FOR DISCUSSION

OK — no request - but no warning told statement could be used vs him

ESCOBEDO CASE

No. 419 Misc., 1965 Term
MIRANDA v. ARIZONA
Cert to Ariz SC

Timely

1. Ariz; kidnapping and rape; pleaded not guilty; twenty to thirty years in prison.

2. Direct attack.

3. Full oral and written confession.

4. Introduced at trial by prosecutor as part of direct case.

5. Evidence objected to at trial on right to counsel grounds; point argued and decided on appeal.

6. Obtained after arrest in police station; had already been identified in line-up by victim; statements made to police officers; at first denied guilt but later succumbed to questioning.

7. No consultations with counsel; never warned of right to counsel and probably never warned of right to remain silent; warned that statement could be used against him before he signed written confession; never asked for counsel.

8. Ample substantiation in record.

9. No procedural obstacles to review.

10. No other issues raised.

MES

Ariz SC op reported
at 401 P. 2d 721

OT 1965 No. 761

WESTOVER v. UNITED STATES Denny

Motion for leave to amend petition for certiorari

The Court has consented to review Westover's conviction on Escobedo grounds. Westover now asks the Court's permission to brief and argue an additional question, i.e., whether the prosecutor's remarks with respect to Westover's failure to take the stand constituted reversible error.

The prosecutor stated:

"Counsel said or tried to say that I inferred that because the defendant didn't testify you should draw some inference. That isn't true. No defendant can be compelled to testify against himself, and I do not ask you to draw any inference from that,, and you shouldn't.

I do say that the evidence is uncontradicted, and I think you as reasonable people can infer that if evidence can be contradicted then it should be; but I urge you, and you should not draw any conclusion from the failure of any defendant in this case or any other not to testify."

This issue was argued to the CA 9, although not mentioned by that court in its opinion. In the pre-Griffin posture of the filing of petition for certiorari, the argument was not carried to this Court. However, Westover could have attacked the prosecutor's statements on the basis of Wilson v. United States, 149 U.S. 60, 67 (1893), which I thought prohibited comment upon a defendant's failure to testify in any federal trial.

On balance, I don't think the prosecutor's remark warrants reversal.

At the same time, to hear a bit of additional argument might not be too much trouble.

1/12/66 LAF

Griffin may cover this - I will see what WDD says - ~~Should~~ this must appeal ~~on~~

No. 761

Any?

No. 80 Misc., 1965 Term
WESTOVER v. UNITED STATES
Cert to CA 9 Timely

Petr was convicted on two counts of violating 18 U. S. C. §§ 2113(a) and 2113(d). Count one charged the robbery of a federally insured savings and loan association, and count two charged the robbery of a federally insured bank, both in Sacramento, California. Petr was sentenced to fifteen years in prison on each count, the sentences to run concurrently. CA 9 affirmed (Chambers, Madden, Jertberg).

Petr attacks the judgment of conviction on the following grounds: (1) The trial court admitted confessions obtained in violation of his right to counsel and his right to a prompt arraignment. (2) The trial court admitted evidence seized in violation of his rights under the Fourth Amendment. (3) There was no evidence to support his conviction under 18 U. S. C. § 2113(d), which concerns those who "[put] in jeopardy the life of any person by the use of a dangerous weapon or device" while robbing a federally insured financial institution.

(1) Paraphrasing the court below, the facts relating to the taking of petr's confessions were as follows: Petr was arrested in Kansas City, Missouri, at about 9:45 p. m. on March 20, 1963, by two Kansas City policemen, on charges of robberies in Kansas City and also because of a report from the Kansas City office of the FBI that petr was wanted on a felony warrant from the State of California. He was taken to police headquarters and, after notice had been given to personnel in places in Kansas City that had been held up, he was placed in a line-up and identified by certain observers as the robber. At about 11:45 p. m. he was "booked" by the Kansas City police "for investigative check."

FBI agents in Kansas City, having been advised that petr had been arrested by the Kansas City police and was in custody in the city jail, told the police that they desired to interrogate petr. At about 11:30 a. m. on March 21, the FBI agents were told that petr was available, in a room in the city jail. He had been interrogated, during the forenoon, by the police with regard to the local robberies. Three FBI agents conducted the FBI interrogation; no Kansas City

policeman was present. The FBI agents advised petr that he did not have to make a statement; that any statement he made could be used against him in a court of law; and that he had a right to consult a lawyer. The agents made no threats or promises to petr. Petr made a detailed confession as to how he had committed the two Sacramento robberies for which he was later indicted and tried. His statements were recorded in long-hand and signed by petr. The interrogation was completed at 2:00 or 2:30 p.m., some two or two and one-half hours after it had begun.

Two of the same three FBI agents interrogated petr again on the morning of the following day. He told them that he wanted to change his statement of the previous day with regard to his mode of transportation to the site of the two robberies. He said that the rest of the two statements were true as he had made them the previous day.

(a) Petr claims that the confessions were taken in violation of his right to counsel. He interprets Escobedo v. Illinois, 378 U.S. 478, to mean that an accused must have consulted with a lawyer prior to police interrogation, not merely that he must have been warned of his right to consult

with a lawyer. Petr argues that otherwise police will testify falsely as to the accused's waiver of the right to counsel, and the jury will inevitably tend to believe the police testimony; he also argues that an accused cannot intelligently waive his right to counsel without the advice of counsel. Petr further interprets Escobedo to mean that the police must inform the accused of his right to have counsel appointed if he is too poor to hire one for himself. Finally, petr interprets Carnley v. Cochran, 369 U.S. 506, to mean that there can be no finding of waiver without a hearing on the subject. He argues that in this case there was no hearing on the question of whether or not he asked the FBI for an opportunity to consult counsel prior to the interrogation.

The SG claims that it would be a radical extension of Escobedo to hold that an accused must actually have talked with a lawyer before the interrogation in order for his confession to have been admissible. See 378 U.S. at 490 n. 14, where the majority allows for the possibility of a waiver. The SG also contends that there is no obligation to inform

an accused of his right to have a lawyer appointed, if the accused indicates no interest in consulting with counsel after the usual FBI warning. As for the allegation that petr might have asked to see a lawyer, there was no suggestion whatever to this effect in the trial court.

(b) Petr claims that the confessions were taken in violation of his right to a prompt arraignment. He points out that the seventeen hours that passed between his arrest and the completion of the first interrogation constituted an unreasonable delay under Mallory v. United States, 354 U.S. 449. He also contends that it is irrelevant that he was in the custody of city police rather than the FBI during this period, since the FBI was working hand in glove with the city police in exploiting petr's detention for the purpose of eliciting a confession. See Anderson v. United States, 318 U.S. 350.

The SG distinguishes Anderson on the ground that there the accused persons were arrested without any state charge being made against them, for the purpose of enabling an interrogation by federal officers, whereas here petr was booked, placed in a line-up, and questioned on the charges

under state law. Petr points out, however, that he was booked, not on any formal state charges, but solely for further investigation. The SG also finds support for his position in Coppola v. United States, 365 U. S. 762, affirming, 281 F. 2d 240 (2 Cir.).

(2) When arrested, petr was entering an automobile. The car was searched and was then towed to the police storage lot. On the following day a policeman and an FBI agent, without a search warrant, again searched the car and found a topcoat in the trunk. At trial the topcoat was shown by the prosecutor to witnesses of the second robbery, who testified that the robber wore a topcoat which looked like the one shown them. Later the topcoat was admitted into evidence against petr.

The CA acknowledged that the coat had been seized in violation of the Fourth Amendment under Preston v. United States, 376 U. S. 364. Because petr had failed to object at trial to introduction of the coat, however, the CA declined to consider his constitutional claim on appeal. The CA also held that admission of the coat would have been harmless error even if petr had raised the point at trial, since the other evidence of guilt was overwhelming.

Petr argues that his failure to object at trial should have been excused, since Preston had not yet been decided, and since the CA had held in a prior case that there was no illegality under these circumstances, Fraker v. United States, 294 F. 2d 859. He supports this argument with an affidavit that he was unaware at the time of the trial that his Fourth Amendment rights had been violated, comparing Henry v. Mississippi, 379 U. S. 443. Petr also contends that the error was not harmless, since the topcoat allegedly supported important eye witness testimony to the second robbery of which he was convicted. He claims that Fahy v. Connecticut, 375 U. S. 85, bars use of the harmless error concept under the facts of this case.

The SG replies that the circumstances surrounding the second search are unclear, and therefore petr cannot claim plain error in admission of the topcoat. The CA, however, was satisfied that the Fourth Amendment had been violated here. The SG also argues that Preston could have been anticipated, and that Fraker did not mislead petr since the second search there took place within a short time after the arrest of the defendant. The SG distinguishes Henry on

the ground that it was a state case raising different issues. Finally, the SG says that even if Preston came as a complete surprise, petr was still obliged to raise his claim at trial or forego it on appeal.

(3) The evidence tended to prove that during the first robbery, petr displayed a large Luger-type weapon to the comptroller and stated to him that if there were any trouble he would blow the place apart. Likewise there was evidence tending to show that during the second robbery, petr showed a bank official a note stating that if there were no noise nobody would get hurt, and he started drawing out a gun.

Petr claims that this evidence was insufficient basis for a finding that he had jeopardized the lives of others by use of a dangerous weapon. Petr argues, further, that even though this failure of proof went only to the charges under 18 U.S.C. § 2113(d), and even though the fifteen-year sentence was authorized under 18 U.S.C. § 2113(a) alone, he was prejudiced by submission of the dangerous weapon charges to the jury. The jury, so he contends, would have been enflamed by the suggestion that he committed the more

serious offense, even though there was no substance in the suggestion.

The SG replies that display of a gun, combined with threats, is enough to support charges under 18 U.S.C. § 2113(d). Petr counters that the gun might not have been loaded and that the threats might have been bluster. Thus there was no evidence that others were put in objective danger, such as has been required by the CA in a prior case, Smith v. United States, 309 F.2d 165. Accord, United States v. Donovan, 242 F.2d 61 (2 Cir).

MES CA 9 op in cert petn

FOR DISCUSSION

ESCOBEDO CASE

No

No. 80 Misc., 1965 Term
WESTOVER v. UNITED STATES
Cert to CA 9

Timely

1. U.S.; armed robbery; pleaded not guilty; fifteen years in prison.

2. Direct attack.

3. Full written confession.

4. Introduced at trial by prosecutor as part of direct case.

5. No objections at trial; point raised by petr but not discussed by CA 9 on appeal, although court did deal with related claim based on illegal detention; trial occurred before Escobedo.

6. Confession obtained after arrest and before preliminary hearing; questioning took place in city jail from 12:00 noon to 2:00 or 2:30 p.m.; statement given to three FBI agents in response to questioning; petr had been in jail for about fifteen hours when questioning began, had already been quizzed by city police, and had been identified in line-up by victims of robberies.

7. No consultations with counsel; petr warned that he did not have to make statement, that any statement he made could be used against him, and that he had a right to consult a lawyer; petr apparently made no response to those warnings.

8. All facts substantiated by record or conceded.

9. No procedural obstacles to review.

10. Unreasonable delay in arraignment; illegal search and seizure; lack of evidence on one element of crime.

MES

CA 9 op in cert petn.