STATE OF NEW JERSEY

v.

MAURICE SZYSLAK,
Defendant - Appellant

A-03-1234-T3

Superior Court, Appellate Division

Submitted August 18, 2003 - Decided September 11, 2003

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Union County, Cr-03-123.

Lionel Hutz argued the cause for appellant (Cobbler & Barrister, L.L.P., attorneys for defendant-appellant, Mr. Hutz, of counsel and on the brief).

Nicole Riviera, Assistant Union County Prosecutor, for the State of New Jersey (Frank Grimes, Union County Prosecutor, attorney; Ms. Riviera, of counsel and on the brief).

REAPER, J.A.D. joined by GRIM, J.A.D.

On March 7, 2003, following a four-day jury trial in the Superior Court, Law Division, Union County, defendant Maurice Szyslak was convicted of first-degree murder in violation of N.J.S.A. 2C:11-3a. He was sentenced on April 8, 2003, to a term of life imprisonment without the possibility of parole pursuant to N.J.S.A. 2C:11-3b. Prior to trial, defendant moved pursuant to N.J.R.E. 104(a) to have his confession excluded at trial and to suppress all statements and evidence relating to his interrogation while in police custody on grounds of involuntariness and unfair prejudice. In this appeal, defendant contends that the trial court erred when, on February 28, 2003, it denied defendant's motion.

We disagree, and hold that the police lawfully elicited a voluntary confession from the defendant during his interrogation. Additionally we hold that statements, documents, and other evidence relating to defendant's interrogation and confession were properly admitted at trial..

Defendant's conviction, therefore, is affirmed.

The Facts

On October 14, 2002, Springfield Mayor Joseph Quimby was shot and killed on the front steps of his home in Springfield, Union County. Reports indicated that the victim was killed almost instantly after being struck in the chest with three rounds from a .50 caliber semi-automatic handgun. There were no known witnesses.

After a week of investigating, the police had very little evidence and virtually no leads in the case. On October 22, 2002, the Springfield police received an anonymous telephone call. The caller said her name was “Amanda” and claimed to have information about “the guy who hit Quimby.” The police officer who took the call, Officer Wilcox, was unable to record the conversation, but was able to convey the information he received to the detective heading up the investigation.

Officer Wilcox told Detective McBain that “Amanda” said she knew that a local bar owner named Moe had killed Quimby. She went on to say that Moe and his friend, and frequent patron, Barney Gumble had started an organization called the Springfield Environmental Liquidation Front (S.E.L.F.). According to the caller, Moe was extremely intoxicated one night and told her that he and Barney had decided to gain notoriety for their organization through a series of assassinations of local and State politicians. She said that Moe told her that “Diamond” Joe Quimby was first on their “hit list.” As he was telling her about their plot, he showed her the gun that he was planning to use to “take care of Quimby.” The caller then stated that Moe pulled out a large silver handgun, referred to it as a “desert something”, and said it was big enough to “bring down a rhino with one shot.”

The caller further stated that Moe told her that he and Barney raised money for S.E.L.F. by operating an illegal sports gambling operation out of the basement of Moe's tavern. Additionally, the caller said that Moe admitted to cheating bettors out of their money to “increase the take.” Moe told the caller that he and Barney had raised enough money to buy weapons and ammunition to begin their assassinations, but were ultimately going to buy enough explosives to “take out the nuclear power plant” and other high-profile targets.

At 12:30 p.m. on October 23, 2002, Maurice “Moe” Szyslak, a local bar owner, was arrested and brought to the Springfield Police Department for questioning. The police also attempted to pick up Barnard “Barney” Gumble, but he could not be located. The defendant was read his rights and questioned by Detective McBain. After making small talk with the defendant, McBain began to talk about the Quimby assassination. The following are extracts of the three interrogation sessions:

DM: So you heard about Quimby?

MS: Yeah, I can't say I was a fan, but no one deserves to go like that.

DM: Yeah, but we got the guy who did ‘em…[pause] You know Barney Gumble?

MS: Yeah, I know Barney…he practically keeps my place in business. He did it?
DM: Why don't you tell me.
MS: Uh…umm (cough)
DM: We picked up Barney, too…told him that he could go down as an accessory to murder. After that, I don't think we could have stopped him from spilling his guts…he told us everything. You should have known better than to partner up with a rummy like Gumble.
MS: He's a lying drunk! You can't believe a thing he says. I'm not sayin' nothin'.
DM: I'll be back.

Detective McBain left the room and considered other ways to “soften up” the defendant. While McBain thought his bluff about Gumble made Moe nervous, he thought more was needed. Based on the anonymous telephone call and the .50 caliber slugs found in Quimby’s body, McBain concluded that the weapon used by Moe was a chrome-plated, .50 caliber Desert Eagle semi-automatic handgun. Though it is a rare handgun, McBain recalled that the SPD had that exact weapon in its evidence locker from a recent, unrelated case. He went into the locker, took a Polaroid picture of the pistol and returned to the interrogation room with the photo.

DM: Well we're almost done with Gumble…should have a completed statement from him within' the hour.
MS: Yeah, you got nothin' on me.
DM: Oh yeah, nothin'…We got nothin'...
[DM shows Polaroid to defendant].
DM: In case you don't recognize that, it's a recently-fired Desert Eagle .50-cal that we now have sitting in our evidence room. Yeah, the .50 caliber Desert Eagle…that's the gun used to kill Quimby.
MS: Where'd you get that?
DM: You ready to talk to me now?
MS: Damn it!

A few minutes later, McBain again left the interrogation room and told another detective that he thought he was close, but needed “a little more to get Moe over the edge.” McBain decided to use the facts he knew about the case to create a written “confession” for Barney Gumble. He typed up the following document on official Springfield Police Department letterhead:

I, Barnard Gumble, being of sound mind and body, hereby admit my involvement with Maurice “Moe” Szyslak in the formation and operation of the Springfield Environmental Liquidation Front (S.E.L.F.). In order to gain notoriety for our organization, Moe suggested that we carry out a series of high-profile assassinations. Springfield mayor Joe Quimby was first on our “hit list.” S.E.L.F. had also planned to carry out a series of catastrophic

attacks on prominent targets, including a nuclear power plant. In order to raise money for S.E.L.F., Moe and I ran an illegal sports betting operation out of his tavern. We often cheated bettors out of money to increase our take. On October 14, 2002, Moe Szyslak, acting alone, set the plan in motion by assassinating Mayor Joe Quimby.

This statement was made freely and without coercion.

Barnard Gumble

McBain returned to the interrogation room with the typed, but unsigned, copy of the Gumble "confession."

DM: You wanna talk to me yet?

MS: Yes... no... I don't know! I think I probably should talk to you about some things. Maybe. I dunno...

DM: It'd probably be a good idea…take a look at this.

[McBain hands copy of "confession" to Moe]

MS: Well, that was sort of what I wanted to talk to you about.... I guess that just about does it, huh?

Within minutes, at approximately 2:45 p.m., Moe gave a complete account of the shooting of Mayor Quimby. In his signed confession, Moe affirmed all the information contained in the Gumble "confession."

Defendant moved pretrial to suppress his confession and all evidence relating to it. The trial court, Hon. Julius Hibbert presiding, held a hearing on February 25-26, 2003, to consider the voluntariness of the confession and ruled, on February 28, 2003, that the statement was made voluntarily and was thus admissible at trial. Over renewed objections by the defendant, Moe's written confession, the transcripts of his interrogation, the Polaroid of "the gun", and the Gumble "confession" were all admitted at trial.

Neither Barney Gumble nor "Amanda", the anonymous caller, was ever located. The murder weapon, likewise, was not recovered by police. At trial, the defendant claimed to have no involvement with S.E.L.F. or the murder of Mayor Quimby. The State's case relied heavily upon the defendant's detailed confession, as well as circumstantial evidence of motive and opportunity. No other charges were brought relating to Moe's involvement with S.E.L.F. or its gambling operation. Defendant was convicted on March 7, 2003, following a four-day trial; on March 11, 2003, the jurors declared themselves unable to agree unanimously on the weight to be given aggravating and mitigating factors. Therefore, in accordance with the law, defendant was sentenced on April 8, 2003, to life in prison without the possibility of parole. He filed his appeal to this court on April 23, 2003.

Discussion

Defendant raises two issues in this appeal. First, the defendant claims that his confession was rendered involuntary through police coercion and its use at trial violated

his due process rights. The defendant further asserts that admitting the police-fabricated "confession" into evidence was a due process violation and did not comport with New Jersey evidence rules. We reject both of these arguments.

Standards for police conduct toward suspects in custody have been addressed on numerous occasions at both the state and Federal levels. In the extant case we are primarily concerned with police conduct leading up to, and contributing to, the suspect giving an incriminating statement to police. It has long been impermissible for the police to use physical force in pursuit of a confession. *Brown v. Mississippi*, 297 U.S. 278 (1936). In 1966 the United States Supreme Court expanded the rights of criminal suspects and set requirements for custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436 (1966). While Miranda expressly forbids some police practices, our Supreme Court has recognized the importance of giving police latitude in obtaining reliable confessions from criminal suspects. *State v. Cooper*, 151 N.J. 326 (1997). This latitude includes allowing the police to give the detained suspect false information about the case to bring forth a truthful confession. *Id*. In the case before us, the police used such creative techniques and skillful interrogation to elicit a voluntary confession from a murder suspect.

While the dissent would have us adopt a bright-line rule prohibiting the use of any police-fabricated documents during an interrogation, precedential case law persuades us to address these types of situations in light of the totality of circumstances in each particular case. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Many factors, including, but not limited to, age, mental competence, and length of detention and questioning, should be taken into consideration when assessing the voluntariness of a confession. *Id*. Although federal requirements set a minimum standard for us to follow, our Supreme Court chose, in *State v. Miller*, 76 N.J. 392 (1978), to adhere to the totality of circumstances test. It is, therefore, the test we apply today.

The defendant is a forty-three year old man with a high school education and no criminal record. By all accounts, he is at least moderately intelligent and has run a successful business for the past seventeen years. He was under no unusual physical or psychological distress at the time of his questioning by police. The only particularly notable elements of his pre-confession interrogation involves the police's admitted use of trickery in attempting to elicit a confession from him. This trickery occurred on three separate occasions during the defendant's interrogation.

The initial oral representations made to the defendant by police regarding his alleged co- conspirator were well within the bounds of reasonable police interrogation practices. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) Suggesting that a co-defendant has confessed does not, in itself, constitute coercion. *Id*. While it may be relevant, the fact that the police falsely state that a presumed co-conspirator has already confessed does not make an "otherwise voluntary confession inadmissible." *Id*. The police's stating that Gumble had confessed may be considered as one factor in analyzing the totality of circumstances surrounding the confession, but it does not render his confession legally defective.

The next use of trickery by the police arose when the police showed the defendant the Polaroid photo of the gun from the evidence locker. However, a close look at that part of the transcript reveals that, while the police may have misled the defendant, the police never actually lied to him. The SPD did have that weapon in the evidence locker and, as the detective stated, it is quite likely that the .50 caliber Desert Eagle was the gun used in the homicide. The detective artfully chose his words, but did not outright lie to the defendant during this exchange. When looking at the totality of the circumstances, this instance of carefully-spoken truth simply does not weigh at all in favor of the defendant.

The final device used by the police in pursuit of a confession was the fabricated statement by his alleged co-conspirator. The conversation during the third part of the interrogation strongly suggests that the defendant was prepared to confess even without being shown the fabricated confession. At the beginning, defendant stated: “I think I probably should talk to you about some things.” After being shown the confession, he continued: “Well, that was sort of what I wanted to talk to you about.... I guess that just about does it, huh? “ Clearly, the confession was forthcoming with or without the fabricated document. A misrepresentation by police does not invalidate a confession unless it is shown to have actually induced the confession. *State v. Cooper*, 151 N.J. 326, 355 (1997). Under the circumstances of this case, it is quite likely that the fabricated confession did not cause the defendant to confess and should not substantially affect our analysis here.

Moreover, the use of false statements regarding a confession of suspected co-defendants has been accepted at both the state and federal levels. *Frazier v. Cupp*, 394 U.S. 731 (1969); *State v. Manning*, 165 N.J. Super. 19, 30-31 (App. Div. 1978), *rev'd on other grounds*, 82 N.J. 417 (1980). Whether out of the mouth of the police or written down on paper, the deception involved is not significantly different.

Police fabrication of this type has not specifically been addressed by New Jersey courts, but has been analyzed in other jurisdictions. The Virginia Court of Appeals recently held that a confession by a defendant was valid, despite the fact that he had been shown false reports indicating that his hair and fingerprints were present at the crime scene. *Arthur v. Commonwealth*, 24 Va. App. 102, 480 S.E.2d 749 (Va. 1997). In 1996, the Nevada Supreme Court held that a valid confession existed even where the defendant was presented with falsified lab report pointing to his guilt. *Sheriff, Washoe County v. Bessey*, 112 Nev. 322, 914 P.2d 618 (Nev. 1996). The Nevada Court concluded that the falsified report would not have caused an otherwise innocent defendant to confess. Id. at 621. It went on to reason that analyzing verbal misrepresentations out of the mouth of a police officer differently than similar misrepresentations “embodied on a piece of paper” is tantamount to making “a distinction without a real difference.” *Id*.

We are inclined to agree with this analysis and, as other jurisdictions have done before us, we reject a *per se* rule against the use of police-created evidence during interrogations and will resolve these matters on a case-by-case basis. See *State v. Kelekolio*, 74 Haw. 479, 513-514, 849 P.2d 58 (Haw. 1993).

Looking at the totality of the circumstances, we conclude that the techniques used by police in this case would not be likely to cause an otherwise innocent man confess. The record indicates that the defendant's confession included many details about the killing that could only be known by the killer himself. These details were not released to the public and leave no doubt as to the reliability of the confession itself. Additionally, the overall length of the defendant's detention and questioning may also be a factor in determining whether it was coercive. The fact that an interrogation is unusually long may point strongly to its coerciveness. *Ashcraft v. Tennessee*, 322 U.S. 143, 154; *State v. Driver*, 38 N.J. 255. The corollary to the foregoing principle is that a reasonably short interrogation points to a lack of coercion. See *Frazier v. Cupp*, *supra*, 394 U.S. at 739. In this case, a mere two hours and fifteen minutes passed from the time the defendant was brought in to the time he gave a full confession. This is hardly enough time for an innocent man's will to be overborne. Finally, the trial court is owed deference with respect to its determinations as to the voluntariness of the confession, and we, as appeals judges, may not replace the judgement of the trial court. *State v. Johnson*, 218 N.J.Super. 290, 297-298, (App. Div. 1997).

The second issue raised by the defendant concerns the admission of the fabricated confession at trial. Defendant asserts that the hearsay rule is violated by admission of the police-created-statement. The hearsay rule, however, is only violated when the statement presented is admitted to prove the truth of the matter asserted. N.J.R.E. 801. The police-created confession was admitted, not for its truth, but to demonstrate the state of mind of the defendant and the voluntariness of his confession. *Spragg v. Shore Care*, 293 N.J. Super. 33, 57 (App. Div. 1996). Indeed, the record shows that all of the facts in the fabricated confession were independently proved by the defendant's own written statement. The jury had no reason to look beyond the defendant's own words to make accurate determinations of truth in this case. Additionally, in accordance with N.J.R.E 105, the jury was cautioned by the trial judge to use the fabricated confession only in considering the reliability of the defendant's confession. Juries are presumed to heed such instructions. See *Fitzmaurice v. Van Vlaanderen Mach. Co.*, 110 N.J. Super. 159, 167 (App. Div. 1970), *aff'd* 57 N.J. 447, 273 (1971). Under these circumstances, the rule against hearsay is not violated. *State v. Manning*, 165 N.J. Super 19, 30-31 (App. Div. 1978). All statements and items relating to the interrogation of the defendant were properly admitted.

Accordingly, the decision of the trial court is hereby **affirmed**.

MERCY, J.A.D., dissenting

The majority today holds that the police may fabricate evidence to elicit a confession from a suspect in custody. Furthermore, this decision holds that the State may then be permitted to use this highly incriminating, albeit completely fictitious, evidence as part of its case in chief against the defendant. I find these actions to be irreconcilable with Constitutional concepts of due process and equally incompatible with the New Jersey Rules of Evidence. I, therefore, respectfully dissent.

The Fourteenth Amendment and the Fifth Amendment of United States Constitution guarantee adequate and appropriate procedural safeguards to protect criminal suspects. *Chambers v. Florida*, 309 U.S. 227, 236 (1940). This protection also includes the protection against fundamental unfairness in the use of evidence at trial. *Lisenba v. California*, 314 U.S. 219, 236 (1941). Additionally, the Fifth Amendment protects a criminal defendant against self-incrimination. This privilege, while not expressly contained in our State Constitution, has been firmly established in New Jersey common law. *In re Martin*, 90 N.J. 295, 331 (1982).

As noted by the majority, physical coercion of a suspect has been long proscribed by the U. S. Supreme Court. *Brown v. Mississippi*, 297 U.S. 278 (1936). Consequently, with physical means no longer an option, police have increasingly turned to psychological methods to elicit confessions from suspects. See *Miranda v. Arizona*, 384 U.S. 436, 448-455 (1966). While the U.S. Supreme Court has not struck down all forms of police trickery in interrogations, it has made it clear that there are limits to the amount of psychological pressure that may be constitutionally brought to bear on a suspect in custody.

It is well established that a criminal defendant whose conviction results from an involuntarily obtained confession is deprived of due process. *Rogers v. Richmond*, 365 U.S. 534 (1961). In *Lynumn v. Illinois*, 372 U.S. 528 (1963), the Court found a due process violation, and invalidated a confession, when a suspect was threatened with the loss of state benefits and the removal of her dependant children. In *Spanno v. New York*, 360 U.S. 315 (1959), misrepresentations from a police officer, who was also a childhood friend of the suspect, were found to be unduly coercive and violative of the due process rights of the defendant. The defendant in this case was in an already inherently coercive setting -- sitting in a police interrogation room accused of capital murder. Though ignored by the majority, a statement made by the detective at the end of the second interrogation session calls into question the voluntariness of the subsequent confession. Before leaving the room, the record indicates that McBain made the following statement to the defendant:

> You know what was done here was bad, but it ain't gonna get anybody the chair... they don't give you the death penalty in this state for just killin' one guy... this isn't as bad as it may seen to you right now. I'm the only person who can help you. Think about it, I'll be back.

The voluntariness of a confession must be proven at the trial level beyond a reasonable doubt. *State v. Yough*, 49 N.J. 587, 600-601 (1967). The inherently intimidating circumstances of a capital murder interrogation, coupled with fabricated evidence and the above statement regarding the death penalty, cast serious doubt on the voluntariness of the confession in this case. In accordance with the standards set in Lynumn and Spanno, the interrogation techniques in this case run afoul of due process and necessarily render the resulting confession involuntary.

I have deep concerns on due process grounds as to the use of police-fabricated evidence, both during interrogation and at trial. Our courts have not directly addressed the use of fabricated evidence to elicit confessions, but other jurisdictions have decried the effect of police-fabricated evidence on the voluntariness of confessions.

In 1989, the confession of a criminal defendant after he was shown police-fabricated scientific reports was held involuntary in *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989), *review dism'd*, 562 So. 2d 347 (Fla. 1990). The Florida Court of Appeals observed that while all forms of police deception are not improper, the use of falsified official-looking reports oversteps "the line of permitted deception." *Id*. at 973. The Cayward court reasoned that there was a substantial difference between fabricated documents or physical evidence and oral misrepresentations. *Id*. at 974. Accordingly, the court decided that the manufacture of false documents by police violated due process under both the state and Federal constitutions. *Id*. In *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (W. Va. 1994), the West Virginia Supreme Court of Appeals cited Cayward with regard to police-fabricated evidence. While upholding the use of oral misrepresentations by police, the court noted that they "definitely draw a demarcating line between police deception generally, which does not render a confession involuntary per se, and the manufacturing of false documents by the police which 'has no place in our criminal justice system.'" *Id*. at 60, quoting *Cayward*, 552 So. 2d at 974.

I would follow *Cayward* and impose a bright line rule invalidating, as involuntary, any confession whereby police fabricated evidence has been used in the interrogation process. Such a rule would give police clear and concise guidance regarding the use of fabricated evidence and would avoid the need to use the subjective "totality of circumstances" test required by the majority.

Even in the absence of a bright line *per se* rule, the particularly offensive circumstances of this interrogation would still require the invalidation of this confession. See *State v. Kelekolio*, 74 Haw. 479, 513-514, 849 P.2d 58 (Haw. 1993).

The majority compounds the error of admitting the defendant's confession by taking the position that the falsified co-conspirator's "confession" is admissible, under N.J.R.E 801, because it is not being offered for its truth. This argument is unsustainable. The only issue in this case -- whether the defendant murdered the victim -- is precisely the subject of the false confession. The limiting instruction given to the jury will likely have little effect on the jury's ability to turn a blind eye to the facts and events that preceded, and contributed to, the creation of the fabricated confession. It is understood that once highly prejudicial evidence regarding confessions is put before a jury, limiting instructions cannot eliminate its effect and a due process violation may result. See *Jackson v. Denno*, 378 U.S. 368, 388 (1964). Even assuming that it is not taken for its truth, because the false statement completely corroborates the defendant's own confession and its prejudicial effect on the jury vastly outweighs its probative value it should have been excluded. See *State v. Alston*, 312 N.J. Super. 102, 113-114 (App. Div. 1998). As in *Alston*, the error of improperly admitting evidence in this case was of constitutional dimensions. In compliance with N.J.R.E. 403(a), the false confession and the Polaroid

picture used during the interrogation should have been excluded, as requested by the defendant.

Further, we cannot ignore the fact that the use of fabricated evidence puts a defendant in a “catch-22” position. On one hand, he wants to exclude the fabricated evidence because it is extremely damaging to his case. On the other hand, he needs to convince the jury that he was coerced, through heavy-handed police tactics, into giving what amounts to an unreliable confession. By putting otherwise excludable hearsay into a phony interrogation document, the state has effectively skirted applicable evidence rules and has gotten this highly prejudicial information in front of the jury. The U.S. Supreme Court has stated that “[a]s applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.” *Lisenba v. California*, 314 U.S. 219, 236 (1941). The Court noted that, to find a denial of due process, “we must find that the absence of that fairness fatally infected the trial.” The use of falsified evidence in the case before us today not only violated evidentiary rules, but fatally infected the trial process and denied the defendant his right to due process under the law.

Finding both the defendant's confession and the fabricated evidence associated with his interrogation to have been improperly admitted at trial, I would reverse the defendant's conviction.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-03-345

STATE OF NEW JERSEY,	:	
	:	
v.	:	**ORDER**
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MAURICE SZYSLAK,	:	
	:	
Defendant-Appellant.	:	
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This matter having been brought before the Court on September 15, 2003, by the defendant-appellant, it is, on this 17th day of September 2003, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before December 3, 2003.

STEPHEN W. TOWNSEND, Clerk
For the Court