University of Baltimore Law Forum

Volume 18
Number 1 *Fall, 1987*

Article 11

1987

Recent Developments: Arizona v. Mauro: Police Actions of Witnessing and Recording a Pre-Detention Meeting Did Not Constitute an Interrogation in Violation of Miranda

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arrest." S. Rep. No. 98-225, p. 6-7.

The Court found that the already compelling interest in preventing crime is heightened when the government has convincing proof that the arrestee presents a demonstrable danger to the community. "Under these narrow circumstances, society's interest in crime prevention is at its greatest." *United States v. Salerno,* 107 S.Ct. 2095 at 2103.

> When the government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).

United States v. Salerno, 107 S.Ct. at 2103. The Court thus concluded there was no facial violation of substantive due process.

Turning to the facial challenge against the procedures, the Court stated that "[t]o sustain [the procedures] against such a challenge, we need only find them "adequate to authorize the pretrial detention of at least some persons charged with crimes." *Id.* at 2103, *quoting Schall v. Martin,* 467 U.S. 253 (1984). The Court then went on to detail the procedures called for under the Act.

Detainees have the right to counsel, to testify, present information by proffer or otherwise, and cross-examine witnesses. The government has the burden and must prove its case by clear and convincing evidence. Section 3142(F); and the judge must include written findings. §3142(i). There is also immediate appellate review. §3245(c).

The Court concluded that the extensive safeguards were sufficient to repel a facial challenge against the procedures.

The Court turned finally to respondent's challenge based on the excessive bail clause of the eighth amendment. The Court stated that the "[p]rimary function of bail is to safeguard the Courts' role in adjudicating the guilt or innocence of defendants...." *United States v. Salerno,* 107 S.Ct. at 2104. However, the Court refused to interpret the bail clause in such a fashion as to make bail available in all circumstances.

The Court stated that, "[T]he Eighth Amendment does not prevent Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable." *United States v. Salerno,* 107 S.Ct. at 2105, *quoting Carlson v. Landon,* 342 U.S. 524, 545-546 (1952).

Thus, the Court expressly empowered Congress to impose other considerations other than questions of flight when deciding whether to allow an arrestee out on bail.

> We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.

United States v. Salerno, 107 S.Ct. at 2105.

In sum, the Supreme Court has found that Congress may constitutionally impose considerations other than flight to the decision of whether an arrestee is bail eligible. Where the considerations are compelling, the Court will defer to the will of Congress.

—Michael Scott Friedman

Arizona v. Mauro: POLICE ACTIONS OF WITNESSING AND RECORDING A PRE-DETENTION MEETING DID NOT CONSTITUTE AN INTERROGATION IN VIOLATION OF *MIRANDA*

In Arizona v. Mauro, — U.S. —, 107 S.Ct. 1931 (1987), the United States Supreme Court held that an "interrogation" did not result from police actions of recording and witnessing a predetention meeting between the accused and his spouse. In reversing a judgment of the Arizona Supreme Court, the Court decided that Mauro's invocation of his *Miranda* rights did not extend any privilege of confidentiality to remarks made to his wife in a "private" meeting arranged by police at the insistence of the defendant's spouse.

After admitting to police that he had murdered his son, William Carl Mauro was arrested and advised of his constitutional rights under *Miranda v. Arizona,* 384 U.S. 436 (1966). Mauro was twice read his right to refuse to make any statement without an attorney present. At Mauro's request, police interrogation immediately halted.

Meanwhile in another room at the police station, Mrs. Mauro was also being questioned concerning the murder of her child. After questioning, she became adamant in her demand to meet with her husband. Although reluctant at first, the police consented to the meeting only on the condition that an officer be present. The Mauros were not consulted prior to their meeting, and their brief conversation was recorded by a tape recorder within their plain view. During the meeting, Mrs. Mauro expressed despair, while Mr. Mauro advised her not to answer any questions until an attorney was present. Mauro, 107 S.Ct. at 1933.

At trial, the defense put forth an insanity plea which the prosecution rebutted by playing back the recorded conversation, and arguing that the recording showed Mauro was sane on the day of the murder. The trial court refused Mauro's motion to suppress the recording, rejecting the defense that it was a product of police interrogation in violation of his *Miranda* rights. Mauro was convicted of murder and sentenced to death, and the present appeal ensued.

In reversing the trial court decision, the Arizona Supreme Court found that the police had interrogated Mauro under *Miranda* by allowing him to speak to his wife in the presence of an officer. *Arizona v. Mauro,* 149 Ariz. 24, 716 P.2d 393 (1986). According to the court, the interrogation was invalid because Mauro had requested counsel before any further questioning. The court based its holding on *Rhode Island v. Innis,* 446 U.S. 291 (1980), which held that interrogation may include practices "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. Since two police officers had testified during pretrial hearings that they thought it possible that Mauro might make incriminating remarks during the meeting with his spouse, the court found that *Innis* applied, and overturned the trial court's admission of the recorded conversation into evidence.

The Supreme Court reversed, by a 5 to 4 margin. Writing for the majority, Justice Powell focused on the issue of whether the police actions were the "functional equivalent" of interrogation under *Innis.* In holding that no interrogation occurred, the Court found that the officer present at the meeting between the Mauros posed no questions to the defendant. This had the effect of rejecting the minority view, embraced by Justice Stevens, that the police "employed a powerful psychological ploy" against Mauro. *Mauro,* 107 S.Ct. at 1937. Justice Stevens, for the dissent, argued that the police actions overwhelmed Mauro because they did not pro-

vide him with an opportunity to refuse to speak with his wife, or tell him in advance that police officer would be present and the conversation recorded. The majority found no evidence to suggest that the police had acted to allow the meeting "for the purpose of eliciting incriminating statements," *Id.* at 1936, and upheld the trial judge's decision to admit the taped conversation. Indeed, the Court found the officers acted to discourage the meeting entirely, and only stipulated to having an officer present to ensure the safety of Mrs. Mauro. *Id.*

The opinion espoused by the Court in *Mauro* narrows the interpretation of *Innis* with respect to action by the police in lieu of direct interrogation of suspects. The Court now permits the police to obtain by proxy that which they can not obtain directly, voluntary self-incriminating statements made in the course of a pre-detention meeting between an accused and a spouse. Such statements may now be used against a defendant at trial, despite police orchestration of and participation in any such meeting, and notwithstanding the defendant's prior assertion of his *Miranda* rights under the fifth amendment.

— Mark Brugh

Maryland v. Garrison: GOOD-FAITH MISTAKE IN VALID BUT OVERBROAD SEARCH WARRANT DOES NOT INVALIDATE SEARCH

As a result of the Supreme Court's recent decision in *Maryland v. Garrison*, U.S. 107 S. Ct. 1013 (1987), the Rehnquist Court has carved, yet, another good-faith exception to the warrant requirement. In *Garrison*, the Court held that a factual mistake made in good-faith by police officers did not invalidate a broader than appropriate search warrant or its accompanying search. The search, the Court explained, was only limited by the police officers' discovery of their factual mistake.

In *Garrison*, "Baltimore police officers obtained and executed a warrant to search the person of Lawrence McWebb and the premises known as 2036 Park Avenue third floor apartment." *Id.* at 1014. The search was for controlled substances and related paraphernalia.

At the time the police obtained the warrant and began their search they were of the belief that only one apartment existed on the third floor of 2036 Park Avenue. Information was obtained from an informant that McWebb was selling marijuana from this third floor apartment. A telephone call to the Baltimore Gas and Electric Company confirmed that there was one apartment situated on the third floor, thereby corroborating the police officers' belief. Although the police inspected the outside of the seven unit building, the building was not approached until the warrant was executed. The third floor, which had a common doorway and vestibule, was divided into two separate units – one belonging to McWebb and the other to respondent, Garrison. Before the police officers became aware of their mistake, they searched Garrison's apartment and seized contraband in violation of Maryland's Controlled Substances Act. Md. Ann. Code art. 27 §276 (1957).

A Maryland trial court denied Garrison's motion to suppress the evidence seized from his apartment. The Court of Special Appeals of Maryland affirmed. *Id.* 58 Md. App. 417, 473, A.2d 514 (1984). The Court of Appeals of Maryland reversed. 303 Md. 385, 494 A.2d 193 (1985).

In a 6-3 decision, the United States Supreme Court reversed. Justice Stevens, writing for the majority, divided the case into two constitutional issues. The first considered the validity of the warrant and the second, the reasonableness of the way the police officers executed the warrant.

As to the validity of the warrant, "[t]he Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one particularly describing the place to be search and the person's or things to be seized." *Id.* at 1017. Because Garrison made no claim that the warrant did not adequately describe "the persons or things to be seized" or that there was no probable cause to believe that they might be in "the place to be searched" as specified in the warrant, the Court held that this Fourth Amendment particularity-of-description requirement was met. The issue, Stevens said, becomes "whether that factual mistake (i.e., believing only McWebb's apartment existed on the third floor) invalidated a warrant that undoubtedly would have been valid if it had reflected a completely accurate understanding of the building's floor plan." *Id.*

This issue, Stevens continued, turns on the constitutionality of the police officers' "conduct in light of the information available to them at the time they acted." *Id.* The majority found that the police officers reasonable believed, based on the information they had gathered, that only McWebb's apartment occupied the third floor. Thus, the Court concluded, "the warrant, insofar as it authorized a search that turned out ambiguous in scope, was valid when it issued." *Id.* at 1018.

Next, the Court addressed the reasonableness of the way in which the police officers executed the warrant. The majority stated that the police had gained access to the third floor common area legally; "they carried a search warrant and they were accompanied by McWebb who provided the key to the third floor." *Id.* at 1018. Thus, the Court only considered the police officers' conduct in executing the warrant once they entered the third floor common area.

The majority stated that the police officers were required to discontinue the search of Garrison's apartment once they discovered or should have discovered that the third floor contained two apartments instead of the assumed one. However, "the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id.* at 1018. Citing *Hill v. California*, 401 U.s. 797 (1971), for the proposition that honest mistakes in arrests obviate Fourth Amendment concerns, the majority held that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.* at 1019. Before their discovery of the factual mistake, the majority stated the officers understandably and reasonably believed that "McWebb's apartment and the third-floor premises as one and the same." *Id.* The execution of the warrant, the majority held, reasonably included the entire third floor and consequently, the contraband found on that floor was properly admissible.

Justice Blackmun, along the Justices Brennan and Marshall dissented. A person, Blackmun opined, has the highest expectation of privacy in his home, whether it be a mobile home, a unit in a multiple-occupancy dwelling, or the most majestic mansion. Indeed, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* at 1020. (Blackmum, J. dissenting) Therefore, absent one of the warrant requirement exceptions as stated in *Coolidge v. New Hampshire*, 403 U.S. 443, 478 (1971), a warrantless search of a home is presumptively unreasonable.

In concluding, that the search of Garrison's apartment was warrantless and therefore improper, the dissent did not believe the particularity-of-description requirement of the search warrant was met. This particularity requirement applies with equal force to multi-unit buildings as to individual private homes, requiring that the targeted unit be described with enough specificity to prevent a search of all units. *Garrison* at 107 S.Ct. 1021. When applying