IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE	)	For Publication
	)	
Appellee	)	Filed: November 12, 1996
	)	
v.	)	Davidson County
	)	
NATHAN SMITH	)	Hon. Seth Norman, Judge
	)	
Appellant	)	No. 01-S-01-9509-CR-00151

FOR THE APPELLANT:

CHARLES W.B. FELS
KENNETH F. IRVINE, JR.
Knoxville, TN
(On appeal)

EDWARD L. HILAND
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(At trial)

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O P I N I O N

AFFIRMED

BIRCH, C.J.

Nathan Smith, the defendant, appeals the judgment of the Court of Criminal Appeals affirming his two convictions for aggravated sexual battery. In this appeal, Smith contends that the trial court erroneously admitted incriminating statements he made to a mental health counselor. He insists that these statements should have been suppressed because: (1) they were elicited in violation of Miranda v. Arizona, 384 U.S. 436 (1966); (2) they constituted an involuntary confession; and (3) they were solicited under circumstances that violated his due process rights under the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution. Under the facts of this case, we find that the admission of these statements did not violate the defendant's state or federal constitutional rights; accordingly, we affirm the judgment.

I

The record reflects that one morning the defendant, clad only in his bathrobe, entered the bedroom of his stepdaughter, AJ.[1] He sat on the edge of her bed and placed her hand on his penis. He removed her hand momentarily and then placed it there again.

A few days later, AJ's mother (the defendant's wife) learned of the incident. She immediately confronted Smith about

[1]In cases involving sexually oriented crimes, the Court endeavors to withhold the identity of young victims when appropriate.

AJ's allegations. Smith and his wife then voluntarily reported the allegations to the Tennessee Department of Human Services (DHS).

On the day the matter was reported, DHS social worker Tracy Walker interviewed the victim, her mother, and the defendant. Walker told the defendant that, from her experience with the district attorney general's office, if a perpetrator admitted the allegations and received treatment, he probably would not be indicted. She also told the defendant that she could not promise that he would not be prosecuted. Walker also told the defendant that he would be indicted if he did not seek counseling. Walker referred the defendant to Luton Mental Health Center.[2]

A few days later, the defendant met with Walker and Jeff West, a detective attached to the Youth Services Division of the Metropolitan Nashville-Davidson County Police Department. West interviewed the defendant at the station; the interview was tape-recorded. The defendant presented himself for this interview voluntarily and was permitted to leave at its conclusion.

Six weeks later, the defendant sought counseling at Luton Mental Health Center. During a session with a counselor, he admitted that the unlawful sexual contact had occurred and that he had found it sexually stimulating.

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[2]Although the record is not clear, apparently Luton Mental Health Center is a private facility.

Neither Walker, West, nor the counselor ever advised the defendant that he had the right to remain silent and that his statements could be used against him. Additionally, the counselor failed to advise him that his statements to her were not statutorily confidential.[3]

At a pre-trial hearing, the trial court suppressed the statements the defendant made to Walker and West, presumably based on their respective failure to advise him of his rights pursuant to Miranda v. Arizona.[4] After a jury-out hearing at trial, the counselor was permitted to testify about the defendant's incriminating statements to her. The trial court admitted this testimony reluctantly, noting:

> We've got a D.H.S. agent, or representative, going to this man and saying, "look, if you'll go get help, we might not prosecute you on this matter." The man goes and gets help, and then you bring that witness in to buttress your case. In other words, you mousetrapped him, didn't you?

At the conclusion of the proof, the jury found the defendant guilty of two counts of aggravated sexual battery. He

[3]Tenn. Code Ann. § 37-1-614 abrogates the privileged nature of communications between any professional person and his or her patient or client where the subject matter of those communications relates to child sexual abuse.

[4]384 U.S. 436 (1966). The trial court did not expressly state its reasons for the ruling on the record.

was sentenced as a mitigated offender to concurrent 7.2 year sentences.[5]

II

The Fifth Amendment to the United States Constitution[6] provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Article I, § 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself."

As a general rule, a person must affirmatively invoke these protections. Minnesota v. Murphy, 465 U.S. 420, 429 (1984); McCormick on Evidence §125 (John William Strong ed., 4th ed. 1992). There are three exceptions to this requirement; two are pertinent here: (1) an individual is not required to invoke the right to avoid self-incrimination during a custodial interrogation by a government agent[7] and (2) an individual is not required to invoke the right to avoid self-incrimination if the government has threatened a penalty if the privilege is asserted.[8]

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[5]We interpret this to be seven years seventy-three days; the record is, however, unclear.

[6]The Fifth Amendment applies to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

[7]Miranda, 384 U.S. at 436.

[8]Murphy, 465 U.S. at 434-39.

According to the defendant, the counselor was required to advise him of his Miranda rights prior to their discussion, and he was excused from asserting his right to avoid self-incrimination.

During a custodial interrogation, state agents must affirmatively advise an individual of his right to remain silent and of the consequences of his failure to assert that right. Miranda, 384 U.S. at 467-69. To constitute a "custodial interrogation," (1) the subject must be "in custody"; (2) there must be an interrogation; and (3) the interrogation must be conducted by a state agent. Id. at 444.

An accused is "in custody" if "deprived of his freedom of action in any significant way." Oregon v. Mathiason, 429 U.S. 492, 494-96 (1977); State v. Smith, 868 S.W.2d 561, 570 (Tenn. 1993). The determinative inquiry is whether "there is a 'formal arrest or restraint of freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983)(quoting Mathiason, 429 U.S. at 495); Smith, 868 S.W.2d at 570. The circumstances of each case will influence a determination of whether a suspect is "in custody" and thus entitled to Miranda protection. Beheler, 463 U.S. at 1125; see generally State v. Cooper, 912 S.W.2d 756 (Tenn. Crim. App. 1995). We think the circumstances in this case clearly indicate that this defendant was not in custody at the time the incriminating statements were made. Although Walker referred Smith to Luton Mental Health Center, she

had no further participation in the defendant's decision to visit the center for counseling almost six weeks after the referral. Smith was free to leave at any time and, in fact, did so after each counseling session. There is no indication whatsoever that his freedom of movement was restrained. Accordingly, Smith was not "in custody," for Miranda purposes, at the time he made his incriminating statements to the counselor.

Because the defendant was not in custody, there is no need for us to determine whether the counselor was a state agent or whether her discussions with the defendant amounted to interrogation. Smith was not in custody; therefore, the absence of Miranda warnings did not violate his constitutional right to avoid self-incrimination.

III

The defendant contends that Walker, as an agent of the state, compelled him to make the incriminating statements to the counselor, thereby producing an involuntary confession.[9]

[9]Smith apparently relies on Walker's alleged "threat" to excuse his obligation to invoke his right to avoid self-incrimination. Murphy, 465 U.S. at 434-39. As discussed infra, Part IV, we do not agree with Smith's categorization of Walker's statements.

Because we find that there was no compulsion, we need not consider the concomitant issue of whether Walker, as a DHS social worker, acted as a state agent when she referred the defendant to Luton Mental Health Center. Nevertheless, it is helpful to describe the mandated interaction of the various governmental entities that respond to reports of child sexual abuse. In these cases, DHS personnel, although not officially members of law enforcement, function to some degree in that capacity. When a report of child sexual abuse is received, the "child protective team" is convened for the county in which the child resides or where the abuse alleged occurred. Tenn. Code Ann. § 37-1-607. The teams are composed of representatives from DHS and the district attorney general's office, a juvenile court officer or investigator, and a law enforcement officer. Id. Tennessee Code Annotated § 37-1-607(a)(3) provides "that the child protective investigations be conducted by the team members in a manner which not only protects the child but which also preserves any evidence for future criminal prosecutions" (emphasis added). DHS must orally notify the child protective team, the district attorney general, and the appropriate law enforcement agency, immediately upon learning of any alleged child sexual abuse. DHS and the team are then required to make a full written report to the district attorney general within three days of the oral report. Tenn. Code Ann. § 37-1-607(b)(3). The team may recommend a particular disposition of the case to the district attorney general, but the

final decision rests with the district attorney general. Tenn. Code Ann. § 37-1-607(b)(5).[10]

We now determine whether Walker's "advice" to the defendant "compelled" his statement to the counselor. Smith contends that his statement was "compelled" for two reasons. First, he argues that Walker promised him leniency if he did not exercise his right to avoid self-incrimination. Second, he argues that Walker threatened him with prosecution if he did exercise his right to avoid self-incrimination.

In a jury-out hearing, prior to the counselor's testimony at trial, the trial court found that the statements to the counselor were voluntary. This determination is conclusive unless the evidence in the record preponderates against that finding. State v. Kelly, 603 S.W.2d 726, 728 (Tenn. 1980); State v. Chandler, 547 S.W.2d 918, 922-23 (Tenn. 1977).

The test of voluntariness for confessions under Article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994); State v. Smith, 834 S.W.2d 915, 918-19 (Tenn. 1992).

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[10]Walker testified that she recommended that the case not be prosecuted, but rather that reunification of the family be sought. The district attorney general obviously did not concur in this recommendation.

In Bram v. United States, 168 U.S. 532 (1897), the Supreme Court held that in order for a confession to be admissible, it must be "free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . ." Id. at 542-43. Since Bram, courts have struggled to articulate a test of voluntariness capable of accommodating the infinite variety of circumstances in which an accused individual is questioned and may ultimately confess. Justice Stewart noted that the effort has yielded "no talismanic definition of 'voluntariness'. . . ." Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973). Justice Frankfurter described the notion of "voluntariness" as "an amphibian." Culombe v. Connecticut, 367 U.S. 568, 604-05 (1961).

In Rogers v. Richmond, the Supreme Court set out the standard for determining the admissibility of a confession under the Fourteenth Amendment:

> convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system--a system in which the State must establish guilt by evidence independently and freely

> secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).[11]

In Tennessee, the particular circumstances of each case must be examined as a whole. Monts v. State, 218 Tenn. 31, 400 S.W.2d 722, 733 (1966). A defendant's subjective perception alone is not sufficient to justify a conclusion of involuntariness in the constitutional sense. State v. Brimmer, 876 S.W.2d 75, 79 (Tenn. 1994)(citing Colorado v. Connelly, 479 U.S. 157, 164 (1986)). Rather, "coercive police activity is a necessary predicate to finding that a confession is not voluntary . . . ." Id.; State v. Branam, 855 S.W.2d 563, 568 (Tenn. 1993).

Promises of leniency by state officers do not render subsequent confessions involuntary per se: "'The Fifth Amendment does not condemn all promise-induced admissions and confessions; it condemns only those which are compelled by promises of leniency.'" Kelly, 603 S.W.2d at 729 (quoting Hunter v. Swenson, 372 F. Supp. 287, 300-01 (D.C. Mo. 1974)(emphasis added)). The critical question is "'whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and

[11]Rogers was decided under the Fourteenth Amendment due process clause. Rogers predates Malloy in which the Supreme Court held the Fifth Amendment applicable to the states. The standard expressed is in our view equally applicable to cases arising under the Fifth Amendment.

bring about confessions not freely self-determined . . . .'" Id. at 728 (quoting Rogers, 365 U.S. at 544).

At the suppression hearing in this case, Walker testified:

> What was explained to Mr. Smith was that, he could not be promised no prosecution, but the best thing was to tell the truth and to get into counseling, so in the end his family could be reunited. . . . I explained that my experience with [the] District Attorney's Office is that, in cases where a person has a problem, if they go into counseling the District Attorney may not prosecute, but I could not promise that. . . . I explained the alternatives; that if there is a problem, [he] should admit it, and more than likely the D.A. will not prosecute if Mr. Smith gets into treatment. I cautioned him that I cannot promise no prosecution, that my experience is that the D.A. handled such cases in this manner.

In later testimony, Walker admitted that in this same conversation she told Smith that if he did not admit the abuse, he would definitely be prosecuted.

After a painstaking review of the record relating to this issue, we conclude that Smith could not have reasonably interpreted Walker's statements as a promise that he would not be prosecuted if he were to admit the abuse and seek counseling. Walker's

statements were obviously equivocal, and she made it clear to Smith that she could not promise freedom from prosecution.

Walker's statement that Smith would be prosecuted should he choose not to admit his unlawful conduct also fails, in our view, to render his subsequent statements to the counselor involuntary. To render a subsequent statement involuntary, the tactics of the state actor must be so coercive as to overbear the defendant's will. Kelly, 603 S.W.2d at 728. Advice to an individual concerning the consequences of a refusal to cooperate is not objectionable. We view this statement as analogous to those made by law enforcement officers in United States v. Crespo de Llano, 838 F.2d 1006, 1015 (9th Cir. 1987) and United States v. Pelton, 835 F.2d 1067, 1072-73 (4th Cir. 1987). In Crespo de Llano, police officers, after having procured a search warrant, asked the defendant to reveal the location of the cocaine so "that they would not have to tear the house apart." Crespo de Llano, 838 F.2d at 1015. In Pelton, FBI officers advised the defendant that there would be a "full scale investigation" should he decide not to cooperate. Pelton, 835 F.2d at 1072. We agree with the Fourth Circuit that "[t]ruthful statements about [a defendant's] predicament are not the type of 'coercion' that threatens to render a statement involuntary." Id. at 1073.[12]

[12]In both Crespo de Llano and Pelton, the defendants relied on United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981). In Tingle, the young defendant had a two-year-old child. The arresting officer told Tingle that she was facing a potential sentence in excess of forty years (an exaggeration) and that if she did not

Finally, we note the six weeks interim between Smith's conversation with Walker and the counseling session. This delay further belies Smith's contention that Walker compelled his statements to the counselor.

Considering all of the circumstances, we conclude that the statements made by the defendant were not "compelled" in violation of the Fifth Amendment or Article I, § 9.

IV

As his final point, Smith argues that the admission into evidence of his statements to the counselor violated his due process rights under the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Tennessee Constitution.[13] Under our holding in Van Zandt v. State, 218 Tenn. 187, 402 S.W.2d

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cooperate, she would not see her child again for a very long time. We consider Tingle clearly distinguishable from this case. In this case, the defendant was not in custody, and Walker's statements were simply her prediction of the future course of events--events that would legally and predicably follow in light of Walker's conversation with Smith and the victim.

[13]The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ."

Article I, § 8 of the Tennessee Constitution provides:

> No man to be disturbed but by law. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

130, 135 (1966), the "true test . . . is whether 'fundamental fairness' and 'substantial justice' . . . are absent or present."

At the outset, we reject any argument by the defendant that the legislature's abrogation of the counselor privilege in child sexual abuse cases contravenes the principles of due process under either the federal or state constitutions. Confidentiality privileges exist solely at the discretion of the legislature or the courts. Thomas R. Malia, Annotation, Validity, Construction, and Application of Statute Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect, 44 A.L.R.4th 649 (1986). In Tennessee common law, there was no physician-patient privilege or psychotherapist-patient privilege. Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965). While the legislature has seen fit to provide such privileges for certain confidential relationships, it has expressly abrogated the privilege in judicial proceedings relating to child sexual abuse. Tenn. Code Ann. § 37-1-614. As this privilege was created by statute, it is without a doubt subject to limitation or removal as the legislature may see fit. The legislature has determined that society's interest in exposing the sexual abuse of children transcends an accused's interest in the confidentiality of his or her communications regarding such abuse. Id.; State v. Lyon, 648 S.W.2d 957, 960 (Tenn. Crim. App. 1982); Adams v. State, 563 S.W.2d 804, 809 (Tenn. Crim. App. 1978)(both holding that the need to protect children outweighs the policy of protecting the marriage relationship and abrogating the marital privilege). The legislature

has duly exercised its prerogative to subordinate the interest in preserving confidential communications to the interest in identifying and prosecuting child abusers; therefore, the defendant suffered no denial of due process by the mere application of the statutes to his circumstances.

According to Smith, the strategy employed by Walker violated his due process rights, i.e., in a deliberate attempt to elicit the incriminating statements, Walker strongly encouraged Smith to seek counseling knowing that any statements he made to the counselor could be used in a subsequent prosecution.

We emphasize that the counselor had an ethical obligation to advise Smith as to the limits of confidentiality in matters relating to child sexual abuse.[14] Failure to do so, however, does not necessarily require suppression of the defendant's statements, particularly where the statements were made in a non-custodial setting to a counselor not directly connected to the state. State v. Mosher, 755 S.W.2d 464 (Tenn. Crim. App. 1988). Further, there is no evidence that Walker communicated with the counselor or in any way interfered to prevent the counselor from informing Smith that his statements to her were not confidential. Absent evidence

[14]See Jaffee v. Redmond, ___ U.S. ___, 1996 WL 315841, 64 U.S.L.W. 4490, n.12 (June 13, 1996)("At the outset of their relationship, the ethical therapist must disclose to the patient 'the relevant limits on confidentiality.'" American Psychology Association, Ethical Principles of Psychologists a Code of Conduct, Standard 5.01 (Dec. 1992)).

of interference by a state agent, we find no violation of due process in this case.

V

To summarize, we conclude that the statements by the defendant to the counselor were not made in a custodial-interrogation setting that would warrant a Miranda advisement. Further, the incriminating statements were not compelled by impermissible threats or promises of leniency so as to render them involuntary. Moreover, the legislature has abrogated the counselor-patient privilege in cases of child sexual abuse. Because there is no evidence that Walker participated in the counselor's decision not to advise Smith of the absence of privilege, we find no due process violation.

Clearly, society has an interest in both the successful treatment of child sex abuse perpetrators and the successful prosecution of these individuals. Thus, there exists a necessary tension between the two interests. While we harbor no desire to upset the delicate balance between these two interests, we are concerned that in their attempts to serve both, state agents may unwittingly create a situation in which neither is accomplished.

We do express the strongest disapproval of any practice whereby state agents encourage suspects to seek counseling for the

purpose of eliciting incriminating statements for use in a subsequent prosecution. Walker's statements to Smith were on the line, but did not cross it.

For the reasons stated herein, the judgment of the Court of Criminal Appeals is affirmed.

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ADOLPHO A. BIRCH, JR., Chief Justice

CONCUR: Drowota, Anderson, JJ.
DISSENTING IN SEPARATE OPINIONS: Reid, White, JJ.