

Recent Case Report

People v. Viray

(2005) 134 Cal.App.4th 1186

ISSUE

Did a prosecutor violate the defendant's Sixth Amendment right to counsel when, after filing a criminal complaint against her, he questioned her about the crime?

FACTS

Viray attempted to steal her elderly aunt's house in Seaside by tricking her into signing a deed. When the aunt's attorney discovered the fraud, he notified Seaside police who, after conducting an investigation, referred the matter to the Monterey County District Attorney's Office. A prosecutor subsequently filed a criminal complaint against Viray, charging her with financial elder abuse.¹

The prosecutor arranged to meet with Viray in his office shortly before she was to be arraigned on the charge. As the meeting began, Viray confirmed that she was not yet represented by counsel. The prosecutor and his investigator then questioned her "at length and in detail." At Viray's arraignment, a public defender was appointed to represent her.

When the case went to trial, some of the statements Viray made to the prosecutor were used against her. She was convicted.

DISCUSSION

Viray contended that her statements should have been suppressed. Although she was not "in custody" for *Miranda* purposes, she contended her statements were obtained in violation of her Sixth Amendment right to counsel. The court agreed.

"CHARGING": Under the Sixth Amendment, a suspect has a right to have counsel present whenever officers question him or otherwise attempt to elicit incriminating statements about a crime with which he has been "charged."² The issue in *Viray* was whether a suspect becomes "charged" in state court at the moment a prosecutor files a criminal complaint against him, or whether it occurs later at, for example, the arraignment on the charge.

Although the United States Supreme Court has not directly ruled on the issue, it has strongly suggested that "charging" occurs when a complaint is filed. For example, in *Kirby*

¹ Penal Code § 368(e).

² See *Davis v. United States* (1994) 512 U.S. 452, 456-7 ["The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel."]; *Arizona v. Roberson* (1988) 486 U.S. 675, 685 ["[The Sixth Amendment right to counsel] arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him."]; *People v. Carter* (2003) 30 Cal.4th 1166, 1210.

v. *Illinois* the Court ruled that a person becomes “charged” when “judicial criminal proceedings” have been initiated against him by the government.³ It is at that point, said the Court, that “the government has committed itself to prosecute” and the person “finds himself faced with the prosecutorial forces of organized society.” The Court elaborated on this theme in *Moran v. Burbine* when it said that a person becomes “charged” with a crime “when the government’s role shifts from investigation to accusation.”⁴

Based largely on these cases, California courts have generally ruled, with little need for discussion, that the filing of a criminal complaint triggers the Sixth Amendment right to counsel.⁵ These are sound rulings. After all, when a prosecutor’s office files a criminal complaint against a person, it is nothing less than a formal announcement that it has “committed itself to prosecute” that person.

Consequently, the *Viray* court ruled that, for Sixth Amendment purposes, Viray had been “charged” with financial elder abuse when the prosecutor questioned her about the crime.

SIXTH AMENDMENT WAIVER: Sixth Amendment rights, like *Miranda* rights, may be waived. This can occur, however, only if both of the following circumstances existed:

(1) **NO INVOCATION:** The suspect must not have invoked his Sixth Amendment rights.

An invocation occurs if the suspect hired an attorney to represent him on the charged case, or if he asked a judge to appoint counsel to represent him.⁶

(Because suspects usually request court-appointed counsel when they are arraigned or have already retained counsel, officers are rarely able to initiate questioning after arraignment.)

(2) **WAIVER:** To obtain a waiver, officers must do two things: (1) advise the suspect of his Sixth Amendment rights, and (2) obtain a statement from him that he is now waiving them. Although there is a special Sixth Amendment admonition that

³ *Kirby v. Illinois* (1972) 406 U.S. 682, 689. ALSO SEE *Maine v. Moulton* (1985) 474 U.S. 159 170; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175; *Moore v. Illinois* (1977) 434 U.S. 220, 228 [prosecution “commenced” “when the victim’s complaint was filed in court”]; *People v. Clair* (1992) 2 Cal.4th 629, 657-8; *People v. Sully* (1991) 53 Cal.3d 1195, 1233-4; *People v. Case* (1980) 105 Cal.App.3d 826, 833.

⁴ (1986) 475 U.S. 412, 430.

⁵ See *People v. Superior Court (Sosa)* (1983) 145 Cal.App.3d 581, 593 [“A prosecution has reached a critical stage after a complaint has been filed.”]; *People v. Engert* (1987) 193 Cal.App.3d 1518, 1525 [“At the time the police interrogated Engert, a complaint had been filed against him . . . The People apparently concede that the Sixth Amendment right to counsel had attached at the time of questioning.”]; *People v. Lebell* (1979) 89 Cal.App.3d 772, 778 [the defendant “was by a filed complaint actually charged with commission of that crime. An adversary judicial process had been commenced against him as a defendant and he was entitled to counsel before the conversation was commenced.”]; *People v. Wader* (1993) 5 Cal.4th 610, 653-4.

⁶ See *Michigan v. Harvey* (1990) 494 U.S. 344, 352 [“To be sure, once a defendant obtains . . . counsel as respondent had here, analysis of the waiver issue changes.”]; *Brewer v. Williams* (1977) 430 U.S. 387, 405; *Michigan v. Jackson* (1986) 475 U.S. 625, 631; *Patterson v. Illinois* (1988) 487 U.S. 285, 290, fn.3; *People v. Wader* (1993) 5 Cal.4th 610, 654 [“Although in this case the Sixth Amendment right to counsel had attached in the capital case at the time of the interview, defendant fails to demonstrate that it had been invoked. The record does not show that defendant asked for a lawyer to represent him in the capital case at or before his interview”]; *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1159-60.

officers may use,⁷ the usual procedure is to simply advise the suspect of his *Miranda* rights, even if the suspect is not in custody. This is because the United States Supreme Court has ruled that the language in the *Miranda* warning that explains the suspect's right to an attorney also conveys the "sum and substance" of his Sixth Amendment rights.⁸

Although Viray had not invoked her rights by retaining counsel, neither had she waived them. As the court pointed out, "Here the prosecutorial interrogators made no apparent effort to advise defendant of her right to counsel or to secure a knowing and intelligent waiver of same. There were no admonitions and nothing resembling a free and voluntary relinquishment of that right."

Accordingly, the court ruled that Viray's statements to the prosecutor should have been suppressed.

COMMENT

As a practical matter, officers seldom need to obtain a Sixth Amendment waiver. This is because most suspects who are questioned about charged crimes have already been arrested and are therefore "in custody" for *Miranda* purposes. Thus, officers will have obtained a *Miranda* waiver which, as noted, also constitutes a Sixth Amendment waiver. As *Viray* illustrates, however, in those rare cases where officers want to question a charged but not-yet-arrested suspect, a Sixth Amendment or *Miranda* waiver is required.

Finally, it should be noted that many Sixth Amendment problems can be avoided if, instead of seeking a criminal complaint, officers apply for a pre-complaint arrest warrant, commonly known as a *Ramey* Warrant. Because prosecutors do not commit themselves to prosecute a person by seeking a *Ramey* warrant, the issuance of a *Ramey* warrant does not constitute "charging."⁹ POV

⁷ **NOTE:** The admonition resembles the *Miranda* warning but without the "right to remain silent" language; e.g., (1) you have the right to consult with an attorney before questioning; (2) you have the right to have counsel present during questioning; (3) if you cannot afford an attorney, one will be appointed for you at no cost, and (4) anything you say may be used against you in court. See *Patterson v. Illinois* (1988) 487 U.S. 285, 293-4

⁸ See *Patterson v. Illinois* (1988) 487 U.S. 285, 293 ["By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, [the officer] conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him."].

⁹ See *United States v. Ash* (1973) 413 U.S. 300, 303, fn.3; *People v. Wheelock* (2004) 117 Cal.App.4th 561, 565; *People v. Case* (1980) 105 Cal.App.3d 826, 833-4; *People v. Johnson* (1992) 3 Cal.4th 1183, 1222-3.