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Criminal Law - Ability to Resist Psychological Coercion a Factor in Determining Voluntary Nature of Confession

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If . . . neither party knew of that fact, then it becomes the duty of the purchaser to have advised himself as to whether or not such an ordinance was in existence.

The conclusion to be drawn from this analysis is that the doctrine of frustration is an attempted defense by a disappointed party to a contract who finds his required performance possible, but undesirable, in that the forseeable object contemplated by both parties has become unforseeably no longer obtainable. This doctrine has been universally rejected by American courts of last resort. The contract remains possible of performance, as in the instant case, and mere disappointment in the final outcome of the bargain, or failure to adequately and wisely draft contracts, or to investigate existing laws which are clearly forseeable, offer no legal defense to a contract.

CRIMINAL LAW–ABILITY TO RESIST PSYCHOLOGICAL COERCION A FACTOR IN DETERMINING VOLUNTARY NATURE OF CONFESSION

Fikes, an uneducated Negro of low mentality, was picked up by Selma, Alabama police and charged with breaking and entering the apartment of the mayor's daughter and attempting to rape her. Booked on an "open charge of investigation," Fikes was not taken before a magistrate per Alabama law but was locked up in the Selma jail the night of the arrest. The following morning police officers questioned petitioner for three hours. The next day he was questioned for another two hours in the morning, and that afternoon he was taken to Kilby State Prison, roughly fifty-five miles from Selma. At the prison there were several hours of interrogation and similar questioning for two more days, after which Fikes confessed. Counsel was admitted after the confession was obtained, marking the first time Fikes had come in contact with anyone other than the police officers, the sheriff of Selma, and his employer. At no time prior to the first confession was Fikes allowed to see relatives or friends. After another week of similar interrogation Fikes gave a second confession. He was subsequently convicted in a trial in which the evidence against him consisted of the challenged confessions and two witnesses who testified that petitioner had previously attacked them. The mayor's daughter failed to identify petitioner as her assailant. Petitioner's conviction was affirmed by the Supreme Court of Alabama, which in turn was reversed by the United States Supreme Court holding that the failure to take the defendant before a magistrate and the incarceration in isolation for a week of questioning, coupled with defendant's low mentality, rendered the confessions obtained thereby involuntary and their use a violation of petitioner's rights under the Fourteenth Amendment to the Federal Constitution. *Fikes v. Alabama*, 352 U.S. 191 (1957).

In *Ingram v. State*,[1] the Alabama Supreme Court held that unlawful detention of a prisoner from the magistrate, in and of itself, does not render inadmissible a confession secured during such detention. The court in the instant case, while acknowledging the holding of the *Ingram* case, indicated that *Stein v. People* was important in deciding the case at hand. In the *Stein* case, in which there was admittedly unlawful detention, the court noted that ". . . such an occurence is relevant circumstantial evidence in the inquiry as to physical or psychological coercion."[2] The court also assumed a position paralleling that of *United States v. Mitchell*, where it was held that ". . . the mere fact that a confession was made while in the custody of the police does not render it inadmissible";[3] and *Lisenba v. California*, where the court noted that ". . . the fact of illegal delay may be relevant to the question of whether or not it denied due process . . . but is not conclusive";[4] and *People v. Alex*, in which it was said that ". . . even where the police illegally delay arraignment after arrest, . . . the confession is admissible unless made under the influence of fear."[5]

The preceding cases represent an unbroken current of authority that remained firm until the upheaval caused by the so-called *McNabb*[6] rule, which rendered inadmissible, as a matter of law, any confession obtained in conjunction with an unlawful detention from a magistrate. In a subsequent case, *Upshaw v. U.S.*, Mr. Justice Reed said in reference to the *McNabb* case: "The police were no longer left free to enforce the law by disobeying the law."[7] The Supreme Court, however, has seen fit in later cases to retreat from the rigidity of *McNabb*, stating in the instant case, as in *United States v. Mitchell*,[8] that the entire circumstances surrounding the confession obtained must be considered and the mere fact that the confession was obtained during an unlawful detention is not conclusive of its inadmissibility. "The question is controlled by the whole body of circumstances accompanying illegal detention."[9] As Mr. Justice Frankfurter observed in a concurring opinion in the present case: "No single one of

[1] 252 Ala. 497, 42 So. 2d 36 (1949). In the *Ingram* decision, the Alabama court noted that the Federal rule that confessions are inadmissible if made during illegal detention, due to failure to promptly carry a prisoner before a committing magistrate, is not binding upon state courts.

[2] Stein v. People, 346 U.S. 156, 187 (1952).

[3] 322 U.S. 65, 69 (1944). The court quoted with approval language used in McNabb v. United States, 318 U.S. 332 (1943).

[4] 314 U.S. 219, 235 (1941).

[5] 255 N.Y. 192, 193, 192 N.E. 289, 290 (1934).

[6] McNabb v. United States, 318 U.S. 332 (1943).

[7] 335 U.S. 410, 430 (1948).

[8] 322 U.S. 65 (1944).

[9] Ingram v. State, 252 Ala. 497, 499, 42 So. 2d 36, 38 (1949).

these circumstances alone would in my opinion justify a reversal."[10] It is apparent that Mr. Justice Frankfurter concurred because the detention of the prisoner, for all intents and purposes, was virtually incommunicado, and there was a failure to arraign the petitioner.

Fundamental to the problem of confessions is whether the confession is a product of reasoned choice or psychological or physical coercion.[11] If the latter is present, the confession is involuntary and is excluded because the truth value is indeterminable and it is untrustworthy.[12] Obviously, some consideration must be given to the defendant's mental capacity so as to determine whether under the circumstances he was able to resist the pressure applied. If he was, other things being equal, the confession cannot be said to be necessarily coerced. On the other hand, if the defendant is mentally deranged or of low mental capacity it may be that the interrogation had a greater effect than it would have had upon a person of normal intelligence.

In the majority opinion in the instant case, Mr. Chief Justice Warren noted that it is ". . . highly material to the question before this court to ascertain petitioner's character and background. . . .There was testimony by three psychiatrists at the trial . . . to the effect that petitioner is a schizophrenic and highly suggestible."[13] It would seem, then, that the court placed no little weight on Fikes' mental capacity. Mental capacity of any sort affects the weight to be given a confession, and if it is of a serious character it may render a confession inadmissible.[14] Of course, the court did not rely solely on petitioner's mental incapacity but considered it in the light of weight given to mental capacity in previous decisions.

Mr. Justice Harlan, and the Justices who joined him in the dissent,[15] raised serious objections to the conclusion subscribed to by the majority of the court. He noted that there was no evidence of physical brutality and that ". . . psychological coercion is by no means manifest."[16] In support of the minority position, it should be noted that previous cases disallowing confessions because of psychological coercion have been based not only on the failure to arraign, but also on the extreme length of the questioning periods. In the leading case of *Watts v. Indiana*,[17] the Supreme Court reversed a conviction based on a confession extracted from the prisoner by way of relay-team interrogation tactics. Relentless question-

[10] 352 U.S. 191, 199 (1957).

[11] United States v. Mitchell, 322 U.S. 65 (1944).

[12] People v. Fox, 319 Ill. 606, 150 N.E. 347 (1925).

[13] 352 U.S. 191, 193 (1957).

[14] State v. Phelps, 138 La. 10, 69 So. 856 (1915).

[15] Mr. Justice Burton and Mr. Justice Reed joined in the dissent.

[16] 352 U.S. 191, 200 (1957).

[17] 338 U.S. 49 (1949).

ing for sequential hours determined whether the pressure was so great as to cause the confession to be involuntary. As Mr. Justice Frankfurter said in *Watts*, "... there is torture of mind as well as body; the will is as much affected by force as by fear."[18] In *Harris v. State*,[19] which followed in the wake of the *Watts* decision, the Supreme Court reversed a conviction in which a confession was used that had been obtained after defendant had been confined in a small, hot room, interrogated intermittently throughout the day and night, and police threatened to arrest his mother. And in *Haley v. Ohio*,[20] the Supreme Court found coercion which the court said should have barred admission of the confession. The defendant in that case was interrogated by relays of police several times, and, on one occasion, from noon until five o'clock the following morning. In addition, there was some evidence that the defendant was beaten.

In none of the cases preceding the instant case were the defendants allowed to see counsel or friends, and in each case questioning was protracted and relentless. Yet the majority stated that notwithstanding the absence of physical brutality and long, continuous interrogation, the failure to take the defendant before a magistrate coupled with his incarceration in isolation for a week of questioning and his weak mental ability made the confessions thus obtained involuntary. It is apparent then that the majority is tending toward, if not the rationale, certainly the effect of the *McNabb* doctrine.[21] While on the one hand acknowledging that a confession is not inadmissible merely because it was obtained prior to arraignment, the court expands its criteria for determining what constitutes psychological coercion abandoning, in effect, the relentless, relay-team type investigation as the touchstone to determine psychological coercion.

It will be interesting to observe the effect this decision has upon standard operating procedures of law enforcement agencies. It would seem that the concept of Due Process of Law has once again been expanded and redefined so as to require police officials to more rigorously observe the constitutional rights of those taken into custody. If the concept has been broadened, the avenues of expansion are clear. The circumstances which the courts will use in determining whether a confession should be admitted into evidence are: (1) the will-power of the defendant and the amount of pressure applied thereto; (2) the defendant's mentality and its effect on the validity of his confession; (3) the presence or absence of relay-team interrogation; (4) the failure to promptly arraign the defendant; (5) the denial of the right to counsel; (6) the failure to allow defendant to consult with friends, and (7) the length of time the defendant is held for questioning.

[18] Ibid., at p. 52.

[19] 338 U.S. 68 (1949).

[20] 332 U.S. 596 (1948).

[21] McNabb v. United States, 318 U.S. 332 (1943).

The above criteria amplify the spirit of previous decisions, all of which have adhered to the proposition that "[a] confession by which life becomes forfeit must be the expression of free choice."[22]

[22] Watts v. Indiana, 338 U.S. 49, 53 (1949).

JURIES–FAILURE TO SELECT WOMEN FOR JURY PANEL DOES NOT DEPRIVE MALE DEFENDANT OF FAIR TRIAL

Sylvester Winfield was convicted of transporting liquor to a dry area with punishment set at two years in jail and a fine of $2,000. Defendant contended that error was committed because no women were selected for the jury panel. The court affirmed the conviction, ruling that regardless of any discrimination defendant did not show that he was prejudiced by it. The dissenting judge, however, thought that to have anything less than a cross-section of the community represented in the jury list was to deny defendant of his constitutional right to a fair trial and was a violation of Texas statute. *Winfield v. State*, 293 S.W. 2d 765 (Tex., 1956).

Alleged error based on discrimination in jury selection appears with increasing frequency as a basis for appeal. Intentional and systematic exclusion based on race,[1] national origin,[2] and occupational status[3] have been the contentions in most of the cases. The problem concerning women jurors is relatively new.

The common-law definition of "jury" or "trial by jury" did not concern itself with the problem as to whether women were qualified as jurors.[4] In regard to sex, the general definition was twelve men.[5] It was inconceivable any woman needed to serve, could serve,[6] or indeed, wanted to serve as a juror. But the modern concept of "man" as a generic term has pervaded the law so that women are now generally recognized as qualified jurors.[7] In *Ballard v. United States*,[8] the United States Supreme Court has gone so far as to say that in cases originating in the federal courts, women *must* be on the jury lists. It has adopted a "cross-section of the

[1] Norris v. Alabama, 294 U.S. 587 (1935).

[2] Hernandez v. Texas, 347 U.S. 475 (1954).

[3] Thiel v. Southern Pacific Company, 328 U.S. 217 (1946).

[4] In rare instances women sat in judgment to determine whether a convicted defendant was pregnant. Anne Wycherly's case, 8 C. & P. 262.

[5] Smith v. Times Publishing Company, 178 Pa. 481, 36 Atl. 296 (1897); N. Wagman & Company v. Schafer Motor Freight Service, 167 Misc. 681, 4 N.Y.S. 2d 526 (1938); In re Opinion of the Justices, 237 Mass. 591, 130 N.E. 685 (1921).

[6] People v. Moe, 381 Ill. 235, 44 N.E. 2d 864 (1942), wherein the defense unsuccessfully contended that the inclusion of women would prejudice him.

[7] People v. Barltz, 212 Mich. 580, 180 N.W. 423 (1920).

[8] 329 U.S. 187, 192 (1946).