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Bradley v. State: The Morgue and Voluntariness

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In fact, in the cases that arose in the four year period between *White Motor* and *Schwinn,* the lower courts, applying the "rule of reason" have permitted vertical restraints where there was economic justification and the restraints did not in fact unduly restrict competition.[42]

Hopefully the Court will review the position it has taken in *Schwinn* and apply the test of reasonableness to situations where a manufacturer employs vertical restrictions and passes title to his distributors and retailers until examination of these restrictions proves them to be anti-competitive in nature and without redeeming value, and truly deserving a *per se* illegal ruling.

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Bradley v. State: The Morgue and Voluntariness: The police started questioning Sherry Bradley about the murder of her two infant children at 2 a.m. She was taken to the Safety Building at about 3 a.m. For the next four and a half hours there was a police officer with her at all times, although there were substantial periods when she was not being questioned. At 7:30 a.m. she was taken to the morgue to see the bodies of her two strangled children. This apparently had an intense emotional impact for she threw herself on the examination table and was allowed to lay with the dead bodies for thirty-five minutes. Her confession, however, was not made until approximately 2 p.m. In that interval she was allowed some respite from interrogation and visited with her husband and a minister.

The trial court denied a motion to exclude the confession as involuntary. On review the question of voluntariness was actually twofold; first, whether the view in the morgue constituted psychological coercion and second, whether the confession was far enough removed in time to cure the defect. The Wisconsin Supreme Court affirmed the lower court decision and held that the confession was voluntary and admissible in evidence.

In considering the view of the bodies in the morgue as psychological coercion the Wisconsin Supreme Court said:

> We cannot, however, condone the conduct of the police in taking this girl of eighteen to the morgue to view her strangled babies. Counsel, during oral argument, found it impossible to defend this reprehensible conduct. The visit had no legitimate police purpose. There was no question of identification that might have required the mother to see these children.[1]

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[42] *See, e.g.,* Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Snap-on Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); C.B.S. Business Equipment Corp. v. Underwood Corp., 240 F. Supp. 413 (S.D. N.Y. 1964); United States v. Penn-Olin Chem. Co., 217 F. Supp. 110 D. Del. (1963), *rev'd on other grounds,* 378 U.S. 158 (1964).

[1] Bradley v. State, 36 Wis. 2d 345, 356, 153 N.W.2d 38, 42-43 (1967).

The court later said that "Had this crude attempt to overbear the will of this defendant resulted in a confession, we would without hesitancy declare the confession coerced and involuntary."[2]

A view of the body by the accused without some overriding police purpose has consistently been held to constitute psychological coercion. In *McKinley v. Wisconsin*[3] the defendant's confession was held involuntary because she was upset over seeing the body of her boyfriend. There was, however, testimony to the effect that the police threatened to keep showing her the body until she confessed.

In *Davis v. United States*[4] the defendant was resisting attempts to secure a confession until he was taken to the morgue at 3:00 a.m. and kept in the presence of the corpse for almost an hour. Two judges who concurred said:

> Indeed, we are at a loss to understand why the prisoner was taken to the morgue at all at that unseemly hour of the night, unless the agent knew something of the Indian character, and believed that he would break down and confess in the presence of the dead body of his victim. But, whatever prompted the appellant to confess, whether it was superstition or fear, or something akin thereto, we are not convinced that the confession was free and voluntary, as those terms have been uniformly defined by the courts.[5]

In neither of these cases, however, was there the time lag between the visit to the morgue and the confession that existed in the present case. The question, therefore, is not whether this was an unconstitutional attempt to force the defendant to confess, but rather why this psychological coercion described by the Court as "crude," "reprehensible," and a "goulish incident," did not contaminate the later confession. How did a six hour interval constitutionally sterilize a confession that would otherwise be contaminated by the illegal police action?

Due process includes the right against self-incrimination[6] and demands that for a confession to be acceptable as evidence against an accused it must be voluntary. In looking at the language used by the United States Supreme Court[7] the needed voluntariness goes beyond a simple absence of physical and psychological coercion. The emphasis of the voluntary requirement is on the confessor and whether he was

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[2] *Id.* 36 Wis. 2d at 357, 153 N.W.2d at 43.
[3] 37 Wis. 2d 26, 154 N.W.2d 344 (1967).
[4] 32 F.2d 860 (9th Cir. 1929).
[5] *Id.* at 863.
[6] Malloy v. Hogan, 378 U.S. 1 (1964).
[7] Watts v. Indiana, 338 U.S. 49 (1948) (an expression of free choice); Fikes v. Alabama, 352 U.S. 191 (1957) (the voluntariness of the confession); Culombe v. Connecticut, 367 U.S. 568 (1960) (free and unconstrained choice by its maker); Malinski v. New York, 324 U.S. 401 (1944) (free individual will); Leyra v. Denno, 347 U.S. 556 (1954) (whether the defendant's will was overborne); Haynes v. Washington, 373 U.S. 503 (1963) (free and unconstrained will.

capable of a free and rational decision, rather than upon the acts or omissions of the inquisitor. It is not an objective test as is the reasonable man standard, but subjective in that the question is whether this particular individual made a free decision. The particular acts of the police are relevant only in relation to the effect they had on the suspect's ability to make a deliberate choice as to confess or not.

Since, under the present rationale of coerced confessions, the focus is upon the defendant and upon his psychological responses to the circumstances surrounding him during interrogation, the court, in determining whether the confession was voluntary, must look at the "totality of the circumstances"[8] in which the confession was obtained. All of the facts which could affect the defendant's ability to make such a decision are relevant, and the court weighs ". . . the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[9]

Under this test, the courts are to set up a formula based on psychological variables. On one side the following pressure factors have been considered: the hostile environment of the police station,[10] protracted questioning,[11] threats or violence, [12] implied promises,[13] long detention,[14] holding incommudicado,[15] sympathy falsely aroused,[16] threat of mob violence, and deprivation of food or sleep.[17] Factor's determinative of the suspects ability to resist are: the defendant's age,[18] mental capacity,[19] education and emotional condition at the time of the interrogation,[20] fatigue,[21] and previous experience with the police.[22]

The pressure versus resistence test is necessarily a sliding scale in which the individual factors are useful only in relation to each other. This is true, partly because of the subjective nature of the factors, and

[8] *See* Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1957); Lisenba v. California, 314 U.S 219 (1941); Lyons v. Oklahoma, 322 U.S. 596 (1943); Malinski v. New York, 324 U.S. 401 (1944); Culombe v. Connecticut, 367 U.S. 568 (1960); Stein v. New York, 346 U.S. 156 (1953); Gallegos v. Colorado, 370 U.S. 49 (1962); Haynes v. Washington, 373 U.S. 503 (1963).

[9] Stein v. New York, 346 U.S. 156, 185 (1953); *see also* Fikes v. Alabama, 352 U.S. 191, 197-198 (1957); Culombe v. Connecticut, 367 U.S. 568, 602 (1961); and the concurring opinion of Justice Wilkie in State v. Hoyt, 21 Wis. 2d 284, 124 N.W.2d 47 (1964).

[10] Culombe v. Connecticut, 367 U.S. 568 (1960).

[11] Spano v. New York, 360 U.S. 315 (1959).

[12] Brown v. Mississippi, 297 U.S. 278 (1936); Davis v. United States, 32 F.2d 860 (9th Cir. 1929); Leyra v. Denno, 347 U.S. 556 (1954).

[13] Davis v. United States, 32 F.2d 860 (9th Cir. 1929).

[14] Gallegos v. Colorado, 370 U.S. 49 (1962).

[15] Haynes v. Washington, 373 U.S. 503 (1963).

[16] Spano v. New York, 360 U.S. 315 (1959).

[17] Chambers v. Florida, 309 U.S. 227 (1940).

[18] Gallegos v. Colorado, 370 U.S. 49 (1962).

[19] Culombe v. Connecticut, 367 U.S. 568 (1960).

[20] Fikes v. Alabama, 352 U.S. 191 (1957).

[21] Spano v. New York, 360 U.S. 315 (1959).

[22] Leyra v. Dunno, 347 U.S. 556 (1953).

partly because what is to be determined is an individual's state of mind —did he in fact have a free will at the time he confessed.

The impact that coercive practices will have on an individual when he confesses will depend to some extent on their proximity in time. An intervening interval can be considered in two ways. First, because of the time lag there may be added circumstances to be considered as either reinforcing or deluting the alleged coercion; for example, food and rest, visiting with an attorney or, on the other hand, continued questioning and accusations. Second, the mere passage of time may effect the force that the coercive acts will have on a subsequent confession. The "happening" is usually, but not always, more vivid than the memory of it. . . . In *Lyons v. Oklahoma,*[23] the defendant was accused of murdering three members of a family and burning their house down to conceal the crime. The first confession was obtained by questioning the defendant until 2:30 a.m. and then placing a pan of the victims' bones in his lap. This confession was not introduced into evidence, but a second confession obtained twelve hours later without any coercion was used. In considering the effect the events of the first confession may have had on the second the United States Supreme Court stated:

> The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process.[24]

Apparently then, there is no point at which the judge can draw the line and say that the attempted coercion is far enough removed in time to allow the subsequent confession to be used in evidence. Rather, he can only consider the whole confession technique used as a single continuing transaction to determine, not whether the atmosphere of coercion or fear had been completely dispelled, but whether the defendant had the mental freedom to confess or deny.

The affect that time alone would have on the relationship between coercion and confession was not analyzed in *Lyons* because there was ". . . evidence for the state which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlister." This interval was the occasion for new factors which had to be considered, and which allowed a reasonable conclusion that the second confession was voluntary.

In *Bradley v. Wisconsin,* however, the Wisconsin Supreme Court speaks of the six hour period as relevant by itself:

[23] 322 U.S. 596 (1944).
[24] *Id.* at 603.

> We conclude, however, that this morbid bit of police work did not wring the confession from the defendant. This incident was far enough removed from the time of the final confession that it did not contaminate the otherwise commendable efforts of the detective bureau, to the extent that we are now obliged to hold the confession inadmissible.[25]

It appears from this statement that a time lapse may be sufficient to cure a serious defect in police procedure.

It is, nevertheless, doubtful that this is the basis of their holding that the trial court and jury could reasonably find Mrs. Bradley's confession voluntary. The "totality of the circumstances" as considered by the court included the facts that she was eighteen and had a ninth grade education, her husband had disappeared two days before and, she had not been able to eat or sleep during that period. The police station environment and her prior experience with the police were also considered. The Court also placed some emphasis on the events between the visit to the morgue and her confession—she was offered food, water, and rest, given fresh clothing, and allowed to see her husband and minster. Consequently, the Court may have considered time primarily as a vehicle for additional facts.

Yet, even if considered only as dicta, the Wisconsin Supreme Court has gone beyond the United States Supreme Court, and paved the way for a holding that an intervening period of time can nullify the effect of coercive police procedure. Indeed, if, in a proper fact situation, such a time lag could allow a suspect to recover any measure of free will that may have been lost, the trier of fact should include it in considering the "totality of the circumstances."

The only argument against such a holding would be that it encourages or at least allows police abuse. This loses sight of the goal of the test: to determine whether the confession was a product of the defendant's free will. It should not be a tool for punishing the police for illegal or barbaric acts. This is not to say that the courts should conden such procedures, nor that society should allow them, but that this is a different problem requiring different remedies. In our adversary system, the state has a right to use statements freely made by the defendant. If, in view of all of the circumstances, the confession was voluntary at the time it was made, it should be allowed in evidence regardless of prior police activity.

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[25] 36 Wis. 2d 345, 357, 153 N.W.2d 38, 43 (1967).