

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

STATE OF TENNESSEE)	<u>FOR PUBLICATION</u>
)	
Appellee,)	
)	
v.)	GIBSON CIRCUIT
)	
BENJAMIN HUDDLESTON,)	Hon. Dick Jerman Jr., Judge
)	
Appellant.)	
)	
)	No. 02S01-9410-CC-00069

FILED
June 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

CONCURRING OPINION

I concur in the result reached by the majority that the defendant's confession was not admissible and that the case be remanded for retrial.

I write separately because, in my view, further analysis of the Rule 5(a) issue is necessary.

I agree that violation of Rule 5(a) of the Tennessee Rules of Criminal Procedure does not require the exclusion of a confession in every case. However, even though the majority recognizes that incarceration is inherently coercive and custodial interrogation is often utilized to induce confessions, it apparently gave little

effect to that factor in its examination of the "totality of the circumstances" in this case.

The assessment of the impact of a blatant violation of Rule 5(a) is aided by an examination of the history and purpose of the rule. Before the adoption of Rule 5(a), a section of Tennessee Code Annotated required that persons arrested by "private persons" be taken before a magistrate or an officer "without unnecessary delay." While no similar provision existed for arrests by police officers, another section provided that "[n]o person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate." Wynn v. State, 181 S.W.2d 332, 334 (Tenn. 1944)(quoting Tenn. Code Ann. §§ 11544, 11515 (1932)). The purpose of these statutes was to assure the vitality of the presumption of innocence. Thus, one arrested by a citizen or officer without the intervention of a neutral determination of probable cause was required to be taken promptly before a magistrate. The magistrate's role, then as now, was to assure that constitutional rights were protected. Among those rights were the presumption of innocence, the right to bail, the right to counsel, and the right to be free from self-incrimination.

Confessions given during warrantless, unsafeguarded periods of pretrial incarceration were suspect because they were given at a time when a presumptively innocent accused was being held illegally without the benefit of constitutional protections. Thus, in order to determine the admissibility of these confessions, the courts focused on the circumstances of confinement and the treatment of the accused during confinement. In a 1943 unpublished decision, this Court excluded a confession made during a warrantless, custodial interrogation which was described as a "continuous grilling." See Wynn v. State, 181 S.W.2d at 333. However, that decision was clarified by the Court the next year in Wynn v. State. There, the Court declined to exclude confessions made during a 72 hour warrantless detention finding no proof "of any mistreatment of defendant." Id. at 334. Thus, the Court held that it was not the fact of a warrantless detention that yielded the confession inadmissible but rather "the treatment . . . during detention." Id.; see also, McGhee v. State, 189 S.W.2d 826, 828 (Tenn. 1945).

This general totality approach was also advanced after the passage of Rule 5(a) in a decision of the Court of Criminal Appeals relied upon by the majority. In State v. Readus, 764 S.W.2d 770 (Tenn. Crim. App. 1988), cert. denied,

(Tenn. 1989), the trial court excluded a confession made during a brief period of delay in which the accused was held without a warrant.¹ The Court of Criminal Appeals reversed and held that "if the totality of the surrounding circumstances indicates that a confession was voluntarily given, it shall not be excluded from evidence solely because of delay in carrying the confessor before a magistrate." Id. at 774.

The facts which prompted the Readus decision are strikingly different from those in the case at bar. Readus was indicted for raping a young girl on her way to school. Within an hour of the rape, he was arrested without a warrant. He was taken to the hospital for the performance of tests. After being explained his Miranda rights, he chose to talk and exculpated himself. Within moments, however, Readus told the detective, "I need some help. . . .I need to talk about it." Less than two hours after the arrest, Readus confessed. A taped confession was given two hours later. Readus was taken before a magistrate approximately eight hours after his warrantless arrest. The Court of Criminal

¹In Readus, the trial court reasoned that the passage of Rule 5(a) without a complementary statute similar to 18 U.S.C. § 3501(c) (clarifying that delay does not **per se** invalidate a confession) resulted in an adoption of the so-called McNabb-Mallory rule in Tennessee. In McNabb and Mallory, the United States Supreme Court held that confessions produced during periods of unnecessary delay between confinement and appearance must be excluded regardless of voluntariness. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

Appeals noted that "a violation of Rule 5(a) could result in the suppression of a confession, if the violation was a factor in its involuntariness," but concluded that the delay of eight hours in the case was not unnecessary, nor was the confession, initiated by Readus, involuntary. Id. at 772. The holding in Readus was that voluntariness is the critical standard under Rule 5(a) for determining the admissibility of confessions obtained during the violation of that rule, and the coercive nature of extended incarceration is a significant factor in determining voluntariness. Id. at 774.

Because pretrial incarceration is inherently coercive and confessions given during periods in which a defendant is being held in violation of Rule 5(a) are inherently suspect, the procedure for determining whether a confession was voluntary is of critical importance. If the challenged confession was given while the defendant was being held in violation of Rule 5(a), the burden is on the State to prove that it was voluntarily made under the totality of circumstances of the case. See generally, State v. Hall, 465 N.W.2d 150 (Neb. 1991); State v. Smith, 725 P.2d 894 (Or. 1986); DeConigh v. State, 433 So.2d 501 (Fla. 1983). In addition to the factors generally relevant to a determination of voluntariness, the proof must address the inherently coercive effect of custodial interrogation, which increases

substantially with each additional hour of isolated custody. For the confession to be admissible, the totality of the circumstances must include evidence of some fact or circumstance which would tend to neutralize or overcome the coercive effect of prolonged incarceration.

Since the proof in this case does not include evidence of any factor or circumstance which would tend to neutralize or overcome the coercive effect of incarceration in violation of Rule 5(a), I would hold that the confession should have been suppressed on that ground also.

Reid, J.

CONCUR:

White, J.