UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 43 | Number 4 Article 11

6-1-1965

Criminal Law -- Admissibility of Confessions

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that while the conclusion in *Lowe* was apparently inescapable, its use as precedent should not be extended beyond cases identical to it in all essential elements.

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Criminal Law—Admissibility of Confessions

Davis, a prison escapee, was captured by police, who requested and received permission of the warden of the state prison to keep him temporarily in their custody. They suspected him of a recent rape-murder. On Davis's being delivered to the city jail a notation was made upon the arrest sheet that he was not to be allowed to use the telephone and that no one was to be allowed to see him. Davis was held in the city jail for the next sixteen days. During that time, according to trial court findings, he was adequately fed, never threatened, and, though questioned daily, not questioned overbearingly.[1] On the sixteenth day of his detention, while he was being questioned alone by a police officer acquainted with him and his family, the officer made reference to a Bible held by Davis. Upon inquiry he learned that Davis had been reading from the Bible, but had not been praying because he did not know how. The police officer recited a short, innocuous prayer. A moment later, Davis confessed to the rape-murder.[2]

In December of 1959 Davis was convicted of the offense largely on the basis of his confession. As is the practice in North Carolina, determination of the "voluntariness"[3] of the confession was made by

[1] The facts as alleged by the prosecution and as alleged by defendant are in complete conflict. Davis contended the instruction on the arrest sheet was carried out; the state that it was ignored, which the trial court so held. The defendant alleged that incarceration in the city jail was improper since it was only an "over-night" jail and that prisoners held for more than a day or two were normally detained in the county jail, which had proper facilities for long detention; that rights under N.C. GEN. STAT. § 15-46 (Supp. 1963) had been violated because he had not been properly arraigned; that he had been inadequately fed (the evidence established that he was offered four sandwiches a day); that he was beaten and continually questioned. The trial court found no merit in any of these contentions.

[2] The federal district court, upon hearing for application of a writ of habeas corpus, found that the defendant requested that the officer pray for him. The state court record indicated that the idea of the prayer originated with the police officer. Davis v. North Carolina, 339 F.2d 770, 773 n.6 (4th Cir. 1964).

[3] The terminology "voluntary" and "involuntary" is uncertain of meaning but popular among the judiciary not to be used. See Kamisar, *What Is*

the trial judge.[4] An objection to the confession's admission was taken on the basis that it was involuntarily made. The North Carolina Supreme Court affirmed the trial court's determination that the confession was voluntary.[5] After denial of a petition for certiorari by the United States Supreme Court,[6] defendant sought a writ of habeas corpus in the federal district court.[7] Although the result of this writ has not been finally determined,[8] the Court of Appeals for the Fourth Circuit, in *Davis v. North Carolina,*[9] recently affirmed the district court's denial of the writ. This decision prompts this note.

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an "Involuntary" Confession? 17 RUTGERS L. REV. 728, 741-47 (1963). The true criterion is asserted by Professor Wigmore to be, "was the inducement sufficient, by possibility, to elicit an untrue confession." 3 WIGMORE, EVIDENCE § 824 (3d ed. 1940) [hereinafter cited as WIGMORE].

[4] North Carolina adheres to what is commonly called the "Massachusetts rule," *i.e.,* the trial judge determines the voluntariness of the confession in the absence of the jury after hearing all the evidence on that issue. If the confession is admitted by the judge, the jury then considers its probative value. State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951). See generally STANSBURY, NORTH CAROLINA EVIDENCE § 187 (2d ed. 1963). The recent Supreme Court decision of Jackson v. Denno, 378 U.S. 368 (1964), expressly approved the Massachusetts rule while holding that any procedure in which the jury determined both voluntariness of the confession and guilt deprives the defendant of liberty without due process of law. See Note, 63 MICH. L. REV. 381 (1964). For a general discussion of the different procedures followed by trial courts in determining voluntariness, see 3 WIGMORE § 861.

[5] State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960), 39 N.C.L. REV. 337 (1961).

[6] Davis v. North Carolina, 365 U.S. 855 (1961).

[7] The writ of habeas corpus sought by Davis was denied after a hearing in which the district court reviewed the state court record. Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961). On appeal the Court of Appeals of the Fourth Circuit reversed, holding that the state court's findings of fact were not acceptable in the habeas corpus court, and remanded for a full hearing as to the voluntariness of the confession. Davis v. North Carolina, 310 F.2d 904 (4th Cir. 1962). The district court in an evidentiary hearing made detailed findings of fact and concluded that the confession was voluntary. Davis v. North Carolina, 221 F. Supp. 494 (E.D.N.C. 1963).

[8] Docketed March 8, 1965, Current Term Miscellaneous Docket, No. 37, U.S. Supreme Court.

[9] 339 F.2d 770 (4th Cir. 1964). It is interesting to note that the Fourth Circuit sat en banc when it heard the first appeal from the district court. Chief Judge Sobeloff, who wrote the opinion of the majority, clearly indicated his dissatisfaction with the police tactics used in obtaining the confession. There was only one dissenter, Judge Haynesworth, the author of the majority opinion in the second decision by the court of appeals. In the second appearance before the court of appeals the arguments were originally heard by Judges Sobeloff, Bell, and Haynesworth. By *consent* of counsel the tape recording of the arguments was reheard by the court en banc, and, as a result, the court affirmed the conviction. Judges Sobeloff and Bell dissented.

A majority of the court of appeals, upon their own independent examination of the undisputed facts and the facts as found by the trial court,[10] agreed with the district court in finding the confession voluntary.[11] However, two of the five judges vigorously dissented and would have reversed on the ground that the confession was involuntary.[12] This difference of opinion is understandable when examined in light of Supreme Court decisions on this issue.

Historically a confession was involuntary if the methods employed could have so overborne a defendant's will as to result in the admission of a crime he had not committed, *i.e.*, when the confession was not deemed trustworthy.[13] But, with the Court's decision in *Ashcraft v. Tennessee*,[14] fourteenth amendment due process became a determinate of admissibility.[15] The Court since has all but abandoned the trustworthiness doctrine[16] and has been largely

[10] "[W]e are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both." Lisenba v. California, 314 U.S. 219, 237-38 (1941). The Supreme Court has also adopted a rule whereby it looks at "the totality of the circumstances that preceded the confessions." Fikes v. Alabama, 352 U.S. 191, 197 (1957); *accord*, Reck v. Pate, 367 U.S. 433 (1961). Although the two rules are contrary to one another the Court has never been bothered by this fact.

[11] The petitioner not only argued that the confession was coerced but also that there had been a denial of the right to counsel. If the argument of denial of counsel succeeds, under recent Court decisions the confession would automatically be excluded. Escobedo v. Illinois, 378 U.S. 478 (1964). For a discussion of the question of the right to counsel, see 43 N.C.L. REV. 187 (1964). The court of appeals distinguished the principal case from *Escobedo* on the basis of factual dissimilarity.

[12] "In dealing with the issue of voluntariness of the confession, the court entertains too narrow a concept of the scope of appellate review. It accepts as virtually unreviewable findings of fact what [sic] in reality are erroneous conclusions of law. Also it too readily defers to findings that are clearly erroneous." 339 F.2d at 783 (dissenting opinion).

[13] 3 WIGMORE § 822.

[14] 322 U.S. 143 (1944).

[15] *Id.* at 154.

[16] "To be sure, confessions cruelly extorted may be . . . untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration." Rogers v. Richmond, 365 U.S. 534, 541 (1961). See Lynumn v. Illinois, 372 U.S. 528 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Ashcraft v. Tennessee, 322 U.S. 143 (1944). *But see* INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 152 (1962), who interpret the opinions (there being no majority opinion) in Culombe v. Connecticut, 367 U.S. 568 (1961), as a return by a majority of the Court to the voluntary-trustworthy test. Professor Kamisar concludes "that Justice Frankfurter's generous use of the 'voluntariness' terminology in *Culombe v. Connecticut* has thrown Inbau and Reid off course. Apparently, they

guided by two principal factors in determining voluntariness: (1) the personal characteristics of the defendant[17] and (2) the outside pressures applied to induce a confession.[18] The Court's inability to agree upon which of these factors shall weigh more heavily in determining admissibility has led to much of the disagreement among appellate judges on this issue.[19] An application of both of these factors to a particular factual situation has often been called the subjective test.[20] Characteristics such as age,[21] mentality,[22]

view the 'voluntariness' test as a *synonym* for the 'trustworthiness' or 'reliability' test." Kamisar, *supra* note 3, at 741-42.

[17] *E.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962); Reck v. Pate, 367 U.S. 433 (1961).

[18] *E.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961). *Cf.* Lynumn v. Illinois, 372 U.S. 528 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960); all demonstrating the use of both factors, one weighing more heavily than the other.

[19] The Supreme Court handed down twenty-six decisions between 1945 and 1964 dealing directly with the question of whether a confession was coerced. Seven of the state court convictions were affirmed—all by divided Courts. Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Thomas v. Arizona, 356 U.S. 390 (1958); Stein v. New York, 346 U.S. 156 (1953); Stroble v. California, 343 U.S. 181 (1952); Gallegos v. Nebraska, 342 U.S. 55 (1951). Of the nineteen reversals of state court convictions only three were unanimous. Lynumn v. Illinois, 372 U.S. 528 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959). The remaining sixteen were by divided Courts. Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Johnson v. Pennsylvania, 340 U.S. 881 (1950); Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945). Lyons v. Oklahoma, 322 U.S. 596 (1944), marked the final instance of the sole reliance on the trustworthiness test, and all of the above decisions have applied the due process provisions of the fourteenth amendment in determining voluntariness.

[20] See Way, *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53 (1963); Comment, 31 U. CHI. L. REV. 313 (1964); 42 B.U.L. REV. 129 (1962); 18 RUTGERS L. REV. 209 (1963). Other writers on the subject divide the cases since 1944 into two "classes" but do not employ the terms "subjective" and "objective." See Kamisar, *supra* note 3; Ritz, *Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962).

[21] See Gallegos v. Colorado, 370 U.S. 49 (1962) (14 years old); Haley v. Ohio, 332 U.S. 596 (1948) (15 years old); *cf.* Reck v. Pate, 367 U.S. 433 (1961) (19 years old); Payne v. Arkansas, 356 U.S. 560 (1958) (19 years old); Lee v. Mississippi, 332 U.S. 742 (1948) (17 years old).

[22] See Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate,

race,[23] and prior police record[24] are weighed against such police pressures as deprivation of food and sleep,[25] protracted questioning,[26] incommunicado detention,[27] and threats[28] in order to determine "whether the defendant's will was overborne at the time he confessed."[29] The due process grounds for this test are the unreliability of the confession and the requirement of fairness in the criminal process.[30] On the other hand, a strict examination of the methods used by the police to elicit a confession, with less regard to the power of resistance of the defendant or the trustworthiness of the confession, is known as the objective test.[31] The due process basis here is solely the demand for an accusatorial rather than an inquisitorial procedure in the criminal processes, an unattainable goal so long as a "coerced" confession is admissible.[32] The purpose of this re-

367 U.S. 433 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957).

[23] See, *e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960); Payne v. Arkansas, 356 U.S. 560 (1958); Thomas v. Arizona, 356 U.S. 390 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Harris v. South Carolina, 338 U.S. 68 (1949); Watts v. Indiana, 338 U.S. 49 (1949).

[24] See Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Spano v. New York, 360 U.S. 315 (1959).

[25] See Reck v. Pate, 367 U.S. 433 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Leyra v. Denno, 347 U.S. 556 (1954); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[26] See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (16 hours); Blackburn v. Alabama, 361 U.S. 199 (1960) (8 hours); Spano v. New York, 360 U.S. 315 (1959) (8 hours); Crooker v. California, 357 U.S. 433 (1958) (16 hours); Leyra v. Denno, 347 U.S. 556 (1954) (23 hours).

[27] See, *e.g.*, Haynes v. Washington, 373 U.S. 503 (1963); Leyra v. Denno, 347 U.S. 556 (1954); Harris v. South Carolina, 338 U.S. 68 (1949); Haley v. Ohio, 332 U.S. 596 (1948).

[28] Haynes v. Washington, 373 U.S. 503 (1963); Malinski v. New York, 324 U.S. 401 (1945).

[29] Lynumn v. Illinois, 372 U.S. 528, 534 (1963). "The limits in any case depend upon a weighing of 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." Stein v. New York, 346 U.S. 156, 185 (1953).

[30] Lisenba v. California, 314 U.S. 219, 236 (1941).

[31] See note 20 *supra*.

[32] Watts v. Indiana, 338 U.S. 49, 54 (1949). Thus the Court stated in Rogers v. Richmond, 365 U.S. 534, 543-44 (1961), that

> we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the

quirement is no longer as much the protection of individual rights themselves as it is the direct discipline of the police for using unfair (illegal) methods on the accused to secure a confession.[33]

It is currently questionable as to whether the subjective or the objective test should be applied.[34] The most recent decisions of the Court indicate that a majority of the Court favor the objective test.[35] But they are not willing to rely upon it exclusively.[36] Under this test the issue is no longer whether the police action overcame

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behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.

[33] See Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959). See generally, Allen, *Due Process and State Criminal Procedures: Another Look,* NW. U.L. REV. 16, 23-25 (1953); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury,* 21 U. CHI. L. REV. 317, 343-44 (1954); Way, *supra* note 20, at 55-56.

[34] *Compare* INBAU & REID, *op. cit. supra* note 16, *with* Kamisar, *supra* note 3. There is currently a marked split between the Supreme Court Justices over the question of which theory is proper. Five of the Justices favor the objective approach (Black, Brennan, Douglas, Goldberg, Warren) and four favor the so called subjective test (Clark, Harlan, Stewart, White). See Haynes v. Washington, 373 U.S. 503 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962).

[35] See, *e.g.,* Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Rogers v. Richmond, 365 U.S. 534 (1961). The *Haynes* decision appears to be conclusive as to this point. There the petitioner was held incommunicado for sixteen hours and the opportunity to see anyone was conditioned upon his confessing. The particular facts made the case an ideal one for application of the subjective test. Yet only a passing note was made of petitioner's prior contacts with police. Failure of the majority to use the subjective approach in holding the police action violative of due process evoked a strong dissent by four Justices (per Clark, joined by Harlan, Stewart, and White). The objective test is the more rational of the two tests so long as the purpose behind the exclusion of a confession is the deterrence of the police action that brought about the inadmissible confession. The subjective and objective test are inconsistent in that under the former the police have everything to gain and nothing to lose in forcing a confession. Only by the adoption of the objective test is deterrence actually realized. For a more complete discussion, see Comment, 31 U. CHI. L. REV. 313 (1964).

[36] Professor Kamisar explains the continued reference to individual characteristics as follows:

> In short, much more often than not, if not always, when the Court considers the peculiar, individual characteristics of the person confessing, it is only applying a rule of *inadmissibility.* "Strong" personal characteristics rarely, if ever, "cure" forbidden police methods; but "weak" ones may invalidate what are generally permissible methods.

Kamisar, *supra* note 3, at 758.

the will of the defendant, but whether the police action was of such a nature that it *could* overcome defendant's will.

In *Davis* the district court and a majority of the court of appeals applied the subjective test in determining that the defendant's confession was voluntary. The dissent made a strict application of the objective test and would have excluded the confession. Thus, the opinions in *Davis* illustrate the divergent results possible under the two tests. Perhaps the recognition of two acceptable tests (perhaps better defined as theories or rationales), both flexible, gives courts a desirable freedom in judging each factual situation. That the two tests may dictate different results in a particular case, however, creates an unfortunate situation: when particular facts are open to interpretation by an appellate court and no clear physical or psychological pressure is evident, the admissibility of a confession is determined by the application of one of either of two *accepted* tests. *Davis* is such a case. The situation is further illustrated by the fact that a majority of the Supreme Court, should it grant certiorari, would probably apply the objective test and thus possibly exclude the confession.[37]

In resolving which test is to be applied, the appellate court must decide for itself what its goal is to be. If it is the condemnation of police methods that make the criminal procedure an inquisitorial rather than an accusatorial process, the objective test must be applied. But if the admissibility of the confession is to depend upon its truth or falsity, the subjective test applies.

Another aspect of *Davis* is the pre-confession prayer. Applying the trustworthiness doctrine to confessions made as a result of religious inducement, the common law courts held that such confessions were admissible.[38] It has been said of such spiritual exhortations that they

> seem, from the nature of religion, the most likely of all motives to produce truth. They are, therefore, of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth—because it is likely to lead to falsehood. If temporal

[37] See cases cited and text at note 34 *supra*.

[38] 3 WIGMORE § 840 and cases collected therein. "We can therefore conclude that, as a general rule, *confessions which result from spiritual exhortations or appeals to morality are admissible in evidence, whether induced by a person in authority or by someone else.*" KAUFMAN, ADMISSIBILITY OF CONFESSIONS 76 (1960). See generally 6 N.C.L. REV. 462 (1928).

> hopes exist, they may lead to falsehood. Spiritual hopes can lead to nothing but truth.[39]

Not only do some writers disagree with this approach,[40] but all courts have not been in accord.[41] Both the majority and the dissent in *Davis* contributed to the deterioration of this concept of trustworthiness. Although the majority held the above principle binding in *Davis*, they recognized that a confession arising from religious influence, whether prompted by a layman or a clergyman, may be subject to exclusion.[42] Though dealing with the prayer only secondarily (sensing in it a diversion), the dissent implied that such action by police has no place in an accusatorial system and that the "psuedo [*sic*] religious ministrations of a policeman" when a minis ter is readily available clearly cannot withstand the objective test.[43] The Supreme Court has never been faced with the issue. But use of religious adjurations to induce a confession would be hard pressed in withstanding the objective test as applied by the Court.

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Evidence—Expert Medical Testimony on Causation

In *Lockwood v. McCaskill*[1] the North Carolina Supreme Court seemingly added another dimension to the *could*-or-*might* rule of admissibility of expert testimony as established in *Summerlin v. Carolina & Northwestern R.R.*[2] It has been an accepted rule in

[39] JOY, CONFESSIONS 51-52 (1842).

[40] Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55 (1963); Note, 1 WASHBURN L. REV. 415 (1961). The latter is the most complete analysis available regarding the clergyman and coerced confessions. *Cf.* REIK, THE COMPULSION TO CONFESS (1959).

[41] *E.g.*, Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958); Denmark v. State, 95 Fla. 757, 116 So. 757 (1928); Johnson v. State, 107 Miss. 196, 65 So. 218 (1914). Forty-four of the states now have a statute making privileged any communications between a member of the clergy and a confessant. These statutes are collected in Professor Reese's article. Reese, *supra* note 40, at 61 n.22.

[42] 339 F.2d at 776.

[43] 339 F.2d at 784-85.

[1] 262 N.C. 663, 138 S.E.2d 541 (1964).

[2] 133 N.C. 550, 45 S.E. 898 (1903).

> It would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car, and not by a fall from any other elevated place, or in any other way that might just as well have pro-