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Criminal Law--Evidence--Admissions Made After Indictment in Absence of Counsel Held Inadmissable (People v. Di Biasi, 7 N.Y.2d 544 (1960))

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parties must be evaluated by the quantum of illegality test proposed by the Court.

Moreover, the Court in the instant case has determined that *Sirkin* establishes a public policy which precludes a plaintiff from recovery when his claim is founded upon commercial bribery. But an analysis of the facts of that case draws into question whether such a public policy was actually established by *Sirkin*. The agreement in *Sirkin* was invalidated upon the long established principle that a contract made in violation of a penal statute is void although not expressly declared void.[32] In *McConnell*, however, the contract under consideration was not made in violation of a penal statute. Yet the Court has determined that a precedent in which a penal violation was the dominant consideration shall, upon grounds of public policy, invalidate a performance in which such violation, even if proven,[33] was at best peripheral. Query, therefore, should the defendant be vicariously benefited by setting up the illegality of an action by the plaintiff with regard to a contract other than that in issue and under which he benefited?[34]

In the last analysis, therefore, the *McConnell* decision, though here limited to actions founded upon commercial bribery, may, by virtue of the quantum of illegality test proposed therein, lead to an unwarranted extension of the doctrine of illegality.

CRIMINAL LAW—EVIDENCE—ADMISSIONS MADE AFTER INDICTMENT IN ABSENCE OF COUNSEL HELD INADMISSIBLE.—Defendant, during his absence from New York, was indicted for murder in the

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[32] Sirkin v. Fourteenth St. Store, 124 App. Div. 384, 388, 108 N.Y. Supp. 830, 833 (1st Dep't 1908).

[33] Though it appears that the plaintiff's act of performance has violated the statute this was not in issue. McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 470, 166 N.E.2d 494, 496, 199 N.Y.S.2d 483, 486 (1960). It has been held that if a plaintiff can make out his case without relying on the illegal transaction he will be given recovery. See Ballin v. Fourteenth St. Store, 54 Misc. 359, 361, 105 N.Y. Supp. 1028, 1030 (Sup. Ct. 1908). But the Court, relying on the validity of the defenses, determined that this holding did not apply. McConnell v. Commonwealth Pictures Corp., *supra* at 471, 166 N.E.2d at 497, 199 N.Y.S.2d at 487.

[34] The illegal act of the plaintiff in performance is in effect a different transaction from the one sued upon. See Southwestern Shipping Corp. v. National City Bank, 6 N.Y.2d 454, 160 N.E.2d 836, 190 N.Y.S.2d 352 (1959), which stands for "the broad proposition . . . that a party unconnected with an illegal agreement should not be permitted to reap a windfall by pleading the illegality of that agreement, to which he was a stranger." McConnell v. Commonwealth Pictures Corp., *supra* note 33 at 474, 166 N.E.2d at 499, 199 N.Y.S.2d at 490 (Froessel, J., dissenting).

first degree. Later, by arrangement with his attorney, he voluntarily surrendered to New York police. In a post-indictment interrogation by the police, during which he did not request the aid of counsel, defendant made certain damaging admissions. These were received into evidence at the trial over the objection of defendant. The Court of Appeals, in reversing the conviction, *held* that the questioning in the absence of counsel was a denial of defendant's constitutional rights, and that the admission of the statements made during that questioning was error. *People v. Di Biasi,* 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

The due process clause of the fourteenth amendment to the federal constitution does not guarantee the right to counsel in criminal prosecutions in a state court in every instance,[1] as the sixth amendment does in federal courts,[2] but only in particular circumstances. In a state capital case, a defendant has an absolute right to assistance of counsel for his defense,[3] and this right extends not only to the trial itself, but also to the preparation for the trial.[4] In a noncapital case, if special circumstances, such as the age and ignorance of a defendant, indicate that unless the defendant has assistance of counsel the effect will be fundamental unfairness, due process requires that he have such assistance.[5] During the interrogation stage of a criminal investigation, the right to assistance of counsel is not guaranteed, so that a voluntary confession obtained during illegal detention of a suspect is admissible in evidence,[6] and the mere refusal to grant a suspect's request to confer with counsel at this stage does not necessarily violate due process.[7] The use of a coerced confession to obtain a conviction, however, is a denial of due process.[8] A dissenting group in the United States Supreme Court, on the other hand, contends that "if due process as defined in the Bill of Rights requires appointment of counsel to represent defendants in federal

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[1] Betts v. Brady, 316 U.S. 455 (1942).

[2] Johnson v. Zerbst, 304 U.S. 458 (1938).

[3] Hawk v. Olson, 326 U.S. 271 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945); Bute v. Illinois, 333 U.S. 640 (1948) (dictum); Duque, *Criminal Cases—Right to Counsel,* 31 CALIF. S.B.J. 465, 477 (1956). In the *Bute* case, the Court said: "[T]his Court repeatedly has held that failure to appoint counsel to assist a defendant or to give a fair opportunity to the defendant's counsel to assist him in his defense where charged with a capital crime is a violation of due process of law under the Fourteenth Amendment." Bute v. Illinois, *supra* at 676.

[4] Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45, 71 (1932).

[5] Gibbs v. Burke, 337 U.S. 773, 780 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948).

[6] Gallegos v. Nebraska, 342 U.S. 55 (1951).

[7] Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958).

[8] Malinsky v. New York, 324 U.S. 401 (1945); Brown v. Mississippi, 297 U.S. 278 (1936).

prosecutions, due process demands that the same be done in state prosecutions." [9] More recently, a dissent has argued that due process requires that an accused who wants counsel should have one at any moment after arrest.[10]

The constitution of New York State says that "in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel. . . ." [11] This right is denied unless the accused is given reasonable time and fair opportunity to secure counsel of his own choice, and to prepare for trial with his aid.[12] By statute, when a defendant has been taken before a magistrate upon an arrest, he must be informed of his right to counsel [13] and allowed reasonable time to secure one.[14] When a defendant appears without counsel at the arraignment to the indictment, he must be assigned counsel if he so desires.[15] By statute also, the normal rule for the admissibility of confessions is voluntariness.[16] Since illegal detention [17] or unnecessary delay in arraignment after arrest [18] do not of themselves make a confession obtained during such periods inadmissible, a confession made by a suspect to the police after arrest is admissible, as long as it is not induced through coercion or false promises.[19]

The present decision adopted the rationale of the dissenting opinion in *People* v. *Spano*,[20] another New York Court of Appeals case with a very similar fact pattern. There, defendant voluntarily surrendered to the police after he had been indicted and a bench warrant had been issued for his arrest. During police questioning, his request to see his counsel was refused. The confession obtained during that interrogation was admitted into evidence at the trial. Defendant contended, *inter alia,* that upon his indictment his absolute right to counsel became operative, and that no confession obtained in the absence of counsel could be used without violating due process.

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[9] Bute v. Illinois, 333 U.S. 640, 678 (1948) (dissenting opinion).
[10] Crooker v. California, 357 U.S. 433, 448 (1958) (dissenting opinion).
[11] N.Y. CONST. art. I, § 6.
[12] People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944).
[13] N.Y. CODE CRIM. PROC. § 188.
[14] N.Y. CODE CRIM. PROC. § 189.
[15] N.Y. CODE CRIM. PROC. § 308.
[16] N.Y. CODE CRIM. PROC. § 395. It states: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."
[17] Balbo v. People, 80 N.Y. 484, 499 (1880).
[18] People v. Mummiani, 258 N.Y. 394, 180 N.E. 94 (1932).
[19] People v. Garfalo, 207 N.Y. 141, 100 N.E. 698 (1912); People v. Harrington, 9 Misc.2d 216, 219, 169 N.Y.S.2d 342, 345 (Queens County Ct. 1957).
[20] People v. Spano, 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958), *rev'd,* Spano v. New York, 360 U.S. 315 (1959).

The dissenting opinion admitted that the normal test for admissibility of a confession into evidence is voluntariness,[21] but argued that that test alone was not applicable where the defendant has been indicted and is therefore being questioned in the course of judicial, and not investigatory, proceedings. Thus, the dissent concluded that this questioning denied defendant two fundamental rights: "the right to have the advice of a lawyer at every stage of the court proceeding, and the right not to be forced to testify against oneself during such a proceeding." [22] The majority, however, stated that the test to be applied was still voluntariness, and that since the confession was voluntary, it was properly admitted into evidence. On appeal to the Supreme Court of the United States,[23] the majority of the Court did not treat the question of the defendant's absolute right to counsel after indictment, but did reverse the conviction on the ground that the confession had been obtained through illegal methods. The concurring opinions of Justices Douglas [24] and Stewart [25] held for reversal on the ground that the right to counsel extended to the preparation for trial, and that any questioning after indictment in the absence of counsel, when defendant had requested the presence of his counsel, was a denial of due process.

In the present case, the majority of the Court of Appeals stated: "In view of what happened in the Supreme Court we do not think we are concluded by this court's decision in *Spano*." [26] In fact, the Court of Appeals seemingly adopts the reasoning of its dissenting group in *Spano*.[27] On the other hand, after reiterating that the traditional test for admissibility of a confession is voluntariness, the dissenting opinion in *Di Biasi* said that it could find no basis for overruling the Court of Appeal's decision in *Spano*, since a similar contention made by defendant there had been rejected by the Court of Appeals and had not been the basis for the Supreme Court's reversal.

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[21] *Id.* at 266, 150 N.E.2d at 231, 173 N.Y.S.2d at 801.

[22] *Ibid.*

[23] Spano v. New York, 360 U.S. 315 (1959), *reversing* People v. Spano, 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958).

[24] *Id.* at 324 (concurring opinion of Douglas, J., in which Black and Brennan, JJ., joined).

[25] *Id.* at 326 (concurring opinion of Stewart, J., in which Douglas and Brennan, JJ., joined).

[26] People v. Di Biasi, 7 N.Y.2d 544, 550, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 25 (1960).

[27] It is interesting to note that Chief Judge Conway and Judges Burke, Dye and Froessel composed the majority group of the Court of Appeals in *Spano*, and Judges Desmond, Fuld and Van Voorhis, the dissenting group. Chief Judge Desmond and Judges Van Voorhis and Foster were the majority in *Di Biasi*, with Judge Fuld concurring, and Judges Dye, Froessel and Burke dissenting. It would seem that the fact that Judge Foster had taken the place of Chief Judge Conway in the court had much to do with the different decision in *Di Biasi*. It is also to be noted that Chief Judge Desmond wrote the dissenting opinion in *Spano*, and the majority opinion in *Di Biasi*.

The requirement that a defendant have effective assistance of counsel in the preparation for trial [28] finds its realization in this decision. The language of the decision could be interpreted to mean that incriminating statements made in the absence of counsel after indictment will not be admitted into evidence in *any* case. However, it appears unlikely that the decision will be interpreted by the Court of Appeals quite so broadly in its future decisions on this subject. Since *Di Biasi,* the Court of Appeals in *People v. Downs,*[29] a memorandum decision, affirmed a first degree murder conviction, despite the fact that certain admissions obtained after indictment and in the absence of counsel had been received into evidence. Chief Judge Desmond alone dissented on the basis of *Di Biasi.* There are, however, a number of elements which distinguish *Downs* from *Di Biasi.* In *Downs,* the defendant had not retained counsel prior to the interrogation but had expressly waived his right to counsel.[30] He did not respond to questioning solicited by the Assistant District Attorney, but instead volunteered the statements.[31] Furthermore, at the trial he repeated substantially the same admissions he had previously made to the police and even added incriminating matter.[32] Likewise, "defense counsel's opening statement . . . revealed substantially all the salient features of the statements." [33] Under the circumstances of *Di Biasi,* statements made to police after indictment and in the absence of counsel were inadmissible, even though the defendant did not request the presence of his counsel. Under what other circumstances the principle of *Di Biasi* will be applied is a question which will have to await clarification by the Court of Appeals.

ESTATE ADMINISTRATION—MARITAL DEDUCTION—ELECTION TO DEDUCT ADMINISTRATION EXPENSES FROM INCOME RATHER THAN GROSS ESTATE, AS INFLUENCING MARITAL DEDUCTION BEQUEST. UPHELD.—Testator bequeathed to his widow a fund equal to one-half the entire value of his adjusted gross estate, all taxes to be taken

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[28] Powell v. Alabama, 287 U.S. 45, 71 (1932); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944).

[29] 8 N.Y.2d 860, 168 N.E.2d 710, 203 N.Y.S.2d 908, *cert. denied,* 29 U.S.L. WEEK 3111 (U.S. Oct. 17, 1960).

[30] Supplemental Brief for Respondent, pp. 2-3, People v. Downs, *supra* note 29.

[31] *Id.* at 2.

[32] *Id.* at 3.

[33] *Id.* at 5.