

1967

Constitutional Law - Evidence - Wyoming Procedure on the Admissibility of Confessions - Kirk v. State

Frederic B. Butler

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Butler, Frederic B. (1967) "Constitutional Law - Evidence - Wyoming Procedure on the Admissibility of Confessions - Kirk v. State," *Land & Water Law Review*: Vol. 2 : Iss. 2 , pp. 463 - 468.
Available at: https://scholarship.law.uwyo.edu/land_water/vol2/iss2/10

This Note is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

CASE NOTES

CONSTITUTIONAL LAW—Evidence—Wyoming Procedure on the Admissibility of Confessions. *Kirk v. State*, 421 P.2d 487 (Wyo. 1966).

Richard Kirk was convicted of first-degree murder in the District Court, Lincoln County, pursuant to a trial in which the testimony of an eye-witness and a confession by the defendant Kirk were admitted into evidence. The defense took exception, claiming that the court committed prejudicial error, *inter alia*, by admitting defendant's handwritten statement and its typed copy into evidence. During the trial the court, on its own motion and prior to the testimony of the witness that would testify as to the voluntariness of the confession, called for a preliminary hearing without the presence of the jury in order to determine the issue of coercion relating to the taking of the confession. After the examination of the witness by both parties, there being no objection or conflicting evidence introduced by the defense, the trial was resumed with the confession being admitted into evidence. The jury was allowed to hear the same evidence that was adduced at the hearing bearing upon the voluntariness of the confession. Following the witness' testimony, the court instructed the jury to the effect that they were to disregard the confession if they found it to have been involuntarily submitted by the defendant.¹ The only time the defense objected to the admission of the confession was after the State had rested its case and after conflicting testimony by the defendant as to how he had killed the victim was put in evidence.² In a divided court, the Supreme Court of Wyoming *held* that the trial court did not err in admitting the confession and concomitant testimony as to its voluntariness into evidence pursuant to a preliminary hearing on the issue of coercion.

The court cited *Jackson v. Denno*³ as delineating accept-

1. The court's instruction read as follows:

You are instructed that unless you believe from the evidence beyond a reasonable doubt, that the defendant made the same and that he made it freely, voluntarily and without compulsion, persuasion or promises, and was not induced by duress, threats, coercion, fear, or through any improper influence, you will then reject the same and not consider it for any purpose whatsoever.

Kirk v. State, 421 P.2d 487, 497 (Wyo. 1966).

2. The defense predicated its belated objection on the ground that the statement was not voluntary and asked that its objection be given a retroactive affect on the record to the time the statement was offered in evidence. The court denied this request. *Ibid*.
3. 378 U.S. 368 (1964).

able procedure to be followed by state tribunals.⁴ The *Jackson* case expressly overruled New York procedure pertaining to the admissibility of a confession in regard to the issue of coercion. Under the New York rule the trial judge excluded the confession by a preliminary determination if he found that under no circumstances could the confession be deemed voluntary; but if the evidence presented a fair question as to its voluntariness, as where certain facts bearing on the issue were in dispute or where such evidence was objected to because of the prejudicial inferences drawn from undisputed facts, the confession was to be admitted into evidence, leaving to the jury, under proper instructions, the ultimate determination of its voluntary character and truthfulness.⁵

In writing the majority opinion for *Jackson*, Mr. Justice White alluded to the jurisdictions that followed the Massachusetts rule and to those adhering to the orthodox rule,⁶ as those states that were in accord with due process. Under the Massachusetts rule, the jury passed on voluntariness only after the judge had fully and independently resolved the issue against the accused. The jury was instructed that it must also find that the confession was voluntary before it was to consider it in arriving at a verdict.⁷ The so called orthodox rule is similar to the Massachusetts rule, the only difference being that in the former admissibility is determined solely by the judge, the jury being instructed that they are only to consider the evidence as to voluntariness as it affects the *weight* or *credibility* of the confession.⁸ The entire court in *Kirk* felt that the trial judge was correct in calling a preliminary hearing without the presence of the jury for the purpose of determining the voluntariness of the confession.⁹ However, the dissent felt that the question as to voluntariness of the confession was not adequately and emphatically resolved at the hearing so as to be in accord with the *Jackson* criteria, *viz.*, that the procedure used be a reliable and clear-cut determina-

4. The court stated: "These procedures must, therefore, be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness may depend." *Id.* at 391.

5. *Id.* at 377.

6. Annot., 1 A.L.R.3d 1205 (1964).

7. See *Commonwealth v. Sheppard*, 313 Mass. 590, 48 N.E.2d 630 (1945).

8. 3 WIGMORE, EVIDENCE § 861 (3d ed. 1940).

9. *Kirk v. State*, *supra* note 1, at 491, 497.

tion of the voluntariness of the confession, including the resolution of *disputed* facts.

The *Jackson* case will continue to have a profound influence on Wyoming procedure in the future as already it has through *Kirk* in that when another opportunity presents itself, *Jackson* will delineate further the acceptable procedure to be applied by the state tribunals so as to accord with the United States Supreme Court's interpretation of due process.¹¹ The dissent took issue with not only the failure of the trial court to more resolutely heed the *Jackson caveat*, but also with the trial judge's indefinite conclusion that no dispute existed in regard to the issue of voluntariness, since no objection had been made by the defendant. The dissent felt that the rule¹² barring admission of a coerced confession was of such importance, that a dispute as to its validity was to be presumed, regardless of the absence of an expressed objection by the defendant.¹³ The *Kirk* case not only gave the Supreme Court of Wyoming the opportunity to review Wyoming procedure, but it did markedly change the law of Wyoming. The only case in Wyoming prior to *Kirk* that had a bearing on this point was the 1906 case of *Clay v. State*¹⁴ which was strikingly similar in procedure to the New York rule that was overruled in *Jackson*.¹⁵ The only distinguishing feature of the *Clay* procedure from that of New York prior to *Jackson* was that if the jury found the confession to be voluntary, it was to consider the surrounding circumstances leading up to the confession along with the other evidence in the case, and give to them such weight as in their judgment they

10. *Jackson v. Denno*, *supra* note 3.

11. Cohen, *Developments In The Law—Confessions*, 79 HARV. L. REV. 935, 1061 (1966).

12. Of this rule Cohen states:

The rule excluding a coerced confession is more than a rule excluding hearsay. Whatever may be said about the orthodox reasoning that its exclusion is on the ground of its probable falsity, the fact is that the considerations which call for the exclusion of a coerced confession are those which call for the protection of every citizen, whether he be in fact guilty or not guilty. And the rule of exclusion ought not to be emasculated by admitting the evidence and giving to the jury an instruction which, as every judge and lawyer knows, cannot be obeyed.

Ibid.

13. The dissent stated to the effect that the very nature of the hearing presupposes a dispute between the parties and cited dictum in *Jackson v. Denno*, 378 U.S. 368 (1964), as support for such contention. *Kirk v. State*, *supra* note 1, at 498.

14. 15 Wyo. 42, 86 Pac. 17 (1906).

15. Rames, *Wyoming Procedure—Re-Admissibility of Confessions*, 19 WYO. L. J. 203 (1965).

were entitled.¹⁶ As is apparent, the *Kirk* case is quite a digression from *Clay*. The dissent in *Kirk* desired a greater digression than did the *per curiam* judges in that the former favored a rule¹⁷ that would require the trial judge to resolve the issue of voluntariness by a complete hearing, culminating with a definite statement by the trial judge on whether the confession was voluntary and admissible or involuntary and inadmissible. The *per curiam* opinion in *Kirk* felt that since there was no dispute as to the coercion issue, the trial judge was warranted in terminating the hearing prematurely without ruling one way or the other on the issue of coercion. The dissent thought that the mere fact that a hearing was called in the first place was indicative of a dispute over the voluntariness of the confession;¹⁸ and this assumption fails to take into account other reasons the trial judge might have entertained for calling the hearing, *e.g.*, as a precautionary measure in view of the *Jackson caveat*. Furthermore, the *Jackson* case did not definitely state whether the judge should make an emphatic ruling as to the voluntariness of the confession. In fact, *Jackson* seemed to infer that the record of the preliminary hearing could be a substitute for a definite statement on the part of the trial judge.¹⁹

In view of the *Jackson* case, *Kirk* procedure is in accord with due process in that it is similar to the Massachusetts rule. The trial court in *Kirk* went through the formality of a preliminary hearing on its own motion which tends to negative the idea of an existing dispute over the admissibility of the confession. In this regard the *per curiam* opinion in *Kirk* seems correct in its position that, on the record, the problem of *Jackson v. Denno* is not really involved. The procedure followed by the trial judge at the preliminary hearing, although rather informal and non-declaratory, was valid as being within his discretion,²⁰ especially when he called for

16. *Clay v. State*, *supra* note 14, 86 Pac. at 20.

17. The dissent favored either the orthodox rule or the Massachusetts rule as acceptable procedure. *Kirk v. State*, *supra* note 1, at 498.

18. *Ibid.*

19. "The judges' conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record." (emphasis supplied). *Jackson v. Denno*, *supra* note 3, at 379.

20. *Stein v. New York*, 346 U.S. 156 (1953). *Jackson* upheld *Stein* on this point, *supra* note 3, at 391.

a hearing in the first instance as a precautionary measure. The United States Supreme Court indicated in *Jackson* that the State procedures used had to be reliable and clear-cut²¹ in order to resolve the *disputed* issue of coercion. The main distinguishing feature between the *Jackson* case and *Kirk* is that in the former there was a dispute over the voluntariness of the defendant's statement,²² while in the latter no dispute existed. The preliminary hearing was called in the *Kirk* case to afford the defense an opportunity to object and to bring in evidence of coercion. When the trial judge at the hearing was not confronted with a dispute over the issue of coercion, he, in his discretion, prematurely ended the hearing and admitted the confession,²³ albeit, he did not formally rule on the voluntariness of the confession. Had there been a dispute presented at the hearing, the judge would have had the opportunity to resolve it one way or the other by a ruling.

Since the *Jackson* case, New York has followed the Massachusetts rule,²⁴ but has qualified the *Jackson* criteria to exclude the cases that have already been concluded wherein there was no hearing on the voluntariness issue by virtue of the fact that no objection was seasonably made to the admission of the confession.²⁵ In view of the latest New York case,²⁶ *Kirk* would require no preliminary hearing since the defense did not raise an objection at the prudent time. However, *Jackson* seems to infer that New York is not to be considered the ultimate authority on this point.

The *Kirk* procedure definitely follows the Massachusetts rule, which seemingly has the approval of the United States Supreme Court, but yet the *Kirk* procedure is not the Mass-

21. *Jackson v. Denno*, *supra* note 3.

22. "[T]his is not a case where the facts concerning the circumstances surrounding the confession are undisputed and the task is only to judge the voluntariness of the confession based upon the clearly *established facts* and in accordance with proper constitutional standards." (emphasis supplied). *Id.* at 391.

23. Note that:

[T]he admission of a confession, where it is not objected that it was not voluntary, does not ordinarily constitute error, especially where there is a *prima facie* showing of its voluntary character, and a failure to exclude a confession has been held not to be erroneous where accused offered no testimony to show its involuntary character, and made no motion to exclude it.

23A C.J.S. *Criminal Law* § 1087 (1961).

24. *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965).

25. *Id.* at 185.

26. *Ibid.*

achusetts rule. *Kirk* says that a preliminary hearing is necessary in order (1) to ascertain if there exists a dispute over the issue of coercion in the first instance, and (2) simply to admit the confession into evidence after finding that there exists no dispute. *Jackson*, by approving the Massachusetts rule via dictum, would say that a preliminary hearing is necessary (1) to ascertain whether there is a dispute over the admissibility of the confession, (2) to afford the trial judge the opportunity to make a definite ruling on the voluntary character of the confession, albeit, a dispute may not have existed in the first instance, and (3) to admit the confession into evidence if it is found to be voluntary at the preliminary hearing. *Jackson* would seem to uphold *Kirk*, not on the procedural criteria of the Massachusetts rule dictum, viz., (2) above, but for the reason that *Kirk* can be distinguished from *Jackson* on the facts. However, the *Kirk* procedure fails as a reliable precedent for Wyoming in that the procedure for resolving the issue of coercion in *Kirk* does not have the legal efficacy that *Jackson* seems to presage; a fortiori, *Kirk* illustrates the plausibility of a criminal code for Wyoming that would require the *Jackson* or Massachusetts rule criteria.

FREDRIC B. BUTLER