

## Sandoval Held Inapplicable to Nonjury Trials

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*Sandoval held inapplicable to nonjury trials*

Under the rule established in *People v. Sandoval*,<sup>169</sup> evidence of a defendant's past criminal, vicious, or immoral acts, offered to impeach the defendant's credibility, may be excluded if the probative value of the evidence is outweighed by its potential prejudicial effect.<sup>170</sup> The development of this doctrine reflects a concern that a jury may disregard a court's limiting instructions<sup>171</sup> and infer from the evidence of prior bad acts that the defendant probably committed the crime in question.<sup>172</sup> Recently, in *People v. Rosa*,<sup>173</sup> the Criminal Court, New York County, found this consideration to be absent where the defendant is tried without a jury, and held that, in such cases, the *Sandoval* doctrine is inapplicable.<sup>174</sup>

<sup>169</sup> 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974).

<sup>170</sup> *Id.* at 373, 314 N.E.2d at 415, 357 N.Y.S.2d at 852. The rule that evidence of a defendant's past conduct is inadmissible for the purpose of establishing a defendant's propensity for criminal acts is designed to prevent convictions based on a defendant's commission of other crimes. *People v. Goldstein*, 295 N.Y. 61, 65, 65 N.E.2d 169, 170 (1946). Evidence of defendant's prior bad acts may be admitted, however, for the purpose of impeaching a defendant who has chosen to testify on his own behalf. *E.g.*, *People v. Webster*, 139 N.Y. 73, 34 N.E. 730 (1893). Accordingly, there are competing interests for the trial court to consider when deciding a *Sandoval* motion. On the one hand, the judge must evaluate the probative value of the evidence on the issue of the defendant's credibility, and on the other, he must evaluate the extent of unfair prejudice to the defendant. 34 N.Y.2d at 375, 317 N.E.2d at 416, 357 N.Y.S.2d at 854. Similarity of prior acts and remoteness in time of such acts to the crime charged, and the relevancy of the prior criminal conduct to the question of veracity are factors bearing on the probative value of the evidence. *Id.* at 376-77, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56.

The *Sandoval* Court approved the use of a pretrial motion to determine which of the defendant's prior bad acts could properly be the subject of cross-examination, *id.* at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 854, and did not afford criminal defendants any new substantive rights, *People v. Davis*, 44 N.Y.2d 269, 275, 376 N.E.2d 901, 904, 405 N.Y.S.2d 428, 431 (1978), since the scope of cross-examination had always been in the sound discretion of the trial judge. *People v. Sandoval*, 34 N.Y.2d at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853; *see, e.g.*, *People v. Schwartzman*, 24 N.Y.2d 241, 247 N.E.2d 642, 299 N.Y.S.2d 817, *cert. denied*, 396 U.S. 846 (1969). *See generally* Prince, *Evidence, 1974 Survey of N.Y. Law*, 26 SYRACUSE L. REV. 423 (1975); Note, *The Dilemma of the Defendant Witness in New York: The Impeachment Problem Half-Solved*, 50 ST. JOHN'S L. REV. 129 (1975). For a discussion of what prior acts of a defendant are permissible subjects of cross-examination for impeachment purposes, *see The Survey*, 52 ST. JOHN'S L. REV. 620, 684 n.302 (1978).

<sup>171</sup> *See, e.g.*, *People v. Davis*, 44 N.Y.2d 269, 376 N.E.2d 901, 405 N.Y.S.2d 428 (1978); *People v. Dickman*, 42 N.Y.2d 294, 366 N.E.2d 843, 397 N.Y.S.2d 754 (1977); *People v. Wright*, 41 N.Y.2d 172, 359 N.E.2d 696, 391 N.Y.S.2d 101 (1976).

<sup>172</sup> *People v. Sandoval*, 34 N.Y.2d 371, 376-77, 314 N.E.2d 413, 417, 357 N.Y.S.2d 849, 855 (1974).

<sup>173</sup> 96 Misc. 2d 491, 409 N.Y.S.2d 117 (N.Y.C. Crim. Ct. N.Y. County), *aff'd mem.*, 65 App. Div. 2d 679, 409 N.Y.S.2d 919 (2d Dep't 1978).

<sup>174</sup> 96 Misc. 2d at 491, 409 N.Y.S.2d at 117. It has been unclear whether the *Sandoval* Court intended to extend its decision to nonjury trials since the Court employed the phrases "triers of fact" and "jury or court." 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855. Since the Court approached the problem in terms of the limiting instructions to the jury,

The defendant in *Rosa* was charged with harassing a police officer,<sup>175</sup> a violation that does not require a jury trial.<sup>176</sup> Prior to trial, the defendant moved for a ruling on the issue "whether a defendant being tried before a judge without a jury is entitled to the application of the *Sandoval* doctrine."<sup>177</sup> Relying on dicta in *People v. Davis*,<sup>178</sup> Judge Hertz held that the procedural safeguards mandated by *Sandoval* are unavailable to a defendant who is tried without a jury.<sup>179</sup> The *Davis* Court, in evaluating the adequacy of a trial judge's limiting instructions, noted that "a jury's natural tendency" is to ignore such instructions.<sup>180</sup> Thus, Judge Hertz reasoned the *Sandoval* doctrine was implicitly based on a court's inability to insure that a jury would not draw impermissible inferences from evidence of the defendant's prior acts.<sup>181</sup> Since a judge acting as the trier of fact "is not free to disregard" the rule that prior criminal, vicious, and immoral acts are not admissible for the purpose of proving the defendant's propensity to commit crimes, Judge Hertz concluded that the problem to which *Sandoval* was addressed is not present when the case is tried by the court.<sup>182</sup>

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*id.* at 377, 314 N.E.2d at 418, 357 N.Y.S.2d at 856, however, at least one of the underpinnings of the *Sandoval* decision is inapplicable to a nonjury trial. See note 181 *infra*. Cases subsequent to *Sandoval*, arising in the context of jury trials, have tended to rephrase the rationale of *Sandoval* in terms of the effect of the evidence on the jury. See, e.g., *People v. Davis*, 44 N.Y.2d 269, 274, 376 N.E.2d 901, 903, 405 N.Y.S.2d 428, 430 (1978); *People v. Dickman*, 42 N.Y.2d 294, 297, 366 N.E.2d 843, 845, 397 N.Y.S.2d 754, 756-57 (1977); *People v. Caviness*, 38 N.Y.2d 227, 233, 342 N.E.2d 496, 500, 379 N.Y.S.2d 695, 701 (1975).

<sup>175</sup> The *Rosa* opinion does not reveal the underlying facts of the offense. See *Questioning Defendant on Crime Record Ruled Permissible in Nonjury Trial*, N.Y.L.J., Oct. 12, 1978, at 1, col. 2-3; N.Y. PENAL LAW §§ 10.00(3) (1975), 240.25 (1967).

<sup>176</sup> The sixth amendment does not require a jury trial when the sentence of imprisonment cannot exceed six months. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>177</sup> 96 Misc. 2d at 492, 409 N.Y.S.2d at 117.

<sup>178</sup> 44 N.Y.2d 269, 376 N.E.2d 901, 405 N.Y.S.2d 428 (1978).

<sup>179</sup> 96 Misc. 2d at 493, 409 N.Y.S.2d at 118.

<sup>180</sup> 44 N.Y.2d at 274, 376 N.E.2d at 903, 405 N.Y.S.2d at 430.

<sup>181</sup> 96 Misc. 2d at 492, 409 N.Y.S.2d at 118. The *Davis* Court held that the refusal of a trial judge to exercise his sound discretion concerning the limitation of cross-examination constitutes reversible error. 44 N.Y.2d at 275-76, 376 N.E.2d at 904, 405 N.Y.S.2d at 431-32. In its decision, the *Davis* Court discussed the competing interests underlying the *Sandoval* rule. *Id.* at 273-74, 376 N.E.2d at 903, 405 N.Y.S.2d at 430, quoted in *People v. Rosa*, 96 Misc. 2d at 492, 409 N.Y.S.2d at 117; see note 170 *supra*. As the *Rosa* court suggested, 96 Misc. 2d at 492, 409 N.Y.S.2d at 117, the language in *Davis* which hinted at limiting *Sandoval* to jury trials should be regarded as dictum since there was a jury trial in *Davis*. In *Sandoval*, a case also tried before a jury, the Court was sensitive to "the risk, despite the most clear and forceful limiting instructions to the contrary, that the evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility." 34 N.Y.2d at 377, 314 N.E.2d at 418, 357 N.Y.S.2d at 856. This concern, however, was only one aspect of the *Sandoval* decision. See note 186 and text accompanying notes 191-192 *infra*.

<sup>182</sup> 96 Misc. 2d at 493, 409 N.Y.S.2d at 118.

The *Rosa* court's implication that no unfair prejudice results where evidence of past criminal acts is introduced in nonjury trials<sup>183</sup> does not appear to be consistent with the *Sandoval* rationale.<sup>184</sup> In *Sandoval*, it was noted that a defendant could be prejudiced by improper conclusions drawn by the trier of fact from evidence of prior bad acts.<sup>185</sup> An added concern was that defendants would be deterred from testifying on their own behalf "and thereby deny the jury or court significant material evidence."<sup>186</sup> In deciding that the judge in a nonjury case need not make a *Sandoval* ruling, the *Rosa* court apparently presumed that judges, unlike jurors, are capable of disregarding evidence which should not have been introduced.<sup>187</sup>

<sup>183</sup> See note 170 *supra*. Apparently, since no distinction can be made between the probative value of the evidence on the issue of credibility in jury and nonjury cases, the *Rosa* court decided to focus only on the extent of unfair prejudice to the defendant. See text accompanying note 181 *supra*.

<sup>184</sup> See note 191 *infra*.

<sup>185</sup> 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855 (citing *People v. Schwartzman*, 24 N.Y.2d 241, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823, *cert. denied*, 396 U.S. 846 (1969)); see note 170 *supra*.

<sup>186</sup> 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855. For a discussion of the constitutional aspects of the denial of a defendant's right to testify, see Note, *The Dilemma of the Defendant Witness in New York: The Impeachment Problem Half-Solved*, 50 ST. JOHN'S L. REV. 129, 137-40 (1975). See generally Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant-Witness*, 37 U. CIN. L. REV. 168 (1968).

<sup>187</sup> See C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 60, at 137 (2d ed. 1972). According to Professor McCormick, most appellate courts presume that the admission of incompetent evidence in a bench trial is not grounds for reversal when there is sufficient competent evidence to sustain the trial court's findings. *Id.* The justification for this presumption is that a judge's "learning, experience, and judicial discipline" make him "uniquely capable of distinguishing the issues." *People v. Brown*, 24 N.Y.2d 168, 172, 247 N.E.2d 153, 155, 299 N.Y.S.2d 190, 193 (1969). Despite the continuing criticism by commentators and some judges, see note 188 *infra*, there seems to be much support for this presumption in decisional law. When a trial judge decides the guilt or innocence of a defendant, courts have held that he is capable of disregarding evidence even though it was previously found to be inadmissible. For example, judges are deemed capable of disregarding an involuntary confession, *e.g.*, *People v. Brown*, 24 N.Y.2d 168, 247 N.E.2d 153, 299 N.Y.S.2d 190 (1969), and evidence obtained through an illegal search and seizure, *e.g.*, *People v. Kozer*, 33 App. Div. 2d 617, 304 N.Y.S.2d 793 (3d Dep't 1969), or illegal eavesdropping. *E.g.*, *People v. DeCurtis*, 63 Misc. 2d 246, 311 N.Y.S.2d 214 (Sup. Ct. App. T. 2d Dep't 1970) (*per curiam*), *aff'd mem.*, 29 N.Y.2d 608, 273 N.E.2d 136, 324 N.Y.S.2d 406, *cert. denied*, 404 U.S. 940 (1971). In these cases, the trial judge must determine whether the evidence is admissible, and then whether any presumption arises as to possible unfair influence on the trial judge who has heard the improperly received evidence. In *Brown*, the Court found that a trial judge could make an objective determination on the question of voluntariness of the defendant's confession after he had heard evidence establishing the truth of the confession. 24 N.Y.2d at 171, 247 N.E.2d 154, 299 N.Y.S.2d at 192. *But cf.* *Jackson v. Denno*, 378 U.S. 368 (1964); *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965) (pre-trial hearing required with jury trial). Thus, the Court held that a separate pretrial hearing was not required with bench trials since a judge's superior learning, experience, and discipline render him "uniquely capable of

It is suggested that judges are not immune from the conscious and subconscious effect of hearing evidence which is immaterial to the guilt or innocence of the defendant.<sup>188</sup> It is not unrealistic to assume

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distinguishing the issues and making an objective determination as to voluntariness, regardless of whether he has heard evidence on other issues in the case." 24 N.Y.2d at 172, 247 N.E.2d at 155, 299 N.Y.S.2d 193; see *People v. Sykes*, 22 N.Y.2d 159, 239 N.E.2d 182, 292 N.Y.S.2d 76 (1968).

In its decision, the *Brown* Court rejected two federal district court decisions that required pretrial hearings in nonjury trials. 24 N.Y.2d at 171, 247 N.E.2d at 154, 299 N.Y.S.2d at 192; see *United States ex rel. Spears v. Rundle*, 268 F. Supp. 691 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3d Cir. 1969) (per curiam); *United States ex rel. Owens v. Cavell*, 254 F. Supp. 154 (M.D. Pa. 1966). Federal courts in other circuits that have addressed the issue have rejected the approach of these early federal cases and have embraced the *Brown* rationale. See, e.g., *United States ex rel. Placek v. Illinois*, 546 F.2d 1298 (7th Cir. 1976); *United States v. McCarthy*, 470 F.2d 222 (6th Cir. 1972).

The New York courts have reasoned similarly in cases involving the admissibility of evidence obtained through illegal searches and seizures, see *People v. Kozer*, 33 App. Div. 2d 617, 304 N.Y.S.2d 793 (3d Dep't 1969), and eavesdropping. See *People v. DeCurtis*, 63 Misc. 2d 246, 311 N.Y.S.2d 214 (Sup. Ct. App. T. 2d Dep't 1970) (per curiam), *aff'd mem.*, 29 N.Y.2d 608, 273 N.E.2d 136, 324 N.Y.S.2d 406, *cert. denied*, 404 U.S. 940 (1971). The *Kozer* court noted, however, that the trial judge must decide whether the evidence is admissible before trial, notwithstanding that the same judge can preside at the trial. Thus, a judge in a nonjury case generally is not precluded from determining guilt or innocence after deciding the admissibility question. New York case law is not consistent, however, on the question whether the judge must make a determination on admissibility prior to trial. Although *Brown* does not require a pretrial hearing, *Rosa* may be distinguished because evidence of prior bad acts in *Rosa* was not tainted with illegality, whereas the excluded evidence in *Brown* was illegally obtained, and the trial judge may be more likely to disregard such tainted evidence. Furthermore, the evidence in *Rosa* was immaterial to the merits of the case, in contrast to *Brown*, where the confession was material to the issue of guilt or innocence.

<sup>188</sup> See *People v. Horie*, 258 App. Div. 246, 248, 16 N.Y.S.2d 235, 237 (1st Dep't 1939). The *Horie* court reversed a conviction, stating that "[t]he improper admission of [subsequent acts which establish a common scheme] constitutes a very serious infraction of the rights of a defendant . . . whether the triers of the facts be a jury or a court." *Id.* Evidence of prior or subsequent acts to establish a common plan or scheme, if improperly admitted, result in the same type of prejudice as evidence of prior bad acts improperly introduced for impeachment purposes.

In a thoughtful discussion of *People v. Brown*, 24 N.Y.2d 168, 247 N.E.2d 153, 299 N.Y.S.2d 190 (1969), one student commentator notes that the *Brown* Court "neglected to deal with the legitimate consideration that the capacity to identify, understand, and distinguish intricate legal issues may not be equivalent to immunity from both conscious and subconscious influences created by the knowledge of evidence indicating guilt." 38 *FORDHAM L. REV.* 120, 124-25 & n.39 (1969). Another commentary notes that "[n]ature does not furnish a jurist's brain with thought-tight compartments to suit the convenience of legal theory, and convincing evidence, once heard, does leave its mark." Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 *YALE L.J.* 1101, 1115 (1927) (emphasis in original); see *United States ex rel. Scoleri v. Banmiller*, 310 F.2d 720, 725 (3d Cir. 1962); *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932); *United States ex rel. Spears v. Rundle*, 268 F. Supp. 691, 696 (E.D. Pa. 1967), *aff'd*, 405 F.2d 1037 (3d Cir. 1969); *Kovacs v. Szentcs*, 130 Conn. 229, 33 A.2d 124, 125 (1943); C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 60, at 138 n.87 (2d ed. 1972); 1 J. WIGMORE, *EVIDENCE* § 194, at 415 (2d ed. 1923); Note, *Incompetent Evidence in Nonjury Trials: Ought We Presume That it Has No Effect?*, 29 *IND. L.J.* 446, 451-52 (1954).

that a trial judge who hears evidence concerning a defendant's past conduct may consider the evidence for an improper purpose.<sup>189</sup> Furthermore, even assuming that the judge is able to limit his consideration of the evidence to its bearing on the issue of the defendant's credibility as a witness, the defendant nevertheless is prejudiced since he may be discouraged from testifying due to a justifiable fear that cross-examination may have an adverse effect on the judge.<sup>190</sup>

It is submitted that a defendant should be afforded the protections of *Sandoval* without regard to whether he elects a jury trial. To insure that the objectives of *Sandoval* are attained, the ruling should be made by a judge other than the trial judge.<sup>191</sup> This procedure, which only would exclude evidence that is inadmissible in jury trials, seems consistent with the language and spirit of *Sandoval*.<sup>192</sup>

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#### INSURANCE LAW

*Ins. Law § 167(3): 1976 amendment applicable only to Dole claims arising from accidents occurring on or after effective date*

Section 167(3) of the Insurance Law initially excluded from

<sup>189</sup> See *People v. Horie*, 258 App. Div. 246, 16 N.Y.S.2d 235 (1st Dep't 1939); cf. *People v. O'Brien*, 86 Misc. 2d 139, 381 N.Y.S.2d 972 (Wayne County Court 1976) (conviction reversed when the trial judge delayed handing down decision in order to hear evidence of similar cases). But see *People v. D'Abate*, 37 N.Y.2d 922, 340 N.E.2d 750, 378 N.Y.S.2d 390 (1975), wherein the Court found that although it was error to cross-examine the defendant on three out-of-state convictions, it was not prejudicial, especially since there was no jury.

<sup>190</sup> See *People v. Sandoval*, 34 N.Y.2d at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 854; see note 188 *supra*.

<sup>191</sup> An administrative problem may arise if *Sandoval* is applied to nonjury cases. It is suggested that the mere knowledge of a defendant's prior criminal activities, acquired when hearing the motion, is sufficient to prejudice the court and defeat the purpose of *Sandoval*. Moreover, because of this potential prejudice, even a defendant who expects the motion to be granted, may be discouraged from making the motion and testifying on his own behalf if the trial judge hears the motion. It is suggested, therefore, that in nonjury cases a different judge should determine the *Sandoval* motion whenever possible. A similar procedure is used in juvenile proceedings where a hearing on the issue of voluntariness of confessions is conducted by a judge other than the one who serves as the trier of fact. See, e.g., *In re Edwin R.*, 60 Misc. 2d 355, 359, 303 N.Y.S.2d 406, 410 (Family Ct. N.Y. County 1969).

<sup>192</sup> In *Sandoval*, Judge Jones consistently referred to "the jury or the court" instead of merely "the jury" when discussing those who would be prejudiced, indicating that *Sandoval* also was intended to apply to nonjury cases. 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855. Judge Hertz, in *Rosa*, was unable to effectively discount the significance of the phrase "jury or court" in *Sandoval*. 96 Misc. 2d at 492-93, 409 N.Y.S.2d at 118. Judge Hertz believed that the use of the phrase "triers of fact" limited *Sandoval* to jury cases, but it appears that this phrase applies to judges or juries, depending on the case. It is suggested that the rephrasing of the issue on terms of the impact on the jury in the post-*Sandoval* cases, see note 170 *supra*, represents a fortuitous consequence that these cases were jury cases.