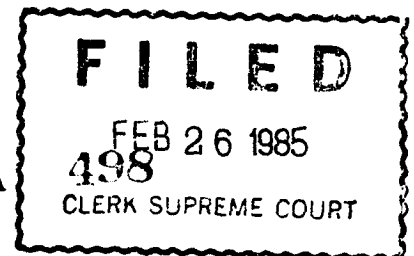


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

MARK ANTHONY THORNDYKE,

)

Defendant-Appellant.

)

Filed February 26, 1985

4-523
84-285

Appeal from the Iowa District Court for Muscatine County - J. L. Burns and
Max R. Werling, Judges.

Defendant appeals from his conviction for burglary in the second degree in
violation of Iowa Code sections 713.1 and 713.5 (1983). REVERSED AND
REMANDED.

Charles Harrington, Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant
Attorney General, for plaintiff-appellee.

Heard by Schlegel, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Defendant appeals from his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5 (1983).

Defendant broke into an unoccupied house and fled when confronted by the owner. A police officer went to defendant's residence and took him to the police station for questioning. At the station defendant was read his Miranda rights and signed a waiver form. Defendant denied any knowledge of the burglary. After he was identified in a lineup and placed under arrest, defendant was again explained his rights and signed a waiver form. He then confessed to entering the house with the intent to steal food.

Our review of criminal proceedings is ordinarily on assigned error. However, we make an independent evaluation of the totality of the circumstances on issues involving the violation of basic constitutional guarantees. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982).

On appeal defendant asserts that the trial court erred in not suppressing his confession because: (1) his Miranda waiver was not knowing, voluntary, and intelligent; and (2) his confession was involuntarily made. These are separate issues. State v. Whitsel, 339 N.W.2d 149, 152 (Iowa 1983). Since we find that defendant's confession was induced by promises of leniency, we do not separately consider the waiver of Miranda rights.

A determination of voluntariness is based on an examination of the totality of the circumstances surrounding the defendant's decision to make the statement. The following factors have been identified by the supreme court as relevant to that determination: defendant's knowledge and waiver of his Miranda rights; defendant's age, experience, prior record, level of education, and intelligence; length of time defendant is detained and interrogated; whether physical punishment was used, including the deprivation of food or sleep; defendant's ability to understand the question; defendant's physical and emotional condition

and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admission; and any mental weakness the defendant may possess. State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1982).

In Hodges the supreme court held that a suspect's confession was inadmissible where the police officer questioning him stated that if the suspect gave his side of the story there was a much better chance of him receiving a lesser charge than first-degree murder. State v. Hodges, 326 N.W.2d at 349. The court stated that an officer can ordinarily tell a suspect that it is better to tell the truth. However, when the officer tells the suspect what advantage is likely to be gained from making a confession, the officer's statements become promises or assurances rendering the suspect's statements involuntary. Id. See also State v. Kase, 344 N.W.2d 223, 225-26 (Iowa 1984) (inculpatory statements were made involuntarily where law enforcement officer told defendant no charges would be brought against her if she told what she knew, but if she did not talk she would be charged with murder). However, in State v. Whitsel, 339 N.W.2d at 153-54, the supreme court held that detectives' offer to tell the county attorney of defendant's cooperation and to recommend to county attorney that defendant receive psychiatric help was not tantamount to a promise of leniency. The evidence showed the detectives had explained to defendant that they could give no guarantees, but they would relate to the county attorney their recommendations. Id. at 153.

In the present case defendant gave the following testimony at the hearing on his motion to suppress:

A. Well, he [Detective Havemann] come out to my dad's and woke me up—I was in the truck—and took—told me—He read me my rights and took me down to the police station and told me that they had a charge on me of B and E, and he said there was two B and E's. But he said if I plead guilty to one he'd just throw the other one out.

* * *

Q. Did Mr. Havemann offer you anything in exchange for your confessing?

A. He told me if—if I signed a statement that I'd probably only be in the County for a couple days; since it was my first time, I'd most likely get probation. And he said if I fight it I'd just be in there for a long time.

The police officer did not either admit or deny predicting that defendant would receive probation. At the suppression hearing he denied offering not to pursue other burglary charges but admitted that in his deposition he had stated, "I believe I shot him the usual deal . . . [t]hat he was under arrest for burglary, that if he had done any other burglaries to let me know about them then, that there would still only be one charge, no other."

There was evidence that results of intelligence quotient tests placed defendant at the educable mentally retarded level. Although defendant completed eighth grade, he failed every subject in seventh grade and failed three out of five subjects in eighth grade. Defendant testified that he had been drinking heavily the night before he was arrested, that he had passed out at 6:30 a.m. and was awakened by the police at 9:00 a.m. The police officer testified that defendant appeared hung over during the interrogation and was mentally "somewhat slow."

Clearly it was impermissible for the police officer to tell defendant he would only be in jail a couple of days if he confessed, but would be there a long time if he did not. Considering as well defendant's mental and physical condition, we are convinced that his confession was involuntary. Therefore, we reverse his conviction and remand the case for a new trial.

REVERSED AND REMANDED.