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Criminal Law-Evidence--Confession to Polygraph Operator Prior to Actual Test Held Admissible

Criminal Law—Evidence—CONFESSION TO POLYGRAPH OPERATOR PRIOR TO ACTUAL TEST HELD ADMISSIBLE—*Jones v. Commonwealth*, 214 Va. 723, 204 S.E.2d 247 (1974).

Rules of evidence governing the admissibility of confessions have developed gradually throughout the history of Anglo-American jurisprudence. Initially any confession was admissible regardless of the methods by which it was obtained.[1] The basic consideration was that the evidence admitted be truthful and reliable.[2] To protect the integrity of judicial proceedings, safeguards were later developed to insure the reliability of confessions by a determination of the voluntariness with which they were given.[3] Courts have struggled with the problem of formulating a workable definition of voluntariness and have not yet developed a uniform substantive test.[4]

Several procedures have been developed to provide for a determination of the voluntariness of a confession.[5] Virginia follows the "Wigmore" or

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1. *See* D. JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND PREVIOUSLY TO THE COMMONWEALTH 73-109 (1837); 3 WIGMORE, EVIDENCE § 818 (Chadbourn Rev. 1970). *Cf.* J. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 205-07 (1974).

2. Gradually it was recognized that torture and other forms of mental and physical coercion had a harmful effect on the reliability of confessions thus obtained. "Pain and force may compel men to confess what is not the truth of facts and consequently such extorted confessions are not to be depended upon." G. GILBERT, EVIDENCE 1371 (1726). *See generally* Regina v. Baldry, 169 Eng. Rep. 568 (Ct. Crim. App. 1852); Regina v. Morton, 174 Eng. Rep. 367 (n.p. 1843) (confession inadmissible if produced by false hope or fear); Regina v. Drew, 173 Eng. Rep. 433 (n.p. 1835) (inducement held out by a person in authority renders a confession inadmissible); King v. Warickshall, 168 Eng. Rep. 234 (K.B. 1783) (confession obtained under a promise of leniency or pardon by officials inadmissible under practice of *approvement* whereby one giving evidence implicating an accomplice is entitled to a pardon for himself); King v. Rudd, 168 Eng. Rep. 160 (K.B. 1775).

3. For an overview of the historical and substantive development of the law of confessions *see generally* 3 WIGMORE, EVIDENCE § 815-63 (Chadbourn Rev. 1970); *Developments in the Law of Confessions*, 79 HARV. L. REV. 938 (1966).

4. Perhaps the best definition was given by Mr. Justice Jackson in his dissenting opinion in Ashcraft v. Tennessee, 322 U.S. 143, 161 (1944). "A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." The following is a sample of other judicial attempts to define voluntariness: A confession is voluntary within the meaning of the law if it is not given " . . . in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person. . . ." Hopt v. Utah, 110 U.S. 574, 585 (1884). "A confession is voluntary in law if, and only if, it was, in fact, voluntarily made." Ziang Sun Wan v. United States, 266 U.S. 1, 14 (1924).

5. The "Wigmore" or "orthodox" procedure is now followed by twenty-six states and the 1st, 5th and 10th circuits. This procedure involves a hearing by the judge, out of the presence of the jury, of all the facts bearing on the issue of voluntariness. If the judge determines that the confession is voluntary, he allows it to be admitted into evidence and the jury weighs only its credibility.

The Massachusetts or "humane" rule is followed by nineteen states, the District of Colum-

"orthodox" procedure.[6] The development of federal rules governing admissibility has been affected by a long line of Supreme Court decisions broadening the scope of the law of confessions to include an inquiry into the due process-fundamental fairness area embraced in the fourteenth amendment.[7] This standard for the admissibility of confessions was made applicable to the states through the fourteenth amendment.[8] In applying due

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bia and the 4th and 9th circuits. In this procedure the judge hears all the evidence bearing on the voluntariness of the confession before ruling on its admissibility. If he finds that the confession is voluntary and admits it, the jury is then instructed that it must also find the confession voluntary before considering it.

Prior to Jackson v. Denno, 378 U.S. 368 (1964), seventeen jurisdictions followed the New York procedure in which the trial judge made a preliminary determination regarding the voluntariness of the confession and if under no circumstances it could be deemed voluntary, the judge excluded it. However, if there was a factual conflict as to the voluntariness of the statement, the judge admitted it into evidence and the jury would determine both the voluntariness and the credibility of the confession. This procedure was held constitutionally defective in *Jackson*. Of those jurisdictions which followed the New York rule, Arizona, Arkansas, Georgia, South Carolina, and Puerto Rico have not made any final determination of the procedure which will be followed. For an exhaustive listing of the cases following each procedure, see 368 U.S. at 411-23; 3 WIGMORE, EVIDENCE § 861, 585-90 (Chadbourn Rev. 1970). *See also* Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between the Judge and Jury*, 21 U. CHI. L. REV. 317 (1954).

6. Mathews v. Commonwealth, 207 Va. 915, 153 S.E.2d 238 (1967); Reid v. Commonwealth, 206 Va. 464, 144 S.E.2d 310 (1965); Upshur v. Commonwealth, 170 Va. 649, 197 S.E. 435 (1938). *See* note 5 *supra*.

7. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (right to be informed of all constitutional rights such as the right to remain silent and the right to counsel); Massiah v. United States, 377 U.S. 201 (1964) (right to have counsel present during interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel prior to indictment); Mallory v. United States, 354 U.S. 449 (1957) (delay in arraignment); McNabb v. United States, 318 U.S. 332 (1943) (illegal detention and delay in arraignment).

8. Brown v. Mississippi, 297 U.S. 278 (1936). However, the due process standard used in weighing the effect of an inducement to confess does not include the traditional "state action" requirement. Rather, the test is whether the person offering the inducement is one "in authority." There have been three primary approaches to the determination of what constitutes a person in authority whose inducements would be sufficient to render a confession made to him inadmissible.

(1) The English rule, applied by a few American courts where the complaining party in a lawsuit has been held to be a person in authority. Sullivan v. State, 66 Ark. 506, 51 S.W. 828 (1899) (owner of stolen property held person in authority).

(2) Rule admitting any statement induced by an unofficial person. United States v. Stone, 8 F. 232 (W.D. Tenn. 1881) (confession to private detective employed by owner of stolen goods held admissible). *Accord*, Early v. Commonwealth, 86 Va. 921, 11 S.E. 795 (1890).

(3) A majority of courts follow the rule whereby a "person in authority" is decided on a case by case determination of whether the accused *reasonably* believed the person offering the inducement had the power or authority to carry out the inducement so as to render it effective. *See* People v. Luis, 158 Cal. 185, 110 P. 580 (1910) (bystander not person in author-

process standards to confessions, some state courts have made a further distinction by excluding confessions obtained where the accused has been deceived or tricked by the police,[9] while admitting those where the deception is carried out by a private individual.[10]

In Virginia the admissibility of confessions under the "Wigmore" rule depends upon whether the confession is trustworthy as evidence.[11] Prior to *Miranda v. Arizona*,[12] Virginia law did not require that a suspect in custody be informed of his constitutional rights during police interrogation, and confessions thus obtained were admitted into evidence.[13]

In *Jones v. Commonwealth*,[14] the Virginia Supreme Court reaffirmed its

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ity); State v. Thorp, 334 Mo. 46, 64 S.W.2d 249 (1933) (private detective held not person in authority); State v. Force, 69 Neb. 162, 95 N.W. 42 (1903) (father urging confession from minor son held person in authority).

State courts have also applied the fundamental fairness doctrine in reviewing police procedures involved in obtaining confessions. People v. Everett, 10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193, *cert. denied*, 370 U.S. 963 (1962).

9. Early v. Commonwealth, 86 Va. 921, 11 S.E. 795 (1890) (private detective not a person in authority whose promise of secrecy would be sufficient inducement to render a confession inadmissible); Fincher v. State, 211 Ala. 388, 100 So. 657 (1924) (promise of secrecy not within meaning of rule excluding involuntary confessions); People v. Stadnick, 207 Cal. App. 2d 767, 25 Cal. Rptr. 30 (Dist. Ct. App. 1962) (confession obtained by police eavesdropping held admissible); Blackwell v. State, 113 Ga. App. 536, 148 S.E.2d 912 (1966) (eavesdropping by police after promise of privacy did not render confession inadmissible); Ford v. State, 181 Md. 303, 29 A.2d 833 (1943) (confession admissible because it was not the result of threats or inducements); State v. Thompson, 38 Wash. 2d 774, 232 P.2d 87 (1951) (confession obtained by artifice, trickery or fraud does not alone render the confession inadmissible even though the practice of obtaining confessions in this manner may be objectionable). *See also* M. Koessler, *The Admissibility of Confessions Obtained by Trickery*, 50 A.B.A.J. 648 (1964).

10. *See* Paroutian v. United States, 370 F.2d 631 (2d Cir.), *cert. denied*, 387 U.S. 943 (1967); People v. Bowman, 240 Cal. App. 2d 358, 49 Cal. Rptr. 772 (Dist. Ct. App. 1966); People v. Teale, 63 Cal. 2d 178, 404 P.2d 209, 45 Cal. Rptr. 729 (1965); People v. Price, 63 Cal. 2d 370, 406 P.2d 55, 46 Cal. Rptr. 775 (1965); People v. Milani, 39 Ill. 2d 22, 233 N.E.2d 398, *cert. denied*, 393 U.S. 865 (1968) (confession volunteered to inmate held admissible); Heldt v. State, 20 Neb. 492, 30 N.W. 626 (1886) (confession made to detective pretending to be fellow prisoner held admissible); People v. Everett, 10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193, *cert. denied*, 370 U.S. 963 (1962); State v. Rush, 108 W. Va. 254, 150 S.E. 740 (1929) (assurance by bank examiner that statements by accused could not be used against him did not render statements inadmissible).

11. Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947).

12. 384 U.S. 436 (1966).

13. Mendoza v. Commonwealth, 199 Va. 961, 103 S.E.2d 1, *cert. denied*, 358 U.S. 873 (1958). The court said that while it would be better police procedure for police to warn suspect of her constitutional rights prior to questioning it is not required. Failure to so warn does not render a confession inadmissible. *See also* Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965).

14. 214 Va. 723, 204 S.E.2d 247 (1974).

adherence to the traditional voluntariness standard. Jones was arrested for the armed robbery of a drug store. Due to his status as a suspect in several other robberies, bail was set at $50,000. At the suggestion of counsel, Jones submitted to a polygraph test administered by a private agency, for the purpose of having bail reduced if the test proved successful. Prior to the actual test, Jones was interviewed by the operator in a separate room. Unknown to Jones, his counsel and two police detectives who had accompanied him were in an adjacent room where they could see and hear the test being administered. After some preliminary remarks,[15] the polygraph operator told Jones that if he would tell him what places he had robbed, that he would not ask about them during the test; whereupon Jones told the operator that he had in fact held up the drug store. Jones' counsel made no attempt to stop the questioning or to object to the nature of the conversation.[16] At trial, the court ruled that the statement to the operator was voluntary and hence admissible.[17] On appeal the Virginia Supreme Court

15. The polygraph operator told Jones that he was Cuban by birth, ostensibly to demonstrate his lack of racial bias. He also made certain disparaging comments about one of the police officers who had accompanied Jones to the office. He then told Jones that, under the fifth amendment, Jones did not have to take the polygraph test.

16. The court indicates that counsel's action, or inaction is significant, perhaps as an indication that Jones had waived his right to remain silent. *Id.* at 725, 204 S.E.2d at 249. *See also* note 28 *infra.*

17. Jones was convicted in the Circuit Court of the City of Richmond. Jones appealed the verdict citing several errors including the trial court's admission of his confession to the polygraph operator. Jones claimed that since the results of a polygraph test are inadmissible in Virginia under Skinner v. Commonwealth, 212 Va. 260, 183 S.E.2d 725 (1971), and Lee v. Commonwealth, 200 Va. 233, 105 S.E.2d 152 (1958), statements made to a polygraph operator prior to the test should also be excluded. The Supreme Court granted a writ of error limited to the consideration of the admission of the polygraph operator's testimony concerning Jones' confession. 214 Va. at 724-25, 204 S.E.2d at 747-48. The Supreme Court properly rejected Jones' argument finding no connection between the exclusion of testimony by the operator as to what actually occurred and the admissibility of an interpretation of electronic data, the reliability of which has not yet been established. *Id.* at 724, 204 S.E.2d at 248, 249.

18. The *Miranda* decision, in dealing with the issue of in-custody police interrogation, stated that police deception in obtaining a waiver by the accused of his constitutional rights would render a confession inadmissible. 384 U.S. at 453, 476. The *Jones* case does not fall within this proscription because of the lack of any demonstrable relationship between the polygraph operator and the state. The opinion emphasizes that the indicia of an agency relationship show that the operator was retained by Jones, and that Jones initiated the test without any encouragement or discouragement from the state, therefore the operator was Jones' agent. Also, it must be assumed that, because the test was administered at the operator's regular place of business, he was aware of the fact, or at least the possibility, that Jones was being observed by the police. The deception was carried out by the operator without the *active* participation of the police and in the presence of Jones' counsel. 214 Va. at 724-26, 204 S.E.2d at 247-49. Cases which have excluded confessions obtained by police trickery have

held that the confession was properly admitted into evidence and affirmed Jones' conviction.

In its short opinion, the court determined that Jones' confession was voluntary and that the polygraph operator was not acting as an agent of the state, therefore, the *Miranda* and other warnings were inapplicable.[18] Furthermore, even though Jones had been tricked into making the confession, it would still be admissible because it was not given under circumstances likely to produce a false statement.[19]

The court cited *Penn v. Commonwealth*[20] as dispositive of the issue of voluntariness. There the suspect had not been subjected to any treatment which would render a confession involuntary.[21] While this approach is the prevailing one, the possible trend toward a broader due process inquiry might have been explored. The court noted that the circumstances present in the *McNabb*[22]-*Miranda*[23] line of cases were not present. Jones was not deprived of counsel, nor held incommunicado, nor subjected to a police grilling, and his physical needs had been met. Still, the court did not consider the voluntariness of Jones' statement from the fundamental fairness-due process standpoint. There was no inquiry as to whether Jones knowingly confessed or if the deception whereby Jones was being observed by the police amounted to a denial of due process.[24] Most states that have

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generally involved a violation of a privileged relationship. *See* Leyra v. Denno, 347 U.S. 556 (1954) (confession elicited by police-employed psychiatrist held violation of doctor-patient privilege); People v. Barker, 60 Mich. 277, 27 N.W. 539 (1886) (confession obtained by one pretending to be representing accused's attorney inadmissible). Statements made in the presence of, but not at the instigation of the police have also been admitted. People v. Petker, 254 Cal. App. 2d 652, 432 P.2d 231, 62 Cal. Rptr. 215 (Dist. Ct. App. 1967). Confessions obtained by deception initiated by the police but carried out by a third party have also been held admissible. *See* People v. Ragen, 262 Cal. App. 2d 392, 68 Cal. Rptr. 700 (Dist. Ct. App.), *cert. denied*, 393 U.S. 1000 (1968); People v. Hays, 250 Cal. App. 2d 96, 58 Cal. Rptr. 241 (Dist. Ct. App. 1967). *See also* discussion notes 9 & 10 *supra*. *But see* Spano v. New York, 360 U.S. 315 (1959).

19. *See* Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947); Early v. Commonwealth, 86 Va. 921, 11 S.E. 795 (1890). *But see* Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1965) (confession elicited by subjecting accused to emotional stress was held inadmissible).

20. 210 Va. 213, 169 S.E.2d 409 (1969).

21. Justice Harrison observed that Jones, like Penn, had not been subjected to any coercion or police interrogation, and that there had been no promises or threats made by the police. The opinion reemphasized the trustworthiness of the evidence and not due process as the critical consideration for determining the admissibility of a confession in Virginia. 214 Va. at 726, 204 S.E.2d at 249.

22. McNabb v. United States, 318 U.S. 332 (1943).

23. Miranda v. Arizona, 384 U.S. 436 (1966).

24. 214 Va. at 725-26, 204 S.E.2d at 249. *See generally* United States *ex rel.* Everett v.

considered the question of confessions obtained by deception or eavesdropping by the police have held that such practices do not render a confession inadmissible.[25] Yet, some courts have expressed distaste for these practices even though admitting the confessions thus obtained.[26]

The rationale in *Jones* would be more persuasive if such issues were expressly dealt with, rather than presumed. The very heart of the issue was the voluntary nature of Jones' admission. While the polygraph operator was not an actual agent of the state, other jursidictions have held that reliance on a polygraph operator's promise of secrecy or other inducement would render a confession to him inadmissible.[27] However, these cases can be distinguished on the basis that the polygraph test was initiated by the state rather than by the defendant.

The opinion further noted that Jones' counsel made no objection to the interview by the polygraph operator and that this was evidence of the voluntariness of Jones' confession. Counsel's failure to object might have in itself raised a due process question of Jones' sixth amendment right to effective counsel.[28] Furthermore, it is the function of the bench as well as

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Murphy, 329 F.2d 68 (2d Cir.), *cert. denied*, 370 U.S. 963 (1964); United States v. Remolif, 227 F. Supp. 420 (D. Nev. 1964); People v. Ketchel, 59 Cal. 2d 503, 381 P.2d 394, 30 Cal. Rptr. 538 (1963).

25. *See* People v. Price, 63 Cal. 2d 370, 406 P.2d 55, 46 Cal. Rptr. 775 (1965); Commonwealth v. Sullivan, 354 Mass. 598, 239 N.E.2d 5 (1968); State v. O'Kelly, 181 Neb. 618, 150 N.W.2d 117 (1967); State v. Cadena, 74 Wash. 2d 185, 443 P.2d 826 (1968).

26. Mendoza v. Commonwealth, 199 Va. 961, 103 S.E.2d 1, *cert. denied*, 358 U.S. 873 (1958); State v. Thompson, 38 Wash. 2d 774, 232 P.2d 87 (1951).

27. *See* People v. Brown, 198 Cal. App. 2d 253, 17 Cal. Rptr. 884 (Dist. Ct. App. 1961). Defendant's confession made to a polygraph operator after operator had told him that he would not be charged if he would admit the crime was held inadmissible. The court said that the defendant *reasonably* believed that the polygraph operator was in a position to offer such inducements and a confession thus made was involuntary and inadmissible. The same result was reached in State v. LaFernier, 37 Wis. 2d 365, 155 N.W.2d 93 (1967), where a spontaneous confession made to a polygraph operator (who was not an agent of the state) in the presence of a police officer was held inadmissible because the defendant had not been warned again of his rights prior to his statement and the possibility of a waiver by defendant of his *Miranda* rights must be proven to have been knowingly made. This court further interpreted *Miranda* to require that warnings be given prior to each interrogation.

28. It is interesting to note here that in a recent federal case in Virginia, Redd v. Peyton, 303 F. Supp. 320 (W.D. Va. 1969), an argument was made on appeal that the accused in a murder case had been denied his sixth amendment right to effective counsel because of his counsel's failure to object to the admission into evidence of defendant's involuntary confession. The argument was unsuccessful, but it is one that perhaps could have been made in the *Jones* case where counsel permitted police detectives to be present and to listen to the conversation between the polygraph operator and Jones without Jones' knowledge. *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963).

the bar to protect the constitutional rights of an individual if they are infringed upon.

While the Virginia Supreme Court said that reliability of the evidence is the underlying reason for a determination of its voluntariness, the United States Supreme Court has noted that the truth or falsity of the confession should not be the controlling factor in the determination of admissibility.[29]

Although the *Jones* decision was in accord with the prevailing state law, there is a possible trend developing in the law outside of Virginia subjecting extra-judicial confessions to a more rigid due process standard.[30] In an accusatorial system based on the presumption of innocence of the accused and the protection of an individual's constitutional rights, it is desirable to insure that the state prove its case without resort to questionable methods of obtaining evidence or by the utilization of evidence obtained by private citizens in a manner proscribed to the state.

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29. *See* Rogers v. Richmond, 365 U.S. 534 (1961). Here the Court held that the use of a legal standard which took into account the probable truth or falsity of the accused's statement was not permitted under the fourteenth amendment due process requirement. A similar result was reached in Culombe v. Connecticut, 367 U.S. 568 (1961); and Lisenba v. California, 314 U.S. 219, *reh. denied*, 315 U.S. 826 (1941). In *Lisenba*, the Court stated that the aim of due process is to prevent fundamental unfairness without regard to the truth or falsity of the confession. These standards have generally been applied to official actions in obtaining incriminating statements and confessions. They have also been applied recently to confessions obtained by unofficial private persons. Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964); People v. Brown, 198 Cal. App. 2d 253, 17 Cal. Rptr. 884 (Dist. Ct. App. 1961); Commonwealth v. Vento, 410 Pa. 350, 189 A.2d 161 (1963). An early case which reached the same result is State v. Russell, 83 Wis. 330, 53 N.W. 441 (1892), in which the court reversed a defendant's conviction on the grounds that incriminating statements made to the assistant prosecutor by the defendant when she thought she was talking to her defense attorney on the telephone were not admissible.

30. *See* discussion notes 18, 24, and 29 *supra*.