FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1986
vs.	)	306
SHERRIE LYNN NELSEN,	)	5-452 84-1480
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (SR 14018) - Robert E. Sosalla and John F. Siebenmann, Judges.

The defendant appeals from her conviction, following a jury trial, for driving while her license was under suspension. **REVERSED.**

Charles Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, David L. Dorff, Assistant Attorney General, and Mary Vavroch, Assistant Linn County Attorney, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ., but considered en banc.

HAYDEN, J.

The defendant, Sherrie Lynn Nelsen, appeals from her conviction for driving while her license was under suspension. She alleges that certain incriminating statements made to her probation officer were obtained in violation of her constitutional right to counsel. Because of this, she claims any evidence concerning these statements was inadmissible at trial. We reverse.

On April 24, 1984, defendant's probation officer, Andrew McInroy, allegedly saw her driving a motor vehicle in Cedar Rapids. At that time, Nelsen's license had been suspended and she was on probation for a previous offense; a condition of her probation was that she not violate her license suspension.

McInroy subsequently wrote to the county attorney "explaining the circumstances." On May 4, 1984, the county attorney filed a formal complaint in district court charging Nelsen with "driving while license under suspension" in violation of Iowa Code section 321B.38. A formal summons to appear was also issued the same day. Three days later, McInroy called Nelsen into his office to discuss the incident. It was during this meeting that defendant made the incriminating statements.

At a jury trial, the probation officer testified, over objection, about the incriminating admissions made in his presence. Nelsen was ultimately found guilty and has appealed from the resulting conviction.

The sole claim raised on appeal is that Nelsen's incriminating statements were obtained in violation of her constitutional right to counsel. In resolving this issue, two questions must be answered: 1) had the right to counsel attached at the time the statements were made, and 2) if the right had attached, did Nelsen waive it?

The right to counsel assured by the sixth amendment attaches at the time that adversary judicial proceedings are initiated against a person by way of

a formal charge, preliminary hearing, indictment, information or arraignment. Kirby v. Illinois, 406 U.S. 682, 688-89, 92 S. Ct. 1877, 1881-82, 32 L. Ed. 2d 411, 417 (1972). The Supreme Court has emphasized that "[t]hat the initiation of judicial criminal proceedings is far from a mere formalism." Id. at 689, 92 S. Ct. at 1882, 32 L. Ed. 2d at 417-18. At certain critical pretrial proceedings, "the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or both." United States v. Ash, 413 U.S. 300, 310, 93 S. Ct. 2568, 2573, 37 L. Ed. 2d 619, 627 (1973). In such situations, the results of confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, 388 U.S. 218, 224, 87 S. Ct. 1926, 1930, 18 L. Ed. 2d 1149, 1156 (1967).

The defendant in the present action argues that adversary judicial proceedings have commenced when the complaint is filed and a summons has been issued. The United States Supreme Court has never addressed this issue. However, we find State v. Johnson, 318 N.W.2d 417 (Iowa 1982), to be particularly instructive. In Johnson, the Iowa Supreme Court characterized a complaint as an accusatory instrument and indicated that the filing of a complaint may constitute the commencement of adversary judicial proceedings. Id. at 434-35. The determinative factor is the degree of prosecutorial involvement. Id. at 435. In Johnson, the county attorney was involved in the filing of the complaint and procuring of the arrest warrant. Id. Due to this involvement, the court reasoned that the proceedings could not be characterized as purely investigatory. Id. "The forces of the State had solidified in a position adverse to the defendant . . . ." Id.

The Johnson court did not resolve the issue of whether sixth amendment rights automatically attach upon the filing of a complaint. Nor do we find it necessary to do so today. In the present case, the degree of prosecutorial

involvement was sufficient to trigger the defendant's constitutional right to counsel. As in Johnson, it was the county attorney who filed the complaint. Furthermore, a magistrate made a probable cause determination, approved the prosecutor's complaint, and issued a summons ordering the defendant to appear in court and answer to the charge.

The only real distinction between the present case and Johnson is the absence of an arrest warrant. However, we do not consider this to be significant. Since Nelsen was charged with a public offense, an arrest warrant was not forthcoming. See Iowa Code § 804.1 (1985). Rather, a summons was issued, serving the analogous purpose of requiring the defendant to answer to the complaint.

Based on these facts, we hold that Nelsen's sixth amendment rights had attached. At the time the complaint was filed and the summons was issued, the prosecutor was clearly acting in an adversarial rather than investigatory capacity. Thus, in accordance with Johnson, Nelsen had the constitutional right to counsel.[1]

Our analysis, however, does not end here. The question remains whether the probation officer's meeting with Nelsen violated her right to counsel.

The attachment of sixth amendment rights does not in and of itself require that a defendant be advised of the right to counsel. This constitutional protection is guaranteed by the fifth amendment, not the sixth amendment. In the present case, there is no claim by defendant on appeal that her fifth amendment rights have been violated. However, the sixth amendment imposes an affirmative

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[1] Contrary to the State's assertion, the fact that defendant was not "in custody" is not a significant factor in a sixth amendment analysis. The United States Supreme Court has specifically indicated that this is not a prerequisite to the attachment of the right to counsel. United States v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2188, 65 L. Ed. 2d 115, 124 (1980).

duty on the State separate and distinct from the fifth amendment right to a Miranda warning. Once the right to counsel has attached, the State must refrain from "intentionally creating a situation likely to induce [a defendant] to make incriminating statements without the assistance of counsel." United States v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 125 (1980).

In Henry, incriminating statements were elicited by a paid government informant acting as a fellow inmate of the defendant's. Id. at 266-67, 100 S. Ct. at 2184-85, 65 L. Ed. 2d at 119-20. In holding that the defendant's sixth amendment rights had been violated, the Supreme Court reasoned that "conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents." Id. at 273, 100 S. Ct. at 2188, 65 L. Ed. 2d at 124. The creation of this situation, in and of itself, violated the sixth amendment.

Factually, the situation before this court is distinguishable from Henry. The incriminating evidence was not elicited by a paid government informant. Rather, the present case involves a probation officer which, as defined by statute, is a peace officer. See Iowa Code §§ 804.4(7), 907.2 (1985). We find, however, that the policy reasons set forth in Henry are equally applicable here. A situation was created where Nelsen made incriminating statements to her probation officer which she would not have made to someone who was obviously associated with the prosecution. In essence, the very fact that the probation officer created this situation violated Nelsen's sixth amendment rights.

The State argues that there was no attempt to deliberately elicit incriminating statements from the defendant. Instead, it is claimed that Nelsen's admissions were made entirely independent of any attempt to secure such statements. We are unpersuaded by this analysis.

This is not a situation where the defendant had an informal conversation with someone and voluntarily made incriminating statements. Nelsen had a probationary obligation to meet with McInroy and, more importantly, had the obligation to be truthful. In requesting a meeting with the defendant and discussing the allegations of criminal conduct with defendant, McInroy used his position as a probation officer to take advantage of Nelsen's probationary obligations and create a situation likely to induce incriminating statements.

The United States Supreme Court recently held that a defendant's sixth amendment rights were violated when defendant made incriminating statements to a joint defendant who was given a recording device and instructed to try to get evidence against him. Maine v. Moulton, No. 84-786, slip op. at 16 (U.S. Sup. Ct. Dec. 10, 1985). There the court said:

> However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.

In the case at bar, the State not only intentionally created the opportunity for defendant to incriminate herself, but virtually insisted that she do so.

In accordance with the United States Supreme Court's decisions in Henry and Moulton, we hold that Nelsen's sixth amendment rights were violated. A situation was intentionally created which would induce the defendant to make incriminating statements. This violates Nelsen's right to counsel. The conviction is therefore reversed.

REVERSED.

All judges concur except Donielson, J., who dissents and Snell, J., who specially concurs.

I respectfully dissent. I raise two concerns before this court embarks upon what may well be uncharted constitutional waters. Even though the offense involved in this case (operating a motor vehicle with a suspended license) is not the most severe under our laws, the principle involved will undoubtedly have far-reaching ramifications for law enforcement officers and probation officers throughout this state. It appears that the State of Iowa may, once again, have provided fertile ground for a sixth amendment right to counsel issue of national dimensions. Cf. Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

I.

The Supreme Court has indicated that in the sixth amendment context "once the right to counsel has attached and been asserted, the state must of course honor it." Maine v. Moulton, No. 84-786, slip op. at 10 (U.S. Sup. Ct. Dec. 10, 1985) (emphasis added). Later in the same opinion, the Court states "this guarantee includes the state's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." Id. at 15. Rather than brushing aside or ignoring this language as my colleagues in the majority are inclined to do, I am convinced this language was included in the opinion, not as verbiage nor was the statement taken out of context, but because it is the law. This language of asserting and invoking appears, not just once, but twice in the opinion (not including this language which is also present in the syllabus by the reporter of decisions) and must be accorded its due weight. Although Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and United States v. Henry, 447 U.S. 264, 100 S. Ct. 2185, 65 L. Ed. 2d 115 (1980), cases involving undisclosed government informants who unbeknown to the defendants obtained incriminating statements, only

mentioned the "attach" requirement, I do not find this presenting a fatal blow to my position. I find substantial authority to persuade me that the assertion of the right to counsel was not discussed in either Massiah or Henry because both of the defendants in those cases had already retained counsel well before any damaging statements were made. On the other hand, a case involving a direct confrontation between a police officer and a defendant who had retained counsel, which is more factually analogous to our situation than Massiah and Henry, was Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). The court in Williams, when addressing the sixth amendment right to counsel issue, stated:

> [Defendant's] statements while in the car that he would tell the whole story after seeing McKnight [his attorney] in Des Moines were the clearest expressions by Williams himself that he desired the presence of an attorney before any interrogation took place. But even before making these statements, Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey. Williams knew of that agreement and, particularly in view of his consistent reliance on counsel, there is no basis for concluding that he disavowed it.
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> Despite Williams' express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams.

430 U.S. at 405, 97 S. Ct. 1242-43, 51 L. Ed. 2d at 440.

The assertion requirement appears to be attributable to the case of Michigan v. Mosley, 423 U.S. 96, 110 n.2, 46 L. Ed. 2d 313, 96 S. Ct. 321 (White, J., concurring in result) ("[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view

that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.") quoted with approval in Brewer v. Williams.

The development of the law in this area has been summarized as follows:

> Edwards v. Arizona, [451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)] held only that it was impermissible to infer a waiver by an accused of his Sixth Amendment right to counsel after he "has clearly asserted his right to counsel," 451 U.S. at 485, 101 S. Ct. at 1885. Further interrogation would then be inconsistent with Miranda. However, unless and until the accused asks for a lawyer he may waive his procedural Miranda rights, see Michigan v. Mosley, 423 U.S. 96, 104 n. 10, 96 S. Ct. 321, 326 n. 10, 46 L. Ed. 2d 313 (1975); id. at 109-11, 96 S. Ct. at 329-30 (White, J., concurring).

United States v. Terry, 702 F.2d 299, 317-18 (2d Cir. 1983). See also Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) ("The question of whether a waiver of the right to counsel is possible once that right has been asserted, but before consultation with an attorney, has not been decided by this Court, and not directly by the Supreme Court. However, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 624 (1966), and Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975) (White, J., concurring), strongly suggest that there is a per se rule barring custodial interrogation of a suspect after a request for counsel has been made.") (emphasis added) The language of this aforementioned authority supports the proposition in Moulton, (which incidentally I feel does not need any buttressing because it is the most recent ruling by the United States Supreme Court) that attaching and asserting the right to counsel is a prerequisite.

II.

Moulton states a clear skepticism of deliberate elicitations induced by the prosecution and police. I am not, however, convinced that a probation officer

falls into the same portion of the legal spectrum for assertion of right to counsel under the sixth amendment. While such questioning by the police and prosecution is at an opposite end of the legal spectrum from questioning by a private citizen acting independently, in light of Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984), reh'g denied 466 U.S. 945, 104 S. Ct. 1932, 80 L. Ed. 2d 477 (1984), I believe a probation officer, not acting at the direction of the prosecution or police, who independently questions a probationer is not the type of peace officer which raises sixth amendment issues as in Brown, Massiah, Henry, and Moulton.

Although Murphy involved a fifth amendment issue which is not raised and therefore not an issue on this appeal, instructive language is contained on the issue presented for purposes of fifth and sixth amendment analysis regarding a defendant who fails to assert constitutional right to counsel or right against self-incrimination, I find the constitutional analysis to be very compatible. The Murphy court indicated:

> We note first that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. . . . It has long been recognized that "[t]he Constitution does not forbid the asking of criminative questions," and nothing in our prior cases suggests that the incriminating nature of a question, by itself, excuses a timely assertion of the privilege.
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> Thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. If he asserts the privilege, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without at that time being assured that neither it nor its fruits

> may be used against him" in a subsequent criminal proceeding. (citations omitted)

465 U.S. at 427-29, 104 S. Ct. at 1142-43, 79 L. Ed. 2d at 419-20. As to the coercive nature of questioning by a probation officer as compared to custodial interrogation, the reasons advanced to explain why defendant did not assert his constitutional rights was unilaterally dismissed as follows:

> First, the probation officer could compel Murphy's attendance and truthful answers. The Minnesota Supreme Court failed to explain how this transformed a routine interview into an inherently coercive setting. . . .
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> Second, the probation officer consciously sought incriminating evidence. We have already explained that this factor does not give rise to a self-executing privilege. . . .
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> Third, Murphy did not expect questions about prior criminal conduct and could not seek counsel before attending the meeting. But the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality.
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> Fourth, there were no observers to guard against abuse or trickery. . . . A probationer cannot pretend ignorance of the fact that his probation officer "is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. Absent some express or implied promise to the contrary, he may also be charged with knowledge that "the probation officer is duty bound to report wrongdoing by the [probationer] when it comes to his attention, even if by communication from the [probationer] himself.

465 U.S. at 431-32, 104 S. Ct. at 1144-45, 79 L. Ed. 2d at 422-23 (citations omitted). Thus, a probation officer, while retaining the trappings of a peace officer, acting at his own behest is not in the same legal category as the prosecution and police for sixth amendment purposes.

I take strong issue with the majority's contention that defendant faced a dilemma of facing a penalty when addressing the questions asked of her by the probation officer. Murphy indicates a defendant is not placed in a no-win situation during such questioning. I, like the court in Murphy, do not believe

that the potential revocation of probation hangs like the sword of Damocles above a probationer's head when questioned.

Applying this authority to the facts presented, even if the defendant's right to counsel attached prior to her meeting with the probation officer, she never asserted such a right at any time prior to the conclusion of the probationary meeting. The defendant did not retain any counsel during such questioning. As Murphy indicates, there is nothing so inherently coercive about questioning from a probation officer which vitiates the probationer's failure to assert her constitutional rights.

In summary, given the analytical framework under the sixth amendment that the right of counsel must attach and be asserted as provided in Moulton, defendant cannot justify her failure to assert her right to counsel on the ground that she was questioned by her probation officer because Murphy holds such a setting is not inherently coercive. Because defendant did not assert her right to counsel during questioning by her probation officer, her statements were properly admitted into evidence. Even if she had asserted her right, Murphy still would have controlled this situation so that the statement would have been properly admitted.

SNELL, J. (specially concurring)

I concur in the result reached by the majority that the State violated Nelsen's constitutional right to counsel. The Iowa statutes provide that probation officers are peace officers. Iowa Code § 907.2 (1985). Iowa Code section 801.4(7) (1985) also defines peace officers to include probation officers.

Andrew McInroy is the probation officer in charge of supervising defendant's conditions of probation. As such, he was employed and paid by the government and is an officer of the court. He not only observed her driving the car, but summoned her to meet with him for the specific purpose of confronting her with an accusation that she violated her probation conditions. That condition was that she wouldn't violate her license suspension by driving a car. In answering her probation officer's accusation, defendant incriminated herself by saying, "Maybe I shouldn't be so cute. People wouldn't recognize me." At trial, McInroy testified that defendant said this to him and also that she admitted driving.

During the meeting with defendant Nelsen, McInroy told her he had written to the county attorney and that charges were going to be filed. In fact, a formal complaint had already been filed in district court charging defendant with driving while license was under suspension. The violation of Iowa Code § 321B.38 (1983) is a serious misdemeanor. The filed formal complaint and formal summons to appear occurred three days before McInroy interrogated defendant. But defendant didn't know this and wasn't told of it by the probation officer. Despite this void of knowledge that she had a right to counsel, she must assert it or lose it, according to the dissent. How you assert a right you know not of is a puzzlement.

Yet this is no more mysterious than how a peace officer is not really a peace officer. The dissent finds this phenomenon occurs when a probation officer obtains incriminating information by interrogating the defendant without being

ordered to do so by the county attorney. Thus, while retaining the trappings of a peace officer, he is acting at his own behest, says the dissent—sort of a frolic of his own.

This scenario for obtaining incriminating information is more reprehensible than in U.S. v. Henry, 447 U.S. 264, 274, 100 S. Ct. 2183, 2189, 65 L. Ed. 2d 115, 125 (1980). In Henry, the government got information by stealth. Here it was by stealth and coercion.

Defendant had an obligation to be truthful with her probation officer. Thus, she should answer truthfully and, with McInroy's testimony, have her probation revoked; or not answer and have her probation revoked. It is hard to imagine a more effective tool for circumventing a constitutional right. And a "realistic threat of self-incrimination," as quoted from Murphy by the dissent, is certainly present.

I believe defendant's right to counsel was violated by the probation officer's actions, whether she knew it existed or not, whether he knew it existed or not. I would reverse and remand for new trial.