



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed December 21, 1978
vs.	)	
GREGORY BRENT YOUNG,	)	<u>647</u>
Appellant.	)	60875

Appeal from Johnson District Court - August F. Honsell, Jr., Judge.

Defendant appeals conviction of the crime of delivery of a controlled substance alleging error in overruling his motion to suppress statements made in violation of his constitutional rights. - Reversed and remanded.

Philip F. Miller, of Des Moines, for Appellant.

Richard C. Turner, Attorney General of Iowa, J. Susan Carney, Assistant Attorney General, Jack W. Dooley, Johnson County Attorney, and Vern Robinson, Assistant Johnson County Attorney, for Appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Gregory Brent Young appeals his conviction by jury of the crime of delivery of a controlled substance in violation of § 204.401(1), The Code 1975. On appeal, Young alleges the trial court erred in overruling his motion to suppress certain statements, admissions and a confession. He also alleges the court erred in failing to dismiss for failure to comply with a discovery order and in overruling his motion for mistrial based on a prejudicial statement by the county attorney during closing argument. Additionally, Young alleges §§ 204.101(17) and 204.401(1)(a) of the Code unconstitutionally classify cocaine as a narcotic drug.

Defendant's first contention is that the statements made to the police after he was taken into custody were not the product of a free and rational intellect and as such were in violation of his constitutional rights. Since this assignment of error presents federal constitutional issues, we make an independent evaluation of the totality of the circumstances from which the assertion of unconstitutionality arises. We review the evidence de novo. *State v. Russell*, 261 N.W.2d 490, 492 (Iowa 1978); *State v. Snethen*, 245 N.W.2d 308, 311 (Iowa 1976); *State v. Conner*, 241 N.W.2d 447, 453 (Iowa 1976).

An individual may waive his constitutional rights. *State v. Hilpipre*, 242 N.W.2d 306, 309 (Iowa 1976). However, it is incumbent upon the State to prove by a preponderance of the evidence such waiver was knowingly, voluntarily and intelligently made. *Russell*, supra; *Hilpipre*, supra at 311. See also *State v. Cooper*, 217 N.W.2d 589, 597 (Iowa 1974). If the defendant's will was overborne or if his confession was not the product of a rational intellect and a free will, his confession is inadmissible because coerced. *State v. Cullison*, 215 N.W.2d 309, 314 (Iowa 1974). The ultimate question is whether defendant voluntarily relinquished his constitutional rights. *Cooper*, supra.

The interrogation took place in a motel room where there were five police officers with defendant and no one else. Defendant was handcuffed, nervous and upset. The police witnesses testified defendant initially was quite hesitant to talk after being given his Miranda rights. However after statements made by agent Keenley and other police officers, Young began conversing with the officers.

Ultimately he made the admissions used against him in his trial.

Officer Alan Young testified at the suppression hearing that Keenley informed defendant he had two choices: he could become an informant or go to jail. Officer Young also testified that he thought Keenley told the defendant things might go better for him if he cooperated. Agent Keenley testified that "What I had told him is what led to his answers."

We find the subtle inducements by the law enforcement officials involved to secure defendant's cooperation and ultimately his confession are of the same nature as the conduct condemned by the supreme court in *State v. Ware*, 205 N.W.2d 700 (Iowa 1973) ('it will go easier on you') and *State v. Franks*, 239 N.W.2d 588, 592 (Iowa 1976). It is also very similar to cases of promisory leniency where promises are made to a defendant during the course of an investigation. See e.g., *Hilpipe*, supra (lesser charge); *Snethen*, supra (non-indictment of brother); *Cullison*, supra (submit to physical examination or continuation of investigation).

From our de novo review we find the State did not meet its burden of proving by a preponderance of the evidence that defendant's waiver of his constitutional rights was knowingly, voluntarily and intelligently made. The trial court erred in refusing to suppress defendant's admissions and confessions. Because this case must be reversed, we need not consider the other issues raised by defendant on appeal.

Reversed and remanded for a new trial without the admission of defendant's admissions and confessions.

All judges concur, except Carter and Donielson, JJ., who dissent.

CARTER, J. (dissenting)

I dissent. In the first place, I believe that defendant's argument relating to the denial of his pretrial motion to suppress fails to demonstrate wherein he was damaged by such ruling. While it has often been stated that error may be predicated upon an erroneous ruling on a motion to suppress,¹ such error is entirely academic unless and until some prejudicial evidence is admitted as a consequence of the ruling. Defendant devotes six pages of his written brief and argument to the "suppression" issue and nowhere in this six pages is one word said about what evidence claimed to be prejudicial was used against him as a result of said ruling. Nor is this made to appear in the statement of the case preceding the argument.

I submit that this deficiency is reason enough to withhold the granting of any relief to defendant on this issue. It should not be incumbent upon this court to rummage through the trial record in search of the damaging evidence which defendant failed to call to our attention. Nor is it fair to the state that we make a sua sponte selection of what evidence, if any, we deem to be prejudicial. Such an approach precludes the state from effectively urging that the evidence we select is cumulative or otherwise lacking in prejudice. I would hold the issue waived under R.App.P. 14(a)(3).

Secondly, I believe the majority applies the rule of involuntariness relating to "promises, however slight" with too broad a brush. That rule has been invoked within the context of defendant's federal constitutional rights. The genesis of the federal "promises, however slight" rule, as applied to admissibility of confessions, is *Bram v. United States*, 168 U.S. 532, 542-43 (1897). The rule has recently been applied in *Hutto v. Ross*, 429 U.S. 28, 97 S.Ct. 202 (1976), a case which establishes that all incriminating statements made as a result of promises by the state are not per se involuntary. In that case, the state made certain promises as part of a plea bargain agreement. After the plea bargain, the defendant confessed. Later the defendant repudiated the plea bargain and went to trial. The confession was used against him.

The Supreme Court held that even though the assurance given by the state in the plea bargain caused the defendant to confess, the confession was not involuntary unless the confession was required as a condition of the plea bargain. Because it was not so

¹State v. Hilpipe, 242 N.W.2d 306, 309 (Iowa 1976); State v. Untiedt, 224 N.W.2d 1 (Iowa, 1974).

required, it was held that it was not involuntary under the rule of *Bram v. United States*.

In the present case, I cannot find any evidence that any of the inducement offered to defendant by the officers, required that he incriminate himself on the specific charge involved in the present case in order to avail himself of the promised leniency, if any. Indeed, there is no evidence that this was even suggested. The thrust of the inducement was to secure defendant's cooperation in setting up a future "buy" from his drug supplier.

Under the circumstances presented, I do not believe there is a per se violation of the principles announced in *Bram v. United States*. Defendant was given his full *Miranda* warnings and under the totality of circumstances, I would find the statements which followed to be voluntary. I would affirm the conviction.

Donielson, J. joins in this dissent.