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Criminal Law—Admissibility of Confessions

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CRIMINAL LAW

Admissibility of Confessions. *State v. Moore*[1] recently held that only two proper grounds exist for excluding a confession from evidence in a criminal trial: That it was obtained in violation of the due process clause of the fourteenth amendment to the federal constitution or that it has not met the test provided by Washington statute.[2] The Washington Constitution provides that, "no person shall be compelled in any criminal case to give evidence against himself . . . ."[3] But the court held that this provision does not apply to the admissibility of confessions. The defendant had been convicted of second degree burglary and grand larceny. He sought reversal on the ground that, since he did not testify, admission of his confessions violated the self-incrimination provision.

The thesis of this note is briefly this: Cases prior to *Moore* held that the self-incrimination provision of the state constitution is identical in substance with that of the federal constitution. Since the basic test of a good confession in the federal courts is the self-incrimination provision, there is an inconsistency in the court's holdings. Secondly, the Washington statute on confessions[4] conflicts with the federal due process clause and with the Washington self-incrimination provision (if interpreted as is the analogous federal provision). Finally, it appears that the test for a confession under the fourteenth amendment due process clause is practically the same as that used under the federal self-incrimination provision.

Before *Moore* was decided, the Washington court had not made it clear whether the state self-incrimination provision applied to the admissibility of confessions. In the principal case the court cited *State*

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promise to abandon non-conforming use of property in a zoned area. The county refrained from alternate remedies during the period of non-conforming use. The court enforced the promise when the promisor later failed to comply with the zoning law as promised.

The forbearance question arose in Pennsylvania, Twilley v. Pennypack Woods Home Ownership Ass'n, 180 Pa.Super. 20, 117 A.2d 788 (1955). To a promise to a tenant that he could remain on the premises the court felt forbearance by the tenant in the form of failure to make plans to move was not definite and substantial.

[1] 160 Wash. Dec. 145, 372 P.2d 536 (1962).

[2] RCW 10.58.030: "CONFESSION AS EVIDENCE. The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

[3] WASH. CONST. art. 1, § 9.

[4] Note 2 *supra*.

v. Winters[5] and *State v. Johnson*[6] for the proposition that it did not. In *State v. Winters,* the appellant unsuccessfully argued that RCW 10.58.030 contravenes the self-incrimination provision. The court there stated that since the statute excludes confessions "when made under the influence of fear produced by threats" it would not overturn the statute. This implies that WASH. CONST. art. 1, § 9 imposes some restriction on the admissibility of confessions. Later in its opinion, however, the court said that this state has no constitutional or statutory provision concerning the use of confessions as evidence except RCW 10.58.030. A year after *Winters, State v. Dildine*[7] held that failure to advise the defendant of his right to keep silent does not violate his constitutional right against self-incrimination. Even though the defendant's right had not been violated the court did recognize that this right pertains to the admissibility of confessions. An early case, *State v. Washing,*[8] used both RCW 10.58.030 and WASH. CONST. art. 1, § 9 in determining that certain statements were admissible into evidence. Although the cases are confusing, *State v. Moore*[9] indicates that the state constitution's privilege against self-incrimination affords protection to the defendant only during his trial.

The interpretation given this privilege is surprising in light of the court's normal treatment of the relationship between federal and state constitutional rights:

The Washington court has applied this general proposition specifi-

> In a series of cases commencing with State v. Vance, 29 Wash. 435, 70 Pac. 34 (1902), this court has adhered to the rule that where the language of the state constitution is similar to that of the Federal constitution, the language of the state constitutional provision should receive the same definition and interpretation as that which has been given to the like provision in the Federal constitution by the United States supreme court.[10]

[5] 39 Wn.2d 545, 236 P.2d 1038 (1951).

[6] 53 Wn.2d 666, 355 P.2d 809 (1959). The court merely quoted the *Winters* case without comment.

[7] 41 Wn.2d 614, 250 P.2d 951 (1952). See State v. Haynes, 58 Wn.2d 716, 264 P.2d 935 (1961); State v. Benson, 58 Wn.2d 490, 364 P.2d 220 (1961); State v. Wilson, 68 Wash. 464, 123 Pac. 795 (1912). In the *Haynes* case, the court considered the due process clause in the state constitution in determining the admissibility of a confession.

[8] 36 Wash. 485, 78 Pac. 1019 (1904). See State v. Clark, 21 Wn.2d 774, 153 P.2d 297 (1944).

[9] 160 Wash. Dec. 145, 372 P.2d 536 (1962).

[10] State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481, 482 (1959). *Accord,* State v. Lei, 59 Wn.2d 1, 365 P.2d 698 (1961); Nostrand v. Balmer, 53 Wn.2d 460, 335 P.2d 10 (1959); City of Bremerton v. Smith, 31 Wn.2d 788, 794, 199 P.2d 95, 98 (1948) (dissenting opinion); State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922); State v. Vance, 29 Wash. 435, 70 Pac. 34 (1902).

cally to WASH. CONST. art. 1, § 9.[11] In spite of the argument in *State v. Schoel*[12] that Washington has the right, if not the duty, to make its own interpretation of the state constitution, the court there adopted the position of the United States Supreme Court.[13] Similarly, to determine whether a statement made by the defendant before a magistrate at a preliminary hearing was properly admitted into evidence, the case of *State v. Washing*[14] applied the federal fifth amendment case of *Wilson v. United States*.[15]

In *Bram v. United States*,[16] the United States Supreme Court said:

> In criminal trials, in courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the constitution of the United States commanding that no person shall be compelled in any criminal case to be a witness against himself.[17]

This has been the rule throughout the history of the Court.[18] The protection given by the self-incrimination provision makes invalid any confession given as a result of an inducement engendering either hope or fear. The provision will not allow a person to be made a deluded instrument of his own conviction. Any interference that restricts this freedom will invalidate the confession. The type of influence is not determinative, even though it may relate to the reliability of the confession. Consequently, a confession obtained by trickery or inducement of hope violates the self-incrimination provision just as much as does a confession obtained by force or threat of force, although the first kind of confession is probably more reliable. Consequently, RCW 10.58.030 is inconsistent with the self-incrimination provision, because the statute specifically allows confessions to be admitted into evidence if they

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[11] State v. James, 36 Wn.2d 882, 221 P.2d 482 (1950). "The provisions quoted from the constitution of this state WASH. CONST. art. 1, § 9, afford appellant the same protection that he could claim under the Federal Constitution." *Id.* at 897, 221 P.2d at 491. *Accord*, State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948). "The latter portion of the fifth amendment to the constitution of the United States, and Article 1, § 9 of the constitution of this state; give to the individuals the same protection." *Id.* at 926, 190 P.2d at 743.

[12] 54 Wn.2d 388, 341 P.2d 481 (1959).

[13] Brief for Respondent, p. 66, State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959).

[14] 36 Wash. 485, 78 Pac. 1019 (1904).

[15] 162 U.S. 613 (1896).

[16] 168 U.S. 532 (1897).

[17] *Id.* at 542.

[18] United States v. Carignan, 342 U.S. 36 (1951); Ziang Sung Wan v. United States, 266 U.S. 1 (1924); Powers v. United States, 223 U.S. 303 (1912); Hardy v. United States, 186 U.S. 224 (1902); Wilson v. United States, 162 U.S. 613 (1896); Sparf v. United States, 156 U.S. 51 (1895).

are the result of inducements other than fear.[19] The statute is designed to prevent unreliable confessions from being admitted, for it prohibits confessions induced by fear and requires a confession made by an inducement of any sort to be corroborated. But no Washington case has noted this inconsistency. Cases have avoided the issue,[20] with the exception of *State v. Winters*,[21] which decided that the statute was not unconstitutional. In the *Bram*[22] case, after a discussion of the protection afforded by the fifth amendment, the Court said that most state courts follow the general rule that the confession must be freely determined. Then it cited an Indiana statute[23] as an exception to the general rule. In other words, the Indiana statute, which is almost the same as the Washington statute, is inconsistent with the self-incrimination provision of the United States Constitution. Since the fifth amendment was not then applied to the states, the Indiana statute was not declared unconstitutional. However, if the self-incrimination provision in the Washington Constitution is interpreted as is the fifth amendment, then RCW 10.58.030 contravenes WASH. CONST. art. 1, § 9.

The Washington statute is also inconsistent with the fourteenth amendment due process clause, which allows a state court to admit a confession into evidence only if it has been "freely self-determined."[24] The test does not depend upon the reliability of the confession but upon whether interrogating officers overcame the defendant's will to resist.[25] In *Rogers v. Richmond*,[26] the interrogating officers, within

[19] See State v. Thompson, 38 Wn.2d 774, 232 P.2d 87 (1951); State v. Clark, 21 Wn.2d 774, 153 P.2d 297 (1944). The court in the *Thompson* case stated; "the general rule, supported by the weight of authority, appears to be that the use of artifice—even trickery or fraud in inducing a confession, will not alone render the confession inadmissible in evidence." 38 Wn.2d at 783, 232 P.2d at 93.

[20] State v. Clark, 21 Wn.2d 774, 153 P.2d 297 (1944) ; State v. Washing, 36 Wash. 485, 78 Pac. 1019 (1904).

[21] 39 Wn.2d 545, 236 P.2d 1038 (1951).

[22] 168 U.S. 532 (1897).

[23] REV. ST. IND. 1894, § 1871: "The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear, produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony." Compare with RCW 10.58.030, note 1 *supra*.

[24] Rogers v. Richmond, 365 U.S. 534, 544 (1961).

[25] Townsend v. Sain, 83 Sup. Ct. 745 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Stevens, *Confessions and Criminal Procedure—A Proposal*, 34 WASH. L. REV. 542, 545 (1959); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Leyra v. Denno, 347 U.S. 556 (1954); Haley v. Ohio, 332 U.S. 596 (1948); Lee v. Mississippi 332 U.S. 742 (1948); Lyons v. Oklahoma, 322 U.S. 596 (1944); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); Lisenba v. California, 314 U.S. 219 (1941).

[26] 365 U.S. 534 (1961).

hearing of the defendant, pretended to order the defendant's wife brought in for questioning. They also told him he would be less than a man if he failed to confess. Although the trial judge found that the confession was admissible because the trick by the officers had no tendency to produce a confession that was not reliable, the Supreme Court reversed the conviction because the trial court had used the wrong standard in determining whether the confession was voluntary. If the trial court in Washington uses the statutory standard for determining the admissibility of a confession, then its decision too may be overturned, because the inducement allowed by the statute may be sufficient to overcome the defendant's will to resist.[27]

The test for determining the validity of a confession under the federal due process clause appears to be merging with the test for determining the validity of a confession under the federal self-incrimination provision. In *Brown v. Mississippi*[28] a confession obtained through use of physical brutality failed the due process test because the method of acquiring it offended a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[29] The fundamental principle, at this point, has two facets: a confession must be reliable, and law enforcement officers must be made to obey the law they are sworn to uphold. The Court specifically stated that exemption from compulsory self-incrimination in the states was not secured by the fourteenth amendment. Consequently, that part of a person's right to privacy was not guaranteed by the federal constitution.[30] Since deciding *Brown,* however, the Court has reversed state convictions even where the method used to extract the confession neither violated state law nor rendered the confession unreliable.[31] The rationale of these subsequent decisions is that due process also forbids a defendant to be made the deluded instrument of his own conviction through a confession unfairly extracted. One of these cases, *Culombe*

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[27] "Ours is an accusational and not an inquisitional system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Id.* at 541.

[28] 297 U.S. 278 (1936). See Chambers v. Florida, 309 U.S. 227 (1940), which held that coercion can be mental as well as physical.

[29] Brown v. Mississippi, 297 U.S. 278, 285 (1936).

[30] See also Wolf v. Colorado, 338 U.S. 25 (1948). "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Id.* at 27.

[31] Townsend v. Sain, 83 Sup. Ct. 745 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959).

v. Connecticut,[32] set out this test for the admissibility of a confession under the fourteenth amendment due process clause:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess; it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[33]

Compare with this test the very similar requirement under the fifth amendment, namely, that "the confession be made freely, voluntarily, and without compulsion or inducement of any sort."[34]

In conclusion, the test for the admissibility of confession would be virtually the same whether the Washington court used the self-incrimination provision of the state constitution (interpreted in accordance with the analogous provision of the federal constitution) or the due process clause of the fourteenth amendment. In either case the test would preclude the use of RCW 10.58.030.

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Double Jeopardy. In *State v. Connors*,[1] the Washington State Supreme Court held that a defendant had been placed in jeopardy when, sua sponte, a trial court erroneously declared a mistrial over his objection. A later retrial of the defendant therefore constituted double jeopardy.

At the first trial a jury had been impaneled and sworn to try the defendant. No opening statements had been made, and no evidence had been introduced. Although the defendant had not consented to a separation of the jury, several members of the jury separated themselves from the rest of the panel during the noon recess. This fact was called to the attention of counsel, and the defendant consented to a separation of the rest of the jurors for the remainder of the recess. Afterwards, on its own motion, the court declared a mistrial over a timely objection by the defendant. Subsequently, the defendant was tried and convicted of an identical charge, over his objection based on double jeopardy.

On appeal, the supreme court reversed. The court held (1) that the mistrial had been improperly granted, and, (2) that the second trial

[32] 367 U.S. 568 (1961).
[33] *Id.* at 607.
[34] Wilson v. United States, 162 U.S. 613, 620 (1896).

[1] 59 Wn.2d 879, 371 P.2d 541 (1962).