided by its decision in *People v. Darden*,[82] the *Castillo* court determined that a trial court sitting in a suppression hearing "may undertake the responsibility of protecting defendant's interests"[83] in confirming that probable cause indeed existed for the search warrant by examining the confidential informant, whose anonymity is vital for safety and/or future investigatory purposes, *in camera, ex parte*.[84] In following *Darden*, the *Castillo* court clearly stated that when such provisions for secrecy are made, and defendant thus loses the ability to be present and participate in the examination of the informant, the hearing court takes on the "special need for protection of the interests of the absent defendant . . . ."[85]

The majority opinion contended that although the suppression court is asked to be "particularly diligent and consider all possible challenges that might be raised on the defendant's behalf,"[86] this is a "legal task particularly within the ambit of its expertise"[87] and therefore rejected defendant's allegations of inherent constitutional violation based upon his exclusion from the proceedings.[88] Hence, the *Castillo* court found that defendant need not be represented by " 'single-minded counsel for the ac-

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80. *Id.* (citing to People v. Darden, 34 N.Y.2d 177, 181, 313 N.E.2d 49, 52, 365 N.Y.S.2d 582, 585-86 (1974); People v. Castro, 29 N.Y.2d 324, 326, 277 N.E.2d 654, 655, 327 N.Y.S.2d 632, 633-34 (1971)).

81. *Id.*

82. 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974).

83. *Castillo*, 80 N.Y.2d at 583, 607 N.E.2d at 1053, 592 N.Y.S.2d at 948.

84. *Id.* at 583, 607 N.E.2d at 1052, 592 N.Y.S.2d at 947.

85. *Id.* at 584, 607 N.E.2d at 1053, 592 N.Y.S.2d at 948 (quoting *Darden*, 34 N.Y.2d at 181, 313 N.E.2d at 52, 356 N.Y.S.2d at 586 (1974)).

86. *Id.* at 585-86, 607 N.E.2d at 1054, 592 N.Y.S.2d at 949.

87. *Id.* at 586, 607 N.E.2d at 1054, 592 N.Y.S.2d at 949.

88. *Id.* at 585, 607 N.E.2d at 1054, 592 N.Y.S.2d at 949.

cused'"[89] at a suppression hearing and that the absence of the defendant and his legal advocate did not violate defendant's due process rights.[90]

Once the *Castillo* court established that, in the face of a compelling interest to maintain the anonymity of the informant, non-disclosure of the informer's identity and exclusion of the defendant from participation in the suppression hearing do not offend constitutional principles, the court turned to the task of determining whether, considering the particular circumstances of the case, such compelling interests existed.[91] Following a four step analysis provided by *People v. Seychel,*[92] the *Castillo* court found first that probable cause,[93] but not perjury,[94] was facially apparent from the search warrant, supporting testimony, and affidavits.[95] Next, the court determined at the *in camera, ex parte* hearing that the "life and/or future investigations of the in-

89. *Id.* at 584, 607 N.E.2d at 1053, 592 N.Y.S.2d at 948 (citing People v. Rosario, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 884, 213 N.Y.S.2d 448, 451, *cert. denied,* 368 U.S. 866 (1961).

90. *Id.*

91. *Id.* at 586, 607 N.E.2d at 1054-55, 592 N.Y.S.2d at 949-50.

92. 136 Misc. 2d 310, 518 N.Y.S.2d 754 (Sup. Ct. New York County 1987). The four step analysis in *Seychel* requires that the court: (1) "review the search warrant to determine whether probable cause appears to be alleged on its face or whether there is any reason to believe, initially, that the warrant is facially perjurious;" (2) conduct "an in camera, ex- parte inquiry of the informant and examination of pertinent exhibits in order to evaluate the People's claim that the informant's life and/or future investigations would be jeopardized by disclosure;" (3) attempt[] to redact the privileged portions of the search warrant affidavit, assuming the court is convinced non-disclosure is necessary;" and (4) "if necessary . . . conduct an ex-parte, *Darden*—type hearing . . . [where] the People are ordered to produce the informant for a hearing." *Id.* at 313, 518 N.Y.S.2d at 756.

93. *Castillo,* 80 N.Y.2d at 586, 607 N.E.2d at 1054, 592 N.Y.S.2d at 949.

94. *Id.* "If the supporting affidavit had appeared perjurious on its face, the court would have conducted an in camera hearing to determine if the affidavit contained perjury and if it did, would have given the People the choice of turning over the affidavit for a hearing or discontinuing prosecution." *Id.* (citing Franks v. Delaware, 438 U.S. 155 (1978) and People v Alfinito, 16 N.Y.2d 181, 211 N.E.2d 181, 264 N.Y.S.2d 243 (1965)).

95. *Id.*

formant would be jeopardized by disclosure."[96] Having found that redaction of the informant's name so as to provide the defendant with all information except the informer's identity was an impossible task,[97] the *Castillo* court concluded that two *in camera, ex parte* suppression hearings sufficed to provide defendant with judicial review of the legality of the searches performed.[98]

Justice Hancock, with whom Justice Kaye joined, dissented and adamantly rejected the majority's holding that the defendant was afforded an opportunity to adequately challenge the validity of the April 6th search warrant.[99] In light of defendant's allegations of police misconduct, the dissent would have held that nothing short of an adversarial hearing on the issue would avail defendant of his constitutional rights.[100] According to the dissent, the issue before the suppression court was not merely whether the search warrant and supporting documents demonstrated sufficient probable cause without facial evidence of perjury,[101] but whether the April 5th search was an illegal one[102] and, if so, did it taint the April 6th warrant procedures and subsequent search.[103] Because this issue went right to the heart of the defendant's

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96. *Id.*

97. *Id.*

98. *Id.* at 586, 607 N.E.2d at 1055, 592 N.Y.S.2d at 950.

99. *Id.* at 587-88, 607 N.E.2d at 1055, 592 N.Y.S.2d at 950 (Hancock, J., dissenting).

100. *Id.* at 590, 607 N.E.2d at 1057, 592 N.Y.S.2d at 952 (Hancock, J., dissenting).

101. *Id.* at 589, 607 N.E.2d at 1056, 592 N.Y.S.2d at 951 (Hancock, J. dissenting).

102. *Id.* at 590, 607 N.E.2d at 1057, 592 N.Y.S.2d at 952 (Hancock, J., dissenting).

103. *Id.* (Hancock, J., dissenting) (quoting Wong Sun v. United States, 371 U.S. 471, 481 (1963). The court must determine "'whether, granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun*, 371 U.S. at 488 (quoting JOHN M. MCGUIRE, EVIDENCE OF GUILT 221 (1982)); *see also* People v. Stith, 69 N.Y.2d 313, 506 N.E.2d 911, 514 N.Y.S.2d 201 (1987) (failure to exclude wrongfully obtained evidence would be an unacceptable dilution of exclusionary rule and would defeat primary purpose of rule, deterrence of police misconduct).

fundamental right to be free from unreasonable searches,[104] the dissent would have held that, unlike cases where mere sufficiency of probable cause was at issue, the circumstances presented in this case required an adversarial proceeding.[105] Only in this way, argued the dissent, could defendant have challenged the conduct of police in a manner in keeping with concepts of fundamental fairness.[106]

The dissent maligned the majority's application of *People v. Darden.*[107] Unlike *Darden,*[108] the hearing court in *Castillo* did not allow defendant's attorney to submit questions to the suppression court to be asked of the informant during the *in camera, ex parte* proceeding.[109] Also contrary to *Darden,* the two *Castillo* suppression courts did not later provide transcripts of the concealed proceedings with factual explanations of the findings of sufficiency of probable cause and lack of perjury and police misconduct.[110] Such secrecy, the dissent stated, is "repugnant to the concepts 'of fair play which have 'evolved through centuries of Anglo-American constitutional history,' particularly as applied to the relationship 'between the individual and the government.'"[111]

The dissent further observed that without an opportunity to be represented by counsel, whose only purpose is protect the defen-

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104. *Castillo,* 80 N.Y.2d at 590, 607 N.E.2d at 1056-57, 592 N.Y.S.2d at 951-52.

105. *Id.* at 591, 607 N.E.2d at 1058, 592 N.Y.S.2d at 953.

106. *Id.*

107. 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1984).

108. *Id.* at 181, 313 N.E.2d at 52, 356 N.Y.S.2d at 586. "Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer. The Judge should take testimony . . . and make a summary report as to the existence of the informer and with respect to the communications made by the informer . . . . That report should be made available to the defendant . . . ." *Id.*

109. *Castillo,* 80 N.Y.2d at 589, 607 N.E.2d at 1056, 592 N.Y.S.2d at 951 (Hancock, J., dissenting) (citing People v. Darden, 34 N.Y.2d 177, 181, 313 N.E.2d 49, 52, 356 N.Y.S.2d 582, 586 (1974)).

110. *Id.* (Hancock, J., dissenting).

111. *Id.* at 588, 607 N.E.2d at 1056, 592 N.Y.S.2d at 951 (Hancock J., dissenting) (quoting People v. Millan, 69 N.Y.2d 514, 520, 508 N.E.2d 903, 906, 516 N.Y.S.2d 168, 171 (1987) (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)).

dant's interests, to cross examine witnesses against him, to rebut evidence put forth by the government on its own behalf and to adduce affirmative evidence of police misconduct, defendant had to settle for the hearing court's patronistic conclusion that the police "'didn't violate his rights, after all.'"[112] The dissent argued that where the government is held to such a stunted burden of disproving misconduct, the very purpose of the exclusionary rule is frustrated.[113] Thus, because the prosecution's case is presented but not rebutted, the dissent contended that the government's risk of being sanctioned through the application of the exclusionary rule is diminished and lawless searches are tolerated, if not encouraged.[114]

The dissent did not purport to disagree with the line of cases which the majority relied upon for support of their holding.[115] On the contrary, the dissent conceded that where there is a limited question as to the sufficiency of probable cause and a compelling interest in maintaining the anonymity of the informant, an impartial hearing court may tailor the proceedings to conform to society's need for nondisclosure.[116] The dissent also agreed with the majority that the use of confidential informants, whose anonymity is protected and guaranteed, is a vital law enforcement technique.[117] But, the dissent argued "the privilege may not be

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112. *Id.*, 80 N.Y.2d at 591, 607 N.E.2d at 1057, 592 N.Y.S.2d at 952 (Hancock, J., dissenting).

113. *Id.* at 591, 607 N.E.2d at 1057, 592 N.Y.S.2d at 952 (Hancock, J., dissenting). "'[I]f the People are permitted to use the [improperly] seized evidence, the exclusionary rule's purpose is completely frustrated . . . .'" *Id.* (quoting People v. Bigelow, 66 N.Y.2d 417, 427, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, 637 (1985)).

114. *Id.* at 591, 607 N.E.2d at 1057, 592 N.Y.S.2d at 952 (Hancock, J., dissenting) ("'a premium is placed on the illegal police action and a positive incentive is provided to others to engage in similar lawless acts in the future'"). *Id.* (Hancock, J., dissenting) (quoting People v. Bigelow, 66 N.Y.2d 417, 423, 488 N.E.2d 451, 458, 497 N.Y.S.2d 630, 637 (1985)).

115. *Castillo*, 80 N.Y.2d at 592, 607 N.E.2d at 1058, 592 N.Y.S.2d at 953 (Hancock, J., dissenting).

116. *Id.* (Hancock, J., dissenting).

117. *Id.* (Hancock, J., dissenting).

availed of . . . when its assertion would seriously prejudice the defense 'by making a fair hearing impossible.'"[118]

The dissent pointed out that even the cases on which the majority relied distinguished between suppression hearings which are limited to the issue of determination of probable cause and those which address other issues.[119] The dissent asserted that the *in camera, ex parte* hearings the majority affirmed and which these cases held constitutional are procedures to be utilized only where probable cause is the sole question before a suppression court.[120] As for the other scenarios, if adversarial procedures are unacceptable to the prosecution, which so profoundly values the technique of anonymous informants, then, the dissent suggested, the Government must decide whether or not to proceed with the prosecution and contend with full disclosure or dismiss the case and protect the safety and future integrity of investigations in which that confidential informer might be involved.[121] Even supported by the strongest societal interest, argued the dissent, defendant's due process rights must prevail.[122]

The majority opinion in this case held that the circumstances presented by the defendant's arrest incident to execution of a judicially authorized search warrant did not deviate from prior cases in such a material manner that defendant's due process rights were sacrificed by the use of *in camera, ex parte* suppression hearings. Despite the dissents' opposition, the majority con-

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118. *Id.* (Hancock, J., dissenting) (quoting People v. Malinsky, 15 N.Y.2d 86, 92, 204 N.E.2d 188, 193, 255 N.Y.S.2d 850, 857 (1964) (quoting People v. Coffey, 12 N.Y.2d 443, 452, 191 N.E.2d 263, 267, 240 N.Y.S.2d 721, 727 (1963)).

119. *Id.* (Hancock, J., dissenting) (citing People v. Darden, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974); People v. Goggins, 34 N.Y.2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571, *cert. denied,* 419 U.S. 1012 (1974); People v. Seychel, 136 Misc. 2d 310, 518 N.Y.S.2d 754 (Sup. Ct. New York County 1987)).

120. *Id.* (Hancock, J., dissenting) (quoting People v. Seychel, 136 Misc. 2d 310, 312, 518 N.Y.S.2d 754, 756 (1987)).

121. *Id.* (Hancock, J., dissenting) (quoting Alderman v. United States, 394 U.S. 165, 184 (1969)).

122. *Id.* at 595, 60 N.E.2d at 1060, 592 N.Y.S.2d at 955. (Hancock, J., dissenting).

cluded that the suppression court was capable of, and did, adequately represent and protect the defendant's interests in insuring that the search warrant which led to his arrest was founded upon probable cause and not tainted by a possibly illegal search of the same premises conducted the day before.

Lovelace v. Gross[123]
(decided November 24, 1992)

See case discussion under PUBLIC RELIEF (*infra* page 911). The court found that Social Services Law section 131-c(2),[124] as applied to Home Relief, does not violate plaintiffs' due process rights under the federal and state constitutions although its "grandparents-deeming" rule calculates a portion of the grandparent's monthly income when determining an infant's eligibility for Home Relief benefits.[125] The court, while acknowledging that the "grandparent has no legal obligation to support the grandchild,"[126] nonetheless found that the statute survived the rational basis test because "it is entirely reasonable for the Legislature to assume that grandparents will contribute to the support of an infant grandchild residing in their household . . . ."[127]

123. 80 N.Y.2d 419, 605 N.E.2d 339, 590 N.Y.S.2d 852 (1992).

124. N.Y. SOC. SERV. LAW § 131-c(2) (McKinney 1992).

125. *Lovelace*, 80 N.Y.2d at 426-27, 605 N.E.2d at 343-44, 590 N.Y.S.2d at 856.

126. *Id.* at 426, 605 N.E.2d at 343-44, 590 N.Y.S.2d at 856.

127. *Id.* at 427, 605 N.E.2d at 344, 590 N.Y.S.2d at 856.