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Criminal Law - Confessions - Wyoming Standards Governing the Admissibility of Confessions Obtained during the Period of Custodial Interrogation - Dryden v. State

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CRIMINAL LAW—CONFESSIONS—Wyoming Standards Governing the Admissibility of Confessions Obtained During the Period of Custodial Interrogation. Dryden v. State, 535 P.2d 483 (Wyo. 1975).

At Gerald Dryden's trial for second degree murder, the State was permitted to introduce damaging statements elicited from him during a six day pre-arraignment detention. Although Dryden had asked to see an attorney on the evening of his arrest and again in the course of two subsequent interrogations, the investigating officers waited to honor his request until after he had agreed to waive his *Miranda v. Arizona*[1] rights and admit his presence at the scene of the murder. The Wyoming Supreme Court reversed the denial of Dryden's motion to suppress, holding that the state may not question a suspect who has invoked his right to counsel unless the suspect himself initiates the conversation.[2]

This note will examine the utility of Wyoming's new *per se*[3] admissibility prerequisite in the light of the inconsistent standards which have characterized judicial determinations of the admissibility of inculpatory statements.

THE PRE-*Miranda* VOLUNTARINESS STANDARD

The Supreme Court has long struggled to formulate comprehensible standards by which to judge the in-court admissibility of extrajudicial confessions. The controversy and confusion surrounding high court admissibility rulings reflect a tension between competing societal values: the need for police interrogation in the efficient enforcement of the criminal law, and the fifth amendment assurance that no individual need incriminate himself "unless he chooses to speak in the unfettered exercise of his own will."[4]

Prior to its decision in *Miranda v. Arizona*, the Court dealt with problems of admissibility by assessing the *volun-*

1. 384 U.S. 436 (1966).
2. Dryden v. State, 535 P.2d 483, 493 (Wyo. 1975).
3. The term *per se* is used to refer to a rule that requires the exclusion of admissions when a satisfactory objective prerequisite has not been met, as opposed to a rule whose operation depends upon the issue of subjective voluntariness. *See* Miranda v. Arizona, *supra* note 1, at 544 (White, J., dissenting).
4. Mallory v. Hogan, 378 U.S. 1, 8 (1964).

tariness of the confession. Incriminatory revelations which were "the product of an essentially free and unconstrained choice"[5] could be freely admitted into evidence, while those elicited from a defendant whose "will [had] been overborne"[6] were excluded as offensive to due process.[7]

This voluntariness determination required the Court to engage in a case-by-case scrutiny of all of the factors surrounding a challenged confession. It was, in fact, an inquiry into the effect of police interrogation upon the subjective state of mind of the defendant, and as such required an assessment of "both the characteristics of the accused and the details of the interrogation."[8]

Few concrete guidelines emerge from an admissibility test dependent not only upon the interaction of person and circumstance, but also upon a resolution of the "inevitable swearing contest"[9] between the interrogating officers and the accused over what took place in the stationhouse. In a limited number of early cases,[10] the Court found the circumstances attending interrogation so "inherently coercive"[11] as

5. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).
6. *Id.*
7. *See* Recent Cases, *Government Can Satisfy Its Burden of Proving Waiver of Miranda Rights By Showing Warnings Given, Signed Waiver, and Proof of Defendant's Capacity to Understand the Warnings*, 26 VAND. L. REV. 1069, 1071 (1973). The note explains that the Supreme Court's decision in *Miranda v. Arizona* was predicated upon the fifth amendment privilege against compulsory self-incrimination. Previously, however, the Court had judged the admissibility of confessions used in state criminal proceedings in terms of the demands of the fourteenth amendment due process clause.
8. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). The Court stated that:

> Some of the factors taken into account have included the youth of the accused, *e.g.*, Haley v. Ohio, 332 U.S. 596; his lack of education, *e.g.*, Payne v. Arkansas, 356 U.S. 560; or his low intelligence, *e.g.*, Fikes v. Alabama, 352 U.S. 191; the lack of any advice to the accused of his constitutional rights, *e.g.*, Davis v. North Carolina, 384 U.S. 737; the length of detention, *e.g.*, Chambers v. Florida [309 U.S. 227]; the repeated and prolonged nature of the questioning, *e.g.*, Ashcraft v. Tennessee, 322 U.S. 143; and the use of physical punishment such as the deprivation of food or sleep, *e.g.*, Reck v. Pate, 367 U.S. 433.

9. United States v. Frazier, 476 F.2d 891, 901 (D.C. Cir. 1973) (Bazelon, C. J., dissenting).
10. *E.g.*, Brown v. Mississippi, 297 U.S. 278 (1936), in which the court excluded confessions which had been brutally elicited, and Chambers v. Florida, *supra* note 8, in which the Court excluded confession obtained after prolonged and relentless incommunicado interrogation.
11. Comment, *Interrogation Efficiency and Protection of the Suspect Through the Model Code of Pre-Arraignment Procedure: A Step Beyond Miranda*, 60 IA. L. REV. 395, 396 (1974).

to establish compulsion as a matter of law. With these few exceptions, however, it could rarely be said that the decision to exclude a confession was required by the presence or absence of a clearly definable criterion.[12]

A move toward the evolution of concrete standards applicable to admissibility determinations in the federal courts was taken by the Court in *McNabb v. United States*[13] and later reaffirmed in *Mallory v. United States.*[14] The *McNabb-Mallory* rule required the automatic exclusion of evidence secured in violation of the federal statutory requirement[15] that an arrested person be taken before a committing magistrate without "unnecessary delay."[16] Because it was predicated upon the Court's supervisory powers, however, the rule was never constitutionally mandated upon the states.

It was six years after the *Mallory* decision that the Court took the first significant step away from sole reliance upon the voluntariness test in *Escobedo v. Illinios.*[17] *Escobedo* required the exclusion of confession obtained in violation of the right to counsel at the time of interrogation, and, as a constitutionally based decision, was clearly applicable to state criminal proceedings.

THE REQUIREMENTS OF *Miranda*

The decision in *Miranda v. Arizona* marked the Court's most comprehensive attempt to establish standardized post-arrest interrogation procedures. *Miranda's* concern was apparently "not with the [voluntariness] standard [itself] but

12. Schneckloth v. Bustamonte, *supra* note 8, at 226.
13. 318 U.S. 332 (1943).
14. 354 U.S. 449 (1957). *McNabb*, decided before the enactment of the Federal Rules of Criminal Procedure, held inadmissible in a federal prosecution a confession obtained after an "unnecessary delay" in taking the arrested person before a committing magistrate. *Mallory* applied the *McNabb* rule to violations of Rule 5(a) of the Federal Rules.
15. FED. R. CRIM. P. 5(a).
16. This move away from the voluntariness test has been vitiated by 18 U.S.C. § 3501, which makes delay between arrest and arraignment only one of the factors to be considered in a voluntariness determination. Although it has been argued that the *McNabb* and *Mallory* decisions were constitutionally grounded, the general view is that the return to the "totality of the circumstances" test explicit in Congress' overruling of *Mallory* was not invasive of judicial prerogative. *See* Ganadara, *Admissibility of Confession in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officers and the Courts*, 63 GEO. L. J. 305, 307 n.11 (1974).
17. 378 U.S. 478 (1964).

with an effective mechanism to apply it."[18] Convinced that custodial questioning is by its nature coercive, the Court spoke of the "necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself."[19] Viewing "knowledge of one's rights and freedom from coercion [as] conditions precedent to making a free choice,"[20] *Miranda* required that the police not question a suspect until he has been advised that he has the right to remain silent, that any statement he makes may be used against him, and that he can insist upon the presence of retained or appointed counsel during the questioning period.[21] An easily applicable admissibility rule might have outlawed altogether the use of confessions made in the absence of counsel; the Court was unwilling, however, to impose so stringent a standard. Stating that "[c]onfessions remain a proper element in law enforcement," the Court made it clear that uncoerced statements volunteered by a suspect after full advisement of his fifth and sixth amendment rights are freely admissible against him.[22] Before it can offer this evidence, however, the government must convincingly demonstrate[23] that the defendant knowingly, intelligently, and voluntarily waived his rights to silence and counsel.[24]

Any notion that *Miranda* had resolved the inconsistencies of the ad hoc voluntariness approach has been dissipated in the intervening years of lower court decisions. By requiring the government to prove knowing, intelligent and voluntary waiver, *Miranda* "shifted the focus of inquiry from the voluntariness of the confession to the voluntariness of the

18. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE Appendix XIII, at 720 (Proposed Off. Draft, 1975) [hereinafter cited as MODEL CODE].

19. Miranda v. Arizona, *supra* note 1, at 439.

20. Comment, *Interrogation Efficiency and Protection of the Suspect Through the Model Code of Pre-Arraignment Procedure: A Step Beyond Miranda*, *supra* note 11, at 399.

21. Miranda v. Arizona, *supra* note 1, at 444, 471.

22. *Id.* at 478.

23. Under the *Miranda* vernacular, a "heavy burden" rested upon the government to prove knowing and intelligent waiver. *Id.* at 475. That burden was redefined in Lego v. Twomey, 404 U.S. 477 (1972). Although leaving the states free to adopt higher standards, the *Lego* Court established that the minimum standard was proof by at least a preponderance of the evidence.

24. Miranda v. Arizona, *supra* note 1, at 479.

waiver preceding it."[25] Although further inquiry has been rendered irrelevant in the absence of the required warnings,[26] once the fact of the warnings has been established, the circumstances surrounding a challenged *waiver* remain to be assessed. As a result, the inconsistency which characterized lower court interpretations of the old voluntariness standard characterizes as well post-*Miranda* approaches to the problem of waiver.

The impact of any leading decision is subject to the inevitable process of interpretation through which the lower courts can water down what appeared to be its strict requirements. *Miranda* has been no exception. Although it would seem that the courts could not countenance deviation from the absolute requirement that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present,"[27] appellate interpretations of this standard have been far from uniform. While some courts have held that police-requested statements taken after invocation of the right to counsel "must be presumed a product of compulsion, subtle or otherwise,"[28] the prevailing opinion in the state courts seems to be that *Miranda* should not be read as forbidding the police from urging the suspect to reconsider waiver.[29] Similar inconsistency has characterized judicial resolution of the closely related problem of waiver obtained after invocation of the right to silence. *Miranda's* pronouncement that "[i]f the individual indicates . . . that he wishes to remain silent, the interrogation must cease"[30] has been strictly enforced in some jurisdictions.[31] Others, however, have upheld the government's claim of waiver where a defendant has indicated inculpatory conversation while being questioned,[32] where reconsideration has been urged "in a careful,

25. MODEL CODE § 140.3, Commentary, at 352.
26. "[T]he expedient of giving an adequate warning . . . [is] so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." Miranda v. Arizona, *supra* note 1, at 468.
27. *Id.* at 474.
28. United States v. Preist, 409 F.2d 491, 493 (5th Cir. 1969). *See, e.g.*, United States v. Clark, 499 F.2d 802 (4th Cir. 1974).
29. MODEL CODE, § 140.8, Commentary, at 372.
30. Miranda v. Arizona, *supra* note 1, at 473, 474.
31. United States v. Bensinger, 463 F.2d 576 (7th Cir. 1972), *cert. denied*, 409 U.S. 932 (1972); United States v .Barnes, 432 F.2d 89 (9th Cir. 1970).
32. Holloway v. United States, 495 F.2d 835 (10th Cir. 1974).

noncoercive manner,"[33] and where the police allow a time lapse before attempting to reopen interrogation and precede requests for waiver with re-advisement of constitutional rights.[34]

The Wyoming Supreme Court could similarly have adopted a position in conflict with at least the spirit, if not the letter, of the *Miranda* mandates. Instead, in a decision[35] which reaffirmed *Miranda's* requirements, it has demanded strict adherence to procedures which assure that the suspect be clearly informed of his constitutional rights and not badgered into waiving his right to counsel.

THE WYOMING SUPREME COURT'S DECISION IN *Dryden*

The factual situation which gave rise to the Wyoming decision was as follows: On January 17, 1974, Gerald Dryden was taken into custody in connection with police investigation of a murder. Although he was informed of some of his *Miranda* rights, he was not told of his right to have an attorney present during the questioning period until his fourth interrogation on January 22. Questioned on the night of his arrest by authorities aware that he had asked to see an attorney, Dryden admitted his presence at the murder scene. He made no further admissions at his second and third interrogations, on the 18th and 19th, but did repeat his request for counsel. These requests were ignored, however, even though Dryden was taken before a magistrate on an unconnected charge on January 19. On January 22, following a proper administration of *Miranda* warnings, Dryden expressed willingness to waive his rights to silence and counsel, and again admitted his presence at the scene of the crime. Criminal complaint and warrant were filed the following day.

A. *Standards Applicable to Testimony that Miranda Rights Have Been Given.*

Since a defendant cannot "knowingly, intelligently, and voluntarily" waive rights of which he has no knowledge,

33. United States v. Collins, 462 F.2d 792 (2nd Cir. 1972).
34. State v. Estrada, 63 Wis.2d 476, 217 N.W.2d 359 (1974).
35. Dryden v. State, *supra* note 2.

a necessary element of the state's burden of proof on waiver would appear to be an explicit showing that the defendant was given the required *Miranda* warnings.[36] Yet despite his dissatisfaction[37] with the failure of the interrogating officers to relate the substance of the warnings given, the district judge held testimony no more explicit than that Dryden had been "advised of his rights" sufficient to satisfy *Miranda's* mandate. The Wyoming Supreme Court explicitly condemned this conclusionary testimony, pronouncing it totally insufficient to satisfy the burden of proof prerequisite to the admissibility of inculpatory statements.[38]

Because disposition of the case turned not upon the inadequacy of the testimony, but rather upon the failure of the state to establish waiver, the evidentiary standard sufficient to demonstrate proper *Miranda* warnings was not delineated. However, since condemnation was confined to the conclusionary nature of the testimony, it seems clear that the state will be allowed to prove the adequacy of a *Miranda* warning by the uncorroborated oral testimony of an officer who can recount its precise wording. This is a standard sufficient in most jurisdictions,[39] but because it is one which leads frequently to admissibility determinations dependent upon a resolution of the relative credibility of conflicting accounts of what transpired, other alternatives seem desirable. In some jurisdictions, the officer's testimony is augmented by the defendant's signature on a written warnings and waiver form.[40] While not necessarily dispositive of a challenge to the voluntariness of waiver,[41] the signed statement could provide objective substantiation of the adequacy of the warnings themselves. The Model Code provides for verifica-

36. As previously noted, *supra* note 26, the state cannot rely on the circumstances to show a defendant's awareness of his fifth and sixth amendment rights. The Wyoming Supreme Court has demanded strict adherence to *Miranda's* demand that the warnings be explicitly related. Dryden v. State, *supra* note 2, at 491.

37. *Id.* at 486 n.3.

38. *Id.* at 487 n.5.

39. MODEL CODE, § 130.4, Commentary, at 346.

40. MODEL CODE, § 130.4, Commentary, at 347.

41. [T]he signed waiver prerequisite is not a panacea because it does not resolve the voluntariness problems that arise in situations where a written waiver form is signed. Since the police could coerce a suspect into signing the form, a determination of whe-

tion of sufficiency of the warnings by requiring that they be tape-recorded,[42] a procedure which has been termed the "most efficient and effective means at this time of reconstructing the conditions of stationhouse interrogation for the purpose of determining whether the proper procedural safeguards have been followed."[43]

B. *Reasoning Underlying the Dryden Decision.*

The Wyoming court's decision in the *Dryden* case turned upon a determination of the elements necessary "to constitute a valid warning and knowledgeable waiver of rights."[44]

The State argued in favor of the admissibility of the statement made by Dryden on the evening of his arrest by contending that as a three-time convicted felon, Dryden had "a great deal of insight into his right to have an attorney present,"[45] and by speaking freely to the sheriff had waived his right to counsel. Citing *Miranda's* requirement that "whatever the background of the person interrogated, a warning at the time of interrogation is indispensable . . . to insure that the individual knows he is free to exercise the privilege at that point in time,"[46] the court "summarily reject[ed]"[47] the State's attempt to prove Dryden's subjective knowledge. Because the State had failed to advise the defendant "of his right not only to have an attorney but of his right to have an attorney present prior to and during the questioning,"[48] the district court was held to have erred in admitting Dryden's initial statement.

The court's holding in this regard was a clear affirmation of *Miranda's* mandate that no matter how knowledgeble the defendant, failure to inform him of constitutional rights requires exclusion of his subsequent admissions. In view of

ther the form was voluntarily, knowingly, and intelligently *signed* would be required.

Comment, *Interrogation Efficiency and Protection of the Suspect Through the Model Code of Pre-Arraignment Procedure: A Step Beyond Miranda*, *supra* note 11, at 409.

42. MODEL CODE, § 130.4(3)(a).
43. MODEL CODE, § 130.4, Commentary, at 347.
44. Dryden v. State, *supra* note 2, at 491.
45. *Id.*
46. Miranda v. Arizona, *supra* note 1, at 469.
47. Dryden v. State, *supra* note 2, at 491.
48. *Id.*

the Wyoming court's explicit adoption of this *per se* standard, its footnoted statement that the question of waiver cannot be meaningfully resolved when the State has failed to establish proper warnings[49] was anamolous. Such resolution is indeed possible under the old voluntariness standard. The point of the exclusionary rule adopted in *Dryden*, however, is to entirely preclude this determination and to focus solely upon police behavior.

The State next argued that even if the statement made by Dryden on the evening of his arrest was inadmissible, the court should affirm the admission of Dryden's response to the interrogation conducted on January 22 because it had been made subsequent to proper warning and explicit waiver. This argument, stated the court, presented the question whether "having previously failed properly to advise the accused of his privilege not to testify against himself, and knowing of the accused's desire for counsel, investigating officers could continue to examine him and by finally coming up with a proper warning and an apparently freely made statement, clear away the debris of the earlier and improper examinations."[50] The court held that they could not. Citing *Miranda's* edict that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present,"[51] the court held that once a defendant has expressed his desire for counsel, he may not be subjected to further interrogation "unless and until" he himself initiates the conversation.[52] By so holding, the Wyoming court has announced as a matter of law that admissions are *per se* involuntary if elicited from a suspect who has invoked his right to counsel and not himself reopened interrogation.

C. *The Significance and Potential Extension of the Dryden Decision.*

Wyoming's *per se* waiver rule constitutes a useful measure in the standardization of admissibility prerequisites, for it has eliminated the necessity for a determination of the

49. *Id.* at 489 n.9.
50. *Id.* at 492.
51. Miranda v. Arizona, *supra* note 1, at 474.
52. Dryden v. State, *supra* note 2, at 493.

voluntariness-in-fact of a police-requested waiver preceded by the defendant's request for counsel. By citing precedent from Wyoming case law,[53] and by speaking of *Miranda* as "pertinent in the construction that we should give to our own constitutional provision [against self-incrimination],"[54] the Wyoming court has arguably established an exclusionary standard grounded in the state constitution. The rule, in any case, goes beyond *Miranda*, for even under *Miranda's* "heavy burden" stricture,[55] the government need not depend upon suspect-initiated conversation to prove the voluntariness of a waiver made subsequent to request for counsel.

Miranda has provided the criminal defendant with a panoply of rights which allow him to invoke or waive silence or counsel at any time prior to or during the interrogation process. Because the rights to counsel and to silence are fully equivalent under the Constitution, the same standard should be applicable no matter which of the rights has been invoked. For this reason, there seems little doubt after *Dryden* that once a Wyoming defendant has expressed a desire to remain *silent*, interrogation must cease unless and until he, himself initiates further conversation.

D. *Voluntariness Deteriminations Still Potentially Necessary Under the Dryden Rule.*

Under the *Dryden* decision, and under its suggested extension, the state is precluded from making a showing of waiver where the defendant has invoked his *Miranda* rights and has not himself reopened conversation with the authorities. Even where the state can prove that these prerequisites have been met, however, it may still face a challenge to the validity of the delayed waiver. The question to be resolved

53. *Id.* at 490, 491. The court cited Miskimins v. State, 8 Wyo. 392, 58 P. 411 (1899), and Maki v. State, 18 Wyo. 481, 112 P. 334 (1911), for the proposition that the privilege against self-incrimination and the right to advice of counsel are firmly established in Wyoming.

54. *Id.* at 491.

55. If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden* rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
Miranda v. Arizona, *supra* note 1, at 475. (emphasis added).

under this circumstance concerns the possibility that the defendant who has changed his mind may have done so through a misunderstanding of his constitutional rights. In *Commonwealth v. Youngblood*,[56] for example, the court held inadmissible a confession volunteered after invocation of rights, stating that when a defendant has assumed "conradictory positions with respect to his submission to interrogation," the investigating officers must inquire further in order to ascertain that his change of position was the product of "intelligence and understanding" rather than of "ignorance and confusion."[57] A similar question as to the suspect's lack of understanding was otherwise resolved by the D.C. Circuit,[58] over a strong dissent by Chief Judge Bazelon. In that case, a defendant who had specifically waived his right to counsel and thereafter indicated a desire to confess refused to allow the officers to commit his statement to writing. Although the majority held his statement admissible, Judge Bazelon read *Miranda* as requiring that where "the suspect says or does something sufficient to put a reasonable man on notice that the warnings may not have been understood,"[59] interrogation must cease until the matter has been clarified. Even though the suspect-initiated statement may present the courts with a voluntariness dilemma, it is clear that the *per se* rule has significantly narrowed the area in which a voluntariness-in-fact determination will be required.

SUMMARY AND CONCLUSION

As the previous discussion has noted, judicial struggle toward the formulation of fair and comprehensible admissibility standards did not culminate with *Miranda*. The conflicting interpretations to which *Miranda* has been subject reflect a certain ambiguity in the case itself. Thus, while some courts stress *Miranda's* concern that confessions must be voluntary, others emphasize the prophylactic effect of its exclusionary rule. Admittedly these are related, for insofar as the rule deters police behavior which in fact induces in-

56. 307 A.2d 922 (Pa. 1973).
57. *Id.* at 927.
58. United States v. Frazier, *supra* note 9.
59. *Id.* at 901 (Bazelon, C.J., dissenting).

voluntary statements, its voluntariness and deterrence functions coincide, voluntariness and deterrence are separable concepts, however, with significantly different consequences. It is the deterrence aspect of *Miranda* that Wyoming has chosen to emphasize.

As explications of the basic constitutional right that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself,"[60] *Dryden's* exclusionary rules have their source in the Constitution. Were the prevention of compelled admissions the sole concern, however, police methods would be of only evidentiary value, and inquiry would be directed toward police misbehavior not as an abstract proposition, but only as it affects the suspect's "governing self-direction."[61]

Dryden's exclusionary rules are rules of law which conclusively presume the involuntariness of statements obtained in the context of particular police misbehavior. Because they are based upon the constitutional protection against compelled testimony, the rules exceed their constitutional grounding to the extent that they prevent the admission of statements which were voluntary even in the face of improper police procedure. The rules may be justified, however, in a frank recognition that the impossibility of judging "after the fact . . . the precise subjective state of mind of every defendant whose confession was challenged as involuntary"[62] has long confounded a rational application of the voluntariness standard. Expressive of notions of the "respect a government—state or federal—must accord to the dignity and integrity of its citizens,"[63] the *Dryden* decision has sensibly incorporated into easily applicable exclusionary rules factors likely to lead to involuntary admission.

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60. U.S. CONST. amend. V.
61. Culombe v. Connecticut, *supra* note 5, at 602.
62. United States v. Frazier, *supra* note 9, at 901 (Bazelon, C.J., dissenting).
63. Miranda v. Arizona, *supra* note 1, at 460.