

STATE OF NEW YORK: COUNTY OF ERIE
COUNTY COURT

PEOPLE OF THE STATE OF NEW YORK

v.

████████████████████

Defendant

Indictment No.: ██████████

DEFENDANT'S
POST-HEARING MEMORANDUM

This case involves the police use of a civilian, the Defendant's mother, as an agent. Police recruited her to obtain a statement from her son regarding claims that he had abused his daughter, and to secure his consent to talk to detectives about it. Police prepared her at length to talk to him: They informed her of the nature of their investigation into her son, showed her video of the victim's statement, asked her to talk to her son and gave her a list of phrases to employ when interviewing him, instructed her to tell them where and when contact would happen, instructed her to ask him to talk to them (detectives), met her just before her meeting with her son for final instructions, and instructed her to report back to them the contents of their conversation; police gave her a phone to use to record the conversation (which did not work), waited outside the venue while she spoke to her son, and specifically instructed her to tell her son that he did not need an attorney. [The testimony of the defendant's mother, in the Hearing Transcript for ██████████, establishes these facts.]

After this extensive preparation with police, defendant's mother interviewed her son, after which he spoke to detectives.

People v. Ray, 65 NY2d 282 (1985), held: "Private conduct...may become so pervaded by governmental involvement that it loses its character as such and invokes the full panoply of constitutional protections. Relevant indicia of state involvement, which may transform private conduct into state action, include: a clear connection between the police and the private investigation; completion of the private act at the instigation of the police; close supervision of the private conduct by the police; and a private act undertaken on behalf of the police to further a police objective." Ray, 65 NY2d at 286 (citations omitted).

People v. Stroman, 730 NY2d 612 (2001), citing Ray, held: "We agree with defendant that the court erred in finding that the victim was not acting as an agent of the police. The investigator asked the victim to call defendant; the telephone call was 'set up' by the police rather than defendant; and the investigator instructed the victim to discuss the allegations. Thus, there was a 'clear connection' between the police and the victim; the telephone call was completed 'at the instigation of the police'; the police exercised 'close supervision' of the telephone call; and the telephone call was 'undertaken on behalf of the police to further a police objective'". Stroman, 730 NY2d at 975 (citations omitted).

Under Ray and Stroman, the defendant’s mother was engaged in state action, and thus her behavior, as Ray holds, “invokes the full panoply of constitutional protections”. Why is that important? Because, as defendant’s mother is prepping with the detective *before* she marches off to interview her son, this happens: “And then I said [to the detective], Well, should I advise him when I’m having my conversation with him to get an attorney? And he [the detective] says, No, because if you do that, then this whole thing is not going to happen, we won’t be able to help him out...”...etc. [Hearing Transcript for February 14, 2022, page 10, lines 17 through 24.]

Then, *at* her interview with her son, *this* happens:

Q. ...Did he at any time ask you or did you at any time talk to him about getting a lawyer?

A. Yes. He asked me if he should get an attorney.

Q. What you say?

A. And I said, No, the detective told me that if you got an attorney now, anything that happened – they couldn’t make a deal if there was something going on, and that he should wait till after he talks to the detective.

[Hearing Transcript for ██████████, page 18, lines 9 through 16.]

Recall that under Ray and Stroman we must regard the defendant’s mother as an agent of the police, so that when *she* says or does something we must treat it as if *police* said or did it. We must ask, If a detective had done or said what she did or said, how would we react? Of course, this is a very natural question to ask here because when asked by her son if he needed counsel, *defendant’s mother gave exactly the reply the detective had instructed her to give.*

Imagine if a detective or a patrol officer, in response to the suspect’s question “Should I get a lawyer?”, replied, “Nah, don’t worry about it. After all, I can’t *help you* if you get a lawyer, buddy. Anyway, you can always talk to a lawyer *after* you give us a statement, so no worries!” How would we react? Police, through their agent, undertook to provide the defendant legal advice...bad legal advice...”advice” that happened to align very nicely with their investigative plans.¹

¹ Obviously, the cases allowing police to use deception in interviews involve deceptions of fact (such as the strength of the evidence) not deceptions of law (like whether you’re allowed to consult an attorney).

Now, I am not claiming an invocation of Right to Counsel. “Should I get a lawyer?” and similar questions do not amount to an invocation: too *equivocal*. So, I am not claiming the defendant invoked. Rather, I am claiming that the police *response* to his question (a response delivered through their agent), was misleading and false (he did, in fact, need a lawyer), and that that response essentially “smothered” his Right to Counsel. Even in the absence of any question about counsel or anything else, even if not in “reply” to anything, police may not preempt a person’s rights by giving them false and misleading (and self-serving) legal “advice” which is given *specifically to stop the exercise of a right*.

That last point is the crucial turn. Police instructed the defendant’s mother to tell him he did not need a lawyer *precisely to stop him from getting one*. Police purposely told the defendant not to obtain counsel *so that he would not obtain counsel*. In other words, this was not a misstep, it was a tactic. I want the Court to rule that police may not preemptively shut down a person’s exercise of a right by deceiving him into believing he has no need to exercise it.

Notably, there is a clear script here. When police are asked for legal advice, all they need do is read aloud their Miranda card, and if such questions persist all they need do is *repeat* reading aloud their Miranda card. That is the extent of their obligation and if they stick to it they are safe. When the defendant asked if he should get a lawyer, the obvious police response was “You have the right to a lawyer and if you cannot afford a lawyer one will be provided to you”, or in the alternative to say nothing at all. Instead of either of those sensible options, police said (through their agent): “Do not obtain counsel; you don’t need it”.

The *effect* of this is the important fact to stress and to keep in mind. Regarding getting counsel, police (through their agent) told the defendant this: “And I said, No, the detective told me that if you got an attorney now, anything that happened – they couldn’t make a deal if there was something going on, and that he should wait till after he talks to the detective.” Now, here’s the point: If he had gotten a lawyer, the rest of the interrogation by the police-agent or by the police themselves, *would not have happened*, as the detectives well knew: “And he [the detective] says, No, because if you do that [tell him he can get a lawyer], *then this whole thing is not going to happen...*” Any lawyer would have invoked his client’s Right to Silence. Police knew that. So they devised a plan to prevent it. That plan was: Tell the defendant he does not *need* a lawyer so that he

will not *get* one. The defendant' statement only occurred at all because the detective's plan to manipulate the defendant into not seeking counsel *worked*.

Under CPL 60.45(2)(b)(ii), a statement is "involuntary", and thus inadmissible, where it is taken "in violation of such rights as the defendant may derive from the constitution of this state or of the United States." The defendant's Right to Counsel was violated when police advised him, right at the start, that he did not need one. That violation infects all that came after. Therefore, all the defendant said after was taken in violation of a State and Federal constitutional right and was thus "involuntary" and thus inadmissible under CPL 60.45(2)(b)(ii).

[REDACTED]