

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

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

FILED

November 12, 1996

Cecil W. Crowson
Appellate Court Clerk

DISSENTING OPINION

The majority makes reference to relevant decisions of this Court and the United States Supreme Court and sets forth the controlling legal principles. However, the majority errs, in my view, in concluding, based on those principles, that the defendant's incriminating statements were admissible as evidence of his guilt. In my view, the record shows that the defendant's incriminating statements were, in fact, not free and voluntary but were obtained by improper influence, both the threat of prosecution and the promise to forebear prosecution, in violation of Article I, Section 9 of the Constitution of Tennessee and the Fifth Amendment to the Constitution of the United States.

The defendant was convicted on statements made to Tracy Walker, the DHS member of a statutory investigating

team,¹ and on statements made to a mental health counselor, to whom the defendant was referred by Walker and who violated the ethical obligation to advise the defendant that his statements were not privileged.

Walker's account of the advise given the defendant, which is relied upon by the majority, is in summary form, phrased as conclusions rather than an account of the conversation between her and the defendant. Nevertheless, there hardly could be a clearer case of the State threatening a penalty if the privilege against self-incrimination should be asserted and promising a reprieve should the defendant confess and accept counseling.

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.

¹Tenn. Code Ann. § 37-1-607(a)(3) (1996).

Majority opinion, page 12-13.

The DHS agent's testimony, not surprisingly, begins with the explanation that the defendant could not be promised that he would not be prosecuted. However, according to her testimony, she hurried to advise "the best thing" for the defendant was to admit the crime and accept counseling. This was the "best thing" because "his family could be reunited." This expectation of benefit offered the defendant for confessing was validated by "her experience" that a person who "has a problem" "may not" be prosecuted if that person admits the abuse and accepts counseling. The "may not prosecute" language was then supplemented with "more than likely the DA will not prosecute." Walker again supported the reliability of her advice by reference to her experience with the District Attorney General.

The statements made by Walker clearly were an offer of leniency if he would confess and a threat of prosecution if he did not confess. Walker's disclaimer that she could not promise no prosecution did not eliminate the coercive nature of her advice. The promise and threat combination, under the circumstances of this case, likely was more coercive than physical force. To a person in the defendant's circumstances, what could be more coercive than a reasonable expectation that he would not be prosecuted and would be reunited with his wife and child?

Since, as observed by the majority,² the courts have not been able to articulate a reliable test for voluntariness, comparison of the facts in this case with those in prior cases is of little help. Although difficult to define accurately, voluntariness in a particular situation is easily recognized. When the facts of this case are applied to the rule of law announced by the majority, the conclusion is obvious. The defendant's confession was not "free and voluntary; that is, ... not extracted by any sort of threats ..., nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." See Majority Opinion, page 10.

Walker was a state agent, charged with investigating the criminal offense and preserving evidence for future prosecution.³ She successfully accomplished that result, she obtained the most damning evidence possible - admission by the accused that he committed the offense. The trial judge's characterization of the state's conduct is accurate and eloquent - "you mouse-trapped him." Notwithstanding the majority's severe admonition,⁴ the opinion will encourage state agents to operate on the brink of constitutional error, confident this Court will not notice inquisitorial zealotry.

²Majority opinion, page 10.

³Tenn. Code Ann. § 37-1-607(a)(3).

⁴See majority opinion, page 18.

Constitutional principles are mere illusions unless they are given effect in the real world, even for the benefit of persons charged with detestable crimes. Who can say that society's best interests (including those of the innocent victim) would not have been better served had the constitution been honored, the defendant afforded treatment, and prosecution held in abeyance, all as outlined by Tracy Walker.

In my view, the confession was obtained in violation of Article I, Section 9 of the Constitution of Tennessee and

the Fifth Amendment to the Constitution of the United States, and the motion to suppress should have been granted.

REID, J.