
Volume 20

Number 1 *New York Constitutional Decisions: 2003*
Compilation

Article 7

December 2014

Court of Appeals of New York, *People v. Grice*

Michael Elkin

Patrick Foster

Follow this and additional works at: <http://digitalcommons.tourolaw.edu/lawreview>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Elkin, Michael and Foster, Patrick (2014) "Court of Appeals of New York, *People v. Grice*," *Touro Law Review*: Vol. 20: No. 1, Article 7.
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol20/iss1/7>

This Effective Assistance of Counsel is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact ASchwartz@tourolaw.edu.

Court of Appeals of New York, People v. Grice

Cover Page Footnote

20 (1)

COURT OF APPEALS OF NEW YORK

People v. Grice¹ (decided June 26, 2003)

The defendant, Terril Grice, was arrested and implicated in a shooting.² Grice was acquitted of the attempted murder charge, but convicted of two counts of burglary in the first degree, one count of burglary in the second degree and criminal possession of a weapon in the second degree.³ Grice appealed his convictions, arguing that his indelible right to counsel under the New York State Constitution⁴ was violated when the police interrogated him after being informed that he was represented by counsel.⁵ Grice argued that his written statements should have been suppressed because his attorney entered the case and thereby triggered his indelible right to counsel at the moment his father advised the police that there was an attorney on the way to the police station.⁶

The trial court denied Grice's motion to suppress, and the Appellate Division, Second Department held that Grice's right to counsel did not attach before he made the voluntary statements.⁷ The New York Court of Appeals affirmed, holding that there is a "bright line rule" that the involvement of counsel must be reliably

¹ 794 N.E.2d 9 (N.Y. 2003).

² *Id.* at 10.

³ *Id.*

⁴ 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. . . ."

⁵ *Grice*, 794 N.E.2d at 10.

⁶ *Id.*

⁷ *Id.*

communicated to police.⁸ Therefore, entry of counsel in a criminal case occurs either when the defendant him or herself notifies the police that he or she has retained counsel, or when the attorney or a professional associate of the attorney notifies the police that the suspect is represented by counsel.⁹ The court reasoned that this rule prevents ambiguities as to whether or not a suspect has representation, which could interfere with a police investigation.¹⁰

Grice was arrested and taken to the police station at which time he was advised of his *Miranda*¹¹ rights.¹² Shortly thereafter he signed a form acknowledging and waiving those rights.¹³ Grice provided two written statements admitting that he acted as a lookout and hid a handgun for the actual shooter involved in the incident.¹⁴ Approximately one hour after Grice was taken to the police station, but prior to his admissions, his father arrived and told a detective that his son was being provided counsel.¹⁵ He also advised the detective that his son should not be questioned further regarding the incident.¹⁶ Approximately an hour and a half later Grice's attorney telephoned the lead detective and notified him that

⁸ *Id.* at 13.

⁹ *Id.* at 13 n.2.

¹⁰ *Grice*, 794 N.E.2d at 13.

¹¹ *Miranda v. Arizona*, 384 U.S. 436, 471 (1966) (holding that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . .").

¹² *Grice*, 794 N.E.2d at 10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

he was representing Grice.¹⁷ At that time, the police halted their questioning.¹⁸

Grice moved to suppress the statements as a violation of his constitutional rights, alleging that his “indelible right to counsel attached when his father informed the detective that an attorney was coming to the station.”¹⁹ The hearing court denied the motion and the appellate division agreed, finding that both statements were made prior to the attorney’s contacting the police and requesting the termination of questioning.²⁰

The New York Court of Appeals affirmed.²¹ The court held that the indelible right to counsel attaches in three ways: when the “criminal action is formally commenced by the filing of an accusatory instrument,” prior to commencement of a formal charge when a person in custody requests to speak to an attorney, or when an attorney who is retained to represent the suspect enters the matter under investigation.²² It is the question of when an attorney enters the case that the court had to consider. The court held, in keeping with New York’s requirement of reliable communication of representation, that it must be the attorney, personally or through a professional associate, who notifies the police that he or she is representing the suspect.²³ The court also expressed concern

¹⁷ *Grice*, 794 N.E.2d at 10.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 14.

²² *Grice*, 794 N.E.2d at 10-11.

²³ *Id.* at 11.

that if notification could be effected by a third party, the police would be required to suspend an investigation to investigate the veracity of whether a suspect had representation.²⁴

The New York Court of Appeals addressed Grice's argument, which relied on *People v. Arthur*,²⁵ that the "identity of the person who apprises the police . . . is not relevant."²⁶ In *Arthur*, the New York Court of Appeals addressed the issue of whether the right to counsel attaches when counsel, without being retained, appears at the police station, on his own accord, on behalf of the defendant.²⁷ Arthur was arrested when he confessed that he had thrown his son in a river.²⁸ At approximately 6:30 p.m. one interrogating officer began typing a statement, which was signed by Arthur at approximately 6:45 p.m.²⁹ In the meantime, after learning about the defendant's arrest from the television, an attorney who had represented Arthur in several unrelated matters, went to the police station to see Arthur.³⁰ The attorney arrived at the station at approximately 6:20 p.m, after Arthur had confessed, but before he signed the written statement.³¹ The attorney approached the Deputy Chief who appeared to be in charge of the investigation and identified himself as the attorney representing

²⁴ *Id.* at 13.

²⁵ 239 N.E.2d 537 (N.Y. 1968).

²⁶ *Grice*, 794 N.E.2d at 10.

²⁷ *Arthur*, 239 N.E.2d at 538.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Arthur.³² The attorney asked to see Arthur and the officer replied that that he was not sure if Arthur was finished with the interrogation process.³³ After a few moments of waiting, the officer informed the attorney that the interrogation had ended and that he could see the defendant.³⁴ The Court of Appeals concluded that the defendant's statements were taken in violation of the indelible right to counsel, reasoning that the right to counsel is not dependant upon "mechanical" and "arbitrary" requirements,³⁵ but "once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches; and this right is not dependent upon the existence of a formal retainer."³⁶

The New York Court of Appeals, in *Grice*, addressed Grice's reliance upon the "know or have been apprised" language in *Arthur* to support his contention that it is irrelevant who notifies the police that the defendant is represented by counsel.³⁷ Grice argued that when his father notified the police that counsel had been retained his New York constitutional right to an attorney had attached.³⁸ The court stated that in the thirty-five years since *Arthur* was decided it had not altered the rule requiring personal

³² *Arthur*, 239 N.E.2d at 538.

³³ *Id.*

³⁴ *Id.* at 538.

³⁵ *Id.* at 539 (citing *People v. Gunner*, 205 N.E.2d 852, 855 (N.Y. 1965)).

³⁶ *Id.*

³⁷ *Grice*, 794 N.E.2d at 10.

³⁸ *Id.* at 11.

involvement of an attorney in order to assure the “reliability” that an attorney had in fact been retained.³⁹ Therefore, Grice’s right to counsel did not attach at the time his father contacted the police.⁴⁰

The United States Supreme Court has also held that the United States Constitution’s right to counsel⁴¹ attaches indelibly at the initiation of adversarial proceedings by the government against a defendant.⁴² The Court has also held that when an accused who is in custody prior to the initiation of formal charges requests representation, all questioning must be terminated.⁴³ However, prior to formal proceedings, the defendant’s right to not be questioned further falls under the Fifth Amendment,⁴⁴ that use of a confession elicited after an attorney was requested violates a defendant’s right against self incrimination.⁴⁵

The federal courts are silent as to whether the indelible right to counsel attaches when an attorney contacts authorities. Subsequently, the courts have not reached the question of whether third-party notification is sufficient for the right to counsel to attach.

The New York Court of Appeals, in interpreting the right to counsel under the state constitution, has not entertained any

³⁹ *Id.*

⁴⁰ *Id.* at 13.

⁴¹ U.S. CONST. amend. VI states in pertinent part: “In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.”

⁴² *Michigan v. Jackson*, 475 U.S. 625, 630 (1986).

⁴³ *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

⁴⁴ U.S. CONST. amend. V states in pertinent part: “No person shall be . . . compelled in any criminal case to be a witness against himself. . . .”

⁴⁵ *Edwards*, 451 U.S. at 480.

attempts by the government to establish “mechanical and arbitrary requirement[s].”⁴⁶ However, the court has established that there must be rules in place that allow a balance between the rights of the individual and the security of society as a whole.⁴⁷ Particularly, the police must have actual notice that the defendant is represented by counsel.⁴⁸ Actual notice can only be effectuated by either an appearance or direct communication by the attorney. This, the court has held, is the most “practical [rule]”⁴⁹ and “provides an objective measure to guide law enforcement officials and the courts.”⁵⁰ The court has expressed its concern for protecting police officers from unreliable third parties claiming that the defendant has retained counsel,⁵¹ and the important public interest of allowing law enforcement officials to do their job effectively.⁵² Law enforcement needs to have reasonable assurance that counsel has been appointed.⁵³ If there were doubt, the officers would be forced to delay their investigatory procedures and, consequently, undermine their investigative techniques.⁵⁴

In *People v. Schaeffer*,⁵⁵ the New York Court of Appeals held that an accused’s right to counsel attaches when the government agent becomes aware that the individual has

⁴⁶ *Grice*, 794 N.E.2d at 11.

⁴⁷ *Id.* at 12.

⁴⁸ *Id.*

⁴⁹ *Id.* at 12 (citing *People v. Pinzon*, 377 N.E.2d 721, 724 (1978)).

⁵⁰ *People v. Robles*, 533 N.E.2d 240, 245 (N.Y. 1988).

⁵¹ *Grice*, 794 N.E.2d at 12.

⁵² *Id.* at 13.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 438 N.E.2d 94 (N.Y. 1982).

representation.⁵⁶ The defendant in *Schaeffer* was convicted of shooting a local bartender.⁵⁷ On appeal to the New York Court of Appeals, the defendant argued that his right to counsel under the New York State Constitution was violated by the police.⁵⁸

During questioning the defendant took police officers to his mother's house to retrieve the murder weapon.⁵⁹ While the police were at Shaeffer's mother's house, his mother notified them that she had an attorney on the telephone, but the detective refused to talk to the attorney.⁶⁰ The detective further indicated to Shaeffer's mother that the attorney would have to meet Shaeffer at the police station.⁶¹ Ultimately, the defendant gave incriminating statements to the police both before the attorney was on the telephone and after.⁶² The Court of Appeals held that Shaeffer's right to counsel had attached once the police knew the attorney was on the telephone attempting to speak to the officer.⁶³

In *People v. Donovan*,⁶⁴ the Court of Appeals excluded inculpatory statements made by the defendant after the police refused to allow an attorney, retained by the defendant's family while defendant was in custody, to see or speak with him.⁶⁵ The court considered whether the trial court improperly admitted

⁵⁶ *Id.* at 97.

⁵⁷ *Id.* at 95.

⁵⁸ *Id.*

⁵⁹ *Id.* at 96.

⁶⁰ *Schaeffer*, 438 N.E.2d at 96.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 97.

⁶⁴ 193 N.E.2d 628 (N.Y. 1963).

⁶⁵ *Id.* at 629.

evidence of a written confession obtained from the defendant after his attorney requested and was denied access to him.⁶⁶ The court held that not only was the defendant's right to counsel violated, but that to admit the statements "contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime."⁶⁷

In *People v. Marrero*,⁶⁸ the court held that if the police are uncertain as to the scope of an attorney's representation, they should not proceed with the interrogation process.⁶⁹ In *Marrero*, the defendant solicited the assistance of an attorney to negotiate his surrender to the police believing that he was sought in connection with a homicide investigation.⁷⁰ After being taken into custody at the attorney's office, the defendant was transported to the police station where he waived his rights and subsequently made incriminating statements without an attorney present.⁷¹ After *Marrero's* motion to suppress the statements was denied, the statements were later entered into evidence and used in *Marrero's* conviction.⁷² *Marrero* appealed his conviction, claiming that the inculpatory statements made during his interrogation should have been suppressed since the statements were elicited in violation of his constitutional right to counsel.⁷³ *Marrero* claimed that he was

⁶⁶ *Id.*

⁶⁷ *Id.* at 630 (quoting *People v. Waterman*, 175 N.E.2d 445, 448 (N.Y. 1961)).

⁶⁸ 409 N.E.2d 980 (1980).

⁶⁹ *Id.* at 981.

⁷⁰ *Id.* at 980.

⁷¹ *Id.* at 980-81.

⁷² *Id.*

⁷³ *Marrero*, 409 N.E.2d at 981.

represented by an attorney, the attorney who orchestrated his surrender, and the statements were taken in the attorney's absence.⁷⁴

The prosecution argued that the attorney-client relationship ceased to exist at the completion of the negotiations to deliver the defendant into police custody.⁷⁵ The court, however, reasoned that the police cannot base the validity of an interrogation on perceived ambiguities in the attorney-client relationship once an attorney has acted on behalf of a defendant.⁷⁶ The court further stated that if the police harbor any uncertainty as to the scope of the representation of a defendant, the police should not subject the defendant to questioning.⁷⁷

In conclusion, although a defendant's right to counsel is considered a strong public interest, in keeping with New York case law that requires reliable notification that an attorney has entered a case, the attorney, personally, or through his or her assistant, must enter the case in a way that police would have reasonable assurance that counsel has truly been retained.⁷⁸ To hold otherwise would subject the police to investigation of the collateral matter of whether counsel has in fact been retained, which would hinder police in the efficient and effective investigation of criminal activity.⁷⁹

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Grice*, 794 N.E.2d at 13.

⁷⁹ *Id.*

2004]

ASSISTANCE OF COUNSEL

59

Therefore, in New York State, third-party notification that counsel has been retained will not suffice to ensure the defendant's right to counsel is protected. Either the defendant him or herself must request an attorney, or the attorney or representative must personally communicate with authorities. Otherwise, statements made in counsel's absence will not be suppressed on that ground.

*Michael Elkin**Patrick Foster*

[This page intentionally left blank]