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Constitutional Law—Self-Incrimination Privilege—Admissibility of Incriminating Statements Made to Federal Officer by Defendant While Asleep, Brock v. United States, 223 F.2d 681 (5th Cir. 1955)

COMMENTS

CONSTITUTIONAL LAW—SELF-INCRIMINATION PRIVILEGE ADMISSIBILITY OF INCRIMINATING STATEMENTS MADE TO FEDERAL OFFICER BY DEFENDANT WHILE ASLEEP

Brock v. United States, 223 F.2d 681 (5th Cir. 1955)

Following a raid upon an illegal still, federal revenue agents approached a nearby house where the "moonshiners" had been seen prior to the raid. One of the agents, while standing outside an open window of the house, saw the defendant asleep inside. Pretending to be one of the moonshiners, the agent elicited incriminating statements from the defendant while he remained asleep. These statements were admitted, over objection, in a subsequent trial in which the defendant was convicted of violating Internal Revenue laws prohibiting the illegal manufacture of liquor. The court of appeals reversed, holding that the admission of the statements made by defendant while asleep violated his privilege against self-incrimination under the fifth amendment, since he was not afforded a "fair chance" to exercise his privilege before being compelled to testify against himself.[1]

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1. Brock v. United States, 223 F.2d 681 (5th Cir. 1955). The court also held that the agent's looking through the open window constituted an unreasonable search under the fourth amendment. On the basis of Boyd v. United States, 116 U.S. 616, 633 (1886), the court could have held that any evidence obtained as a result of a violation of the fourth amendment was also inadmissible as a violation of the fifth amendment, Agnello v. United States, 269 U.S. 20, 33-34 (1925); Gouled v. United States, 255 U.S. 298, 306 (1921), or simply that it was inadmissible because obtained in violation of the fourth amendment, Weeks v. United States, 232 U.S. 383, 398 (1914). See also Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11 (1925); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, in 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1398 (1938). For a severe criticism of the federal rule excluding illegally obtained evidence, see 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

There is some doubt, however, whether the fourth amendment was violated. The court based its reasoning upon McDonald v. United States, 335 U.S. 451 (1948). In that case police officers illegally broke into a rooming house. Proceeding down a hallway, one of them stood on a chair and, looking through a transom, saw the defendant operating a lottery. Gaining entrance, the officers seized evidentiary chattels. The search was held illegal and the evidence inadmissible. In his concurring opinion, Justice Jackson explained that the search was illegal because the officers had illegally entered the house and consequently everything following that entry was also illegal. But he also indicated that if they had entered the house legally, *they could have peeped through the keyhole or could have climbed on one another's shoulders to look through the transom and the defendant would have had no grounds on which to complain. Id.* at 458-59. Furthermore, it was held in Hester v. United States, 265 U.S. 57 (1924), that the unreasonable search and seizure provision in the fourth amendment does not extend to open fields around a house even though officers might be *trespassers* upon the property. It is submitted that the *Hester* and *McDonald* cases are possible authority for the proposition that the fourth amendment does not extend to the situation where a federal officer stands outside a house and looks through a window. *But see* Hobson v. United States, 226 F.2d 890 (8th Cir. 1955).

Traditionally, the privilege against self-incrimination protects a person from testimonial compulsion, *i.e.*, any disclosure sought by legal process against him as a witness.[2] It extends to all judicial or official hearings, investigations, and inquiries where the person is formally called upon to give testimony.[3] Under this view, the obtaining of evidence from the accused without the use of legal process is not covered by the privilege.[4]

Historically, evidence obtained in violation of the privilege against self-incrimination is excluded upon a theory distinct[5] from that which prohibits the admission of coerced confessions.[6] The privilege is based upon the theory that a person should not be compelled to be his own accuser, while the confession-rule is based upon the theory that an accused's statements may be *testimonially untrustworthy* when obtained under certain circumstances.[7] Under tests adopted by various courts, a confession is testimonially untrustworthy if it is induced by physical force or by threats or promises operating upon the fears or hopes of the accused.[8] The shorthand expression of these tests found in most opinions is that a confession, to be admissible, must be "vol-

2. 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940). See also Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Haywood v. United States, 268 Fed. 795, 802 (7th Cir. 1920), *cert. denied*, 256 U.S. 689 (1921); United States v. Goodner, 35 F. Supp. 286, 290 (D. Colo. 1940).

3. MCCORMICK, EVIDENCE § 123 (1954).

4. 8 WIGMORE, EVIDENCE §§ 2263-64 (3d ed. 1940); MCCORMICK, EVIDENCE § 126 (1954).

5. 8 WIGMORE, EVIDENCE §§ 823, 2266 (3d ed. 1940); MCCORMICK, EVIDENCE § 75 n.9 (1954).

6. It appears that coerced admissions are also inadmissible in federal criminal trials. Sykes v. United States, 143 F.2d 140 (D.C. Cir. 1944) (admission introduced in evidence held not to be error where it was not claimed to have been coerced); Gulotta v. United States, 113 F.2d 683, 686 (8th Cir. 1940) (stating arguendo that coerced admissions are inadmissible in evidence).

The court in the principal case did not distinguish whether defendant's statements were in the nature of a confession or an admission. "A confession is a complete acknowledgment of guilt of the crime on trial. An admission is any other statement of a fact, revelant to the charge, made by the accused and offered against him as evidence of the fact." MCCORMICK, EVIDENCE § 113 (1954). For the purposes of the present inquiry, defendant's statements will be treated as a confession. It is apparent that if it is concluded that the statements are admissible when treated as a confession, *a fortiori*, they would also be admissible if they were treated as an admission.

Some state courts have permitted the use of coerced admissions. State v. Romo, 66 Ariz. 174, 186, 185 P.2d 757, 765 (1947) (evidence that admissions were not voluntarily made was rejected); People v. Trawick, 78 Cal. App. 2d 604, 608, 178 P.2d 45, 48 (1947) (admissions are "admissible in evidence irrespective of their voluntary character"). At the present time, there is some doubt as to whether the due process clause of the fourteenth amendment excludes the use in state courts of coerced admissions as it does in the case of coerced confessions. As to the latter, see note 13 *infra*. In Ashcraft v. Tennessee, 327 U.S. 274 (1946), the Supreme Court held that the introduction in evidence of a coerced admission was a violation of the due process clause of the fourteenth amendment. But see Stein v. New York, 346 U.S. 156, 163 n.5 (1953) where, without mentioning the *Ashcraft* case, the Court stated in dicta that the fourteenth amendment did not require the exclusion of coerced admissions.

7. 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

8. 3 *id.* §§ 824-25.

untary."[9] The rules covering the admissibility of confessions should not be confused with the privilege against self-incrimination merely because the latter protects against compulsory disclosures and confessions are admissible only if found to be voluntary. Traditionally, the privilege is limited to officially compelled testimony while the confession-rule extends to statements obtained without the use of legal process.[10]

In *Bram v. United States*,[11] however, the Supreme Court excluded a coerced confession upon the theory that its admission in a federal criminal trial was a violation of the privilege against self-incrimination. It is apparent that the Court confused the origins of the privilege and the rules covering confessions since it stated that the privilege was a crystallization of the doctrine covering confessions.[12] As a result of the *Bram* case, therefore, a coerced confession may be excluded in the federal courts either on the ground that its admission would be a violation of the privilege against self-incrimination or that it would be testimonially untrustworthy under the confession-rule.[13]

But did the *Bram* case, although expanding the *theory* upon which coerced confessions were excluded, change the *tests* determining their

9. Wigmore states that, although judicial opinions often treat the voluntariness of a confession as sufficient in itself to determine the admissibility of a confession, its validity rests upon the fundamental principle of the confession-rule, *i.e.*, trustworthiness of the confession. Furthermore, the presence or absence of voluntariness is often determined by the other tests. 3 *id.* § 826. See text supported by note 8 *supra*. See also MCCORMICK, EVIDENCE § 111 (1954), where he states that when used in connection with confessions the term "voluntary" does not mean that the confession should be spontaneous, but rather it is limited "to the special content of freedom from physical force or threats thereof and absence of offers of leniency and takes no account of other forms of pressure."

10. The confession-rule may also extend to statements made under compulsion of legal process. For example, the rule could conceivably operate to exclude statements made in court where the privilege is waived or is not claimed. For other situations where the two principles might operate independently, see 8 WIGMORE, EVIDENCE § 2266 (3d ed. 1940).

11. 168 U.S. 532, 542 (1897).

12. *Id.* at 543. See 3 WIGMORE, EVIDENCE § 821 n.2 (3d ed. 1940), where he criticizes the *Bram* case as being "the height of absurdity in misapplication of the law." Although McCormick agrees that the *Bram* case is an "historical blunder," he advances the proposition that in essence the privilege is meant to protect one from being coerced into a confession, whether it be with or without legal process, and that the rules covering confessions should be considered as rules of privilege. MCCORMICK, EVIDENCE § 75 (1954). See also Wan v. United States, 266 U.S. 1, 14 (1924).

13. The Supreme Court has held that the admission in state courts of coerced confessions violates the due process clause of the fourteenth amendment. Chambers v. Florida, 309 U.S. 227, 235-38 (1940); Brown v. Mississippi, 297 U.S. 278, 285-86 (1936). No case has been found in which a coerced confession has been excluded in a federal criminal trial squarely on the basis of the due process clause of the fifth amendment. The reason seems to be that, prior to the *Bram* case, coerced confessions were excluded under the common law confession-rule and therefore federal courts never had to decide this constitutional question. In view of the Supreme Court's interpretation of the due process clause of the fourteenth amendment, however, there is no doubt that if the issue were squarely presented the Court would exclude a coerced confession under the due process clause of the fifth amendment.

admissibility? Earlier Supreme Court cases had accepted the historical tests governing the admissibility of confessions. Thus, a confession was not voluntary if induced by force, threats, or promises which operated upon the fears or hopes of the accused.[14] The mere fact that one was imprisoned,[15] or that officers were present,[16] or that the statements were made in answer to questions advanced by police officers[17] was not in itself sufficient to render a confession involuntary. The *Bram* case expressly adopted all of these tests.[18] It is true that the Court emphasized that in determining the admissibility of a confession the inquiry should be directed to the question whether the *making* of the confession was voluntary. But in determining that question, the Court looked to *external* factors operating upon the mind of the accused.[19] These factors were substantially the same as those that historically governed the admissibility of confessions. Therefore, it is clear that only the theory upon which the exclusion is based was changed by the *Bram* case.[20]

It appears that the court in the principal case has made an unwise extension of the privilege against self-incrimination. Conceding that the privilege should be extended so as to exclude all coerced confessions,[21] the statements made by the defendant in the principal case were not "coerced" within the meaning of the tests adopted by the *Bram* case.[22] The emphasis here is not upon abuses committed by officers—we have seen that mere questioning by the police is not sufficient in itself to render a confession inadmissible—but rather it is focused solely upon the accused and whether he had a "fair chance" to exercise the privilege. Thus, the test in this case has become, did the accused realize he was making incriminating statements? Such a rule carried to its logical conclusion would place an unreasonable handicap upon law enforcement, for it could eliminate proof of incriminating statements made by the accused before arrest,[23] while

14. Wilson v. United States, 162 U.S. 613, 622-23 (1896); Sparf v. United States, 156 U.S. 51, 55 (1895); Hopt v. Utah, 110 U.S. 574, 585 (1884).
15. Sparf v. United States, 156 U.S. 51, 55 (1895).
16. Pierce v. United States, 160 U.S. 355 (1896).
17. Perovich v. United States, 205 U.S. 86, 91 (1907); Gray v. United States, 9 F.2d 337, 339 (9th Cir. 1925); Sparf v. United States, 156 U.S. 51, 55 (1895) (dictum).
18. 168 U.S. 532, 542-43, 558 (1897).
19. *Id.* at 549. See also Wan v. United States, 266 U.S. 1, 14-15 (1924), where the Court states that any form of compulsion renders the confession involuntary regardless of the character of the compulsion.
20. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 n.2 (1948).
21. See note 12 *supra*.
22. See text supported by note 14 *supra*.
23. For example, see United States v. Burgman, 87 F. Supp. 568, 571 (D.D.C. 1949) where the defendant, a staff member of the American Embassy in Berlin, was tried for treason on the ground that he had prepared German propaganda for broadcast to the United States during the Second World War. The court held

intoxicated,[24] or while under a misapprehension of the hearer's identity or of the surrounding circumstances.[25] In situations where the accused, without compulsion, makes incriminating statements, there is in fact no constitutional question involved, but rather the sole inquiry should be whether the statements have *probative value.*

Under this approach to the problem, there are two possible extremes. On the one hand, a confession made while asleep could be excluded as a matter of law.[26] On the other hand, it could be admitted as any other confession, the judge allowing the jury to determine its credibility and requiring no more corroboration than he would if the confession had been made while awake.[27] It is submitted that neither position should be adopted. Due to the possibility that such a confession might have probative value, the public should not be handicapped in its administration of justice by an automatic rule of exclusion, but neither should the accused be convicted on the basis of a confession which arose from a world of fantasy. The admissibility of a confession made while asleep should be left to the sound discretion of the judge. In the exercise of that discretion, the judge should require as corroboration of the confession not only proof of the corpus delicti, but he should also require proof that all the surrounding cir-

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that the introduction in evidence of recordings made by the defendant did not violate his privilege against self-incrimination, since the privilege merely protected defendant from being required to testify against himself but did not bar proof of the words spoken by him. It would seem that the rule adopted by the principal case would extend the privilege to this situation.

24. Generally, statements of an accused made while intoxicated have been held to be admissible. See, *e.g.*, Mergner v. United States, 147 F.2d 572 (D.C. Cir. 1945); Bell v. United States, 47 F.2d 438 (D.C. Cir. 1931). The court in the *Bell* case stated that,

> [T]he drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury.

Id. at 439.

25. Young v. United States, 107 F.2d 490, 492 (5th Cir. 1939) (incriminating statements made by defendant to fellow-prisoners in jail were admitted in evidence although one of the witnesses was a federal officer who had disguised himself as a prisoner); Lewis v. United States, 74 F.2d 173, 176-77 (9th Cir. 1934) (the making of false statements to the accused by officers as to the evidence against him does not render a subsequent confession involuntary); Jackson v. United States, 102 Fed. 473, 483 (9th Cir. 1900) (confession obtained by trick is admissible) (dictum).

26. People v. Robinson, 19 Cal. *40, *41 (1861) (words spoken while asleep do not constitute evidence of guilt); Martinez v. People, 55 Colo. 51, 132 Pac. 64 (1913) (words spoken while asleep are not voluntary and therefore are inadmissible, but if there is doubt as to whether the accused was asleep, the question should be left to the jury under proper instructions); People v. Colón, 52 P.R. 399, 404 (1937). The MODEL CODE OF EVIDENCE rule 505(b) (1942) provides that a confession made by the accused is admissible unless, at the time he made it, the accused was unconscious or incapable of understanding what he said and did.

27. State v. Morgan, 35 W. Va. 260, 13 S.E. 385 (1891). In a situation where it was not certain whether the accused was asleep, the court held that whether the accused was asleep was a question for the jury and, even if he were asleep, that it was a jury question whether the statements were worthless or whether they sprang from a sense of guilt and were true.

cumstances tend to connect the accused with the crime. If it is decided that the confession is to be admitted, the jury, of course, should also be warned of the doubtful validity of statements made while asleep.[28] By the use of this warning in conjunction with the requirement of added corroboration, a two-fold protection would be provided which would insure that any conviction based upon a confession made by a defendant while asleep would be grounded in fact.

TORTS—LIABILITY FOR INDUCING NON-PERFORMANCE OF UNENFORCEABLE CONTRACT

Evans v. Mayberry, 278 S.W.2d 691 (Tenn. 1955)

Plaintiff entered into an oral contract to purchase real estate from his brother. Defendant, a third party with knowledge of the existence of the contract, induced the vendor to sell the property to another. In plaintiff's action for damages for inducing the vendor's non-performance of the contract, the trial court sustained defendant's demurrer. On appeal, the Tennessee Supreme Court, affirming the ruling of the trial court, held that since the contract was not enforceable between the parties because of the Statute of Frauds,[1] defendant could not be held liable for inducing its non-performance.[2]

Grounded in antiquity,[3] the tort of "inducing breach of contract" was limited to liability for enticing a servant from his master's employment[4] until 1853 when, in *Lumely v. Gye*,[5] the doctrine was extended to include interference with any contract of personal service. Later, the doctrine was further expanded to include contracts other than those for personal services.[6] The rule has been generally accepted

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28. A problem arises where there is a question as to whether the accused was asleep. This being a question of fact, it would have to be decided by the jury. If the judge would admit the confession *only* if the accused was awake at the time of making the confession, he should instruct the jury to disregard the confession if they find he was asleep. See cases cited in notes 26 and 27 *supra*.

1. TENN. CODE ANN. § 7831 (Williams 1934).

2. Evans v. Mayberry, 278 S.W.2d 691 (Tenn. 1955). The action was based on a Tennessee statute providing for the recovery of treble damages against a person who procures the breach of a "lawful" contract. TENN. CODE ANN. § 7811 (Williams 1934). In Watts v. Warner, 151 Tenn. 421, 269 S.W. 913 (1925), the court held that under this statute an unenforceable contract was not a "lawful" contract, and thus was not within the purview of the statute. As a matter of statutory construction, this result is highly questionable since a contract may be unenforceable merely because of technical defects and yet may not be "unlawful" in the sense of being illegal or contrary to public policy. While the court in the principal case relied on the *Watts* case, the decision was not reached primarily on the basis of statutory construction. See text supported by notes 22-24 *infra*.

3. For the history of the action, see PROSSER, TORTS 722-25 (2d ed. 1955); Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663 (1923).

4. See PROSSER, *op. cit. supra* note 3, at 723; Sayre, *supra* note 3, at 665-66.

5. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

6. Temperton v. Russell, [1893] 1 Q.B. 715 (C.A.).