

question: scope of Escobedo.

Whether petitioner's conviction should be reversed because he was not advised of his right to remain silent and his right to counsel (in absence of request) during interrogation.

*Malloy Argued
p. 8 - 378/1*

*Another on
Escobedo -
I guess we should
grant that &
decide*

LAF

Misc. No. 397

*although I am
opposed to
standing
it*

FOR DISCUSSION

~~Misc No 397~~
No. 760
Grant

No. 397 Misc., 1965 Term
VIGNERA v. NEW YORK
Cert to NY Ct Apps

Timely

Petr was convicted of robbery in the first degree and sentenced to prison for a term of thirty to sixty years by the former County Court, Kings County, New York. The CA affirmed the conviction without opinion. The Assistant District Attorney for Kings County does not oppose a grant of cert. In an affidavit, he says "It is my belief that the administration of the criminal justice in this county will be aided, simplified and established on a firm foundation if this Court were to give a final answer to the question [i. e., the scope of Escobedo]. It is for this reason that I make no opposition to the petition for the granting of certiorari herein, but on the contrary express my personal and official hope that the petition will be granted."

Proceedings

The case history is described in petr's brief as follows:

Petitioner was convicted of first-degree robbery by the former County Court, Kings County, following a three-day trial before judge and jury on August 28-30, 1961. On November 3, 1961, petitioner was adjudged a third-felony offender and was sentenced to thirty to sixty years imprisonment pursuant to Section 1941 of the New York Penal Law.

On December 31, 1962, the United States District Court for the Western District of New York sustained a writ of habeas corpus filed by appellant attacking the constitutional validity of a prior felony conviction underlying his present conviction as a third-felony offender, on the ground of deprivation of counsel. Vignera v. Wilkins, Civ. 9901 (W. D. N. Y. Dec. 31, 1961) (Henderson, D. J.). Pursuant to the order of the District Court, petitioner was remanded for resentencing as a second-felony offender. On February 6, 1963, petitioner was resentenced to thirty to sixty years imprisonment.

On May 4, 1964, the Appellate Division of the New York Supreme Court, Second Department, affirmed the judgment of February 6, 1963, on resentence, without opinion, and dismissed as moot an appeal from the original judgment of November 3, 1961. By order dated May 25, 1964, as amended on June 22, 1964, the Appellate Division denied defendant's motion for reargument and stated that the judgment rendered on resentence superseded the original judgment of November 3, 1961. Leave to appeal to the New York Court of Appeals was granted by certificate of Judge Stanley H. Fuld, dated June 23, 1964. On April 15, 1965, the Court of Appeals affirmed the judgment of the Appellate Division. On May 20, 1965, the Court of Appeals ordered that the remittitur be amended to read as follows:

"Upon the appeal herein there were presented and necessarily passed upon questions under the United States Constitution, viz. :

(1) whether, in the circumstances of this case, the admission in evidence of a confession elicited prior to arraignment by an Assistant District Attorney from defendant-appellant and recorded by a stenographer constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution;

(2) whether, in the circumstances of this case, the admission in evidence of police testimony as to statements elicited from defendant-appellant constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution.

"The Court of Appeals held that no rights of defendant-appellant under the Fourteenth Amendment to the United States Constitution had been violated."

Facts

At about 5:30 p. m. the evening of Tuesday, October 11, 1960, a man entered a dress shop and forced the complaining witness with a knife to surrender cash, traveller's checks and one or more credit cards. He then fled. On Friday of that week, one Nemeth was arrested while trying to purchase jewelry with a credit card which had been taken from the complaining witness. Nemeth told the police that he had been given the credit card by petr, and he told them where the petr lived.

Shortly thereafter, petr was picked up and taken to a police station. He was taken to another station where he was identified by the complaining witness and another witness. Petr was formally arrested while in detention at about 3:00 Friday afternoon. The interrogating detective questioned petr as to whether he had committed the holdup; petr admitted he had. The petr further admitted other facts concerning the crime. Friday night after 11:00 p. m., petr was visited by an assistant district attorney who questioned him about the crime in the presence of a stenographer. Petr repeated his confession. The stenographer read notes of these questions and answers over objection predicated on the best evidence rules. The following day the petr was taken to court to be arraigned.

How federal questions were raised below

The confession seems to have been admitted into evidence at trial without objection on constitutional grounds. At least, there is no indication in petr's brief that his trial counsel objected other than on the "best evidence" rule. (The trial was held in 1961.) But on cross-examination of the interrogating detective, the defense counsel sought to

ascertain whether petr had been advised of his right to counsel while being detained and interrogated prior to arraignment. When he asked the question of the detective, the prosecutor objected [on what grounds, it does not appear] and the trial court upheld the objection. Petr urges here, as he did in the ct below, that constitutional error occurred because he has a constitutional right to be advised of his right to remain silent and his right to counsel (even in the absence of his request).

Petr also argued on appeal that the admission of testimony as to statements made by him during a period of illegal detention constituted a denial of due process.

Elaborating on this in his brief, he desires the Court to apply the McNabb-Mallory rule to the states. However, it does not appear that this issue was raised at the trial.

Apparently the appellate cts in the state might have dealt with this issue nonetheless by inference -- i. e., the App Div, in affirming the conviction and denying a motion for reargument, noted that it had "considered fully and passed upon all the points urged by appellant."

Petr's arguments

Petr approaches Escobedo on its facts and attempts to draw parallels to his case. He argues that, as in Escobedo, (1) the investigation was no longer a general inquiry into an unsolved crime but had focused upon a particular suspect at the time petr was picked up and questioned by the police. (The District Attorney's brief in the NY Ct of Apps stated "We do not dispute that by this time the defendant was in the eyes of the police and the authorities a prospective defendant, and that the police had every intention of arraigning him, as they did, the next morning.") (2) The petr was in custody. (3) The sole purpose of the interrogation conducted by the assistant DA at 11:00 in the presence of a stenographer was to "elicit a confession," see Escobedo, 378 U. S. at 492. The same is argued of the earlier interrogations by the police detective. (4) Petr was not warned of his right to counsel or his right to remain silent. (The trial prevented full elaboration of this issue when it upheld the prosecutor's objection to the question, but the point was apparently conceded by the DA in the courts below.)

Hence, the only difference between the instant case and Escobedo is said to lie in the fact that petr here had no opportunity to retain counsel at the time of his arrest and was not sufficiently sophisticated to request such an opportunity. Petr claims that by this Court's decision in Escobedo, other right to counsel and coerced confession cases, and especially People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (Calif. SC), cert denied, 85 Sup. Ct. 1793, the distinction is without meaning. Petr then goes on to urge this court to review his case because of the divergence of opinion among state and federal courts as to the scope of Escobedo. He also claims that his fourth and fifth amendment right to privacy was violated by the unauthorized detention and urges the Court to apply the exclusionary rule of McNabb and Mallory upon the states.

KZ No Op in NY Ct Apps;
order amending remittitur
petn appx

FOR DISCUSSION
ESCOBEDO CASE

No. 397 Misc., 1965 Term
VIGNERA v. NEW YORK
Cert to NY Ct Apps

Direct here
No warnings
no counsel
Timely

1. Robbery conviction, sentenced to 30-60 years by a NY state court after a not guilty plea.

No request

2. Direct attack with trial pre-Escobedo and appeal post-Escobedo.

3. Oral confession taken down by stenographer.

Mc Hall
Malloy
applies to states

4. Prosecution introduced confession by having the stenographer read his notes.

NY code
grant

5. The confession was objected to on best-evidence rule, but the state appellate court treated the matter as if the constitutional objections had been placed in issue. (See remittitur filed by NY Ct Apps.)

Deuy

6. Police arrested another man for using a credit card. This credit card had been stolen in a robbery the previous week. The man told the police that petr had given him the credit card, and told them his whereabouts. The petr was taken to the station house by the police and identified by the complaining witness. Then he was arrested formally,

while under detention, and questioning elicited a confession during the afternoon. That same evening, an assistant district attorney questioned petr about the crime in the presence of a stenographer, who recorded the questions and answers. Petr also claims the illegal detention violated his rights, and asks the Court to apply McNabb-Mallory to the states.

7. The state appears to concede that petr was not warned of his right to counsel or his right to remain silent. Petr did not request counsel.

8. The record is not clear whether petr was in fact advised, because at the trial, the prosecution objected (on what grounds it does not appear) to the admission of testimony whether petr had been advised of his rights.

9. No. The State's attorney here urges the Court to grant cert.

10. McNabb-Mallory applicable to states.

KZ