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Constitutional Law—Coerced Confessions: Due Process Challenge

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subsequent events rectified the error. The defendant did change his plea to guilty after conferring with counsel, and no steps were taken to move against the indictment because he was deprived of counsel. The dissent, however, pointed out that had the defendant pleaded guilty, the case would have been identical to the *Marincic* case. For it is no answer, continued the dissent, simply to say that because the defendant was not prejudiced by this error the judgment must be affirmed. The dissent further argued, that the right to counsel being fundamental, the denial of such right is enough to set a conviction aside.

People v. Spano,[22] is the second case to point in this direction. The defendant had retained counsel prior to being taken into custody. Once in custody, however, he was questioned at three A.M. in the absence of counsel, and a full confession was obtained. The majority held (4-3), that since the defendant was provided with counsel before being taken into custody, he thereby obtained counsel's advice as to future conduct, and this was sufficient to show compliance with his right to aid of counsel.

While this holding supported a less rigid interpretation of the right to the aid of counsel, it also strongly implied a less stringent interpretation of the requirement of a delay in the proceedings. For as the dissent in the *Spano* case pointed out, a defendant's right to the aid of counsel is not confined to immediately before being taken into custody, or to any other single time, but extends to every stage of the proceedings. Yet, the defendant in this case, while being held no longer as a suspect, but as a defendant awaiting trial, was questioned, and a full confession obtained in the absence of counsel. To this practice the majority subscribes. Such a holding, contends the dissent, makes the right of a defendant to the aid of counsel useless. The rationale of the dissent in the *Spano* case was specifically upheld by the United States Supreme Court, in overruling the decision of the New York Court of Appeals, holding that the denial of the right to counsel at every stage of the proceedings is violative of the Fourteenth Amendment.[23]

The logical relationship *between* a defendant's right to the aid of counsel on the one hand, and a right to a delay in the proceedings to obtain counsel on the other, is inescapable. In many cases, of which the *Dolac* and *Spano* cases are examples, it is in fact quite difficult to make any distinction at all between these two rights. A court cannot infringe upon one, or foster the free operation of one, without, *ipso facto*, influencing the other. The better reasoned cases, to which the instant case adheres recognizes this relationship and thereby allows Section 699 of the Criminal Code to achieve its full purpose.

COERCED CONFESSIONS: DUE PROCESS CHALLENGE

Under Section 395, New York Code of Criminal Procedure, the confession

22. 4 N.Y.2d 256, 173 N.Y.S.2d 793 (1957).
23. People v. Spano, 360 U.S. 315 (1959).

of a defendant, whether in the course of judicial proceedings or to a private person, can be given against him in evidence unless made under the influence of fear produced by threats, or upon the stipulation of the district attorney that he shall not be prosecuted therefor. In asserting the right to have the voluntary nature of his confession determined, the defendant must object to the confession's admission, at which time evidence is taken on that issue.[24] If there is no conflict on the facts surrounding the confession, the question of admissibility is for the court; existence of an issue, however, makes the question one for the jury.[25] The United States Supreme Court will not interfere with the right of states to regulate their own criminal procedure so long as a "fair trial," under Fourteenth Amendment due process, is had.[26]

Defendant Kiernan,[27] imprisoned for life on conviction as an aider and abettor in a felony murder prosecution, processed his appeal, asserting denial of due process, on the ground his confession was improperly submitted to the jury. The Court of Appeals unanimously held that the evidence surrounding Kiernan's confession was not sufficient to hold it involuntary as a matter of law, hence its submission to the jury was proper and did not result in denial of due process of law.

While it appears that the Court's statement of the legal principle involved is unassailable,[28] its decision in the instant case seems less firm. Kiernan processed his appeal after the United States Circuit Court (Second Circuit) had granted a *writ* of *habeas corpus* to Kiernan's co-defendant, Wade.[29] In granting that *writ*, the court listed fourteen factual reasons why Wade's confession was involuntary as a matter of law. For the most part, these facts were equally applicable to defendants Kiernan and Wade, and involved physical beating, continuous questioning over a 23½ hour period without arraignment,[30] and failure to inform on the right to counsel. "This kind of treatment," said the court, "without convincing explanation of its reasonableness, is sufficient to indicate that the resulting statement was involuntary and that it was given to put an end to what most of us would consider torture."[31] Kiernan may now attempt to get into the federal court system with his plea to the United States Constitution.[32] Once the question is put before those courts, an independent examination of the facts surrounding the confession will be made and,

24. People v. Fox, 121 N.Y. 449, 24 N.E. 923 (1890).

25. See People v. Brasch, 193 N.Y. 46, 85 N.E. 809 (1908); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909).

26. See Palko v. Connecticut, 302 U.S. 319 (1937); see also: Malinski v. New York, 324 U.S. 401, and Schwartz v. Texas, 344 U.S. 199 (1952).

27. People v. Kiernan, 6 N.Y.2d 274, 189 N.Y.S.2d 215 (1959).

28. *Supra* note 25.

29. Wade v. Jackson, 256 F.2d 7, *cert. denied* 357 U.S. 908 (1958).

30. Wade and Kiernan, convicted in the State courts as aiding and abetting the escape of two Sing Sing prisoners during which a guard was killed, were held for 23½ hours before arraignment, while the two escapees were arraigned about 6-8 hours earlier.

31. Wade v. Jackson, *supra* at 14.

32. U.S. CONST. amend. XIV.

without changing the New York rule of evidence in any manner,[33] Kiernan's confession may be determined involuntary, as a matter of law.[34]

It is true, as the New York Court of Appeals notes,[35] that Wade testified at the trial while Kiernan did not. Kiernan, having a criminal record, obviously chose to rely upon the evidence of involuntariness illicited from other witnesses rather than place himself in the worst possible light before the jury by having this record revealed through the certain attempt of the district attorney to impeach him. The decision of the federal courts will not rest upon Kiernan's failure to testify, but upon his rebutting the State's evidence of voluntariness, with evidence however adduced.

SUFFICIENT SPECIFICATION OF CRIMINAL ACTS: "LOITERING"; "BARBITUATE PRESCRIPTIONS"

In order to validly impose criminal liability, a statute must, on its face, inform the public of the acts to be avoided.[36] This general standard, laid down in *United States v. Brewer*, has consistently been followed in New York.[37] Twice during the 1958 term, the New York Court of Appeals was called upon to determine the validity of statutes challenged on the ground they were not sufficiently informative as required; one concerned with barbituate prescriptions,[38] the other with loitering.[39]

A provision of the Sanitary Code of the City of New York was attacked in *People v. Caswell-Massey Co.*[40] The challenged section provided in its first subdivision that telephonic barbituate prescriptions could be filled without ever being reduced to writing; in its third subdivision, that prescriptions for barbituates may not be refilled unless the original contains authorization in writing to do so. Reasoning from the impossibility of there being written authorization in an oral prescription, while refill of barbituate prescriptions is allowed under subdivision three generally, the majority (4-3) struck the provision as confusing to the ordinarily intelligent person.

The dissent insists there is no confusion about what is prohibited by the statute. Notwithstanding that a telephonic prescription, never reduced to writing, is valid and lawful, no original prescription not containing express written authorization for refilling, may be refilled.

Conceding the validity of the dissent's argument, there remains the instance of an original prescription, in whatever form, reordered orally by the same physician for the same patient, the instance, in fact, upon which the *Caswell-Massey* case arises. Recognizing that the court is striking this statute

33. That embodied in Section 395, N.Y. CODE CRIM. PROC.
34. Malinski v. New York, *supra*.
35. People v. Kiernan, *supra* at 276, 189 N.Y.S.2d 215, 217.
36. United States v. Brewer, 139 U.S. 278 (1891).
37. People v. Vetri, 309 N.Y. 401, 131 N.E.2d 568 (1955); People v. Firth, 3 N.Y.2d 472, 168 N.Y.S.2d 949 (1957).
38. People v. Caswell-Massey Co., 6 N.Y.2d 497, 190 N.Y.S.2d 649 (1959).
39. People v. Johnson, 6 N.Y.2d 549, 190 N.Y.S.2d 694 (1959).
40. *Supra* note 38.

because of uncertainty upon its face, and not because it was invalidly applied, the majority decision seems to rest, though it is not clearly articulated, upon the fact that the section in question does not proscribe the "refilling" in such circumstances with the sufficiency required by the *Brewer* case.[41]

On the same day it decided the *Caswell-Massey* case, the Court in *People v. Johnson*,[42] upheld Section 722-b,[43] of the New York Penal Law. Defendant argued that the use of the words "loiter," or "loitering," alone, were insufficient to describe the acts made criminal by the statute.

In 1953, the Court, in *People v. Bell*,[44] upheld a provision of the New York Penal Law which provided:

> Any person who loiters about any toilet, station or station platform of a subway or elevated railway or of a railroad, or who is found sleeping therein or thereon and who is unable to give satisfactory explanation of his presence is guilty of an offense.[45]

Both the majority and the dissent in the *Bell* case, agreed that if the section had ended without the proviso, ". . . and who is unable to give satisfactory explanation of his presence . . . ," its validity would be unquestionable for the word "loiter" had taken on a definite meaning by long statutory usage.[46]

In 1958, however, the Court struck the "loitering" ordinance of the City of Dunkirk in the case of *People v. Diaz*,[47] the statute providing simply, "No person shall lounge or loiter about any street or street corner in the City of Dinkirk." In declaring the ordinance void, the Court said, "while the term loiter . . . has by long usage acquired a common and accepted meaning, it does not follow that by itself, and without more, such term is enough to inform a citizen of its criminal implications. . . ." The Court further explained its position by reference to the New York Penal Law, wherein "loiter" was used to "point up" the prohibited act, *viz:* with the intent to commit a breach of the peace or whereby a breach of the peace is committed.[48] Used in this manner, the term becomes significant and convictions will not be reversed for lack of clarity as to the act proscribed.[49] Since "loitering," by definition, may include innocent conduct, the Court concluded that the Dunkirk ordinance,

41. *Supra* note 36.
42. *Supra* note 39.
43. N.Y. PEN. LAW § 722-b:
Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct.
44. People v. Bell, 306 N.Y. 110, 115 N.E.2d 821 (1953).
45. N.Y. PEN. LAW § 1990-a(2).
46. The majority holds the clause beginning ". . . and who is unable . . . ," is merely a procedure for determining whether the suspect is legitimately present, and does not affect the substance of the provision.
47. People v. Diaz, 4 N.Y.2d 469, 176 N.Y.S.2d 313 (1958).
48. N.Y. PEN. LAW § 722.
49. People v. Galpern, 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932); People v. Gaskin, 306 N.Y. 837, 118 N.E.2d 903 (1954).