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Evidence - Admissibility of Statements to Parole Officer - Miranda Warnings; State v. Gallagher

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the Constitution is what the judges say it is."[53] Regarding the fourth amendment, the judges are having trouble saying what it is. Every person's fourth amendment protection suffers as a result.

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CRIMINAL LAW—EVIDENCE—ADMISSIBILITY OF STATEMENTS TO PAROLE OFFICER—MIRANDA WARNINGS

State v. Gallagher, 36 Ohio App. 2d 29, 301 N.E. 2d 888 (1973).

THE OPINION handed down in this recent decision from the Montgomery County Court of Appeals examined a question of first impression in the courts of Ohio. The issue presented was "whether a parole or probation officer is a law enforcement officer within the contemplation of *Miranda* and thus subject to the *Miranda* requirements of constitutional warnings to suspects during custodial interrogation. . . ."[1]

The defendant, Gallagher, appealed from a conviction of armed robbery of a 7-11 Store. He was tried without a jury and sentenced to from ten to twenty-five years in the Ohio State Penitentiary. The state's prosecuting witness, an employee of the store, was robbed at gunpoint by two men of approximately $350.00. Although two patrons were also present in the store at the time of the robbery, neither was able to corroborate the employee's identification of the defendant.[2] Approximately one month after the robbery, the defendant was arrested, and immediately thereafter fully advised of his *Miranda* rights by the Dayton police. At that time he executed a standard pre-interview form which listed all his rights and which constituted an agreement whereby he agreed that any statements he made thereafter were of his own free will.[3] Four days after the arrest, Mr. William Sykes, a parole officer who had been assigned to the defendant after his release from prison on a previous conviction, visited the defendant. During this first visit, the defendant declined to make any statements concerning his arrest. One week later the defendant was again visited by Mr. Sykes. During this meeting the defendant admitted to him that he had participated in the robbery in concert with the other robber.[4] At the trial of this cause, Mr. Sykes was allowed to testify,

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53 Address before the Elmira Chamber of Commerce, May 3, 1907, in ADDRESSES OF CHARLES EVANS HUGHES 185 (2d ed. 1916).

1 State v. Gallagher, 36 Ohio App.2d 29, 30, 301 N.E.2d 888, 889 (1973).

2 *Id.*

3 *Id.* at 32, 301 N.E.2d at 890.

4 *Id.* at 30, 33, 301 N.E.2d at 889-891.

over defense objection, that he had met with the defendant on the two aforementioned occasions, and that during the second meeting, the defendant had confessed his participation in the robbery. In his testimony, Mr. Sykes further stated that he had not advised the defendant of his rights to remain silent, to have an attorney present, nor that anything he said could be used against him.[5]

The defendant asserted two assignments of error: first, the refusal of the trial judge to suppress the testimony of the parole officer concerning the defendant's admission of guilt, and secondly, the failure of the court to direct a verdict in favor of the defendant at the close of the state's case.[6] Since the second assignment of error relied on a favorable ruling on the first, our discussion here will be confined to the first assignment of error as was the approach taken by the appellate court.[7]

The defendant argued two grounds in support of his first assignment of error. The first contended that the court's admission of the probation officer's testimony was in violation of the constitutional requirements of *Miranda v. Arizona*.[8] The second ground asserted that communications between the parole officer and a parolee are privileged due to the confidential character of their relationship.[9] The court, in a unanimous decision, rejected both of these arguments and held that:

> [s]tatements made by an accused to a parole officer, whose acquaintance stems from a previous offense, concerning the crime with which he is charged are admissible in evidence against him even though such officer failed to inform him of his *Miranda* rights, where such rights were explained to him at the time of his arrest.[10]

Although the court noted that there was a split of authority on this issue in other jurisdictions, they distinguished those cases in support of

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[5] *Id.* at 30, 301 N.E. at 889.

[6] *Id.* at 29, 301 N.E. at 889.

[7] *Id.* at 34, 301 N.E. at 891.

[8] *Id.* at 30, 301 N.E.2d at 899, *citing* Miranda v. Arizona, 384 U.S. 436 (1966), where the Supreme Court summarized its holding at 444:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.

[9] State v. Gallagher, 36 Ohio App.2d 29, 33, 301 N.E.2d 888, 891 (1973).

[10] *Id.* at 29, 301 N.E.2d at 888.

the defendant's argument[11] from the present case. In *State v. Lekas*,[12] the appellant, a parolee under the supervision of an officer of the Kansas State Board of Probation, was taken into custody by a police officer and his parole officer. Neither the police officer nor the parole officer gave the appellant the *Miranda* warnings at that time. During an initial interrogation, to which the police officer was not a party, the parole officer elicited an admission from the defendant. This admission to the parole officer was received in evidence over the appellant's objection.[13] The Kansas Supreme Court stated that "[u]nder the foregoing circumstances the question, simply stated is whether the requirements of *Miranda v. Arizona* [citation omitted], apply to interrogation made by an officer of the Kansas State Board of Probation and Parole."[14] The court concluded that the statutory police powers which could be exercised by parole officers were equivalent to those granted to other peace officers,[15] and held:

> The *Miranda* decision places a duty upon the officers of the Kansas State Board of Probation and Parole, when they are investigating the commission of a fresh or new felony by a parolee, to comply with the mandate in *Miranda,* if the incriminating statements they elicit from a parolee are to be admissible as evidence in the prosecution of the new offense. On the facts in this case the incriminating statements made by the appellant to the parole officer were inadmissible in evidence.[16]

In *State v. Williams*[17] the defendant was not given the full *Miranda* warnings prior to questioning by his parole officer which occurred immediately following his arrest. The Missouri Supreme Court held that probation officers were required to give a parolee the full *Miranda* warnings prior to interrogation involving the possible commission of a fresh offense.[18] *People v. Gastelum*,[19] the third case considered by the court in support of the appellant's contentions, involved admissions made

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[11] *Id.* at 30, 31, 301 N.E.2d at 889, *citing* People v. Gastelum, 237 Cal. App.2d 205, 46 Cal. Rptr. 743 (1965); State v. Lekas, 201 Kan. 579, 442 P.2d 11 (1968); State v. Williams, 486 S.W.2d 468 (Mo. 1972).

[12] 201 Kan. 579, 442 P.2d 11 (1968).

[13] *Id.* at 581, 582, 442 P.2d at 14, 15.

[14] *Id.* at 582, 442 P.2d at 15.

[15] *Id., citing* KAN. STAT. ANN. § 62-2235 (1964), which provides:

> The director and all other officers and employees of the Board shall be within the classified service of the Kansas Civil Service Act, and all persons employed under the provisions of this act as probation and parole officers shall have and exercise police powers to the same extent as other police officers and such powers may be exercised by them anywhere within the state.

[16] *Id.* at 584, 442 P.2d at 16.

[17] 486 S.W.2d 468 (Mo. 1972).

[18] *Id.* at 474, *and see* MO. ANN. STAT. § 549, 280 (Vernon 1953): "The Board and probation and parole officers shall have jurisdiction co-extensive within the boundaries of this state and may make arrests of persons on parole anywhere in the state in the course of their duties under this chapter."

[19] 237 Cal. App.2d 205, 46 Cal. Rptr. 743 (1965).

by the defendant to his parole officer immediately following his arrest. Again the defendant was not advised of his rights prior to the interrogation. The court held that it was reversible error to admit the defendant's admission into evidence.[20] The foregoing cases were distinguished by the court from the present case by pointing out that in each of these cases the defendant was not given the full *Miranda* warning at any time prior to the questioning by the parole officer.[21]

In holding that the parole officer was not subject to the *Miranda* requirements of constitutional warnings, the court cited a number of decisions from other jurisdictions in support of their view.[22] The cases cited by the court in support of what they considered to be the majority view demonstrates the extreme paucity of controlling precedent in this area of the law. Further, it becomes apparent upon examination of these decisions, that the court gave little weight to the significant distinctions between them and the present case. The decision in *State v. Johnson*[23] focused on the status and duties of a parole officer and the circumstances at the time of questioning. In this case the parole officer on his own initiative went to the defendant's home to question him concerning the issuance of a bad check. No *Miranda* warnings were given. At that time the defendant was under the supervision of the South Dakota Board of Pardons and Paroles. When questioned, the defendant admitted issuing the check and this admission was allowed to be presented in court as part of the parole officer's testimony.[24] The South Dakota Supreme Court held: "*Miranda* warnings do not have to be given in all interrogations. They must be given prior to 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (citing *Miranda*). Neither of these compelling factors is present here. LeVake [parole officer] was not a law enforcement officer within the spirit or meaning of *Miranda, People v. Ronald W.* [citation omitted], and he did not take, or have, defendant in custody.[25]

The second case cited by the court as persuasive authority for their decision was *People v. Ronald W.*[26] Here, the defendant, a parolee, appeared voluntarily at his probation officer's office seeking help with a narcotics problem. The defendant was questioned by the parole officer,

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20 *Id.* at 209, 46 Cal. Rptr. at 746.

21 State v. Gallagher, 36 Ohio App.2d 29, 31, 301 N.E.2d 888, 889 (1973).

22 Gilmore v. People, 171 Colo. 358, 467 P.2d 828 (1970); Nettles v. State, 248 So.2d 259 (Fla. App. 1971); People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969); State v. Johnson, 202 N.W.2d 132 (N.D. 1972).

23 202 N.W.2d 132 (N.D. 1972).

24 *Id.* at 133.

25 *Id., citing* Miranda v. Arizona, 384 U.S. 436 (1966); People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d 260 (1969).

26 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S.2d at 261.

without the *Miranda* warnings, concerning the presence of needle marks on his arm. The defendant admitted that he had been purchasing and using heroin and this confession was admitted as evidence in a proceeding to revoke the defendant's probation. He was found to have violated the terms of his probation and was confined to prison.[27] The New York Appellate Court rejected the defendant's contention that he was entitled to receive the warnings announced in Miranda prior to being questioned by the probation officer and stated:

> [t]he questioning of the appellant was hardly the sort of incommunicado, police dominated atmosphere of custodial interrogation and overbearing of the subjects' will at which the *Miranda* rule was aimed. The clearly stated objectives of education and rehabilitation which are always paramount in the relationship between the probation officer and the probationer . . . are totally foreign to the elements the Supreme Court addressed itself to in *Miranda*.[28]

The case of *Nettles v. State*[29] is the only case cited by the court in support of its holding which approximates the fact pattern in the present case. There the appellant was found guilty of robbery. He appealed that conviction on the ground that the court erred in denying his motion to suppress evidence of a confession made by him to a probation officer who had failed to give the *Miranda* warnings. In a situation similar to the present case, the confession was made to the parole officer six days after a waiver of his *Miranda* rights was given to a police detective immediately following his arrest.[30] In upholding the conviction, the Florida Appellate Court founded its decision on the theory of "constructive custody."[31] They pointed out:

> [t]he defendant was in constructive custody and he had agreed to abide by certain rules and restrictions as condition for his probation. He waived his right to his constitutional *Miranda* warnings when he accepted probation and his waiver continues in effect even on a new and fresh crime as regards his probation officer.[32]

In his dissenting opinion in *Nettles* Judge Mann noted that the holding of the majority was not supported by the cited cases in that they presented the question of "whether an admission to a probation supervisor might be introduced in a *proceeding for revocation of probation* without proof

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[27] *Id.* at 733, 734, 249 N.E.2d at 883, 302 N.Y.S.2d at 261.

[28] *Id.* at 734, 735, 249 N.E.2d at 883, 884, 302 N.Y.S.2d at 261, 262 *citing* N.Y. CODE CRIM. PROC. § 936; Williams v. N.Y., 337 U.S. 241 (1949); People v. Peace, 18 N.Y.2d 230 (1966).

[29] Nettles v. State, 248 So.2d 259 (Fla. App. 1971).

[30] *Id.*

[31] *Id.* at 260, *citing* People v. Ronald W., 24 N.Y.2d 732, 249 N.E.2d 882, 302 N.Y.S. 2d 260 (1969); *See* U.S. *ex rel.*, Bishop v. Brierly, 288 F. Supp. 401 (E.D. Pa. 1968); Gilmore v. People, 171 Colo. 358, 467 P.2d 828 (1970); People v. Parks, 110 Ill. App.2d 455, 249 N.E.2d 720 (1969).

[32] *Id.*

of compliance with *Miranda*."[33] In distinguishing this question from that presented in *Nettles* he stated:

> But whether that same admission can be admitted at the defendant's trial for the *subsequent* offense—question now before us—is a different matter. Such a proceeding is independent of the probation revocation proceeding unless, as the majority imply, acceptance of probation carries with it an *implied* waiver of constitutional rights while probation continues. It is doubtful that even an *express* waiver of constitutional rights in future cases could be upheld, but we need not contemplate that. I think it clear that there is no waiver of the Fifth Amendment by implication.[34] [emphasis added].

He further indicated what he believed to be the better view:

> I think that the proper rule is that in a proceeding for revocation of probation or parole it need not be shown that *Miranda* was followed, but that in a prosecution for a *separate offense* it must be shown either that the interrogation was not in a custodial setting or that the accused knew the rights he was waiving.[35] [emphasis added].

Judge Mann's distinctions in the *Nettles* case are applicable to the present case insofar as they point to the significant deficiencies in the cases cited by the Ohio Appellate Court in support of their decision. In *People v. Ronald W.*[36] the action was a proceeding to revoke a probation where the defendant had not been arrested and was not in custody, but had freely come to the parole officer seeking help as a friend.[37] *State v. Johnson*[38] may also be distinguished from the present case in that the interrogation there did not take place after arrest while the defendant was in custody, but may be characterized as an informal interrogation which took place at the defendant's home.[39]

Commentators have pointed out that the full impact and breadth of the *Miranda* decision may not be definitized for years as state and lower federal courts rely on each other's decisions to determine its full implications.[40] Decisions which have restricted the application of *Miranda* only to police officers have been rendered in Ohio[41] and a number of

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33 Nettles v. State, 248 So.2d 259, 260 (Fla. App. 1971) (Mann, J., dissenting).

34 *Id.* at 261.

35 *Id.*

36 24 N.Y.2d 732, 302 N.Y.S.2d 260, 249 N.E.2d 882 (1969).

37 *Id.*

38 202 N.W.2d 132 (N.D. 1972).

39 *Id.*

40 Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona,* 14 U.C.L.A. L. REV. 59, 61 (1967). *See generally* Sable, *Miranda Warnings in Other Than Police Custodial Interrogations,* 21 CLEV. ST. L.R. 135 (1972); Comment, *Custodial Interrogation,* 35 TENN. L. REV. 604 (1968).

41 State v. Bolen, 27 Ohio St.2d 15, 271 N.E.2d 839 (1971); State v. Peoples, 28 Ohio App.2d 162, 275 N.E.2d 626 (1971).

other jurisdictions.[42] In *Ohio v. Peoples*,[43] the Ohio Court of Appeals held that "[a] person not a police officer, or not acting in concert with or at the request of police authority, is not required to extend constitutional warnings prior to the soliciting of an incriminating statement."[44] They further noted that "[p]rivate security officers or private detectives are not officers of the law in such capacity that they have to render a constitutional warning precedent to the taking of a statement in the nature of a confession."[45] This same restrictive view was sustained by the Ohio Supreme Court when applied to questions asked of a suspected thief by an employee of a merchant in *State v. Bolan*.[46] These foregoing cases, the present decision, and those decisions cited therein as authority indicate a restrictive trend in the interpretation and application of *Miranda* by the courts. This restrictive and narrowing trend seems to run contrary to the spirit and intent of *Miranda* which is indicated in the following excerpt from that decision:

> Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and exercise of those rights must be fully honored.[47]

This expansive spirit indicated in *Miranda* was affirmed in *Mathis v. U.S.*,[48] a decision which a preponderance of jurisdictions including Ohio seem to have ignored in their recent decisions. In that case the petitioner was incarcerated in a state prison and was questioned by an internal revenue agent concerning the petitioner's tax returns as part of a routine

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[42] People v. Morehod, 45 Ill.2d 326, 259 N.E.2d 8 (1970); People v. Morgan, 24 Mich. App. 660, 180 N.W.2d 842 (1970); Schaumberg v. State, 83 Nev. 372, 432 P.2d 500 (1967); People v. Frank, 275 N.Y.S.2d 570 (1966).

[43] 28 Ohio App.2d 162, 275 N.E.2d 626 (1971).

[44] *Id.*, 275 N.E.2d at 628.

[45] *Id.*

[46] 27 Ohio St.2d 15, 271 N.E.2d 839, 840 (1971), where the Ohio Supreme Court held: Where . . . an employee of a merchant has detained a person whom he has probable cause to believe has unlawfully taken items offered for sale by the mercantile establishment, an admission or confession made during such detention is not rendered inadmissible by the failure of such employee to fully explain to such detained person those constitutional rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966).

[47] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[48] Mathis v. U.S., 391 U.S. 1 (1968).

tax investigation. The petitioner was not given the *Miranda* warnings. He was convicted on two counts of filing false claims against the Government and was sentenced to thirty months imprisonment. The conviction rested upon evidence admitted as a result of the statements made to the government agent. The petitioner objected to the introduction of this evidence, and on appeal grounded his assignment of error solely on *Miranda*. The Supreme Court granted certiorari and reversed the lower court's decision. In attempting to avoid *Miranda* the government argued first that the questions were asked as part of a routine tax investigation and not as part of a criminal proceeding, and secondly, that the petitioner had not been incarcerated by those questioning him, but was there for a separate offense.[49] These arguments were rejected by the Court stating that the distinctions were "too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody."[50]

Viewed in light of the *Miranda* and *Mathis* decisions, the present case and the decisions of other jurisdictions represent a clear trend toward narrowly construing and applying the *Miranda* warning mandate. The present case clearly falls within the scope and spirit of the *Mathis* interpretation of the *Miranda* requirements in three respects. First, the interrogation in both instances occurred while the defendant was in custody. Secondly, the questioning in *Mathis* was made pursuant to a civil investigation while the questioning in the present case concerned possible criminal charges. Finally, the parole officer in the present case ostensibly appears to be more nearly the equivalent of a peace officer than does the internal revenue agent in the *Mathis* decision. Although Ohio statutes[51] do not expressly equate parole officers with peace officers as is the case in other jurisdictions,[52] the parole officer in Ohio is elevated to the status of a peace officer in certain situations.[53] These foregoing reasons seem to indicate a severe departure from the direction initiated by the Supreme Court in *Mathis* toward a more pervasive application of the *Miranda* requirements.

The court summarily rejected the appellant's second ground for his first assignment of error—that the relationship of parole officer and

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[49] *Id.* at 2-4.

[50] *Id.* at 4.

[51] OHIO REVISED CODE § 2301.31 (Page 1954).

[52] KAN. STAT. ANN. § 62-2235 (1964); MO. ANN. STAT. § 549.280 (Vernon 1953).

[53] OHIO REVISED CODE § 2301.31 (Page 1954) which provides:

> For violation of the conditions of parole, as defined by section 2968.01 of the Revised Code, or of the rules and regulations governing persons on parole, any county probation officer may arrest a person on parole in the custody of the county department of probation provided for in section 2301.27 of the Revised Code with which such officer is connected. Upon the written order of the chief probation officer of the county department having custody of a person on parole violating such conditions, rules, and regulations, any probation officer, or any sheriff, constable, or police officer shall arrest such person.

parolee is a privileged one.[54] Although this point seems to be arguable as a practical matter, those relationships which are considered privileged are carefully controlled by statute in Ohio,[55] and the Ohio decisions interpreting the statutes have narrowly construed them.[56] In the recent decision of *State v. Halleck*,[57] the defendant claimed a confidential relationship between him and his parole officer.[58] The Ohio Appellate Court rejected this argument and stated that "R.C. 2317.02 states what are privileged communications and acts. The relationship claimed here to be a confidential one is not listed therein."[59] The appellant's second ground of error was therefore properly rejected by the court in light of this established precedent.

In conclusion, it appears that with this decision, Ohio has joined a growing majority of jurisdictions which have confined the effect of *Miranda* solely to police interrogations. This trend appears to be adverse to the spirit and intent of *Miranda* and the liberal interpretation given to it in the *Mathis* decision. It is therefore unlikely that this trend will abate in the absence of a definitized decision by the Supreme Court defining the scope of the *Miranda* requirements and enumerating with specificity those situations where it must be applied.[60]

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54 State v. Gallagher, 36 Ohio App.2d 29, 33, 34, 301 N.E.2d 888, 891 (1973).

55 OHIO REVISED CODE § 2317.02 (Page 1954).

56 State v. Halleck, 24 Ohio App.2d 74, 263 N.E.2d 917 (1970); *see* Weis v. Weis, 147 Ohio St. 418, 76 Ohio App. 483, 65 N.E.2d 300 (1947).

57 24 Ohio App.2d 74, 263 N.E.2d 917 (1970).

58 *Id.* at 81, 263 N.E.2d at 922.

59 *Id.*

60 The U.S. Supreme Court has recently granted certiorari to review the scope of the *Miranda* requirements. Two questions relevant to the *Gallagher* case will be examined: (1) whether the *Miranda* interrogation standards are too restrictive in excluding admissions, and (2) whether these standards are mandated by the United States Constitution. Michigan v. Tucker, *cert. granted*, 42 U.S.L.W. 3325 (U.S. Dec. 4, 1973) (No. 73-482).