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Criminal Law--Failure to Request Counsel-- Escobedo Distinguished

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Recent Cases

CRIMINAL LAW — FAILURE TO REQUEST COUNSEL — ESCOBEDO DISTINGUISHED — Appellant was sentenced to twenty-five years' imprisonment upon conviction of armed robbery. His court-appointed attorney, relying on *Escobedo v. Illinois*,¹ contended that the use at his trial of incriminating statements obtained during interrogation of the appellant prior to preliminary examination² constituted plain error requiring reversal. It does not appear in the record that the appellant was advised of his right to remain silent and that any statement made by him might be used against him. *Held*: Affirmed. The court distinguished *Escobedo* on the grounds that the appellant had failed to request counsel, holding, "[U]nless his right to counsel was established by the denial of a request by defendant for an opportunity with his lawyer or a lawyer, he had no such right which could have been the subject of waiver." *United States v. Childress*, 347 F.2d 448, 450 (7th Cir. 1965).

In a similar case³ the Illinois Supreme Court held that *Escobedo* did not apply unless the suspect requested counsel.

The United States Court of Appeals for the Third Circuit has decided the issue differently. There⁴ the appellant, while in police custody, but prior to either preliminary hearing or indictment, confessed. He had not been advised of his rights and had not requested counsel. The court held that the appellant had been denied his right to counsel and reversed. The court stated:

We can perceive no sound basis for holding that request for counsel is a prerequisite for the right to counsel at the interrogation stage while it is not at the other. . . . No sound reasoning that we can discover will support the conclusion that although at other stages in the proceeding in which the right attaches there must be an intelligent waiver, at the interrogation level a failure to request counsel may be deemed a waiver.

The court cited *People v. Dorado*,⁵ a similar case, in which the California Supreme Court held:

¹ 378 U.S. 478 (1964).

² In *Goldsmith v. United States*, 277 F.2d 335, 338-39 n.2(a) (D.C. Cir. 1960), the court observed: "We have here used the terminology into which the courts and the bar have drifted over a period of years, which inaccurately describes as an 'arraignment' the 'appearance before the Commissioner' under Rule 5, Fed. R. Crim. P. The hearing called for by Rule 5, is *not* an 'arraignment' but a preliminary examination of the arrested person." In this article "preliminary examination" and "arraignment" will not be used interchangeably.

³ *People v. Hartgraves*, 31 Ill. App. 2d 375, 202 N.E.2d 33 (1964).

⁴ *United States ex rel. Russo v. New Jersey*, 351 F.2d 429 (3rd Cir. 1965).

⁵ 40 Cal. 264, 394 P.2d 952 (1964).

[T]he right to counsel precludes the use of incriminating statements elicited by the police unless that right is intelligently waived. . . . No waiver can be presumed if the investigating officers do not inform the suspect of his right to counsel or his right to remain silent.⁶

The supreme courts of two of the states in the Third Circuit have reached conflicting conclusions on whether to follow its decision.⁷

The New Jersey Supreme Court has refused to follow it,⁸ declaring, "there is parallelism but not paramountcy" between state and lower federal courts in deciding constitutional questions.⁹

The Pennsylvania Supreme Court, which had previously decided in several cases¹⁰ that while in police custody a suspect must request counsel even when not advised of his rights, acquiesced to the decision of the Third Circuit,¹¹ stating:

The decision of the Third Circuit Court of Appeals is on this matter, for all practical purposes, the ultimate forum in Pennsylvania. If the Pennsylvania courts refuse to abide by its conclusions, then the individual to whom we deny relief need only to "walk across the street" to obtain a different result. Such an unfortunate situation would cause disrespect for the law.¹²

The Supreme Court has granted certiorari in four cases¹⁴ involving interpretations of *Escobedo*. One¹⁴ of these deals with the issue discussed here. It is expected that the Court will greatly clarify *Escobedo* in its decisions of these cases.

While the *Escobedo* holding¹⁵ was narrowly restricted to the facts of that case, its sweeping dicta indicated that in the future the Court may find a right to counsel prior to preliminary hearing in practically any factual circumstances where the suspect has not been advised of his rights. Many lower courts,¹⁶ realizing the enormous difficulties a broad interpretation of *Escobedo* would present, have distinguished the

⁶ 40 Cal. 264, 268, 394 P.2d 952, 954 (1964).

⁷ See, 9 Defender News Letter (July 6, 1965).

⁸ *Ibid.*

⁹ State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965).

¹⁰ Linde v. Maroney, 416 Pa. 331, 206 A.2d 288 (1965); Commonwealth v. Patrick, 416 Pa. 437, 206 A.2d 295 (1965).

¹¹ United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965).

¹² Commonwealth v. Negri, 419 Pa. 117, 213 A.2d 670 (1965).

¹³ Westover v. United States, 342 F.2d 684 (9th Cir. 1965), *cert. granted*, 328 U.S. 924 (1965) (No. 80, Misc., 1965 Term; renumbered No. 761, 1966 Term); Miranda v. Arizona, 98 Ariz. 18, 401 P.2d 721 (1965), *cert. granted*, 328 U.S. 925 (1965) (No. 419 Misc., 1965 Term; renumbered No. 759, 1966 Term); Johnson v. New Jersey, 43 N.J. 572, 206 A.2d 737 (1965), *cert. granted*, 328 U.S. 925 (1965) (No. 205 Misc., 1965 Term; renumbered No. 762, 1966 Term); Vignera v. New York, 15 N.Y.2d 970, 259 N.Y.S.2d 857 (1965), *cert. granted*, 328 U.S. 925 (1965) (No. 397 Misc., 1965 Term; renumbered No. 760 1966 Term).

¹⁴ Vignera v. New York, *supra* note 13.

¹⁵ 378 U.S. 478, 490 (1964).

¹⁶ See, People v. Hartgraves, 31 Ill. App. 2d 375, 202 N.E.2d 33 (1964).

case because the suspect did not request counsel. However, their decision to distinguish it on this basis is unfortunate, for they would now be hard pressed to uphold a conviction in a case which was identical except that the suspect did request counsel. Prior to preliminary hearing, there is little that counsel could do, if present, except to advise the suspect of his right to remain silent. The suspect who requests counsel is probably already aware of this right while he who fails to request is probably unaware of it. Thus, the holding of these cases¹⁷ may be referred to as the "gangster theory of *Escobedo*," aiding those who are experienced in the methods of police interrogation while discriminating against those who are ignorant.

It may be hoped that the Supreme Court will overrule *Escobedo* or at least strictly limit it to its facts. The only alternative is a sweeping decision that the suspect is entitled to an absolute right to counsel from the moment he is apprehended by the police. Any intermediate decision will undoubtedly be resisted and "watered down" by some courts and expanded by others, resulting in a lack of uniformity of the law and the decline in public respect for the law which will inevitably follow.

Such a broad interpretation of *Escobedo* would present insurmountable difficulties. Law enforcement officers would be obliged to retain an attorney for every suspect and lawyers would find themselves literally "walking the beat" with the police, and every suspect would have to be subjected to the indignities of "booking" because his attorney would demand that he be either charged or released immediately.

A reasonable alternative is available. If an absolute affirmative duty were placed upon the state to advise¹⁸ a suspect of his right to remain silent and that any information he volunteers may be used against him, there is no need for counsel at this time.

The Court could insure that this duty would be fulfilled by insisting that preliminary hearings be made available twenty-four hours a day throughout the country and that the suspect, upon apprehension, be taken immediately before a magistrate or commissioner, who would advise him of these rights¹⁹ and that any incriminating statement he made prior to that time would be ipso facto "involuntary."²⁰

¹⁷ *Ibid.*

¹⁸ Professor Gerhard O. W. Mueller of New York University has suggested that the considerable talents of "Madison Avenue" might be employed to perform this function.

¹⁹ This result could be obtained by an extension of the holding of *Mallory v. United States*, 354 U.S. 449 (1957).

²⁰ For an interpretation of the *Mallory* case which could serve as a precedent for such a decision see Judge Bazelon's concurring opinion in *Trilling v. United States*, 260 F.2d 677, 685 (D.C. Cir. 1958).

To guard against "coerced confessions," the magistrate should also be present at all times when the suspect is being interrogated. This system would elevate magistrates to the status of more useful public officials, would relieve attorneys of the overwhelming burden which may otherwise be cast upon them, would reduce or eliminate appeals on the basis of "right to counsel" and "coerced confession," and would insure the rights of the suspect prior to arraignment.²¹

Paul W. Blair

EVIDENCE—INTERNAL REVENUE CODE—ADMISSIBILITY OF ILLEGALLY-OBTAINED EVIDENCE.—An information under section 7203 of title 26 *United States Code*¹ was filed against defendants charging each with failure to file income tax returns for two taxable years. Subsequently an indictment under section 7201 of title 26 *United States Code*² was returned against defendants charging each with willful tax evasion. Before the trial defendants moved to suppress for use as evidence against them certain files, records and information seized by means of a compulsory process directed at one Birrell. The court reserved decision on all issues raised by the motion and the case proceeded to trial. The jury failed to reach a verdict and the judge declined to decide the reserved motion.

In another court, Birrell moved to have the seized documents suppressed as evidence against him and returned to him, and to have various indictments against him dismissed. Neither the indictment nor the information that charged defendants, charged Birrell, and therefore, neither was made the subject of Birrell's motion. A decision on Birrell's motion was reserved by the court.

Upon assignment of the information and indictment against defendants to the United States district court for the southern district of New York, defendants renewed their motion to suppress, and, in

²¹ See, *supra* note 2.

¹ Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

² Any person who willfully attempts in any manner to evade or defeat any tax imposed by law, or the payment thereof, shall, in addition to other penalties by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution.