
Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ALICIA LEWIE,

Defendant-Appellant.

**BRIEF FOR AMICUS CURIAE
DISTRICT ATTORNEYS ASSOCIATION
OF THE STATE OF NEW YORK**

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PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York (“DAASNY”) submits this brief as amicus curiae in the above captioned appeal. By permission of the Chief Judge, defendant Alicia Lewie appeals from an order of the Appellate Division, Third Department, affirming a judgment of the County Court of Warren County (Hall, Jr., J.), rendered June 26, 2008, convicting defendant of the crimes of manslaughter in the second degree (two counts), reckless endangerment in the first degree and endangering the welfare of a child and from a judgment of said court, rendered June 27, 2008, which resentenced defendant.

In the course of the prosecution, defendant sought suppression of statements she made to police officers on the ground that they had been made in violation of the indelible right to counsel. According to defendant, the right attached when, before

her arrest, counsel had been appointed for her in an Article 10 removal proceeding initiated in Family Court arising from the set of facts underlying the criminal prosecution. It is this claim that amicus will address.

STATEMENT OF AMICUS CURIAE

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their nearly 2900 assistants. Members of the Association are responsible for the investigation and prosecution of crimes committed against children, crimes that often serve as a basis for the removal of children from the custody of abusive parents. DAASNY's experience on issues relating to the criminal law and criminal procedure applicable to the prosecution of such crimes places it in a position to assist the court's resolution of the specific issue of statewide concern raised by this appeal: whether the indelible right to counsel that protects defendants in criminal cases attaches upon the appointment of counsel for an individual in a Family Court Article 10 removal proceeding.

THE RELEVANT FACTUAL BACKGROUND¹

On the evening of November 13, 2007, defendant reported to the Warren County Sheriff's Department that she was taking her child to the hospital because of

¹ The factual recitation is based upon the factual recitation contained in the opinions of the motion court and the Appellate Division, respectfully.

injuries the child sustained when she, defendant, fell in the shower while holding the child. Hospital staff discovered extensive bruising at different stages of healing around his eyes and head, red marks on his neck and torso and bite marks on both arms. X-rays revealed a broken right arm, collapsed lung, lacerated liver, fractured ribs, and bleeding around the brain. Though the child's heartbeat was restored, he could not breathe on his own and he was placed on a respirator. The child was later transferred to Albany Medical Center and, after no brain activity was detected, life support was removed. Shortly thereafter, at 6:18 p.m. on November 14, 2007, he died.

On the night of November 13, 2007, after defendant brought the child to the hospital, police initiated a child abuse investigation. Defendant spoke to officers, made a written statement, and signed a consent to search her home then left with her parents. The following day, November 14, 2007, State Police Investigator Andrew Werner and Glens Falls Police Detective Lloyd Swartz went to the Albany Medical Center to further question defendant. This conversation began at approximately 11:50 a.m., stopped at 12:25 pm then resumed at 1:30 pm. About 15 minutes later, Investigator Werner was told that there might be an emergency Family Court proceeding respecting the child and counsel might be appointed. Counsel was in fact appointed in the Family Court proceeding at 3:25 pm and at 4:06 pm, the assistant public defender notified the District Attorney that this had occurred. Defendant ultimately gave a written statement that afternoon, then joined her family.

At about 7:50 pm, about an hour and a half after the child had been pronounced dead, Investigator Werner and Detective Schwartz asked defendant to join them for further conversation. Though they had agreed to take her to her parents' home, the officers drove defendant to the Glens Falls Police Department to discuss some discrepancies. Upon their return to the department, defendant was taken into the detective room for further questioning, was again advised of her rights, waived them, and signed a written statement.

Prior to her trial, defendant sought suppression of her statements on a variety of grounds. As relevant here, she contended that her right to counsel had attached when counsel had been appointed for her in Family Court and thus, any waiver of the right to counsel in counsel's absence were invalid and the statements subject to suppression. This was rejected by the motion court. The court pointed to People v. Snyder, 221 A.D.2d 870 (3d Dept. 1995) and People v. Kent, 240 A.D.2d 772 (3d Dept. 1997), which both held that the appearance of counsel in a Family Court proceeding did not trigger the indelible right to counsel in a criminal matter arising from the same set of facts. The Appellate Division, Third Department affirmed. People v. Lewie, 67 A.D.3d 1056 (3d Dept. 2009).

The case is now before the Court on a grant of leave by the Chief Judge.

ARGUMENT

THE DUE PROCESS BASIS OF THE RIGHT TO COUNSEL IN FAMILY COURT REMOVAL PROCEEDINGS COUNSELS AGAINST ESTABLISHING AN INDELIBLE RIGHT TO COUNSEL IN A CRIMINAL PROCEEDING ARISING FROM A COMMON NUCLEUS OF FACTS

At issue here is whether the indelible right to counsel that protects defendants in criminal cases attaches upon the appointment of counsel for an individual in a Family Court Article 10 proceeding, a proceeding intended "to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being." See Family Court Law §1011. In amicus's view, this Court's refusal to adopt such a rule in People v. Smith, 62 N.Y.2d 306 (1984) because of the commencement of the Family Court matter was a sound recognition of the differences between the two types of proceedings. This is particularly so, as will be developed, because the basis for the right to counsel in criminal cases is far different from the basis for the right in family court proceedings. Consequently, there is simply no reason to extend that former because of the latter simply because counsel had been appointed in the Family Court matter.

This Court has just recently reiterated the basis of New York's right to counsel rules. It reminded that "New York has long viewed the right to counsel as a cherished and valuable protection that must be guarded with the utmost vigilance.

Arising from the due process guarantee in our State Constitution, the entitlement to effective assistance of counsel and the privilege against compulsory self-incrimination, the right to counsel is referred to as ‘indelible’ because, once it ‘attaches,’ interrogation is prohibited unless the right is waived in the presence of counsel.” People v Lopez, 2011 NY Slip Op 1316, 4 (N.Y. Feb. 22, 2011). Thus, lying at the heart of New York’s expansive view of the right to counsel is not merely the state constitutional guarantee that “[I]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions” NY Const Art I, § 6, but the due process guarantee in that same section, providing that “[n]o person shall be deprived of life, liberty or property without due process of law.” NY Const Art I, § 6.

This due process guarantee to the assistance of counsel in criminal cases was first outlined in People v. Donovan, 13 N.Y.2d 148, 153 (1963). In Donovan, a written confession was taken from defendant Donovan after the police had refused to allow an attorney, retained for him by his family while he was in custody, to see or speak with him. In condemning the police conduct, this Court adopted what had previously been the views of a plurality of the members of the Court – that denying a defendant the assistance of an attorney at the precharge interrogation stage “violated the fundamental fairness essential to the concept of justice.” People v. Donovan, 13

N.Y.2d at 153 (citing People v. Noble, 9 N.Y.2d 571, 574 [1961] [Dye, J., writing for three members of the Court]).

This due process analysis in the sphere of criminal procedure anticipated by 14 years the due process test announced by the United States Supreme Court for determining whether or not a particular state criminal procedure practice violated the federal due process clause. In Patterson v. New York, 432 U.S. 197 (1977), petitioner Patterson contended that placing upon defendants the burden of proving the affirmative defense of extreme emotional disturbance violated due process. In rejecting this claim, the Patterson court held that a state's regulation of its criminal procedures is subject to proscription under the due process clause only if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Patterson, 432 U.S. at 201-02 (citations omitted). The Court repeated this in Medina v. California, 505 U.S. 437 (1992), rejecting a due process challenge to a California rule that placed the burden on incompetent defendants to prove their incompetence by a preponderance of the evidence.

While it is true that a parent’s right to counsel in an Article 10 removal proceeding is also guaranteed, at least in part, by due process, In re Ella B., 30 N.Y.2d 352, 356-57 (1972) the due process analysis is a very different one for cases involving not matters of criminal procedure but involving the deprivation of a liberty or property interest. As the Supreme Court explained in Mathews v. Eldridge, 424 U.S.

319 (1976), “[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. “ Mathews v. Eldridge, 424 U.S. at 335. This Court has recognized that this is the test to be used in Article 10 proceedings. In re Tammie Z., 66 N.Y.2d 1, 4 (1985). As a general matter, then, the process due a parent in Article 10 removal proceedings “is flexible and calls for such procedural protections as the particular situation demands.” Mathews v. Eldridge, 424 U.S. at 334, citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Put another way, the due process right that underlies the right to counsel in family court matters does not create hard and fast rules; instead, “[a]pplying the Due Process Clause is an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. Lassiter v. Dep't of Social Services, 452 U.S. 18, 24-25 (1981).

What that means for this circumstance is that designating as indelible in a criminal case a right to counsel that has been established by virtue of procedural due

process confuses two very different constructs which have very different purposes. The right to counsel in Family Court removal proceedings is intended to limit the risk of erroneous deprivation of a liberty or property interest. The indelible right in criminal cases is “to protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State.” People v. Hobson, 39 N.Y.2d 479, 485 (1976). Indeed, this is precisely why the Court rejected this argument in People v. Smith, 62 N.Y.2d 306 (1984). As the Court noted, not only is the Family Court proceeding civil in nature, but “the two proceedings have wholly different purposes. The Family Court proceeding seeks to protect the infant from future abuse by removing him or her from the parental home; the criminal action, to punish the parent for abuse inflicted in the past.” People v. Smith, 62 N.Y.2d at 315.

It is of no little import that the remedy for a right to counsel violation in each type of proceeding is significantly different. A right to counsel violation in the criminal context will result in suppression of the illegally taken statement. See, e.g. People v. Rogers, 48 N.Y.2d 167 (1979); People v. Burdo, 91 N.Y.2d 146 (1997). By contrast, a right to counsel violation in the Family Court proceeding will result in the conduct of a de novo proceeding. In re Ella B., 30 N.Y.2d at 358. There is no principled basis to provide defendant with more protection

Defendant distinguishes Smith, arguing that Smith merely held that the filing of a Family Court removal petition did not trigger the indelible right to counsel in a

related criminal case but suggested that the result might be different once counsel was appointed. People v. Smith, 62 N.Y.2d at 315 (noting that the Family Court removal proceeding at issue is civil in nature and one in which the defendant's statutory right to counsel had not matured by the appointment of counsel when he was interrogated on the criminal charge). The mere appointment of counsel in a related civil proceeding simply cannot trigger the right to counsel in the related criminal matter. In People v. Grice, 100 N.Y.2d 318, 323 (2003), this Court emphasized that its consistent refusal to undermine the right to counsel with “mechanical” requirements “has always been based upon an unequivocal indication that counsel ha[d] entered a criminal matter.” People v. Grice, 100 N.Y.2d at 323. In other words, this Court has recognized that it is the only the actual entry of counsel in a criminal case that will trigger the indelible right to counsel, not the entry in a civil matter.

That only actual entry in a criminal case will trigger the indelible right to counsel is confirmed by People v. Kazmarick, 52 N.Y.2d 322 (1981). In Kazmarick, the right to counsel had attached in an unrelated matter merely by virtue of the commencement of that criminal action. This Court ruled that there was no indelible right to counsel in connection with a new charge unless there had been actual representation or entry on the new charge. Crucially, it is actual entry in the criminal case that matters, not merely the existence of that case.

In the end, what defendant is urging is the attachment of an indelible right to counsel in a criminal case arising from an appointment of counsel in a related civil matter. In common parlance, this can only be understood as creating a “derivative” right to counsel, that is, a right stemming from representation in another matter. But, of course, as this Court recently reiterated, there is no longer a “derivative” right to counsel. People v Lopez, 2011 NY Slip Op 1316, 4 (Feb. 22, 2011). As the Court noted there, in People v Bartolomeo, 53 N.Y.2d 225, 232 (1981), it had “expanded the prohibition on interrogation regarding unrelated matters by creating a ‘derivative right to counsel’ that attached to a new criminal offense whenever a suspect was represented by counsel in connection with unrelated pending charges and regardless of whether the suspect was in custody on the pending charges. The derivative right was fictional because it presumed the existence of an attorney-client relationship in connection with the new, unrelated matter even though the accused was not actually represented by an attorney in the new case.” People v Lopez, 2011 NY Slip Op 1316, 7 (N.Y. Feb. 22, 2011).

Insuring respect for this right became particularly difficult because the right could attach without the police even knowing about the prior representation. As a result, the police were obliged to inquire whether a suspect was represented in any unrelated matter of which they had knowledge. Failing such inquiry, the police were bound by what such inquiry would have revealed--meaning the derivative right could

attach without actual knowledge that the suspect was represented by counsel at all. People v. West, 81 N.Y.2d 370, 378 (1993). As a result of these concerns, the Court abandoned it in People v. Bing, 76 N.Y.2d 331 (1990).

Here, concluding that a defendant has an indelible right to counsel arising from an appointment in a Family Court proceeding arising from a common nucleus of fact creates precisely what has been abandoned: a “right piggy-backed solely on a defendant's prior representation in unrelated proceedings,” the classic definition of the derivative right. People v. Steward, 88 N.Y.2d 496, 499 (1996). It could hamstring those investigating allegations of child abuse by virtue of a need to determine if a particular individual is represented in a Family Court matter related to the child whose assault is the subject of an investigation.

True it is that the derivative right was defined as one arising from an unrelated matter and, of course, the Family Court and criminal matters were factually related. But it cannot be disputed that the two matters are not related in law. And, it most certainly cannot be disputed that this Court has already recognized a fundamental difference between a Family Court removal proceeding and a criminal proceeding. See People v. Smith, 62 N.Y.2d at 315 (“The Family Court proceeding seeks to protect the infant from future abuse by removing him or her from the parental home; the criminal action, to punish the parent for abuse inflicted in the past”). That being the case, the common nucleus of fact notion simply cannot serve to create an

indelible right to counsel in a matter unrelated in law. Indeed, this Court has made the distinction clear:

To the extent that the article 10 proceeding is directed at protecting the child, it is defendant's parental rights that are at stake. In this regard, no legally cognizable identity of issues exists between the child protective proceeding, which seeks to safeguard the child, and a criminal action, which yields a final determination conclusive of defendant's penal responsibility.

People v. Roselle, 84 N.Y.2d 350, 358 (1994).

There is yet a further reason why defendant's effort at pressing for recognition of a right to counsel in the criminal matter must fail. As noted, because the right in the criminal matter is "piggy backing" on the appointment of counsel in the civil matter, it is derivative in nature and ought not be recognized. It has been explained that the right to counsel recognized in People v. Rogers, 48 N.Y.2d 167 (1979) (which had been the basis for recognition of a "derivative" right to counsel in People v. Bartolomeo, *supra*) was to insure that questioning of a defendant on an unrelated matter will not interfere with the attorney-client relationship on the case on which the defendant has representation. People v. Robles, 72 N.Y.2d 689, 697 (1988). But when no such relationship has been formed even though the right has attached by virtue of commencement of a criminal action but defendant does not yet have an attorney, there is no violation of the right to counsel on a separate, unrelated matter. People v. Ruff, 81 N.Y.2d 330, 333 (1993). The record here reflects that, although

counsel had been appointed for defendant in the Family Court matter, she did not know this.

What this means for this case is obvious. The overriding concern that this Court has expressed when the right to counsel arises from representation in another matter is that police questioning does not interfere with an existing attorney/client relationship. But where the defendant does not even know that counsel has been appointed for her, much less has never met counsel, these concerns do not exist. Thus, even if it were to be assumed that the appointment of counsel in the Family Court matter has some impact on the right to counsel in the criminal matter – a proposition that the People view as dubious -- that can only be the case if defendant knew of this and the concerns identified by the Court in Robles are at stake.

In sum, the right to counsel in the two different proceedings that underlie this appeal stem from very different concerns. That being the case, that counsel has been appointed in the Family Court removal proceeding can have no impact whatever on the right to counsel in the criminal matter.

CONCLUSION

The order of the Appellate Division should be affirmed.

Respectfully submitted,

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