Case Western Reserve Law Review

Volume 17 | Issue 3 Article 28

1966

Recent Legislation: Right to Counsel in Ohio--A New Exclusionary Rule

Charles E. Brown Jr.

Recent Legislation

RIGHT TO COUNSEL IN OHIO — A NEW EXCLUSIONARY RULE?

Ohio now has two statutory guarantees of the right of an accused person to communicate with an attorney. The first, Ohio Revised Code Section 2935.14,[1] was enacted in 1960 and provides for the accrual of the right at the time of confinement. The second was added in the last session of the Ohio Legislature, and its purpose, according to its sponsor, is to ensure the right of an accused person to obtain counsel at the time of arrest or detention and the right to telephone and consult with a lawyer immediately.[2] To be explored here is the new section's effect on confessions obtained in the absence of counsel during the period immediately following arrest but before indictment and arraignment.

The main question not explicitly answered by the language of the new statute is whether the failure to inform a prisoner of his right to communicate with counsel will operate automatically to exclude a confession,[3] or whether such failure will merely be another

---

[1] OHIO REV. CODE § 2935.14 states in pertinent part:

> If the offense charged be a felony, . . . [the arrested person] shall, prior to being confined . . . be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel. . . .

[2] Remarks of State Representative Stokes, Cleveland Plain Dealer, April 11, 1965, p. 11-AA, col. 1. OHIO REV. CODE § 2935.20 states:

> After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be permitted forthwith facilities to communicate with an attorney at law of his choice who is entitled to practice in the courts of this state, or to communicate with any other person of his choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be visited immediately by any attorney at law so obtained who is entitled to practice in the courts of this state, and to consult with him privately. No officer or any other agent of this state shall prevent, or advise such person against the communication, visit or consultation provided for by this section.
>
> Whoever violates this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days, or both.

[3] The exclusionary rule evolved from two cases, Escobedo v. Illinois, 378 U.S. 478 (1964) and Massiah v. United States, 377 U.S. 201 (1964). The Supreme Court held in these cases that the rights guaranteed under the sixth amendment of United States Constitution are made obligatory upon the states by the fourteenth amendment. Therefore, unless a statement obtained without the benefit of counsel is excluded from evidence at trial, the prisoner's right to due process is violated. For a complete analysis of *Escobedo* and *Massiah* see Note, 19 RUTGERS L. REV. 111 (1964).

element in the totality of circumstances used by the court in determining a confession's admissibility.[4] In order to conclude that the failure to inform a prisoner of his right to communicate with counsel will automatically exclude a confession obtained without the benefit of counsel, it must be shown that Ohio law enforcement officials have the duty to inform a prisoner of his statutory and constitutional rights.[5]

Before discussing the main question, the major differences between the language of the new section and the language of section 2935.14 and a repealed statute[6] should be set forth to define more adequately the meaning of the new statute. The newly enacted section 2935.20 contains language which differs in three major respects from the language of section 2935.14: the word "forthwith" is used instead of "speedily"; the rights guaranteed are extended to those accused of misdemeanors as well as of felonies; and the point at which these rights accrue is at "arrest, detention, or any other taking into custody" instead of "prior to being confined."[7] The extension of these rights to misdemeanors as well as to felonies should not pose any difficulties for the practitioner or the courts. However, substitution of "forthwith" for "speedily" may raise problems as to when the police must make communication facilities available to the prisoner. Ohio does not have an explicit definition of "forth-

---

[4] If the denial of the rights guaranteed by § 2935.20 does not by itself exclude a confession, then the denial will be grouped with the other incidents surrounding the arrest and confession (for example, the prisoner's mental age, his susceptibility to suggestion, the length of detention before arraignment, and the time and place of arrest) and the totality of the circumstances will be weighed by the court in an attempt to determine if the confession was voluntarily given. An excellent example of this is Colombe v. Connecticut, 367 U.S. 568 (1961).

[5] The proposition that the failure to inform a prisoner of his rights will result in the exclusion of a confession is advanced with the full awareness that the statute provides its own remedy for failure to comply with the statutory provisions. The Supreme Court in Haynes v. Washington, 373 U.S. 503, 510 n.7 (1963), held that the violation of a similar Washington statute, which also contained its own remedy, necessitated the suppression of a confession by use of the exclusionary rule. The rationale behind the use of the exclusionary rule is twofold: (1) a prosecutor is reluctant to prosecute his own police force; and (2) statutes of this type are intended to guarantee certain rights to the accused and not to punish law enforcement officials.

[6] 113 Ohio Laws 123, 142 (1929): "After the arrest of a person, with or without a warrant, any attorney at law entitled to practice in the courts of this state may, at the request of the prisoner or of any relatives of such prisoner, immediately visit the person so arrested, and consult with him privately."

[7] See statutes cited note 1 *supra.*

with" and therefore only vague statements by the courts[8] and the tenor of the statute as a whole[9] can be looked to for guidance in arriving at a legal definition of the word as presented by the statute. By coupling the court's statements and the statutory language with the sponsor's statement of purpose,[10] it seems clear that the rights to counsel and access to a telephone and the duty to inform the accused of these rights accrue before the accused can be questioned. Therefore, "forthwith" would seem to mean immediately upon arrest or within a reasonable time thereafter, depending upon the circumstances in the particular case but, in any event, before questioning of the accused with the intent to elicit a confession. The use of the phrase "arrest, detention, or any other taking into custody" does not on its face seem to connote a time too different from that indicated by "prior to being confined." However, in light of *Escobedo v. Illinois*[11] there is a significant difference. In *Escobedo* the Court held that a prisoner's right to counsel accrues when the questioning process shifts from investigatory to accusatory.[12] The statute provides for the obvious shift evidenced by an arrest, but there is also the recognition that such a shift can occur when an individual is taken into custody or detained. Therefore, the statute provides for the accrual of the right at any of the times when the shift may occur and not just at the time of confinement.

However slight the difference in the language of section 2935.20 and section 2935.14 may be, the wording of the new section marks a radical departure from the repealed statute.[13] Under the re-

---

[8] "Sections . . . [of the Ohio] Revised Code, require *immediate* action upon arrest by a police officer without a warrant by *forthwith* filing an affidavit charging the crime for which the arrest was made, securing a warrant and serving it on the accused and *forthwith* taking the accused before a magistrate. . . . " State v. Domer, 1 Ohio App. 2d 155, 170, 204 N.E.2d 69, 81 (1964). (Emphasis added.)

[9] The statute does not place any qualifications upon the time when the rights of the accused accrue but rather it seems to insure them immediately. This latter position is maintained because there is no qualification following, "arrest, detention, or any other taking into custody," and because once counsel is obtained, the accused has the right to be visited immediately. See statute cited note 1 *supra.*

[10] See note 2 *supra.*

[11] 378 U.S. 478 (1964). For a discussion of this case, see note 3 *supra.*

[12] Escobedo v. Illinois, 378 U.S. 478, 492 (1964). The Court said: "We hold only that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Ibid.*

[13] See 113 Ohio Laws 123 (1929). For the text of this section, see note 6 *supra.*

pealed act, counsel was only allowed access to the accused upon "*the request* of the prisoner or any relative of such prisoner";[14] no such qualification is contained in the new law. The absence of this qualification could provide the basis of an argument that the accused's rights accrue immediately without his having to request them. Also, under the repealed statute the rights accrued upon "arrest" while section 2935.20 is effective upon "arrest, detention, or any other taking into custody." This change is in accord with *Escobedo v. Illinois*,[15] for the right to counsel accrues when the interrogation shifts from investigatory to accusatory regardless of what name is given to the proceeding.[16]

The question naturally arises whether the Ohio courts will consider the holdings of the recent United States Supreme Court cases on the fourteenth amendment guarantees[17] to be implicit in the language of section 2935.20. Through an analysis of recent Ohio cases and these United States Supreme Court cases, it will be shown that the new section can be interpreted to mean that, in Ohio, there is an affirmative duty to inform the prisoner at the accusatory stage of his statutory and constitutional rights to counsel and that the failure to do so will operate automatically to exclude a confession obtained without counsel.

The Ohio cases which form the basis for the argument that law enforcement officials have the duty to inform a prisoner of his rights are *State v. McLeod*[18] and *State v. Arrington*.[19] In *McLeod* the defendant was indicted for first degree murder on October 3, 1960; on October 11 he made an oral confession to the assistant prosecuting attorney. McLeod was not represented by counsel when he made the statement, nor did he request counsel. The confession was used against him at trial and the Ohio Supreme Court upheld its use. The court justified its decision to admit the confession by distinguishing *McLeod* from *Escobedo* and *Massiah* on two points: (1) the confession in *McLeod* was obtained after indictment but

---

[14] 113 Ohio Laws 123 (1929). (Emphasis added.) For a discussion of this section, see note 6 *supra*.

[15] 378 U.S. 478 (1964).

[16] See text accompanying note 12 *supra*.

[17] Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964). For a discussion of these two cases, see note 3 *supra*.

[18] 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd per curiam*, 381 U.S. 356 (1965).

[19] 3 Ohio St. 2d 61, 209 N.E.2d 207 (1965).

before arraignment, while in *Massiah* the confession was obtained after arraignment; and (2) McLeod had not requested counsel whereas Escobedo had.[20] *McLeod* was reversed by the United States Supreme Court in one sentence, and only one case, *Massiah*, was cited in support of the decision.[21]

The Ohio Supreme Court commented upon the reversal of *McLeod* in *State v. Arrington*.[22] The majority acknowledged the fact that the Supreme Court had rejected its attempt to distinguish *McLeod* from *Escobedo* and *Massiah*, but stated that one could only speculate as to the specific grounds upon which their decision was reversed.[23] Judge O'Neill, however, in his concurring opinion took a different stand:

> It requires no speculation on the part of this court to determine the basis for the reversal by the United States Supreme Court of *State v. McLeod*. . . . The defendant in that case was neither granted the right to confer with counsel, nor was he informed of his right to counsel or his right to remain silent. Hence, any statements made by him under those circumstances could not be used against him without prejudice to his constitutional rights. . . .
>
> It is not the duty of the defendant to request counsel. It is the duty of the officials attempting to obtain a confession from him to inform him of his rights. . . .[24]

Therefore, Judge O'Neill disregarded the time at which a confession was given — whether before or after indictment — and looked solely to the intent of the proceeding — to obtain a confession. This is in complete accord with *Escobedo*.[25]

This line of Ohio cases seems to suggest that there is a positive duty on the part of law enforcement officials to advise a prisoner of his statutory and constitutional rights and that the neglect of this duty will result in the exclusion of any confession without regard to other circumstances. It is submitted, therefore, that the failure to comply with section 2935.20, either by outright denial or by neglect to inform the accused of his rights under the statute, should operate to exclude any confession and not merely constitute another element in the totality of circumstances.

---

[20] State v. McLeod, 1 Ohio St. 2d 60, 62-63, 203 N.E.2d 349, 351-52 (1964), *rev'd per curiam*, 381 U.S. 356 (1965).

[21] McLeod v. Ohio, 381 U.S. 356 (1965).

[22] 3 Ohio St. 2d 61, 209 N.E.2d 207 (1965).

[23] *Ibid.*

[24] *Id.* at 62-63, 209 N.E.2d at 208.

[25] See note 12 *supra*.

There are, however, problems with the statute. The most important is the omission of a provision in the repealed legislation which allowed a lawyer obtained by a prisoner's relatives to visit him.[26] The question immediately presented is whether, after informing a prisoner of his statutory rights to obtain counsel and to remain silent, the official must also tell the prisoner that a lawyer obtained by his family is waiting to talk with him. If the answer is in the affirmative, the next logical question must concern the effect of the neglect of this duty. Clearly, if the provision of the repealed section had been included in section 2935.20, there would have been a positive duty to inform the prisoner of the presence of such counsel. This would have been the natural corollary to the interpretation announced by Judge O'Neill, for the situation would have been anticipated and the right guaranteed by statute. However, now the question is unanswered, and the problem recedes once again into an area of uncertainty.[27]

The second problem is waiver. What effect will the waiver of the rights under the statute have upon the admissibility of a confession? The answer to this should be no different from that found in cases where the right to be represented by counsel at trial has allegedly been waived and depends upon whether the prisoner has intelligently and understandingly waived the right.[28]

In conclusion, it is submitted that if Judge O'Neill's interpretation of the reversal of *State v. McLeod*[29] is followed, the Ohio Supreme Court will be committed to the position that, in the absence of an intelligent waiver, a denial of the rights guaranteed by section 2935.20, or failure to inform an accused of these rights, will exclude a confession obtained after arrest and before arraignment with-

---

[26] See note 6 *supra.*

[27] New York settled this problem in People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), where the Court of Appeals held that the prisoner's right to counsel had been denied when a lawyer retained for him by his family was not allowed to visit with him at a pre-indictment interrogation. The court ordered a new trial and excluded the confession obtained from the prisoner at the interrogation.

[28] Carnley v. Cochran, 369 U.S. 506 (1962); Wade v. Yeager, 245 F. Supp. 67, 70 (D.N.J. 1965); Seymour v. Maxwell, 3 Ohio St. 2d 25, 208 N.E.2d 922 (1965).

[29] 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd per curiam*, 381 U.S. 356 (1965).

out the benefit of counsel. Such a position, it is further submitted, is in accord with the sponsor's statement of the statute's purpose,[30] Ohio case law,[31] recent Supreme Court cases,[32] and a growing trend in judicial thought.[33]

CHARLES E. BROWN, JR.

---

[30] See text accompanying note 2 *supra.*

[31] See discussion of *McLeod* and *Arrington* in text accompanying notes 18-24 *supra.*

[32] See discussion of *Escobedo* and *Massiah* in notes 3, 12 *supra.*

[33] In the following cases, United States *ex rel.* Russo v. New Jersey, 351 F.2d 429 (3d Cir. 1965); Carrizosa v. Wilson, 244 F. Supp. 121 (N.D. Cal. 1965); and People v. Dorado 62 Cal. 2d 769, 398 P.2d 361, 42 Cal. Rep. 169 (1965), the police had begun to focus on a particular suspect; the suspect was taken into custody and questioned. At no time was the accused informed of his right to counsel nor did he waive it. In each case the confession obtained by the interrogating officers was excluded and the lower court's decision reversed.

In connection with recent trends it must also be noted that on November 22, 1965, the Supreme Court granted certiorari in two cases which may very well remove some of the question marks in the area of confessions and police duties. Vignera v. New York, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 527 (1965), *cert. granted*, 382 U.S. 925 (1965), concerns the question whether police officers have the duty to inform a prisoner of his right to counsel. Westover v. United States, 342 F.2d 684 (9th Cir. 1965), *cert. granted*, 382 U.S. 924 (1965), turns upon whether a confession is inadmissible because a prisoner who has been informed of his right to counsel was given no opportunity to consult with an attorney. The decisions in these cases could very well affect judicial interpretation of § 2935.20. *Vignera* is being appealed on constitutional grounds, and therefore a finding that the duty to inform exists will not necessitate resort to the statute. An affirmance will foreclose a constitutional argument to the court but will not invalidate arguments based on Ohio case law. However, if the case is affirmed, Ohio courts would probably be reluctant to find the duty to inform despite precedent. *Westover* does not raise a constitutional question but one of procedure in federal courts. Therefore, a reversal would only lend support to an argument in a state court, and an affirmance would have little effect on the outcome.