Volume 67 | Issue 3 Article 10

April 1965

Criminal Law--Confessions Before Arraignment

Dennis Raymond Lewis
West Virginia University College of Law

Mr. Justice Stewart dissented on the grounds that the right to assistance of counsel should not attach until the formal institution of proceedings by indictment, information or arraignment. He reasoned that the majority's holding could have an unfortunate impact on the fair administration of criminal justice. It may be argued that if the requirement to provide counsel is extended to the moment of detention, extra-judicial confessions might categorically be held inadmissible. Note, 63 MICH. L. REV. 381 (1964).

The West Virginia court has awarded habeas corpus relief on the basis of two federal constitutional grounds—the right to counsel and the right to a free transcript. This provided a significant broadening of the rather limited reach of the traditional state habeas corpus remedy. There appears to be nothing to prevent the court from awarding state habeas corpus relief on the basis of a violation of constitutional rights laid out in the *Jackson*, *Stevenson* and *Escobedo* cases. If *May* and *Banach* actually represent a crack in the door, as they appear to, state habeas corpus relief conceivably could be opened to all constitutional objections which may now be advanced in federal courts.

Lester Clay Hess, Jr.

Criminal Law—Confessions Before Arraignment

Petitioner, a state prisoner, sought habeas corpus relief in the federal court. Petitioner claimed that his state court conviction violated his constitutional rights because it was based on an inadmissible confession. The confession was obtained after he had been arrested without a warrant and questioned about a fire which had resulted in a death. No formal charges were lodged against petitioner until after the confession had been signed. The writ of habeas corpus was denied and petitioner appealed. *Held*, affirmed. The use of a confession freely given does not deny due process, even though the confession was obtained during a period of unlawful detention. The test is whether the confession was voluntary or coerced. *Allen v. Bannan*, 332 F.2d 399 (6th Cir. 1964).

State concern with admissibility of evidence obtained between arrest and arraignment has become more intense since the establishment of the *McNabb-Mallory* rule in the federal courts. This rule excludes from federal prosecutions all incriminating statements

obtained during unlawful pre-commitment detention, regardless of whether it was voluntarily made. *Mallory v. United States,* 354 U.S. 449 (1957); *McNabb v. United States,* 318 U.S. 332 (1943). The theory behind such rulings is that the accused should not be incriminated by his own evidence which was gained as a result of "third degree" tactics during police interrogation. The fact that the police officer has the mere opportunity to employ abusive questioning will bar evidence obtained during such time. *Cleary v. Bolger,* 371 U.S. 392 (1963).

The *McNabb-Mallory* doctrine is an evidentiary rule adopted by the United States Supreme Court, and state courts do not apply the rule as a matter of state law. *Ingram v. State,* 252 Ala. 497, 42 So.2d 36 (1949); *State v. Browning,* 206 Ark. 791, 178 S.W.2d 77 (1944). While some states have considered the *Mallory* rule on the merits and refused to adopt it, others simply feel that the "fruits" of such detention is a valid police method of gaining evidence. *State v. Traub,* 150 Conn. 169, 187 A.2d 230 (1962). Present constitutional limits recognized and applied in determining whether a confession is admissible in state proceedings is "voluntariness." This involves the question of whether the confession was freely given. A confession is inadmissible under the fourteenth amendment to the federal constitution unless the state can prove that the confession was voluntary. The question of voluntariness, in most jurisdictions, is determined by the trial judge through a preliminary hearing of the evidence in absence of the jury. *Commonwealth v. Johnson,* 217 Pa. 77, 66 Atl. 233 (1907); *State v. Brady,* 104 W. Va. 523, 140 S.E. 546 (1927). Such evidence is usually conflicting and vague because of the necessity of considering actual physical abuse as well as subtle psychological pressure. The psychological factors which must be taken into consideration produce confusion and promote inconsistency. *Turner v. Pennsylvania,* 338 U.S. 62 (1949). This situation, at best, leaves the judge with a difficult decision; where is the line to be drawn between improper and permissible police conduct so as to provide due process? The judge must weigh the voluntary consent against the police action so as to protect individual rights. Strong indications of guilt only increase the difficulty of this decision since the judge may unconsciously be influenced by his sociological ideas concerning adequate police protection for society. The principal case is a product of such state judicial determinations.

Since the states and the United States Supreme Court disagree as to whether denying admissibility of evidence is necessary to discourage "third degree" tactics, it becomes interesting to consider the proposition of the Court someday ruling that voluntary confessions obtained during unlawful detention cannot be used as evidence in state courts. Such a holding could be justified under the due process requirements of the fourteenth amendment to the federal constitution. Recent court decisions quickly disclose that the "voluntariness" rule now applied by the states is inadequate, because it does not provide due process as interpreted by the Court in other areas. The Court, in dealing with illegal search and seizure, states that the illegality of the search bars the evidence so obtained. *Mapp v. Ohio,* 367 U.S. 643 (1961). This is simply a part of a broader rule which declares that the illegal search cannot be legalized by what it brings to light. *Nuesleiu v. District of Columbia,* 115 F.2d 690 (D.C. Cir. 1940). It seems that the authority cited in the principal case may have been undercut by the *Mapp* decision. The court, in the principal case, did not squarely face the issue of whether the confession was illegally obtained evidence. Compare this with evidence gained by illegal detention. A man cannot be arrested without a warrant unless there is reasonable grounds for making such an arrest; therefore, when a person is arrested on "probable cause," it is all the more important that he be taken directly to a magistrate in order to substantiate the validity of the "probable cause." *Mallory v. United States, supra.* In *United States v. Arrington,* 215 F.2d 630 (7th Cir. 1954), a confession obtained unlawfully was not admitted to prove the existence of tangible evidence, and the court indicated that the statement as well as the tangible evidence must be admitted together or not at all. Since the United States Supreme Court is not willing to accept unlawfully obtained tangible evidence, it seems logically to follow that they will not allow intangible evidence so gained. This conclusion becomes overwhelming when *Escobedo v. Illinois,* 84 Sup. Ct. 1758 (1964) is added to the analogy.

By tracing the recent judicial rulings on the issue of right to counsel, the trend toward complete protection becomes apparent. First, in *Gideon v. Wainwright,* 372 U.S. 335 (1963) the Court held that it was a violation of assistance of counsel, as stated in the sixth amendment and made obligatory on the states by the fourteenth

amendment, for an accused to be denied representation in the trial court. *Massiah v. United States,* 377 U.S. 201 (1964), extended this doctrine to provide adequate counsel for an indicted defendant under police interrogation. The Court reasoned that a judicial system which provides for legal representation at trial would surely protect a defendant in a completely extrajudicial proceeding. The final ruling in this area came in *Escobedo v. Illinois, supra,* where the defendant's request for counsel at the police interrogation stage was denied; this illegality was added to by the fact that the defendant was not advised of his constitutional right to remain silent. After prolonged questioning the defendant confessed to part of the alleged crime, and the confession thus obtained was a major factor in the subsequent conviction. In reversing the decision, the Court ruled that an accused is entitled to counsel when the investigation ceases to be general in nature and begins to focus on the particular suspect. Police officials have argued that such a restriction will result in fewer convictions, and seriously affect their ability to deter criminal acts. The fallacy of such reasoning becomes apparent when considered in light of the provisions of the federal constitution. Granted that a policeman's job is not a happy one, the plight of his prisoner must also be considered. It may well be that a system of enforcement which cannot rely so heavily on the "confession" will produce more reliable evidence through independent investigation.

Some states have begun to recognize the sound reasoning of the *McNabb-Mallory* rule which forbids as evidence a confession obtained during unlawful detention. Some of the recent decisions at least indicate that the state courts are beginning to recognize the trend of federal rulings. In *People v. Trinchillo,* 2 App. Div.2d 146, 153 N.Y.S.2d 685 (1956), the court ordered a new trial to determine whether a confession obtained after prolonged detention should be admitted as evidence. An early Virginia decision also recognized the serious violation of individual rights that can occur during illegal police interrogation. *Enoch v. Commonwealth,* 141 Va. 411, 126 S.E. 222 (1925). But some states have even refused to recognize the constitutional question involved. State v. Fahy, 149 Conn. 577, 183 A.2d 256 (1962). In other decisions the trial judge did not consider the issue himself and neglected to instruct the jury that such a confession could be considered voluntary or involuntary and so weighed in their determination of guilt

or innocence. *Stevenson v. Boles, supra; State v. Goyet,* 119 Vt. 167, 132 A.2d 623 (1957).

The conclusion that such confession should not be admitted as evidence seems hard to escape when considered in light of the fact that such an accused has been denied advice of counsel and the right to be properly charged. When both of these abuses combine to produce incriminating statements, voluntary or involuntary, the subsequent use of such evidence should be prohibited. Such a conclusion was recognized even before *Escobedo v. Illinois, supra,* when the Chief Justice and three other members of the Court dissented to a conviction based on a voluntary confession elicited from a "suspect" who had been denied the assistance of counsel. *Crooker v. California,* 357 U.S. 433 (1958).

The fact that the United States Supreme Court has had to deal with this issue so frequently makes a new ruling in this area almost inevitable. It seems that the federal courts have been trying to allow the states to solve this problem for themselves without making a sweeping policy ruling. The ideal way for the states to do this would be to find more unlawfully obtained confessions involuntary because of the psycological pressures which are surely being exerted on a suspect when he is held for days without counsel, arraignment, or proper treatment. The tendency now is in a direction which may even go farther than the comparable *Escobedo v. Illinois, supra;* the ultimate effect of this may well produce the elimination of any interrogation whatsoever before counsel is provided and proper arraignment given.

Dennis Raymond Lewis

Divorce—Merger of Separation Agreement into Divorce Decree

D grossly misrepresented the value of his assets to induce *P* to accept a relatively small lump sum payment as a property settlement and for her waiver of future support payments. *P* subsequently obtained a divorce and the separation agreement was incorporated into the decree. There was no judicial inquiry as to the fairness or adequacy of the agreement. *P* later learned of the husband's fraud, brought an action of deceit and recovered judg-