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INVOLUNTARY CONFESSIONS AND NEW YORK PROCEDURE

When a defendant objects to the admission of a confession on the grounds that it was not voluntarily made, it is the trial judge's duty in New York, upon request, to hear the evidence upon the question.[1] In *People v. Tuomey*,[2] a recent New York decision, the state submitted in evidence a defendant's oral and written confessions, whereupon defense counsel objected to their admission on the ground that they were involuntary.[3] Defense counsel was accordingly given the opportunity to make a searching cross-examination as to the voluntariness of the written confession, but he was denied an examination as to the oral confession. The Supreme Court, Appellate Division, reversed, holding it to be error to deny a full examination of the circumstances under which both the oral and written confessions had been obtained.[4] Since the oral confession was immediately reduced to writing, not a case where the oral confession was alleged to be the product of one beating and the written of another independent means of coercion, the dissent urged that an examination as to the voluntariness of the written transcript of the confession was sufficient.[5]

A defendant's protection against the admission of an involuntary confession involves the application of the rules regulating the hearing of evidence.[6] Therefore, when the procedural safeguards in the trial court against the admission of coerced confessions are found to be wanting, apparently technical reversals, as in *Tuomey*, are not without merit.

In New York, there is no recognized procedure for the suppression, by pre-trial motion, of an involuntary confession so that the defendant's only opportunity to attack admissibility is by objecting to its

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[1]People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927); People v. Fox, 121 N.Y. 449, 24 N.E. 923 (1890).

[2]234 N.Y.S.2d 318 (App. Div. 1962).

[3]Mr. Romanoff, who defended Tuomey on appeal, discloses that during the trial a motion for a dismissal of the indictment on the grounds that the confession had been illegally and unconstitutionally obtained together with a motion to exclude the confessions prior to introduction were sought. Counsel also asked for a hearing outside the presence of the jury. Letter from David Romanoff to Gerald Kesten, April 22, 1963.

[4]The court relied upon People v. Holland, 244 App. Div. 287, 279 N.Y.S. 372 (1935).

[5]Apparently the dissent felt that there was but one confession, a written transcript of an oral confession. People v. Toumey, supra note 2, at 321.

[6]For a discussion of the various procedural safeguards omitted in the New York practice under the rule of Stein v. New York, see Meltzer, Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury, 21 U. Chi. L. Rev. 317, 338 (1954).

introduction as evidence in the trial.[7] He then may offer evidence regarding the circumstances under which the confession was obtained, and vigorously cross-examine the state's witnesses regarding the methods by which the confession was acquired.[8]

Whether the jury is to be present at this hearing on the admissibility of a confession presents a crucial question. While the better practice is to exclude the jury during this hearing, New York law is not entirely clear on the practice to be followed. In *Stein v. New York*,[9] the United States Supreme Court sustained the constitutionality of the New York practice under which the admissibility of a confession is an ultimate issue in the case. The practice is explained as follows: (1) If the trial judge finds the confession to be involuntary, he excludes the confession and the question of its competency is never presented to the jury;[10] (2) if the trial judge finds a question of fact exists as to its admissibility, he admits the confession and instructs the jury to disregard it if the confession is found to be involuntary.[11]

Consequently, *if* there are controverted questions of fact, and the trail judge does not rule the confession inadmissible as a matter of law, the confession and related evidence will ultimately be submitted to the jury. Similarly, even though a confession is excluded by the trial judge, the confession will have been brought to the attention of the jury. In the latter situation, the defendant is prejudiced in two ways: (1) It is not unlikely that the jury would find credible what the judge excluded as incompetent; (2) during the hearing on the confession, the defendant by testifying puts his credibility in issue and exposes himself to cross-examination and impeachment,[12] which may result in a disclosure of his prior criminal record[13] and in effect constitutes a waiver of his privilege against self-incrimination.[14]

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[7]People v. Nentarz, 142 Misc. 477, 254 N.Y. Supp 574 (1931).

[8]People v. Brasch, 193 N.Y. 46, 85 N.E. 809 (1908); People v. Fiori, 123 App. Div. 174, 108 N.Y. Supp. 416 (1908).

[9]346 U.S. 156 (1953).

[10]People v. Barbato, 254 N.Y. 170, 172 N.E. 458 (1930). See, People v. Pignataro, 263 N.Y. 229, 188 N.E. 720 (1934); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909); People v. Meyer, 162 N.Y. 357, 56 N.E. 758 (1900).

[11]346 U.S. at 177.

[12]People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950); People v. Johnston, 228 N.Y. 332, 127 N.E. 186 (1920); People v. Trybus, 219 N.Y. 18, 24, 113 N.E. 538, 540 (1916); Spiegel v. Hayes, 118 N.Y. 660, 22 N.E. 1105 (1889); Conners v. People, 5 N.Y. 240 (1872).

[13]People v. Nelson, 145 App. Div. 680, 130 N.Y. Supp. 488 (1911). In the Stein case each defendant had several prior convictions, therefore none of them testified on the issue of admissibility. Stein v. New York, supra note 9, at 176.

[14]People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916). Contra, State v. Thomas, 208 La. 548, 23 So. 2d 212 (1945); Hawkins v. State, 193 Miss. 586, 10 So. 2d 678 (1942); Enoch v. Commonwealth, 141 Va. 411, 126 S.E. 222 (1925).

At the trial in *Stein* none of the defendants requested exclusion of the jury,[15] so the Court did not have to decide whether the failure to exclude violated any federal constitutional right. The Court, however, reviewed the two leading New York cases that have considered the question. In *People v. Brasch*,[16] the New York Court of Appeals sustained a ruling whereby the trial judge granted defense counsel's request for a hearing in the absence of the jury, but on the condition that defense counsel assure the court that "some legitimate and useful purpose"[17] would be served. Since counsel was unwilling to give such an assurance, the prosecution was allowed to continue to present its case in the jury's presence. In *Stein*, the United States Supreme Court interpreted the *Brasch* case as meaning that "the judge is not required to exclude the jury while he hears evidence as to voluntariness,"[18] an interpretation that goes beyond the precise holding. In *People v. Randazzio*,[19] the defense counsel's request to remove the jury was granted, whereupon the testimony of the prosecution's witness and that of the defendant disclosed a conflict in the evidence as to whether the police officer had in fact threatened the defendant. Since this conflict was for the jury's determination, the Court of Appeals held that it was error for the trial judge to admit the confession as though its voluntariness had been established. He should have required the testimony to be repeated in the presence of the jury, and then submitted for their determination the question of whether the confession was in fact voluntary. While seemingly a reference to the trial judge's omission, the opinion from the Court of Appeals reads:

> "Of course, in the trial of civil cases, parties may agree between themselves to many things pertaining to the conduct of the trial. They may even dispense with the jury entirely, but in criminal trials this practice cannot be sanctioned. The preliminary examination of this witness was a part of the evidence in the case, and should have been taken in the presence of the jury."[20]

In *Stein*, the Supreme Court interpreted the *Randazzio* case to mean that "perhaps [in New York, the judge] is not permitted to [exclude

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[15] "No defendant objected or requested a hearing with the jury absent." 346 U.S. at 172-73.

[16] 193 N.Y. 46, 85 N.E. 809 (1908).

[17] 85 N.E. at 813.

[18] 346 U.S. at 172.

[19] 194 N.Y. 147, 87 N.E. 112 (1909).

[20] 87 N.E. at 117.

the jury while he hears evidence as to voluntariness]";[21] thus the Court recognized an equivocation in the *Randazzio* opinion.

Accordingly, one writer cites *Randazzio* for the rule that the jury's absence during the hearing on the confession would be error in New York,[22] while a federal district judge gives a contrary interpretation to the case in the recent *Application of Jackson.*[23] In *Jackson,* the petitioner urged that the New York rule for determining voluntariness of a confession, as outlined in *Stein,* is violative of due process. In denying the petition, Judge Dawson, referring to a request for a preliminary hearing, suggested of the *Brasch* and *Randazzio* cases:

> "If one had been made it would undoubtedly have been granted by the trial court, in accordance with the New York rule. Defendant, however, apparently preferred to proceed on the basis of letting everything go before the jury."[24]

In *United States v. Carignan,*[25] the United States Supreme Court decided that the defendant was entitled to have the jury excluded in a federal trial court when he was testifying on the admissibility of the confession. Therefore, it is difficult to understand why in New York the absence of the jury during the hearing on the confession should be error. For example, the defendant with a prior criminal record must choose between exposing his discreditable past when offering testimony of the facts surrounding the admissibility of the confession, or remain off the stand entirely to keep the evidence of his previous convictions from the jury.[26]

In New York, when a judge rules a confession inadmissible he must instruct the jury to disregard the testimony they have heard regarding the confession.[27] According to the presuppositions underlying the *Stein* rule, a jury will follow such an instruction. Similarly, in theory they should be able to disregard evidence of the defendant's prior convictions brought out by the state's cross-examination. How-

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[21]346 U.S. at 172.

[22]Meltzer, supra note 6, at 330.

[23]206 F. Supp. 759 (S.D.N.Y. 1962).

[24]Id. at 763.

[25]324 U.S. 36 (1951).

[26]"We now know that each had an impressive felony record, one including murder and another perjury. Doubtless, to have testified would have resulted in disclosing this to the jury, while silence would keep it from being brought to light until after the verdict." Stein v. New York, supra note 9, at 176.

[27]In Meltzer, supra note 6, at 332, the author suggests that this practice might result in the Judge's resolving doubt in favor of voluntariness for purposes of avoiding a mistrial.