St. John's Law Review

Volume 52
Number 4 *Volume 52, Summer 1978, Number 4*

Article 12

July 2012

Declaration Against Penal Interest Held Inadmissable Against Defendant in Criminal Action

Ralph J. Libsohn

ment made by the employee in the payee's name is effective.[201] Thus, if a bank pays on such an instrument it is not liable in conversion since the employer is made to bear the risk of loss.[202] In *Underpinning,* the employee did not merely indorse the instrument in the payee's name; rather, he restrictively indorsed it. This event, although sufficient in the court's view to give the drawer a cause of action against the depositary bank, should not alter the legal result obtaining from the imposter rule. Since section 3-405 was drafted with the object of imposing risk of loss upon the drawer,[203] the *Underpinning* result is inconsistent with the intent of the drafters of the Code.

Bruce A. Antonelli

DEVELOPMENTS IN NEW YORK PRACTICE

Declaration against penal interest held inadmissible against defendant in criminal action

In *People v. Brown,*[204] the Court of Appeals expanded the declaration against interest exception to include a declaration against penal interest offered by a defendant in a criminal case.[205] The

[201] N.Y.U.C.C. § 3-405 (McKinney 1964); *see* notes 174-75 *supra.*

[202] N.Y.U.C.C. § 3-405 (McKinney 1964). An argument might be made, however, that even where the imposter rule applies, if a bank acts contrary to reasonable commercial practices and pays inconsistently with the terms of a restrictive indorsement, the drawer should be allowed to assert such negligence and shift the loss to the payor bank. Under §§ 3-406 and 4-406, if both the bank and its customer are shown to have been negligent with respect to instruments which have been altered or signed without authorization, the resulting loss is borne by the bank. N.Y.U.C.C. §§ 3-406, 4-406 (McKinney 1964); *see* WHITE & SUMMERS, *supra* note 173, at 548-49.

[203] *See* R. ANDERSON, *supra* note 174, §§ 3-405:6,-505:3.

[204] 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970).

[205] It had been the settled rule in New York that the declaration against interest exception only included declarations against one's pecuniary or proprietary interest. *See, e.g.,* Kittredge v. Grannis, 244 N.Y. 168, 175-76, 155 N.E. 88, 90 (1926); Ellwanger v. Whitefold, 15 App. Div. 2d 898, 898-99, 225 N.Y.S.2d 734, 735 (1st Dep't 1962) (per curiam), *aff'd mem.,* 12 N.Y.2d 1037, 190 N.E.2d 24, 239 N.Y.S.2d 680 (1963). *See generally* W. RICHARDSON, EVIDENCE §§ 255-266 (10th ed. J. Prince 1973); *see also* People v. Sullivan, 43 App. Div. 2d 55, 349 N.Y.S.2d 702 (1st Dep't 1973) (per curiam). Professor Wigmore persuasively urged American courts to "discard this barbarous doctrine [precluding the admission of declarations against penal interest], which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice . . . ." 5 J. WIGMORE, EVIDENCE § 1477, at 290 (3d ed. 1940).

In the *Brown* case, the defendant was on trial for murder and asserted that he had killed the victim in self-defense. 26 N.Y.2d at 90, 257 N.E.2d at 16, 308 N.Y.S.2d at 826. Although

Brown Court did not indicate, however, whether a declaration against penal interest could be used by the prosecution as part of its affirmative case.[206] Since one requirement established by *Brown* is that the declarant be unavailable for examination at trial,[207] the admission of such testimony would appear to conflict with the constitutional right of a defendant in a criminal case to cross-examine adverse witnesses.[208] Recently, in *People v. Cepeda*,[209] the Appellate Division, First Department, held that the sixth amendment right of confrontation precludes use by the prosecution of a declaration against penal interest made by an unapprehended co-felon for pur-

---

Brown alleged that when he fired the victim had a pistol drawn, several witnesses testified to the contrary and the police found no weapon at the scene of the shooting. *Id.* Brown's attorney, however, learned that a third party had admitted to the police "that he had 'picked up the gun . . . immediately after the shooting,' " and had used the weapon in a robbery. *Id.*, 257 N.E.2d at 17, 308 N.Y.S.2d at 826. This corroborated the defendant's plea of self-defense. *Id.* at 90-91, 257 N.E.2d at 17, 308 N.Y.S.2d at 826. Believing that to exclude this testimony would be unjust, the Court discarded the traditional rule, citing authority which would admit such evidence to exonerate a defendant. *See, e.g.*, Donnelly v. United States, 228 U.S. 243, 277-78 (1913) (Holmes, J., dissenting); People v. Spriggs, 60 Cal. 2d 868, 874-75, 389 P.2d 377, 381, 36 Cal. Rptr. 841, 845 (1964) (en banc); 5 J. WIGMORE, *supra*, § 1476, at 283.

[206] *See, e.g.*, RICHARDSON, *supra* note 205, § 260; Note, *Declarations Against Penal Interest in New York: Carte Blanche?*, 21 SYRACUSE L. REV. 1095, 1130-31 (1970).

[207] 26 N.Y.2d at 93-94, 257 N.E.2d at 18, 308 N.Y.S.2d at 828-29. The *Brown* Court established that the requirement of "unavailability" is fulfilled if the declarant is deceased, beyond the jurisdiction of the trial court or unwilling to testify based on the privilege against self-incrimination. *Id.* at 94, 257 N.E.2d at 18-19, 308 N.Y.S.2d at 829. In addition, a declaration against penal interest will only be admissible at trial if the declaration was against the declarant's penal interest when made, the declarant had competent knowledge of the facts and there is no probable motive to misrepresent them, the testimony is material, and there is other evidence establishing the existence of the declarant and connecting him with the crime. *See* People v. Riccardi, 73 Misc. 2d 19, 22, 340 N.Y.S.2d 996, 999 (Sup. Ct. Kings County) (mem.), *aff'd mem.*, 40 App. Div. 2d 1083, 338 N.Y.S.2d 598 (2d Dep't 1972), *cert. denied*, 414 U.S. 827 (1973). A declaration against penal interest may also serve as a basis for probable cause. *See* People v. Wolzer, 41 App. Div. 2d 679, 681, 340 N.Y.S.2d 953, 956 (3d Dep't 1973) (mem.); People v. Barcia, 37 App. Div. 2d 612, 612, 323 N.Y.S.2d 517, 518 (2d Dep't 1971) (mem.), *appeal dismissed mem.*, 30 N.Y.2d 873, 335 N.Y.S.2d 305 (1972); People v. Lee, 78 Misc. 2d 1020, 1024, 357 N.Y.S.2d 805, 809 (Sup. Ct. Bronx County 1974). Although *Brown* involved a criminal case, "it is, of course, obvious that a declaration against penal interest . . . is admissible as well in civil cases." RICHARDSON, *supra* note 205, § 260, at 228. *See also* CPL § 60.10 (McKinney 1976) (the civil rules of evidence are generally applicable to criminal proceedings).

[208] *See* RICHARDSON, *supra* note 205, § 260. The sixth amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI; *see* Pointer v. Texas, 380 U.S. 400, 403-06 (1965) (confrontation rights made obligatory on states through fourteenth amendment). *See also* California v. Green, 399 U.S. 149 (1970); Illinois v. Allen, 397 U.S. 337 (1970); Roberts v. Russell, 392 U.S. 293 (1968)(per curiam); Barber v. Page, 390 U.S. 719 (1968); Douglas v. Alabama, 380 U.S. 415 (1965).

[209] 61 App. Div. 2d 962, 403 N.Y.S.2d 248 (1st Dep't 1978) (mem.).

poses of inculpating a defendant in a criminal case.[210]

Ramon Cepeda was convicted in Supreme Court, Bronx County, for his participation in a homicide.[211] At the trial, a prosecution witness testified that shortly after the crime occurred, and in the company of the defendant, an unapprehended accomplice had stated: "[W]e just shot a colored guy."[212] On appeal, the prosecution argued that the statement was a declaration against penal interest and, under *Brown,* was properly admitted against the defendant for its truth.[213] The first department, however, rejected this argument, finding that *Brown* only sanctioned the admission of a declaration against penal interest on behalf of a criminal defendant.[214] The court reasoned that had the declarant been on trial with the defendant and refused to testify, the admission of the testimony in unredacted form would have been an impermissible infringement of the defendant's right of confrontation.[215] Positing that a defendant's right of confrontation does not depend on whether his co-felon is being jointly tried, the court held that the admission of the testimony was error.[216]

---

[210] *Id.* at 963, 403 N.Y.S.2d at 249.

[211] *Id.* at 962-63, 403 N.Y.S.2d at 249.

[212] *Id.* at 963, 403 N.Y.S.2d at 249.

[213] *Id.*

[214] *Id.; see* note 205 *supra.* The memorandum opinion expressed the views of Justices Evans, Lynch, Sander and Sullivan. Presiding Justice Silverman concurred in the result only.

[215] 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. The *Cepeda* majority felt that Bruton v. United States, 391 U.S. 123 (1968), barred the introduction of a declaration against penal interest uttered by a co-felon. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. *Bruton* involved the joint trial of Evans and Bruton for postal robbery. 391 U.S. at 124. At trial, a postal inspector recounted an oral confession allegedly made by Evans, incriminating himself as well as Bruton. *Id.* The trial judge instructed the jury that Evans' confession was inadmissible against Bruton and should be disregarded in determining his guilt or innocence. *Id.* at 125. Both Bruton and Evans were convicted and appealed. *Id.* at 124 n.1. The eighth circuit suppressed Evans' confession and reversed his conviction on the basis of Westover v. United States, decided with Miranda v. Arizona, 384 U.S. 436 (1966). 391 U.S. at 124 n.1. Bruton's conviction was affirmed, however, on the basis of Delli Paoli v. United States, 352 U.S. 232, 241-43 (1957), wherein it was held that where a codefendant's testimony is inadmissible against the defendant but is used for other purposes at trial, limiting instructions by the trial judge sufficiently protect the defendant's rights. On appeal to the Supreme Court, the government urged that Bruton's conviction be reversed "in the interests of justice," and urged that *Delli Paoli* be left intact. 391 U.S. at 125-26. Instead, the *Bruton* Court, in reversing the conviction, overruled *Delli Paoli.* The Court held that the admission of the codefendant's confession violated the defendant's right of confrontation because of the substantial risk that despite limiting instructions the jury might consider this evidence against the defendant. *Id.* The *Bruton* Court emphasized that the hearsay implicating the defendant was inadmissible and did not fit within a recognized hearsay exception. *Id.* at 128 n.3. Dean Prince has restated the *Bruton* rule as follows: "A confession by one defendant, who does not testify, that implicates his co-defendant is . . . not admissible on a joint trial, unless the implicating references can effectively be deleted." RICHARDSON, *supra* note 205, § 233, at 207.

[216] 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. The court sustained Cepeda's conviction,

Presiding Justice Silverman disagreed with the majority and urged that *Brown* be given a broad construction to encompass incriminating declarations.[217] Justice Silverman argued that the confrontation clause does not preclude the introduction of otherwise admissible hearsay against a defendant in a criminal action.[218]

---

however, finding that the admission of the testimony was harmless beyond a reasonable doubt. *Id.* Under the doctrine of harmless error, a constitutional error requires reversal of a criminal conviction unless "there is no reasonable possibility that the error might have contributed to Defendant's conviction and that it was thus harmless beyond a reasonable doubt." People v. Crimmins, 36 N.Y.2d 230, 237, 326 N.E.2d 787, 789, 367 N.Y.S.2d 213, 218 (1975); *see* Milton v. Wainwright, 407 U.S. 371, 372 (1972); Harrington v. California, 395 U.S. 250, 251 (1969); Chapman v. California, 386 U.S. 18, 23 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); People v. Evans, 43 N.Y.2d 160, 167, 371 N.E.2d 528, 532, 400 N.Y.S.2d 810, 814 (1977); People v. Almestica, 42 N.Y.2d 222, 224, 366 N.E.2d 799, 801, 397 N.Y.S. 2d 709, 711 (1977). In addition, the majority rejected the prosecution's contention that the defendant's failure to respond to the remark was an admission by silence. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249. An admission by silence may be found when a party remains silent in circumstances where he would naturally be expected to speak. *See* RICHARDSON, *supra* note 205, § 222, at 197. The criteria for admitting such evidence were established in People v. Allen, 300 N.Y. 222, 90 N.E.2d 48 (1949). The accusation must be " 'fully known and fully understood' " by the party against whom the admission has been offered. *Id.* at 225, 90 N.E.2d at 49 (quoting People v. Koerner, 154 N.Y. 355, 374, 48 N.E. 730, 736 (1897)). Further, it must be made at a time when the party was " 'at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent.' " 300 N.Y. at 225, 90 N.E.2d at 49 (quoting People v. Conrow, 200 N.Y. 356, 367, 93 N.E. 943, 947-48 (1911)). It is well settled, however, that since a defendant has no obligation to speak to authorities when under arrest or about to be arrested, *see* Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 360 U.S. 609 (1964), his silence under such circumstances is not an admission. 384 U.S. at 468 n.37; *see* People v. Von Werne, 41 N.Y.2d 584, 587-88, 362 N.E.2d 982, 985, 394 N.Y.S.2d 183, 186 (1977); People v. Rutigliano, 261 N.Y. 103, 107, 184 N.E. 689, 690 (1933). In criminal cases, courts are strict in requiring that admission-by-silence evidence fit clearly within the rule. *See* RICHARDSON, *supra* note 205, § 222, at 197.

[217] 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249 (Silverman, J.P., concurring). Justice Silverman also disagreed with the majority's conclusion that the defendant's failure to respond was not an admission by silence. *Id.* at 964, 403 N.Y.S.2d at 250 (Silverman, J.P., concurring).

[218] *Id.* (Silverman, J.P., concurring). Justice Silverman cited People v. Harding, 37 N.Y.2d 130, 135, 332 N.E.2d 354, 357, 371 N.Y.S.2d 493, 497 (1975) (Cooke, J., concurring), as authority for the proposition that declaration against penal interest testimony is admissible to incriminate. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 249-50. *Harding* involved the use at a criminal trial of a deceased declarant's prior testimony given before an administrative panel. This testimony was not admissible as "former testimony" under CPL § 670.10 since it did not fall within one of the enumerated categories in the statute. 37 N.Y.2d at 134, 332 N.E.2d at 356, 371 N.Y.S.2d at 496. Judge Cooke, joined by Chief Judge Breitel and Judge Jasen, urged that the record made at the administrative hearing was admissible against the defendant as a declaration against penal interest. *Id.* at 135, 332 N.E.2d at 357, 371 N.Y.S.2d at 497 (Cooke, J., concurring). Nevertheless, it is submitted that Judge Cooke's concurring opinion provides no support for Justice Silverman's position that such hearsay is admissible irrespective of a defendant's right of confrontation. The declarant in *Harding* "was subjected, under oath, to extensive cross-examination at the hearing by defendant and later by his attorney." *Id.* at 137, 332 N.E.2d at 358-59, 371 N.Y.S.2d at 499 (Cooke, J., concurring).

While the *Cepeda* court correctly recognized that nothing in *Brown* suggests that declarations against penal interest testimony should be admitted to incriminate, its interpretation of the confrontation clause appears overbroad. Generally, defendants are entitled to confront the declarant of hearsay as well as the witness.[219] Occasionally, however, the trier of fact has been permitted to consider incriminating hearsay of great probative value where the declarant is unavailable for cross-examination.[220] While the Supreme Court has not spoken with clarity on the relationship between hearsay rules of evidence and the right of confrontation, the distinction between the two should not be blurred.[221] If the prosecution can show a high level of reliability,[222] justifying the admission of a declaration against penal interest as an exception to the hearsay rule, it is submitted that a defendant's right of confrontation may be satisfied by cross-examination of the witness alone.[223] Only when the intro-

---

Judge Cooke acknowledged this in concluding that the testimony's admission at trial "would not be precluded by the confrontation clause . . . ." *Id.* (Cooke, J., concurring). Justice Silverman noted that the Supreme Court, in Dutton v. Evans, 400 U.S. 74 (1970), had found that the right of confrontation was not violated by the admission of an extrajudicial statement by an accomplice which fit within a statutory hearsay exception. 61 App. Div. 2d at 964, 403 N.Y.S.2d at 250 (Silverman, J.P., concurring).

[219] *See* Douglas v. Alabama, 380 U.S. 415, 419-20 (1965).

[220] In Pointer v. Texas, 380 U.S. 400 (1965), the Court noted that the admission of certain types of hearsay is not prohibited by the confrontation clause. *Id.* at 407; *see, e.g.*, Delaney v. United States, 263 U.S. 586, 590 (1924) (statements of deceased co-conspirator); Mattox v. United States, 156 U.S. 237, 243-44 (1895) (former testimony); Mattox v. United States, 146 U.S. 140, 151 (1892) (dying declarations). *See also* Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); People v. Corey, 157 N.Y. 332, 347-48, 51 N.E. 1024, 1028-29 (1898).

[221] As the Supreme Court noted in California v. Green, 399 U.S. 149 (1970), the confrontation clause is not a codification of hearsay rules as they existed at common law. *Id.* at 155. Various forms of hearsay may be deemed admissible, while others are held to violate the sixth amendment. *Id.* at 155-56.

[222] Indicia of reliability are entirely lacking, for example, if the declaration is made to a police officer after arrest. *See* Dutton v. Evans, 400 U.S. 74, 81 (1970) (Harlan, J., concurring); People v. Coble, 65 Cal. App. 3d 187, 192, 135 Cal. Rptr. 199, 202 (1976); People v. Shipe, 49 Cal. App. 3d 343, 353, 122 Cal. Rptr. 701, 708 (1975).

[223] *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 89 (1970). The *Dutton* Court was faced with a challenge to the Georgia statutory co-conspirator exception to the hearsay rule. *Id.* at 78. The statute provided that declarations made after the culmination of the charged conspiracy were admissible as evidence-in-chief against all co-conspirators on the theory that there existed a continuing conspiracy to conceal the crime charged. *Id.* The fifth circuit had reversed Evans' conviction on the ground that the introduction of post-conspiracy declarations made by Evans' codefendant violated the strictures of Bruton v. United States, 391 U.S. 123 (1968); *see* 400 F.2d at 827. *See also* Fiswick v. United States, 329 U.S. 211, 217 (1946). The *Dutton* Court, in a plurality opinion, upheld the statutory scheme. 400 U.S. at 87-88 (Stewart, J.) (Chief Justice Burger and Justices White and Blackmun joined in the judgment); *see* note 224 *infra*. Justice Harlan, concurring in the result, stated that a sixth amendment analysis was inappropriate. 400 U.S. at 96-97 (Harlan, J., concurring). Justice Harlan felt that the rules of evidence would be better weighed against a due process standard of fairness. *Id.* at

duction of such evidence is unfairly prejudicial should the trial courts exercise their discretion and exclude it.

The confrontation clause has long been held not to bar the introduction of reliable hearsay.[224] Since the *Brown* court determined that under the rules of evidence declaration against penal interest testimony is sufficiently reliable so as to permit its use by a defendant, there appears to be no constitutional bar to permitting its use by the prosecution.

Ralph J. Libsohn

Press held accountable in punitive damages for trespass

The first amendment's prohibition on abridging the freedom of the press[225] is grounded in the belief that a free society needs an

---

97 (Harlan, J., concurring). Justice Marshall, joined by Justices Black, Douglas and Brennan, dissented. *Id.* at 100 (Marshall, J., dissenting). Justice Marshall believed that "[a]bsent the opportunity for cross-examination [of the declarant], testimony about [an] incriminating and implicating statement allegedly made by [an accomplice is] constitutionally inadmissible. . . ." *Id.* at 103 (Marshall, J., dissenting). Justice Marshall cited Bruton v. United States, 391 U.S. 123 (1968), as controlling. 400 U.S. at 103. *Bruton*, however, concerned use of inadmissible hearsay against the defendant which did not fall within any recognized hearsay exception. 61 App. Div. 2d at 963, 403 N.Y.S.2d at 250 (Silverman, J.P., concurring); *see* note 215 *supra*. It appears, therefore, that *Bruton* is distinguishable from both *Dutton* and *Cepeda*.

The statutory rule at issue in *Dutton* contrasts with New York law which holds that although admissions by a co-conspirator in furtherance of conspiracy are admissible against all co-conspirators, admissions made after the culmination of the common plan are admissible only against the declarant. RICHARDSON, *supra* note 205, § 244, at 214-15. *See also* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972).

[224] *See* note 220 *supra*. This is the teaching of Dutton v. Evans, 400 U.S. 74 (1970), wherein the Court held that indicia of reliability were required for the introduction of incriminating hearsay testimony. *Id.* at 88-89. The Court noted that such indicia are present if: (1) the declarant's personal knowledge of the facts contained in the declaration is "abundantly established"; (2) there is little possibility that the statement is the product of a faulty recollection; (3) the circumstances indicate that the declarant has not misrepresented the involvement of the defendant; and (4) the statement appears spontaneous and against the penal interest of the declarant. *Id.* Whether the statement in *Dutton* was against the declarant's penal interest is questionable. Evans' codefendant made the declaration at issue upon his return to prison after his arraignment on a murder charge. *Id.* at 77. He was asked by a fellow inmate; " 'How did you make out in court?' " *Id.* The declarant responded: " 'If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now.' " *Id.* The self-incriminating aspect of this statement is unclear, as it appears likely that the declarant was attempting to shift the blame to Evans. One commentator has questioned the precedential value of *Dutton* in light of its plurality opinion. *See* Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

[225] The first amendment of the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The freedoms of the first amendment are protected from state action through the