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Unrelated Charge Exception to Donovan-Arthur Right to Counsel Held Inapplicable Where Same Policemen Interrogate Defendant on Both Charges

Ronald S. Meckler

Unrelated charge exception to Donovan-Arthur *right to counsel held inapplicable where same policemen interrogate defendant on both charges*

Under the *Donovan-Arthur* rule,[130] once the police are aware that a defendant is represented by counsel, they may not interrogate him out of the presence of his attorney. Generally, this protection is not available when the defendant is questioned in connection with a charge that is unrelated to the charge for which he has obtained representation.[131] The courts have recognized an exception to the

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stances, the decision raises a number of questions. Can an unrepresented defendant faced with a lineup effectively waive his right to counsel in the absence of an attorney after the filing of an accusatory instrument? Would the Court's determination as to the permissibility of waiver have been the same if the defendant had been involved in an interrogation rather than a lineup? Is the Court liberalizing the standard for determining when formal adversary proceedings commence, or has it begun to develop a broader right to counsel at lineups than that enunciated in Kirby v. Illinois, 406 U.S. 682 (1972)?

[130] In People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), the Court of Appeals held that statements made by a defendant in custody are inadmissible if made after his request for counsel has been denied or after his attorney has been denied access to him. This rule was extended in People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), wherein the Court held that once the police learn that a defendant is represented by counsel or an attorney has informed the police that he intends to represent the defendant, a right to counsel attaches and the police may not question him without the attorney present. Furthermore, the *Arthur* Court expanded the right to counsel by holding that after the right attaches it cannot effectively be waived in the absence of defendant's attorney. *Id.* at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666. In People v. Robles, 27 N.Y.2d 155, 263 N.E.2d 304, 314 N.Y.S.2d 793 (1970), *cert. denied,* 401 U.S. 945 (1971), and People v. Lopez, 28 N.Y.2d 23, 268 N.E.2d 628, 319 N.Y.S.2d 825, *cert. denied,* 404 U.S. 840 (1971), the Court of Appeals appeared inclined to weaken the *Donovan-Arthur* rule. Its vitality was reaffirmed, however, in People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), wherein the Court expressly overruled *Robles* and *Lopez. See The Survey,* 51 ST. JOHN'S L. REV. 201, 218 (1976). *See generally* People v. Clark, 41 N.Y.2d 612, 363 N.E.2d 319, 394 N.Y.S.2d 593 (1977); People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976).

The *Donovan-Arthur* rule does not require the suppression of statements made while the defendant is not in custody. People v. McKie, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969). In addition, the spontaneous statements of a detained defendant are admissible even when made in the absence of counsel. People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969).

[131] *See, e.g.,* People v. Taylor, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971); People v. Hetherington, 27 N.Y.2d 242, 265 N.E.2d 530, 317 N.Y.S.2d 1 (1970); People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964), *cert. dismissed,* 382 U.S. 802 (1965); *cf.* People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (represented suspect not protected by *Donovan-Arthur* rule at lineup for unrelated charge); People v. Simons, 22 N.Y.2d 533, 240 N.E.2d 22, 293 N.Y.S.2d 521 (1968), *cert. denied,* 393 U.S. 1107 (1969) (defendant held for parole violation may be questioned outside attorney's presence in connection with criminal charge). The unrelated charge rule was recently reiterated in People v. Clark, 41 N.Y.2d 612, 363 N.E.2d 319, 394 N.Y.S.2d 593 (1977), wherein the Court of Appeals stated that "[r]epresentation by counsel in a proceeding unrelated to the investigation is insufficient to invoke the [*Donovan-Arthur*] protections." *Id.* at 615, 363 N.E.2d at 321, 394 N.Y.S.2d at 596 (citations omitted).

"unrelated charge" rule[132] only in instances where the police detain the defendant on a contrived charge in order to question him in connection with a more serious matter.[133] Recently, however, in *People v. Ermo,*[134] the Appellate Division, Second Department, held that when a defendant is interrogated on an unrelated charge by a team of law enforcement agents who are also investigating a charge for which counsel has been retained or appointed, the right to counsel which attaches may only be waived in the presence of an attorney.[135]

In *Ermo,* a mildly retarded defendant was taken into custody because he resembled a composite sketch of a suspect who had sexually assaulted a young girl.[136] After signing a written waiver of his *Miranda* rights, Ermo admitted committing the assault.[137] The police then questioned him about a murder which had occurred approximately 7 months earlier.[138] The defendant confessed to having committed the murder, but later recanted.[139] The following day, Ermo was arraigned on the assault charge and a public defender was assigned to his case.[140] After the arraignment and outside the pres-

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[132] "Unrelated charges" can be either charges arising from the same criminal act or charges flowing from different sets of facts. *See, e.g.,* People v. Taylor, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971); People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964), *cert. dismissed,* 382 U.S. 802 (1965).

[133] The Court of Appeals has condemned the practice of arraigning defendants solely as a pretext for detaining them for further interrogation on another crime. *See* People v. Vella, 21 N.Y.2d 249, 234 N.E.2d 422, 287 N.Y.S.2d 369 (1967); People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964), *cert. dismissed,* 382 U.S. 802 (1965); People v. Davis, 13 N.Y.2d 690, 191 N.E.2d 674, 241 N.Y.S.2d 172 (1963) (mem.); People v. Robinson, 13 N.Y.2d 296, 196 N.E.2d 261, 246 N.Y.S.2d 623 (1963). The Court has also circumvented the unrelated charge rule where the police appear to have acted in bad faith. *See* People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389 N.Y.S.2d 299 (1976). In *Ramos,* the defendant had retained an attorney to represent him in connection with a drug possession charge. Immediately after his arraignment, the police took the defendant back into custody to question him on an unrelated murder. Before the defendant was taken from the courthouse, however, his attorney announced within earshot of the police that he had instructed his client not to make any statements while in custody. *Id.* at 612, 357 N.E.2d at 957, 389 N.Y.S.2d at 301. Nevertheless, the police later questioned the defendant and obtained statements implicating him in the murder charge. Reasoning that the attorney's courthouse announcement was notice to the police that the defendant had legal representation for the murder charge, the Court invoked the *Donovan-Arthur* rule and suppressed the inculpatory statements. *Id.* at 618, 357 N.E.2d at 961, 389 N.Y.S.2d at 304-05.

[134] 61 App. Div. 2d 177, 401 N.Y.S.2d 831 (2d Dep't 1978).

[135] *Id.* at 181-82, 401 N.Y.S.2d at 834-35.

[136] *Id.* at 178, 401 N.Y.S.2d at 832.

[137] *Id.*

[138] The murder was committed during the course of a sexual assault. *Id.* The similarity between the crimes caused the police to suspect that Ermo might have committed both. *Id.* at 181, 401 N.Y.S.2d at 834.

[139] *Id.* at 178, 401 N.Y.S.2d at 832.

[140] *Id.*

ence of his attorney, the police again interrogated Ermo about the murder, initiating the questioning with inquiries about the assault charge.[141] In response to this questioning Ermo made an inculpatory statement about the murder.[142] One week later, Ermo was taken to the district attorney's office where he again implicated himself in the murder.[143] After his indictment for felony murder, Ermo unsuccessfully moved to suppress the incriminating statements elicited by the police and was subsequently convicted.[144]

On appeal, the Appellate Division, Second Department, ordered suppression of the inculpatory statements and reversed the conviction.[145] In reaching this result, the majority distinguished the facts in *Ermo* from previous cases which held that the *Donovan-Arthur* right to counsel is only available when the suspect is questioned in connection with the charge for which he is represented.[146] The court noted that the prior cases involved independent investigations conducted by different law enforcement teams.[147] In *Ermo,*

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[141] *Id.* at 181, 401 N.Y.S.2d at 834.

[142] *Id.* at 179, 401 N.Y.S.2d at 832.

[143] *Id.*

[144] *Id.* The defendant's incriminating statements were used to convict him of felony murder. *Id.* at 178-79, 401 N.Y.S.2d at 832.

[145] *Id.* at 182, 401 N.Y.S.2d at 834-35.

[146] *Id.* at 181, 401 N.Y.S.2d at 834. The appellate division mentioned three earlier decisions: People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977); People v. Taylor, 27 N.Y.2d 327, 266 N.E.2d 630, 318 N.Y.S.2d 1 (1971); People v. Stanley, 15 N.Y.2d 30, 203 N.E.2d 475, 255 N.Y.S.2d 74 (1964), *cert. dismissed,* 382 U.S. 802 (1965). In *Stanley,* the defendant was in police custody after having been indicted on a federal charge. While in custody, he was questioned by New York City police officers in connection with a larceny charge stemming from the same incident. Although his attorney was not present during the interrogation, the defendant's statements were held admissible. 15 N.Y.2d at 33, 203 N.E.2d at 477, 255 N.Y.S.2d at 76-77. In analyzing this case, the *Ermo* court apparently assumed that the state and federal charges had been investigated by different teams of law enforcement agents. 61 App. Div. 2d at 181, 401 N.Y.S.2d at 834.

In *Taylor,* the defendants, who were represented in connection with an earlier robbery arrest, were questioned about a second robbery without benefit of counsel. Although the interrogating detective was aware that the defendant had an attorney, the Court of Appeals refused to suppress the inculpatory statements and held that the *Donovan-Arthur* rule protects suspects only when they are questioned about the charges for which counsel was retained or appointed. 27 N.Y.2d at 331-32, 266 N.E.2d at 633, 318 N.Y.S.2d at 4-5. In distinguishing this case, the *Ermo* court noted that the detective in *Taylor* was not involved in the investigation of the earlier robbery. 61 App. Div. 2d at 181, 401 N.Y.S.2d at 834.

In *Coleman,* a robbery suspect who was incarcerated on an unrelated charge was required to appear at a corporeal viewing procedure pursuant to a court order of removal. Although the defendant had counsel for the earlier unrelated charge, the Court of Appeals concluded that his right to have counsel present at the lineup could be waived in the absence of his attorney. 43 N.Y.2d at 226-27, 371 N.E.2d at 822, 401 N.Y.S.2d at 60. This case was similarly distinguished by the *Ermo* court on the ground that different police teams were investigating the two crimes. 61 App. Div. 2d at 181, 401 N.Y.S.2d at 834.

[147] 61 App. Div. 2d at 181, 401 N.Y.S.2d at 834.

however, the same police officers were contemporaneously investigating both the assault and the murder.[148] The court observed that the investigators had exploited their dual role by using the assault charge to initiate further questioning about the murder.[149] In the court's view, the assault charge had been a "crucial element" in obtaining the defendant's admissions in connection with the murder.[150] Since the police were aware that the defendant had representation for the assault charge, the *Ermo* majority concluded that further questioning on the murder charge should not have been conducted without the presence of the defendant's attorney.[151]

In his dissent, Justice Hawkins asserted that the majority's reasoning was inconsistent with *People v. Coleman,*[152] wherein the Court of Appeals stated that the protection of the *Donovan-Arthur* rule is limited to instances in which the defendant is questioned in connection with charges for which counsel has been retained or appointed.[153] Justice Hawkins was of the opinion that an extension of this right to situations in which the same police officers are investigating unrelated crimes would provide a defendant, arrested for one offense, with "virtual immunity" from further interrogation in connection with more serious crimes.[154]

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[148] *Id.*

[149] *Id.*

[150] *Id.* at 182, 401 N.Y.S.2d at 834.

[151] *Id.* Implying that the police had acted in bad faith, the *Ermo* court noted that the use of the assault charge as a predicate for further questioning was "a subtle attempt to secure a confession from this mildly retarded defendant to the more serious crime of felony murder." *Id.* at 181-82, 401 N.Y.S.2d at 834.

Under a doctrine similar to the "fruits of the poison tree" doctrine, *see* note 157 *infra,* courts will suppress a statement which is tainted by an earlier admission where the first statement is acquired through illegal police conduct. Harrison v. United States, 392 U.S. 219 (1968); People v. Stephen J.B., 23 N.Y.2d 611, 246 N.E.2d 344, 298 N.Y.S.2d 489 (1969); *In re* Hector G., 89 Misc. 2d 1081, 393 N.Y.S.2d 519 (Family Ct. N.Y. County 1977). The "cat out of the bag" doctrine was articulated by the Supreme Court in United States v. Bayer, 331 U.S. 532 (1947), wherein the Court recognized that "after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed." *Id.* at 540. Thus, if a defendant confesses to having committed a crime in response to an illegal interrogation, his subsequent statements concerning that crime may be suppressed even if made under otherwise legal procedures. This rule is not directly applicable to the facts in *Ermo,* where the illegality lay in the interrogation concerning the assault charge while the statements in question related to the murder charge. Nevertheless, the underlying reasoning in *Bayer* would seem applicable to *Ermo* since the police obtained Ermo's statements concerning the murder by exploiting the psychological advantage they enjoyed by reason of his earlier confession to the assault charge.

[152] 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977).

[153] 61 App. Div. 2d at 183-84, 401 N.Y.S.2d at 835-36 (Hawkins, J., dissenting).

[154] *Id.* at 183, 401 N.Y.S.2d at 835 (Hawkins, J., dissenting). The *Ermo* dissent appears to be in accord with the reasoning in People v. Ramos, 40 N.Y.2d 610, 357 N.E.2d 955, 389

The *Ermo* court's decision to suppress the defendant's inculpatory statements may, in subsequent cases, be viewed as an extension of a line of decisions which require the suppression of evidence that is tainted by unlawful police conduct.[155] Once Ermo had been arraigned on the assault charge and appointed counsel, any questioning outside the presence of his attorney on that charge clearly was illegal.[156] This illegality was further exploited by the officers in their efforts to obtain statements implicating the defendant in the murder charge. Under this approach the fruits of this exploitation, the defendant's admissions concerning the murder, would be suppressed.[157]

Alternatively, *Ermo* may be interpreted as an application of the *Donovan-Arthur* right to all instances in which the police are inves-

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N.Y.S.2d 299 (1976), wherein the Court of Appeals stated that the limitations on the *Donovan-Arthur* rule are needed to permit the police to conduct a good-faith investigation unhampered "by the mere fortuity that [the defendant] was represented by counsel on an unrelated charge," *Id.* at 617, 357 N.E.2d at 960, 389 N.Y.S.2d at 304; *see* People v. Clark, 41 N.Y.2d 612, 615, 363 N.E.2d 319, 321, 394 N.Y.S.2d 593, 596 (1977). The police, however, should not be permitted to take undue advantage of these limitations on an accused's right to counsel. *See* note 133 *supra; cf.* People v. Stanley, 15 N.Y.2d 30, 34, 203 N.E.2d 475, 478, 255 N.Y.S.2d 74, 78 (1964) (Desmond, C.J., dissenting), *cert. dismissed,* 382 U.S. 802 (1965) (police interrogation should not be continued after suspect has been placed in role of accused).

[155] *See, e.g.,* Wong Sun v. United States, 371 U.S. 471 (1963) (evidence secured by exploiting illegally obtained information held inadmissible); *accord,* People v. Paulin, 25 N.Y.2d 445, 255 N.E.2d 164, 306 N.Y.S.2d 929 (1969) (physical evidence discovered through use of illegally obtained statement inadmissible); People v. Robinson, 13 N.Y.2d 296, 196 N.E.2d 261, 246 N.Y.S.2d 623 (1963) (gun excluded from evidence where illegally elicited statements enabled police to find it).

[156] *See* People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

[157] In Wong Sun v. United States, 371 U.S. 471 (1963), the Supreme Court stated that the admissibility of evidence that is "tainted" by illegal police conduct depends upon "whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

The "fruit of the poison tree" doctrine articulated in *Wong Sun* usually is applied in situations where the police have uncovered physical evidence by exploiting information that has been obtained from the defendant illegally. *See* note 155 *supra. But see* Harrison v. United States, 392 U.S. 219 (1968) (inculpatory statements elicited through exploitation of illegally obtained statements inadmissible). The police conduct in *Ermo,* therefore, does not fit into the classical application of this doctrine. In the classic case, what is learned from impermissible conduct is utilized to uncover evidence through otherwise lawful means. In *Ermo,* although there existed a similar pattern of illegal questioning followed by the otherwise lawful securing of evidence, *i.e.,* the defendant's inculpatory statements, the initial illegality did not provide the police with information which led to independent discovery of this evidence. Instead, the illegal questioning was exploited to create an atmosphere that would encourage the defendant to confess to the murder. Thus, since the situation in *Ermo* is distinguishable from the classic case, the court would have had to broaden the doctrine in order to suppress the evidence as "fruits of the poison tree."

tigating unrelated charges and question the defendant on one of the charges with knowledge that he is represented on the other. Such an interpretation, however, would be inconsistent with the line of decisions which have recognized an exception to the unrelated charge rule only where the defendant is questioned after being detained on a contrived charge.[158]

In the final analysis, the *Ermo* decision is probably best interpreted as an indication that the courts will scrutinize police procedures closely in instances where a defendant is interrogated by the same team of law enforcement agents in connection with unrelated charges. In such instances, the possibility of police misconduct in the absence of the defendant's attorney is sufficiently serious to justify heightened judicial suspicion. Thus, when police misconduct does not fit within one of the traditional legal theories that would mandate suppression, the courts may nevertheless intervene when the misconduct violates fundamental notions of fairness.

Ronald S. Meckler

DOMESTIC RELATIONS LAW

DRL § 248: Cohabitation alone not sufficient to authorize termination of alimony payments

Section 248 of the Domestic Relations Law empowers a court, in its discretion, to terminate a wife's alimony[159] upon proof that she

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[158] *See* note 133 *supra*. The *Ermo* court could not rely on the "pretext" exception to suppress the confessions since the assault charge was legitimate and not a mere contrivance with which to detain the defendant for further questioning on the unrelated murder charge.

[159] Generally, only a wife may receive an alimony award in a matrimonial action. *See* DRL § 236; FAM. CT. ACT § 412 (McKinney 1975). Under normal circumstances, the husband has no equivalent right to support. The husband may be entitled to receive support from his wife, however, if he becomes a recipient of public assistance before the marriage is dissolved. *Id.* § 415 (McKinney Supp. 1977-1978). The statutory obligation of a husband to provide support is based upon a legislative assumption that a wife may suffer severe economic hardship as a result of a divorce. The statutory alimony provisions were intended to protect the wife and prevent her from becoming a ward of the community. *See* Phillips v. Phillips, 1 App. Div. 2d 393, 150 N.Y.S.2d 646 (1st Dep't), *aff'd mem.*, 2 N.Y.2d 742, 138 N.E.2d 738, 157 N.Y.S.2d 378 (1956); Kolmer v. Kolmer, 19 Misc. 2d 298, 305, 191 N.Y.S.2d 324, 331 (Sup. Ct. N.Y. County 1959). Under DRL § 236, the court may award alimony to a woman in any matrimonial action. FAM. CT. ACT § 412 provides that "[a] husband is chargeable with the support of his wife and . . . may be required to pay . . . a fair and reasonable sum, as the court may determine . . . ." A wife is not entitled to alimony, however, if she is found guilty of misconduct which "would itself constitute grounds for separation or divorce." DRL § 236.

DRL § 236 provides that, in making an alimony award, the court may consider such factors as the "length . . . of the marriage, [and] the ability of the wife to be self-supporting . . . ." In addition, DRL § 236 and FAM. CT. ACT. § 466 (McKinney 1975) permit the court to modify a prior support order if the parties' circumstances have changed significantly. *See*