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Abstracts of Recent Cases

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ABSTRACTS OF RECENT CASES

Federal Rules Do Not Entitle Defendant to Pre-Trial Inspection of Statement Made to Investigator—Defendant was indicted for the illegal sale of narcotics. In advance of trial in a federal district court, defendant made a motion under rules 16 and 17(c) of the Federal Rules of Criminal Procedure to permit the inspection and copying of an oral statement made by defendant in response to questions propounded by an attorney for the prosecution. While the statement was reduced to writing, it was not signed and, according to a government affidavit, did not contain a confession of guilt. The motion was supported by affidavits of defendant which alleged that he could not recall the statement word for word and that a copy was essential to the preparation of the defense. Rule 16 provides that, upon motion by defendant before trial, the court may order the prosecution to permit the defendant to inspect and copy books, papers, documents, or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. Rule 17(c) authorizes the court to issue, in advance of trial, a subpoena duces tecum for designated books, papers, etc. in possession of the prosecution and sought for use as evidence by defendant. The trial court denied defendant's motion on the grounds that neither of the above rules was designed to require pre-trial disclosure of defendant's statements or confessions. *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955).

The decision was based largely on an interpretation of the legislative history of the rules. Rule 16, the court concluded, was not intended to afford the defendant an unlimited right of discovery and inspection, but, on the contrary, the rule was a restatement of the pre-existing common-law procedure which did not permit such discovery in criminal cases. The rule appeared to the court to have been directed at the case where large numbers of documents had been seized by the prosecution and which were

necessary for the preparation of defendant's case. In addition, the court expressed doubt that an oral statement qualifies as "books, papers . . . obtained from or belonging to defendant", but stated that, even if the statement were deemed to be within that language, the defendant's request in the present case failed to fulfill the statutory requirements of materiality and reasonableness. The fact that the statement was unsigned was not considered material; defendant's signature, the court said, would not bring the statement within the scope of the rule.

The court interpreted rule 17(c) as adding nothing to the traditional type of trial subpoena, other than making it, for purposes of convenience, returnable prior to the trial. The purpose of 17(c), the court said, is not to allow discovery in addition to that permissible under rule 16 but is to be used merely to facilitate the securing of documents which are to be used as evidence by defendant at the trial. The rule may not be used, it was stated, to help the defendant recall his prior statements so that he may not be impeached at the trial. The court discussed at length the policy arguments involved in interpreting pre-trial disclosure rules and concluded that such arguments should properly be considered only by the legislature.

The only reported case found by the court to grant pre-trial inspection under Rules 16 and 17(c) by defendant of his unsigned statements was *United States v. Peace*, 16 F.R.D. 423 (S.D.N.Y. 1954). The *Peltz* ruling was subsequently followed in *United States v. Hall*, 18 F.R.D. 384 (S.D.N.Y. 1956).

In *Monroe v. United States*, 234 F.2d 49 (D. C. Cir. 1956), it was held that Minifon wire recordings of incriminating telephone conversations had by defendant with a government investigator would not qualify for discovery under rule 16. The recordings were considered by the court as analogous to copies of confessions made by defendants to police officers. However, the court indicated that the trial judge, in his discretion, could order discovery

of such recordings, if sought by the defendant for use as evidence, under rule 17(c).

Confessions Obtained During Delay in Arraignment Are Not Automatically Inadmissible in a Federal Court—After her arrest on a charge of the malicious burning of another's property, the defendant was subjected to a two hour interrogation by police officers before being arraigned before a magistrate. During the interrogation, police informed defendant that she did not have to make a statement and that any statement made might be used against her. Nevertheless, the defendant prepared and signed a written confession. At the trial in a federal district court, defendant objected to the introduction of the confession on the grounds that it was obtained in violation of rule 5(a) of the Federal Rules of Criminal Procedure which requires that an arrested person be taken before the nearest available commissioner "without unnecessary delay." The Court of Appeals for the District of Columbia Circuit, with one member dissenting, affirmed defendant's conviction and approved the admission of the statement. *Tillotson v. United States*, 231 F.2d 736 (D. C. Cir. 1956).

In support of her contention, defendant relied on the majority opinion in *Upshaw v. United States*, 335 U. S. 410, in which the Court said at page 413: "... a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate." The court, however, considered the *Upshaw* case to be a restatement of the rule set forth in *McNabb v. United States*, 318 U. S. 332 (1948) which held inadmissible confessions obtained during "inexcusable detention" by "continuous questioning for many hours under psychological pressure." The exclusions of the statements in both the *McNabb* and *Upshaw* cases, the court said, were based on findings that the confessions were the "fruits of wrongdoing" and that the accused was illegally detained for the very purpose of securing the confessions. The present case, the court stated, did not involve such a situation. To render a confession inadmissible as the product of a law violation, it was said, the delay in arraignment must be unreasonable, and,

in addition, questioning must be continuous and of such a coercive nature as to indicate that the statement was not the "offspring of reasoned choice." Affording the arresting officers a reasonable opportunity to question defendants prior to their arraignment, the court concluded, will not constitute such an "unnecessary delay" as to violate rule 5(a).

When is a Declaration Spontaneous?—Lampe and O'Bryan were jointly indicted for the murder of one Lamar. The two defendants and Lamar had been engaged in a prolonged drinking bout and, as the outcome of a dispute over Lamar's failure to contribute to the liquor fund, defendants assaulted their companion. Upon regaining consciousness, Lamar left the scene. When found elsewhere by the police, Lamar told the officers that he had been beaten by the defendants. Lamar was then taken to police headquarters where he made a second statement to the effect that both defendants had taken part in the assault. Subsequently, Lamar was removed to a hospital where he made a third statement to an officer to the effect that only one of the defendants was responsible for the assault. Following Lamar's death, one day later, defendants admitted the assault. Lampe's confession admitted that he had administered the major part of the beating, while O'Bryan's statement sought to minimize his own part in the crime. The trial court admitted into evidence, over defendants' objection, the testimony of the police officers as to the three statements made to them by the victim Lamar. The Court of Appeals for the District of Columbia Circuit affirmed the conviction of defendant Lampe and the admission into evidence of the three declarations by the victim. *Lampe v. United States*, 229 F.2d 43 (D. C. Cir. 1956).

In regard to the first statement made by Lamar shortly after being found by the police, the court observed that while "... the place referred to was several blocks away, it seems clear that the officer to whom this statement was made was the first person with whom Lamar spoke after becoming conscious and moving away from the scene of the attack in a fatally wounded, dazed and excessively shocked condition." The court found that the second

declaration, made by Lamar at police headquarters, qualified as spontaneous because "there had been no opportunity for reflection. Lamar had had no medical attention and must have been suffering from his grievous wounds even more than when he first talked to the police." However, even if the second statement were not considered spontaneous, the court said, its admission was not prejudicial to defendants since it added nothing to Lamar's first statement. The court considered the third statement, made at the hospital, to be inadmissible since "... the contents of the remarks were not due to physical shock or nervous excitement that had stilled the reflective faculties and removed their control, and therefore deemed so trustworthy as to be admissible even though brought into the trial by hearsay evidence." Nevertheless, admission of the third declaration was not considered prejudicial because it merely confirmed facts which were admitted by defendant Lampe's confession.

Use of Wire Tap Recordings to Refresh Memory of Witness Does Not Render Testimony Inadmissible in a Federal Court—In the course of an investigation of the defendant's attempt to bribe police officers, an investigator recorded a telephone conversation between himself and the defendant. The recording was made through the use of an induction coil apparatus attached to the telephone receiver and connected to a Minifon recording device. At the trial, before stating his own recollection of the recorded telephone conversation, the investigator refreshed his memory by playing the recording. The Federal Communications Act, 48 STAT. 1103-4 (1934), 47 U.S.C. § 605 (1952) provides, in part, that no person shall divulge the existence or contents of an intercepted communication or use information contained therein for his own benefit. The Court of Appeals for the District of Columbia Circuit held that the use of the recording to refresh the recollection of the witness, who was also the recipient of the telephone call, did not render

the testimony about the conversation inadmissible. *Monroe v. United States*, 234 F.2d 49 (D.C. Cir. 1956).

The court avoided the question as to whether this type of recording constituted an interception within the meaning of the statute and stated that, in any case, "Lt. Thoman's testimony was not the product of an illegal interception; he repeated on the stand what he himself had heard."

It is Improper to Cross-Examine Defendant Concerning Past Convictions even though Defense Fails to Make Timely Objection—The defendant was convicted of armed robbery and larceny of a motor vehicle. Upon cross-examination the state's attorney asked the defendant whether he had ever been convicted of a felony. After the defendant had given an affirmative response, his counsel objected to the question and the objection was overruled. The prosecutor then proceeded to question the defendant concerning the previous felony. On appeal, the defendant claimed the admission of this evidence was incompetent and prejudicial. The Supreme Court of Illinois accepted this argument and remanded the cause for new trial. *People v. Flynn*, 133 N.E.2d 257 (Ill. 1956).

The State did not contend that it was proper to question the defendant about past convictions but claimed that the incompetency of the testimony was waived through the lack of timely objection to the question. Lack of prompt objection, the court indicated, will not excuse the introduction of such prejudicial information. The Court said that it is improper to cross-examine a defendant concerning prior convictions, because "... there is no question more damaging to a defendant with a jury than one which suggests or intimates that he is a criminal or has been charged with criminal offenses." Prior convictions can be used only to affect the defendant's credibility as a witness and must be introduced by the offer of the record of the prior conviction or a certified copy thereof.