Denver Law Review

Volume 31 | Issue 4 Article 3

June 2021

Involuntary Confessions - Fourth Stage in Colorado

Vasco G. Seavy Jr.

INVOLUNTARY CONFESSIONS—FOURTH STAGE IN COLORADO

VASCO G. SEAVY, JR.*

"There is no branch of the law of evidence in such inextricable confusion as that relative to confessions." [1] This famous quotation by Chief Justice Sherwood of the Missouri Court was made over four decades ago, but in a large degree still exists as a quasi-truth in many of our jurisdictions.

The principal reason for the confusion in regard to the problem of involuntary confessions might be said to stem from our appellate court's inability to weigh modern reason and logic on the one hand, and adherence to ancient and technical rules on the other. The history of the rule shows that the result has often been an "exhibition of morbid sensibility toward criminals." [2]

Professor Wigmore in his work on evidence [3] has separated the problem into three distinct historical periods. The first existed up through the middle of the eighteenth century during which time a confession, whether voluntary or involuntary, was regarded as a "plea of guilt." [4] The second stage was evidenced during the latter half of the eighteenth century when the problem was recognized, but only in so far as that it existed.[5]

In the early years of the nineteenth century, there was the beginning of the so-called "modern rule." In this period all confessions were viewed with distrust.[6] This stage reached its high point in this country in 1897 when the United States Supreme Court decided the *Bram* case [7] which will be discussed at a later point.

Baron Parke summarized the third period in a statement made in the case of *Reg. v. Moore* (1852).[8] " * * * that if the threat or inducement was held out, actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement." The United States Supreme Court quoted with favor the rule when deciding the *Bram* case, *supra,* and it was generally held to be the existing law in all jurisdictions.[9]

It becomes clear by an examination of the test stated by Parke that there was no logic nor reasonable basis for decisions involving confessions during the period. The fourth stage can, therefore, be defined as that period in which the appellate courts are to put reason over technicality, logic over procedure, and modern public

* Student, University of Denver, College of Law.

[1] State v. Patterson, 73 Mo. 695, 705 (1881).
[2] Queen v. Johnston, 15 Ir. C. L. 60.85.
[3] Wigmore on Evid., Vol. 3 (3rd Ed), sec. 817.
[4] Hale, Pleas of the Crown, Emlyn's Ed. 225 (1680).
[5] Rudd's Case, 1 Leach Cr. C. 135, per Lord Mansfield (1775).
[6] Wigmore, *op cit supra,* sec. 820.
[7] Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L. Ed. 204 (1897).
[8] 2 Den. C. C., 522 (1852).
[9] Wigmore, *supra,* sec. 825.

policy over an adherence to ancient rules which have long ceased to have any distinction other than age.

PURPOSE, SCOPE AND DEFINITIONS

The purpose of this article will be an attempt to show that Colorado has reached this stage of "modern reason" in connection with the problem of confessions. The general rules for the exclusion will be helpful to clarify the problem. So also will a short discussion of the United States Supreme Court cases help to show by contrast the period of enlightenment into which our Colorado Court has entered.

It will be necessary to limit the scope of the problem to those matters related to the admission of confessions, i.e., in determining whether they are voluntary or involuntary. The scope will be further limited to those confessions which are "extra-judicial" in nature, and which are induced in one form or another by law enforcement officers acting in their capacity of crime detection.

"A confession is an acknowledgment by an accused in a criminal case of his guilt of the crime charged." [10] Therefore, any statement which would be exculpatory or an exoneration would not be classified as a confession.[11]

Chamberlayne [12] has given five requisites enabling an extra judicial confession to be admitted into evidence: (1) a declaration by one accused of the crime involved in the proceedings, (2) incriminatory, (3) certain, (4) complete, and (5) voluntary. It is the last problem with which we are here confronted.

It is extremely difficult to define the word voluntary as used in this sense. A definition was attempted in the Colorado case of *Tuttle v. The People* wherein the court stated that the confession must proceed "from the spontaneous suggestion of the party's own mind." [13] But Justice Jackson of the United States Supreme Court, in an able dissenting opinion in the *Ashcroft* case,[14] said in effect that every confession made in response to questions by law enforcement officers was induced in some degree. Thus, it is the degree of the inducement, in connection with its effect,[15] which is the test of voluntariness, and not the inducement standing alone.

PRINCIPLES OF EXCLUSION

There is no doubt but that modern day police practices warrant a close inspection of every confession claimed to be made under duress. Wharton [16] once stated that the inquisition practices of the twentieth century were so related to those of the sixteenth century, that the Colorado legislature made it a felony to induce

[10] 22 C.J.S., p. 1420.
[11] Walker v. The People, 126 Colo. 135, 248 P. (2d) 287 (1952).
Mora v. The People, 19 Colo. 255, 35 P. 179 (1893).
[12] Chamberlayne, Modern Law of Evidence, Vol. 2, sec. 1473.
[13] 33 Colo. 243, 79 P. 330 (1905).
[14] Ashcraft v. Tenn., 320 U.S. 728, 64 S.Ct. 94, 88 L. Ed. 1192 (1944).
[15] Osborn v. The People, 262 U. S. 892 (1927).
[16] Wharton, Criminal Evidence, Vol. 2 (10th Ed.), sec. 622f.

confessions either by mental or physical duress.[17] This law still remains in Colorado.[18] An examination of the "Wickersham Report" [19] made in 1931 discloses many incidents of actual police brutality in this respect. So also in the last decade have many cases [20] appeared before the United States Supreme Court where devices used to obtain confessions have a striking similarity to those used in the medieval periods.

The problem, therefore, certainly cannot be considered as having no bearing on modern jurisprudence.

Criticisms of the modern view in regard to the exclusion of confessions are prevalent and in the most part justified. There are many different views concerning the value of confessions ranging from a statement by a South Carolina Court that a confession is "in most cases the highest evidence that can be given." [21] to Blackstone's remark that it "is the weakest and most suspicious of all testimony." [22] It becomes clear then, why there is so much confusion in regard to the entire doctrine of confessions when their value is regarded with such contrast. Where confusion is present, justified criticisms are only one step behind.

The basic criticism is, of course, that the rule of exclusion, when based on grounds of the law of evidence, is illogical. It is difficult to find a logical ground upon which an involuntary confession is to be excluded. One writer has commented "that a person should falsely accuse himself of having been guilty of a serious crime may seem grossly improbable." [23] Certainly the duress would have to be very great before one of strong constitution and reasonable intelligence would falsely confess to a crime which possibly would result in his execution.

Nevertheless, it is agreed by most authorities that the underlying principle of exclusion is the untrustworthiness of the evidence.[24] But the difficulty with this theory is that few courts are willing to examine all the surrounding conditions of the induced confession to see if the inducement actually had the effect of compelling the particular defendant to confess falsely. The Colorado Court has held that "it is no answer to say we cannot explore the human mind."[25] Perhaps if all courts would take this approach the doctrine of untrustworthiness would be a reality and not a mere legal fiction in answer to a difficult problem.

Actually the reason for excluding involuntary confessions is found in the ancient principle, emanating from the common law

---

[17] Colo. Laws, c. 195, p. 468 (1909).
[18] Colo. Stat. Ann., c. 48, sec. 153 (1935).
[19] Nat'l Commission on Law Observance and Enforcement. (1931) Report No. 11, Lawlessness in Law Enforcement.
[20] See ante, Supreme Court Cases.
[21] Columbia v. Harrison, 2 Mills Const. (S.C.) 215 (1818).
[22] 4 Black Comm. 357.
[23] Chamberlayne, *supra*, sec. 1591.
[24] 20 American Jurisprudence, 422, sec. 483.
Chamberlayne, *supra*, sec. 1481.
Wharton, *supra*, sec. 622e.
[25] Osborn v. The People, *supra*.

and fixed in most state constitutions, that no one can be forced to incriminate himself.[26] If the problem were always explained on this basis no attempt would be necessary to justify the rule under some principle of evidence.

Under the Constitution of the United States, the Federal Courts are bound under the self incrimination clause[27] in like manner as are the states under their respective constitutions. So also may a constitutional basis be found for the rule when a state case goes to the United States Supreme Court via the Fourteenth Amendment. It is, of course, more difficult for that court to find reversible error in alleged involuntary confessions under the Fourteenth Amendment than under the Fifth Amendment, when the case comes from a lower Federal Court. But regardless of where the constitutional safeguards are found, they are present and should be used as the basis for exclusion.

THE UNITED STATES SUPREME COURT CASES

Before going into the Colorado cases, it is interesting to note the confusion which exists in the decisions of the United States Supreme Court. It appears that the Court is in each case seeking to promulgate a definite standard or a technical rule under which the problem may be simplified. The result, as an examination of a few cases will show, has only led to inconsistency and, consequently, confusion.

Bram v. United States[28] was decided by that Court in 1897. The facts were, briefly, that an officer of a ship was accused of murdering the captain, put ashore in irons at Halifax, accused of the crime and asked to confess by a law enforcement officer, subsequently confessed; and then returned to the United States where he was convicted. In the interrogation by the police officer, there were no threats, no abuses, no prolonged questions, but merely an accusation and a request for a confession. This said the Court, "must have created an impression of hope, or of fear in remaining silent," and consequently the confession was held to be improperly induced. Wigmore cites the case as the most unreasonable perpetuation of inappropriate doctrines.[29]

It is necessary to skip almost one half century to bring the present day rules into focus. The Court was first confronted with the problem arising in a State Court in the case of *Brown v. Mississippi*.[30] This case may be categorized with three other cases: *Chambers v. Florida*,[31] *White v. Texas*,[32] and *Ward v. Texas*.[33] In each of the four cases there were negroes involved; each case arose in the Southern section, and each was reversed on the grounds

[26] Colo. Const., Ar. IV, sec. 18.
[27] United States Const., Amend. V.
[28] 168 U.S. 532, 18 S.Ct. 183, 42 L. Ed. 204 (1897).
[29] Wigmore, *supra*, p. 355.
[30] 297 U.S. 278, 56 S.Ct. 461, 80 L. Ed. 682 (1936).
[31] 309 U.S. 227, 60 S.Ct. 472, 84 L. Ed. 716 (1940).
[32] 310 U.S. 530, 60 S.Ct. 1032, 84 L. Ed. 1342 (1940).
[33] 316 U.S. 547, 62 S.Ct. 1139, 86 L. Ed. 1663 (1942).

of involuntary confessions failing to meet the requirements of the Fourteenth Amendment. In these cases, there can be no doubt but that any reasonable court would have acted as did the Supreme Court in reversing. The brutality involved gives weight to Wharton's statement as to the close relationship of the sixteenth and twentieth century inquisition practices.[34]

But in 1943 came the famous *McNabb* case,[35] coming to the Supreme Court via the lower Federal Courts. Mr. Justice Frankfurter therein laid down the "civilized standard" rule of exclusion, which was based upon the failure to take the defendant before a committing magistrate. Can any more logical grounds be found for labelling a confession involuntary when the accused was not immediately taken before a magistrate than when he is accused and asked to confess as in the *Bram* case?

Nor was the Supreme Court satisfied with this "civilized standard," for in 1944 that Court decided the case of *Ashcraft v. Tennessee*.[36] Here the Court devised another standard, that of "inherent coercion." This was based upon thirty-six hours of questioning the accused. Justice Jackson in his able dissent asked the pertinent question, that if time were to be used as the standard, where was the line to be drawn? It is interesting to note here that only three years prior to the *Ashcraft* case the same Court could find no "inherent coercion" in forty two hours of no sleep and continued questioning, but preferred to rest on the basis of a state's sovereignty necessitating a "plain abuse" of Federal right.[37]

These few cases illustrate the difficulty of the courts when confronted with the problem of confessions to advance from out-moded and inadequate standards to a position of realistic approach to an involved question.

The problem will be greatly simplified when the United States Supreme Court clarifies its position, for the influence of that event upon the state courts could not be over-estimated.[38]

Colorado Cases

There have been three outstanding Colorado cases reversed due to an involuntary confession being admitted as evidence.[39]

In *Beery v. United States,* decided in 1873, the court followed the rule of the period and found that a slight chance of hope in promises made was sufficient to render the confession involuntary. At that time there was a strong dissent labelling the opinion of

[34] *Supra,* note 16.

[35] McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L. Ed. 819 (1943).

[36] 320 U.S. 728, 64 S.Ct. 94, 88 L. Ed. 1192 (1944).

[37] Lisenba v. California, 314 U.S. 219, 68 S.Ct. 280, 86 L. Ed. 166 (1941).

[38] For an examination of the Supreme Court cases see Inbau, "Confession Dilemma in the United States Supreme Court," 43 Ill. L. R. 442.
McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 Tex. L. R. 239.

[39] Bruner v. The People, 113 Colo. 194, 156 P. (2d) 111 (1945);
Beery v. United States, 2 Colo. 183 (1873);
Read v. The People, 122 Colo. 308, 221 P. (2d) 1070 (1950).

the majority one of the "venerable errors abounding in the law * * * respectable only for their antiquity." [40]

The second of the three, *Bruner v. The People,* is a clear case of abuse by police officers. The defendant was questioned for fifteen hours, threatened throughout, denied food and rest, and denied the satisfaction of the calls of nature. The Court found that the defendant was justified in believing that such treatment would continue until he confessed.

In the last case, *Read v. The People,* the defendant was in such a state of mental depravity when she was being questioned that there was no doubt of her inability to have the mental capacity to render a voluntary confession. The state of mind was not caused by any duress stemming from police officers, but existed due to extraneous circumstances.

These cases illustrate the point that the Court will, when necessary, declare a confession to be involuntary, but that there must be clear and convincing proof of the causal relationship between the inducement or mental incapacity and the confession. So also do the three cases illustrate three separate problems under the confession dilemma.

The *Beery* case comes under the heading of those inducements tending to incite hope, fear, or some other state of mind which would render the confession invalid when made thereto. The *Bruner* case is illustrative of actual physical abuse, and the *Read* case shows a state of mental incapacity rendering the confession "involuntary."

THE OSBORN CASE

The entire confession doctrine is discussed in the case of *Osborn v. The People, supra.* This case should be discussed before going any further. Its importance in this respect cannot be overestimated. The case, standing alone, is sufficient evidence of Colorado's enlightenment.

The defendants, Osborn and Noakes, were convicted of first degree murder. One of the defendants was brought to Denver and his treatment, while then incarcerated, was the basis for the involuntary contention.

The defendant had been placed in jail on a Saturday where he remained until Monday at which time he was brought before the Chief of Police. The defendant was questioned for short intervals throughout the day, and during the intermissions of the questioning was placed into what was known as the "hole." He went without lunch during the day, and late in the afternoon confessed.

The other defendant claimed that, because during the time that he was being driven to Denver certain statements referring to "neck cracking" were made to him by the Chief of Police, his subsequent confession was made involuntarily.

---

[40] per Wells, Justice.

The Supreme Court affirmed the opinion of the trial court in a decision written by Mr. Justice Butler. The entire history of confessions was discussed, the Court recognizing the limitations of the value of the rule and conceding the inadequacy of the courts in handling the problem. The Court mentions in this respect the case of *Beery v. United States, supra,* and while not specifically overruling the case, it cites authorities who have agreed with the dissenter, Mr. Justice Wells, and intimates that there would be no reason to perpetuate the rule of that case.[41]

The Court in deciding the case, settled certain points in connection with the confession doctrine which have since become established principles in this jurisdiction. The most important of these should be enumerated and commented upon.

First, and most important, there must be a cause and effect relationship between the inducement and the confession.[42] Therefore, not every abuse rendered the defendant no matter how slight will suffice to invalidate a subsequent confession. If the abuse did in fact cause the defendant to confess, the confession will be deemed involuntary. But, on the other hand, if the confession was made due to some reason other than the inducement, the inducement has no effect on its voluntariness.

Second, the appellate court may "look into the mind" of the defendant to see if the inducements actually caused the confession. This, of course, is the method of arriving at the cause and effect rule set out above. This point is evidence of the Court's refusal to promulgate any technical rule under which to determine the validity of a confession. It does signify, however, the principle that each case shall be determined upon its own merits.

Third, the question of admissibility is one for the court. This is very important, as the matter is one of law and as such should not be left for the determination of the jury. Wigmore believes that the practice in some jurisdictions of allowing the jury to rule upon the question of admissibility is nothing short of heresy.[43]

Fourth, the function of the jury is to determine the weight to be given the confession. Of course, the jury may give the confession no weight at all if it determines that it was made under duress, but this is a proper function of the jury as there is no difference in the type of evidence produced by an admitted confession from any other properly admitted evidence left for the determination of the jury.

Fifth, the trial court's finding based upon conflicting evidence cannot be disturbed in the absence of a clear abuse of discretion.

Obviously, the trial court is in a better position to weigh the conflicting evidence before it to determine this point than is the appellate court which has before it only the printed record of the proceedings. This rule has been rigidly adhered to in this jurisdic-

[41] Osborn v. The People, *supra*, p. 28.
[42] *Ibid*, p. 37.
[43] Wigmore, *supra*, sec. 861.

tion and is one of the main reasons why there is a lack of confusion in regard to confessions in Colorado.[44]

Here then is the law of confessions. Admittedly, if threats, torture, hope, fear, or any other extraneous force did "in fact" cause the accused to confess, the confession is involuntary. But the inducements must cause the confession. Mere facts of statements to the effect of "neck cracking," the placing in a "hole," the deprivation of lunch, the accusations, the advice to tell the truth, the solitary confinement, and the intermittent questioning while under arrest, are not sufficient, standing alone, to render a subsequent confession involuntary.

There is, however, one criticism which may be made of the *Osborn* case. On page 27, the Court quotes from Wigmore that "the policy of the future * * * should be to receive all well proved confessions in evidence, and leave them to the jury subject to all discrediting circumstances, to receive such weight as may seem proper." [45] The Court states that it has not yet reached that stage. May it never. The constitutional immunity from self incrimination should never be left to a jury's deliberation. It is a matter of law, and as such, should remain with the court's superior wisdom. A quotation from Mr. Justice Burke's dissenting opinion in the *O'Loughlin* case is well taken: "It has been too many centuries, too much blood, and too many hard won constitutions, to insure men and women fair and impartial trials and freedom from threat of convictions obtained by confessions extorted by torture, to permit these rights to be now prejudiced by hasty action." [46]

GENERAL RULES IN COLORADO

Although it is difficult to find in Colorado case law many specific incidents governing the law of admissibility of confessions, due in the main to the Court's adherence to the rule of the necessity of finding an abuse of discretion in the trial court,[47] there are, however, certain rules pertaining to confessions which should be noted.

1. All surrounding circumstances in regard to the making of the confession should be taken into consideration by the trial court in determining its validity.[48] This includes the age, maturity, intelligence, and character of the defendant, plus the circumstances surrounding the confinement.

---

[44] See note 47 *ante*.

[45] Wigmore, *supra*, sec. 867.

[46] O'Loughlin v. The People, 90 Colo. 368, 400, 10 P. (2d) 543 (1932).

[47] Osborn v. The People, *supra*.
Moss v. The People, 92 Colo. 88, 18 P. (2d) 316 (1932).
Bosko v. The People, 68 Colo. 257, 188 P. 743 (1920).
Moya v. The People, 88 Colo. 139, 293 P. 235 (1930).
Fincher v. The People, 26 Colo. 169, 56 P. 902 (1899).
Saiz v. The People, 93 Colo. 291, 25 P. (2d) 1114 (1933).
Goodfellow v. The People, 75 Colo. 243, 224 P. 1051 (1924).

[48] Read v. The People, *supra*.
Osborn v. The People, *supra*.
Ingles v. The People, 92 Colo. 518, 22 P. (2d) 1109 (1933).

2. The Court has decided that certain contentions made by the defense are not sufficient to render a confession involuntary. An example is that mere failure to warn the defendant that his statement might be used against him does not render an otherwise voluntary confession involuntary.[49] Nor will a confession be deemed involuntary due to a delay in bringing the accused before a committing magistrate,[50] nor using abusive language during the interrogation,[51] nor inducing a confession by trick of fraud.[52]

3. Mental capacity is always a question involved in the law of admissibility of confessions. If the defendant was asleep at the time of making the confession, it should be excluded,[53] and if there is any doubt as to whether the accused was asleep when the alleged confession was made, the question should be left to the jury.[54] As to intoxication, the question is one of degree. If there is mental capacity sufficient to realize what one is saying, intoxication is of no consequence.[55]

4. In regard to procedure, it has been held that failure to observe procedural requirements of the general rule is not fatal when there is no prejudice.[56] In this respect, the Court has held that it is not reversible error when the trial court fails to conduct a preliminary hearing without the presence of the jury when the confession is in fact voluntary.[57] Nor will remarks made by the prosecution in reference to the confession before there is a preliminary hearing invalidate a confession which is subsequently shown to be voluntary.[58] But it is reversible error for the trial judge to comment upon the weight which the jury is to attach to the confession.[59]

5. In the determination of the validity of a confession the Supreme Court has held that an involuntary confession will have no effect when there has been a subsequent voluntary confession made.[60] A confession will be deemed voluntary when it is substantiated upon cross-examination,[61] and if there is evidence

---

[49] Cahill v. The People, 111 Colo. 29, 137 P. (2d) 673 (1943).
Reagan v. The People, 49 Colo. 316, 112 P. 785 (1910).
Byram v. The People, 49 Colo. 533, 113 P. 528 (1911).
[50] Cahill v. The People, *supra.*
[51] Buschy v. The People, 73 Colo. 472, 216 P. 519 (1923).
Downey v. The People, 121 Colo. 307, 215 P. (2d) 892 (1950).
[52] Osborn v. The People. *supra.*
[53] Martinez v. The People, 55 Colo. 51, 132 P. 64 (1913).
Taylor v. The People, 77 Colo. 350, 237 P. 159 (1925).
[54] Martinez v. The People, *supra.*
[55] Roper v. The People, 116 Colo. 493, 179 P. (2d) 232 (1947).
[56] Roper v. The People, *supra.*
Andrews v. The People, 33 Colo. 193, 79 P. 1031 (1905).
[57] Cahill v. The People, *supra.*
[58] Mitsunaga v. The People, 54 Colo. 102, 129 P. 241 (1912).
Reagan v. The People, *supra.*
[59] Fincher v. The People, *supra.*
[60] Roper v. The People, *supra.*
[61] Honda v. The People, 111 Colo. 279, 141 P. (2d) 178 (1943).

which supports a recital of voluntariness incorporated within the confession it will be determined voluntary.[62]

When the evidence supports the trial court's finding, the appellate court cannot determine the confession to be involuntary, for obviously there has been no abuse of discretion.[63] Evidence by the defendant tending to show threats or abuses after the confession was made is clearly inadmissible,[64] and in like manner is evidence showing abuse when there is no attempt by the People to introduce into the record a confession.[65]

By an examination of the foregoing rules, and of the *Osborn* case, it becomes clear that the Colorado Court has reached an advanced stage in treating confessions. It is a stage of reason and realism. There is no attempt to promulgate any inflexible rule.[66] There is no attempt to protect the criminal at the expense of public welfare. There is no evidence of Wigmore's statement that the only ones who seem to be unaware of the necessities of police detection are Supreme Court Justices.[67]

CONCLUSION

Professor Wigmore cites three possibilities which would help eliminate the problem.[68] The first is to let an authorized, skilled, magistrate take the confession. In many outlying districts where crimes are, unfortunately, also committed, this would be virtually impossible. As far as experts are concerned, witness the *Bruner* case, *supra.*

The second suggestion is to make a moving picture of the proceedings. Apart from the cost element, this suggestion when analyzed nears the sublime.

The third suggestion is to let the bench and bar "rigorously expose and suppress the brutal methods." This is a self-evident truth, for no member of a learned and ethical profession would be justified in following any other course.

If and when the practice of regarding confessions with the realistic and enlightened approach of the Colorado Court is followed throughout the common law justidictions, there will no longer be the necessity of seeking for answers to a problem which may be solved by mere reasonableness.

---

[62] Pearson v. The People, 69 Colo. 76, 168 P. 655 (1917).
O'Donnel v. The People, 71 Colo. 113, 204 P. 330 (1922).
[63] Fincher v. The People, *supra.*
Bosko v. The People, *supra.*
[64] Kolenberger v. The People, 9 Colo. 233, 11 P. 101 (1886).
Brindisi v. The People, 76 Colo. 244, 230 P. 797 (1924).
[65] Frady v. The People, 96 Colo. 43, 40 P. 606 (1934).
[66] Reagan v. The People, *supra.*
[67] Wigmore, *supra,* sec. 851.
[68] Wigmore, *supra,* sec. 851.