

KENTUCKY - SIXTH AMENDMENT

Keysor v. Com., 486 S.W.3d 273 (2016)

FACTS: Keysor was arrested in Graves County on two counts of Sexual Abuse. He received appointed counsel at his request. While awaiting trial, Graves County officers learned his putative victim had reported to Marshall County authorities she had also been sexually abused by him in Marshall County. Marshall County officers, along with a social worker, went to Graves County to question him about the crime. His counsel was not notified of this.

At the outset of their interrogation, the officers advised Appellant of his Miranda rights and informed him that they were there only to discuss the Marshall County allegations. With that understanding and without contacting or consulting his attorney, [Keysor] signed a waiver of his right to remain silent and voluntarily agreed to talk to Marshall County authorities. Despite their stated purpose to collect information only about the Marshall County allegations, the interrogation expanded to include questions pertinent to the pending Graves County charges. [Keysor] denied the allegations. When he said that a polygraph would confirm his innocence, the interrogating officers asked him to submit to a polygraph examination, and he did so. Eight days later, a polygraph examination was arranged by Marshall County police authorities. [Keysor] again waived his right to remain silent and submitted to the examination. Again, his appointed counsel was not informed of this procedure. During the interview with police that immediately followed the polygraph examination, [Keysor] made incriminating statements which the Commonwealth then decided to use in the pending Graves County prosecution.¹

When his counsel learned of this, a suppression motion was made, addressing only the admissibility of the statements in the Graves County trial. He argued that “the use of the statements in the upcoming Graves County trial would violate his right to counsel as explained in Michigan v. Jackson¹ and as thereafter adopted by this Court in Linehan v. Com.².”

The Graves Circuit Court granted the motion, and “Immediately thereafter, the Commonwealth requested a reconsideration of the issue because just days before the trial court's ruling, the United States Supreme Court decided Montejo v. Louisiana³ which expressly overruled Jackson.” The U.S. Supreme Court had “decided in Montejo that a defendant, charged with murder and represented by counsel, may nevertheless be approached by police for interrogation without the knowledge or presence of counsel, and with the defendant's knowing, voluntary, and informed consent, any resulting statements may be admitted against him at trial despite counsel's exclusion from the interrogation.” The Graves Circuit Court agreed and changed its latest ruling, thus again denying Keysor's suppression motion, reasoning the Kentucky Supreme Court had previously expressed “that the constitutional right to counsel under Section 11 provided no greater protections than the Sixth Amendment of the United States Constitution.”⁴ As such, the trial court agreed it was bound to follow the new precedent set by Montejo and allow the admission of Keysor's confessions made in the absence of counsel.

Keysor took a conditional guilty plea and appealed. The Kentucky Court of Appeals echoed the “the trial court's prediction that in light of Montejo [the Kentucky Supreme Court] would overrule Linehan” and upheld the denial of Keysor's motion. Keysor further appealed to the Kentucky Supreme Court.

ISSUE: May a confession taken by law enforcement from an individual about a crime be admitted against the individual, when the confession is taken when the individual is already in custody, has invoked their right to counsel at arraignment and is represented by counsel in another, related case, but that counsel is not notified nor is present?

¹ 475 U.S. 625 (1986).

² 878 S.W.2d 8 (Ky. 1994).

³ 556 U.S. 778 (2009).

⁴ “[T]he right of counsel guaranteed by Section 11 of the Kentucky Constitution is no greater than the right of counsel guaranteed by the Sixth Amendment of the United States Constitution . . .” Cain v. Abramson, 220 S.W.3d 276 (Ky. 2007) (quoting Cane v. Com., 556 S.W.2d 902 (Ky. App. 1977)).

HOLDING: No

DISCUSSION: The Kentucky Supreme Court noted that Keysor's situation "straddle[d] a dramatic shift in the United States Supreme Court's perception of the Sixth Amendment right to counsel." The Kentucky Supreme Court agreed that the most critical period for a criminal defendant was from arraignment through trial."⁵

The Court continued:

In Jackson, the Supreme Court merged the Fifth Amendment's right-to-counsel perspective as expressed in Edwards v. Arizona, with Sixth Amendment right-to-counsel principles.⁶ Edwards held that an accused person who had invoked his right to counsel could not be subjected to further interrogation by police "until counsel has been made available to him" or "unless the accused himself initiates further communication, exchanges, or conversations with the police." Thus, per Edwards, under the Fifth Amendment, police could not initiate a post-indictment interrogation of a defendant who had requested counsel or was represented by counsel. Statements obtained under those circumstances would be suppressed.

In Jackson, the Court ruled that once a "formal accusation" has been made, the suspect then become the accused, and "the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation." In 1991, in McNeil v. Wisconsin, the rule articulated in Jackson, which was itself "built upon established right to counsel principles," was reiterated, with the Court noting that "after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible."⁷ From this legal backdrop, Linehan was decided for Kentucky. Linehan, in fact, was "similar in any relevant aspect" to Keysor's case. In Linehan, the charges were consolidated and the question was "whether the incriminating statements obtained during the investigation of the second crime (but after he had been indicted and appointed counsel on the initial charges) could be used to convict him of the initial charges." It was decided that his waiver was not valid so as to allow the statements in a trial involving the first offenses, since he had been formally charged and was represented by counsel, in that case at the time he was questioned in the second case.

The Kentucky Supreme Court noted that Montejo was argued and decided on "social utility" reasoning, with one justice noting the constitutional protection afforded, with the cost-benefit of the rule not paying its way when balanced against the ability to find the truth. It noted "every constitutional protection provided to those the government would imprison imposes "substantial costs" upon the criminal justice system; that is so by design. Constitutional protections were put in place by the framers of the state and federal constitutions to hinder oppressive impulses by retarding the government's ability to incarcerate suspected offenders. Fairness, not expedience, is the touchstone of our criminal justice system. Few if any constitutional liberties will "pay their way" in terms of prosecutorial efficiency; they exist to make criminal prosecutions fair and just, not cheap and easy."

The Kentucky Supreme Court noted that in Escobedo v. Illinois, it had stated:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.⁸

⁵ Powell v. Alabama, 287 U.S. 45 (1932).

⁶ 451 U.S. 477 (1981).

⁷ 501 U.S. 171 (1991).

⁸ 378 U.S. 478 (1964).

The Kentucky Supreme Court agreed that, in the past, it had equated Kentucky's interpretation of right to counsel, in Section 11 of the Kentucky Constitution, to be equivalent to that guaranteed by the Sixth Amendment, that did not mean it was an "immutable rule of law." It further noted "maintaining and protecting the integrity of the attorney-client relationship is an important public policy of this Commonwealth." The Rules of Evidence and the Rules of Professional Conduct support this.

The Court continued:

Linehan and Jackson reinforced the attorney-client relationship guaranteed by Section 11 and nurtured by Kentucky public policy by barring the police from interceding between the accused and his attorney after formal prosecution had begun. The Montejo court, by discounting the social value of the attorney-client relationship in a cost-benefit analysis, completely disregarded the unavoidable deterioration of the right to counsel that results when prosecuting authorities are permitted to send police interrogators to conduct custodial interviews with accused persons about the pending charges without the knowledge of their attorneys.

The Court agreed nothing in its current decision barred "the use of evidence obtained when the defendant initiated the conversation with police." The Kentucky Supreme Court stated it had to reassess its usual adherence to interpretations of the Sixth Amendment by the federal courts as binding law, and noted, it did so in this case "because of the Supreme Court's abrupt recalibration of its perception of the Sixth Amendment."

In conclusion:

Based upon the foregoing considerations, [the Court] reaffirm the rationale of Linehan as a manifestation of the right to counsel under Section 11 of the Kentucky Constitution. In summary, once the right to counsel has attached by the commencement of formal criminal charges, any subsequent waiver of that right during a police-initiated custodial interview is ineffective. "Police and prosecutorial authorities are at liberty to question a willing suspect about new offenses without regard to whether there is prosecution pending on other charges, whether similar or different in nature, but they must be cognizant that the evidence thus obtained may not be used to incriminate him on pending charges wherein he is represented unless his counsel is present."

The Kentucky Supreme Court reversed the Kentucky Court of Appeals and reinstated the Graves Circuit Court's original decision in the case, which disallowed the admissions taken regarding the Marshall County allegations as evidence in the Graves County case. (Admissibility of the statements in the Marshall County case was not before the court.)

NOTE: In this case, the Kentucky Supreme Court elected to uphold a stricter interpretation of Kentucky's Constitution, Section 11, than the U.S. Supreme Court has held in the U.S. Constitution's equivalent provisions, the Fifth and Sixth Amendments. As such, although the U.S. Supreme Court allowed the admission of the information obtained in Montejo in federal cases, as a result of this holding, the Kentucky courts will not admit such confessions, statements or admissions in Kentucky state prosecutions.