

People v. Martin  
(May 14, 2002) \_\_\_ Cal.App.4th \_\_\_

## ISSUE

Did officers violate Martin's Sixth Amendment right to counsel when, knowing he was represented by an attorney as to a charged murder case, they provided his ex-girlfriend with a tape recorder and asked her to record her telephone conversations with him?

## FACTS

Martin shot and killed Jose Ramon in San Bernardino. The apparent motive: Ramon had revealed to friends that Martin was having an affair with Ms. Camolinga. Based on circumstantial evidence, Martin was arrested and charged with the murder.

After being held to answer on the murder charge, Martin was released on bail. He then began to a campaign designed to scare Ms. Camolinga, apparently hoping to convince her not to cooperate with prosecutors. For example, he followed her when she went home to visit her family in Mexico and secretly took pictures of her and her children. Upon her return, he showed her the photos, apparently to demonstrate how easy it would be to hurt her or her children. He continued to follow her and her children, sometimes phoning her and describing what she and her daughters were wearing that day.

Because of Martin's threats, Ms. Camolinga took her daughters and moved to Ceres. Although the direct threats stopped, something just as terrifying happened: Her boyfriend, Cosio, was murdered. Although Martin was not charged with Cosio's murder, Ms. Camolinga figured he had done it, and she believed that she and her daughters might be next. So, finally, she went to the police.

At the request of a San Bernardino detective, Ms. Camolinga started recording her telephone conversations with Martin. Officers gave her a tape recorder, "told her how to install it, and instructed her to turn it on when [Martin] called." The detective later testified that, although the threats and the murder of Ramon were closely related, he was at that point "investigating the crime of intimidating witnesses," and that the purpose of recording the phone calls was "to document the threats made to her at the time." He acknowledged, however, that he did not instruct Ms. Camolinga to avoid discussing the murder of Ramon.

According to the Court of Appeal, Ms. Camolinga "turned out to be a very good questioner . . . she was a very active interrogator who conducted a very sophisticated interrogation on her own." Significantly, she did not limit her questions to the threats she'd received—she also "delved deep" into Martin's murder of Ramon. Some of Martin's statements to Ms. Camolinga were highly incriminating and were played to the jury during Martin's murder trial. He was convicted.

## DISCUSSION

It is a violation of the Sixth Amendment for a police officer or police agent to "deliberately elicit" an incriminating statement from a defendant concerning a

crime with which he has been charged.<sup>1</sup> Citing this rule—which applies regardless of whether the suspect is in or out of custody—Martin contended his statements must be suppressed. Because it was apparent that Ms. Camolinga had “deliberately elicited” incriminating statements from him, Martin would be entitled to a suppression order if, (1) Ms. Camolinga was acting as a “police agent” when she questioned him, and (2) she questioned Martin about the charged murder.

“Police agent?”

A person will be deemed a “police agent” if, (1) he was acting at the request or under the direction of an officer,<sup>2</sup> or (2) he was given an incentive by officers to obtain incriminating information from the suspect.<sup>3</sup> Although it was true that the detective requested Ms. Camolinga to tape record her conversations, the court noted that he did not ask her to question Martin or otherwise seek to elicit incriminating statements from him. Said the court, “[T]he police did nothing more than facilitate the recording of the conversation.”<sup>4</sup> Furthermore, “Ms. Camolinga undertook her interrogation on her own, and the officers did not know that she would do so.” Thus, the court ruled that Ms. Camolinga was not acting as a police agent.<sup>5</sup>

Questioning about “charged” crime

Even if Ms. Camolinga had been deemed a police agent, her questioning of Martin would not have violated the Sixth Amendment because her questions pertained to the uncharged crime of intimidating witnesses—not the charged murder of Ramon. Although it was true that Martin used the murders of Ramon and Cosio to help intimidate Ms. Camolinga, the court noted that both the U.S. and California Supreme Courts have consistently ruled that questioning

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<sup>1</sup> See *Massiah v. United States* (1964) 377 US 201; *United States v. Henry* (1980) 447 US 264; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1442; *People v. Williams* (1997) 16 Cal.4th 153, 203-4; *In re Neely* (1993) 6 Cal.4th 901, 915; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247, 1249; *People v. Frye* (1998) 18 Cal. 4th 894, 993. **NOTE:** Although a defendant may waive his Sixth Amendment rights, no waiver occurred here—nor could it—because the questioning was covert.

<sup>2</sup> See *People v. Moore* (1985) 166 Cal.App.3d 540, 546; *People v. Cribas* (1991) 231 Cal.App.3d 596; *People v. Whitt* (1984) 36 Cal.3d 724; *People v. Miranda* (1987) 44 Cal.3d 57, 86; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1198; *Maine v. Moulton* (1985) 474 US 159; *In re Neely* (1993) 6 Cal.4th 901, 915-8; *People v. Williams* (1997) 16 Cal.4th 153, 203-4; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1247.

<sup>3</sup> See *U.S. v. Henry* (1980) 447 US 264, 270-1; *Maine v. Moulton* (1985) 474 US 159, 174; *People v. Superior Court (Sosa)* 145 Cal.App.3d 581, 598; *People v. Whitt* (1984) 36 Cal.3d 724, 744; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Howard* (1988) 44 Cal.3d 375, 402; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241 [“Absent evidence of direct motivation by police in this case, or of a *prior* working relationship between [the informant] and the authorities from which such encouragement might be inferred, there is no basis to hold the police accountable for [the informant’s] decision to question defendant.”]; *People v. Williams* (1997) 16 Cal.4th 153, 204 [incentive to question suspect not established merely because informant later received favorable treatment].

<sup>4</sup> Citing *People v. Frye* (1998) 18 Cal. 4th 894, 993.

<sup>5</sup> **NOTE:** To the extent Ms. Camolinga’s state of mind might be relevant to this issue, the court noted that she testified her purpose in recording the conversations was to “document her fear of defendant and the threats he had been making.”

pertaining to an uncharged crime does not violate the Sixth Amendment even if the crime was closely related to a charged crime.<sup>6</sup> Said the court, “The fact that the officers were investigating a new crime, witness intimidation, means that the Sixth Amendment right to counsel had not attached to that investigation, even if it was closely related to the murder investigation.”

Martin’s conviction was affirmed.

#### DA’s COMMENT

This was a close case. The Court of Appeal essentially ruled that the trial court’s interpretation of the facts was permissible, although it noted that an interpretation in Martin’s favor might also have been upheld.

To avoid this issue, officers who arrange to record conversations between charged suspects and civilians should consider instructing the civilian to ask no questions about the crime with which the suspect is charged. Instead, the civilian will be told to simply listen. As noted in *California Criminal Investigation*, “A police agent does not ‘deliberately elicit’ if he acts merely as a passive listener, ‘listening post,’ or ‘ear,’ and simply reports the defendant’s statement to the police.”<sup>7</sup>

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<sup>6</sup> Citing *Texas v. Cobb* (2001) 532 US 162; *People v. Slayton* (2001) 26 Cal.4<sup>th</sup> 1076.

<sup>7</sup> Citing *Kuhlman v. Wilson* (1986) 477 US 436, 459; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1444; *People v. Pitts* (1990) 223 Cal.App.3d 606, 848; *People v. Cribas* (1991) 231 Cal.App.3d 596, 604; *People v. Hovey* (1988) 44 Cal.3d 543, 559-61; *People v. Howard* (1988) 44 Cal.3d 375, 399-402; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240; *People v. Talamantez* (1985) 169 Cal.App.3d 443; *In re Neely* (1993) 6 Cal.4<sup>th</sup> 901, 915; *People v. Williams* (1997) 16 Cal.4<sup>th</sup> 153, 205.