

May 2014

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Recommended Citation

Matero, Diane (2014) "County Court, Nassau County, People v. Osbourne," *Touro Law Review*: Vol. 23: No. 2, Article 18.
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol23/iss2/18>

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**COUNTY COURT OF NEW YORK
NASSAU COUNTY**

People v. Osbourne¹
(decided September 26, 2006)

Defendant Stanley Osbourne was indicted on four criminal counts in Nassau County.² Subsequently, Osbourne, without counsel present, made statements about those criminal acts to Canadian authorities.³ The defendant sought to prevent the statements from being used against him in the United States, claiming that their use were in violation of the Sixth Amendment of the United States Constitution⁴ and article I, section 6 of the New York State Constitution.⁵ The Nassau County Court, relying on the state constitution, held that the right to counsel is “invoked as a matter of law” at the commencement of the criminal action, and cannot “be waived without counsel then being present.”⁶ Thus, even though Osbourne waived his right to counsel, the statements could not be used against him because counsel was not present when he waived his constitutional right.⁷

¹ No. 0194N/02, 2006 N.Y. Misc. LEXIS 3025, at *1 (Nassau County Ct. Sept. 26, 2006).

² *Id.*, at *1.

³ *Id.*, at **5-6.

⁴ U.S. CONST. amend. VI states in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence.”

⁵ N.Y. CONST. art. I, § 6 states 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”

⁶ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *12. The Court of Appeals of New York explained that commencement of the criminal judicial action in this case was the filing of the indictment. *Id.*, at *8.

⁷ *Id.*, at **12-13.

On August 17, 2001, Stanley Osbourne allegedly committed several crimes against his wife.⁸ Five days later, a felony complaint was filed and subsequently a warrant for Osbourne's arrest was issued.⁹ In early 2002, Osbourne was indicted on various counts, including: assault in the first degree, assault in the second degree, and weapon possession.¹⁰ Osbourne, who had not yet been arrested, failed to appear for his arraignment; the presiding judge issued a bench warrant.¹¹

Nearly four years later, Osbourne was featured on the television show "America's Most Wanted."¹² After the show aired, United States Marshal Roy White received tips indicating that Osbourne was living in an apartment in Brampton, Ontario.¹³ White contacted Detective Sergeant Dolan, who was the head detective for investigating criminal offenses in Brampton.¹⁴ White told Dolan that Osbourne was wanted in New York and informed Dolan of the tip.¹⁵ Dolan notified Constable Salmon, a Canadian law enforcement officer who used Canada's police database to discover a Canadian immigration warrant for Osbourne and to confirm his fugitive status in the United States.¹⁶ The homeowners of the house where the defendant was allegedly residing were contacted and were shown a

⁸ *Id.*, at *1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at **1-2.

¹² *Id.*, at *4.

¹³ *Id.* The tip was detailed and included an address in Brampton, Ontario. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *2. The Canadian immigration warrant was issued on July 4, 2004, and that warrant had no expiration date. *Id.*

photograph of Osbourne.¹⁷ They verified that Osbourne was the man living in their basement apartment.¹⁸

Salmon then arrested Osbourne pursuant to the immigration warrant and read him Canada's Charter of Rights.¹⁹ Under the Charter of Rights, a defendant has the right to counsel.²⁰ This includes free legal advice, which can be provided by calling a toll-free number.²¹

Subsequently, Osbourne was taken to Detective Dolan's office, where he was interviewed by Dolan.²² Dolan informed Osbourne that the interrogation would be video and audio taped.²³ Dolan also reiterated to Osbourne that he was arrested on an immigration warrant and was wanted in the United States.²⁴ Dolan again informed Osbourne of his right to counsel and Osbourne indicated that he did not want a lawyer.²⁵ Dolan then proceeded with the interrogation, the majority of which was dedicated "to the New York charges."²⁶ The Nassau County prosecutor sought to use the statements made during the Canadian interrogation against Osbourne.²⁷ Osbourne challenged the use of the statements under both the federal and state constitutions because he did not have an

¹⁷ *Id.*, at *3.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *3.

²² *Id.*, at *5.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*, at **5-6.

²⁶ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *6.

²⁷ *Id.*, at *1.

attorney present when he waived his right to counsel.²⁸

The Nassau County Court held that under article I, section 6 of the New York State Constitution, the right to counsel attaches at the commencement of official proceedings and cannot be waived without the presence of counsel.²⁹ The right to counsel is broader under the New York State Constitution than under the Federal Constitution.³⁰ The court explained:

At the time when legal advice is most critically needed, our Constitution strikes the balance in favor of the defendant by placing a buffer, in the form of an attorney, between himself and the coercive power of the State. This court has long jealously guarded an indicted defendant's right to counsel, and we refuse to predicate a waiver of so valued a right on the recitation of a formula printed on a card.³¹

Thus, because Osbourne did not have counsel present in Canada when he waived his right, the statements he made to Canadian authorities were inadmissible.³²

The *Osbourne* court followed *Maine v. Moulton*³³ to a degree, holding the right to counsel attaches early in the criminal judicial process.³⁴ In *Moulton*, defendant Moulton was indicted on four counts of theft.³⁵ His co-defendant, Colson, met with police to make

²⁸ *Id.*, at *7.

²⁹ *Id.*, at *12.

³⁰ *Id.*, at *11.

³¹ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *9 (quoting *People v. Settles*, 385 N.E.2d 612 (N.Y. 1978)).

³² *Id.*, at **12-13.

³³ 474 U.S. 159 (1985).

³⁴ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at **7-8.

³⁵ *Moulton*, 474 U.S. at 162.

a plea bargain.³⁶ Colson agreed to tape conversations with Moulton, on the condition that further charges would not be brought against him.³⁷ During their conversations, Moulton told Colson of his idea to kill a witness.³⁸ Moulton sought to suppress the statements, arguing that they were in violation of the Sixth Amendment of the United States Constitution.³⁹ The trial court denied Moulton's motion.⁴⁰ Moulton was subsequently convicted and appealed the use of the statements, again asserting violation of his right to counsel.⁴¹ The Supreme Judicial Court of Maine granted an appeal and "held that the State cannot use against Moulton at trial recordings of conversations where the State 'knew, or should have known' that Moulton would make incriminating statements regarding crimes as to which charges were already pending."⁴² Subsequently the State appealed to the United States Supreme Court.⁴³

The Supreme Court held that the constitutional right to counsel "cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."⁴⁴ As a result,

³⁶ *Id.*

³⁷ *Id.* at 163. Colson confessed to the crimes for which he and Moulton were indicted and to other crimes in which they had participated. *Id.* Colson also agreed to have his telephone "tapped" to record conversations between himself and Moulton. *Id.* at 163. Moulton asked Colson to meet with him to further discuss the plan for their defense. *Id.* at 164. Colson then agreed to a body wire to record the face-to-face conversation. *Id.*

³⁸ *Id.* at 166 n.4.

³⁹ *Id.* at 166.

⁴⁰ *Moulton*, 474 U.S. at 166.

⁴¹ *Id.* at 167.

⁴² *Id.* at 167-68.

⁴³ *Id.* at 168.

⁴⁴ *Id.* at 170.

the right to counsel is invoked early in the criminal proceeding.⁴⁵ Thus, Moulton's statements to Colson were inadmissible because the "police knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent"⁴⁶ While the *Osbourne* court agreed with the holding of *Moulton*, in that the right to counsel attaches early in the criminal judicial process,⁴⁷ the New York State Constitution affords the criminal defendant with a greater protection than the federal government.⁴⁸

Osbourne followed *People v. Settles*,⁴⁹ which held that the right to counsel attaches at the commencement of the criminal judicial process and this right cannot be waived in the absence of counsel.⁵⁰ In *Settles*, two men robbed a bar.⁵¹ In an ensuing police chase, one of the perpetrators fatally shot a police officer.⁵² Later that evening, the police were directed to the apartment of one of the perpetrator's common law wife.⁵³ After receiving permission to enter the apartment, the police found evidence of the robbery.⁵⁴ They arrested one man and took the defendant into custody for questioning.⁵⁵ The defendant was later released and indicted on

⁴⁵ *Moulton*, 474 U.S. at 170.

⁴⁶ *Id.* at 180.

⁴⁷ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at **7-8.

⁴⁸ *Id.*, at *11.

⁴⁹ 385 N.E.2d 612 (N.Y. 1978).

⁵⁰ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *12; *Settles*, 385 N.E.2d at 613-14.

⁵¹ *Settles*, 385 N.E.2d at 614.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* The police found clothing worn by the perpetrators and the weapon which fired the shot that killed the police officer. *Id.*

⁵⁵ *Id.*

charges of murder and robbery.⁵⁶ Subsequently, a warrant was issued for the defendant's arrest.⁵⁷ The police apprehended the defendant and placed him in a lineup, in which he agreed to participate without the presence of an attorney.⁵⁸ Two witnesses identified the defendant.⁵⁹ The trial court allowed the lineup identification into evidence and the defendant was subsequently convicted.⁶⁰ The appellate division affirmed.⁶¹

The New York Court of Appeals reversed, holding that the lineup identification could not be used against the defendant because his right to counsel had attached prior to the lineup; therefore, post-attachment, his constitutional right could not be waived without counsel present.⁶² The court explained that at the time of indictment, the right to counsel attached because "the police function shifts from investigatory to accusatory."⁶³ Thus, *Miranda* warnings do not satisfy the higher constitutional standard of right to counsel, because the view of the criminal defendant has shifted from a suspect to the accused.⁶⁴ The court stated that it is possible for a criminal defendant to "knowingly and intelligently waive his right to counsel at any stage of the judicial proceedings. But no knowing and intelligent

⁵⁶ *Settles*, 385 N.E.2d at 614.

⁵⁷ *Id.*

⁵⁸ *Id.* At the time of the lineup, *Settles* was unaware that he was indicted, but was read his *Miranda* rights. *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 613.

⁶¹ *Settles*, 385 N.E.2d at 613.

⁶² *Id.* at 613-14.

⁶³ *Id.* at 616.

⁶⁴ *Id.*

waiver of counsel may be said to have occurred without the essential presence of counsel.”⁶⁵ The *Osbourne* court, relying on the reasoning in *Settles*, thus held that because Osbourne was now the accused, he could not have effectually waived his constitutional right to counsel without counsel being present.⁶⁶

In conclusion, the constitutions of both the New York and federal government are in agreement in that the constitutional right to counsel attaches at the beginning of the criminal judicial process.⁶⁷ Specifically, New York has held that a filing of an indictment constitutes a commencement of criminal proceedings.⁶⁸ However, the New York State Constitution, under article I, section 6, affords the criminal defendant greater protections, than does the federal Constitution, because the right to counsel can attach as early as the filing of an “accusatory instrument.”⁶⁹ Accordingly, the New York State Constitution recognizes this extended protection to ensure that a defendant has the assistance of counsel from the outset of formal judicial proceedings.

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⁶⁵ *Id.* at 617 (citations omitted).

⁶⁶ *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at *12.

⁶⁷ *See, e.g., Moulton*, 474 U.S. at 170; *Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at **7-8.

⁶⁸ *See Osbourne*, 2006 N.Y. Misc. LEXIS 3025, at **7-8.

⁶⁹ *Settles*, 385 N.E.2d at 615.