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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 26, 1986
vs.	)	253
LEONARD EUGENE BERG,	)	6-309 85-866
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (No. CRF 8731) - August F. Honsell and Harold J. Swailes, Judges.

Defendant appeals from his convictions, following a jury trial, for first-degree murder and assault with intent to inflict serious injury. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and Jane Spande and Mona Knoll, Assistant Linn County Attorneys, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

The defendant, Leonard Eugene Berg, appeals from his convictions, following a jury trial, for first-degree murder and assault with intent to inflict serious injury. The defendant contends that the district court erred in refusing to suppress a confession made while at the Cedar Rapids police station on the grounds that the confession was "tainted fruit" of an earlier interrogation at the scene of the arrest. We affirm.

On June 8, 1984, defendant became embroiled in a domestic dispute with his wife at a local Cedar Rapids bar after the defendant entered the bar and witnessed his wife kissing another man. The defendant's wife returned to their home and defendant followed in pursuit. Shortly before 11:00 p.m., the defendant's daughter telephoned the Cedar Rapids police and stated that they needed a policeman at their home because the defendant was threatening her mother. The evidence offered at trial indicated that defendant, upset at his wife's actions at the bar, had returned home and had immediately gone to the basement to search for a shotgun. Finding that the shotgun didn't work, the defendant went upstairs and retrieved a 12-gauge shotgun from under the bed and loaded the gun with several deer slugs.

Notified by defendant's wife and children that defendant was searching for a gun, the police radioed for backup units. Several units responded; upon arrival, Officers Sumner and Thompson were instructed to go to the rear of the house. At that time defendant was seen in the backyard with a rifle. Officers Sumner and Thompson proceeded down the alley behind the defendant's home, Sumner being in the lead and carrying a flashlight. The defendant, who was in the backyard, saw the flashlight, pointed his gun at the flashlight, and fired, killing Officer Sumner instantly with a shot to the head. Defendant fired once more, hitting a police squad car.

The defendant was taken into custody immediately after the shootings. He made certain incriminating statements at the crime scene. At that time the defendant was allegedly intoxicated and the officers were highly agitated and emotional because of the shootings. The defendant was allegedly cursed, struck, and shouted at by the arresting officers during the commotion. It was unclear whether the Miranda warnings had been given to the defendant at the arrest scene, although there was testimony that one of the officers present had shouted the warnings to the defendant.

Following his arrest, the defendant was taken to the police station where he was given the Miranda warnings. He then made a detailed confession to two police detectives unassociated with defendant's arrest at the scene of the alleged crime.

Before his trial, the defendant moved to suppress all incriminating statements made at the arrest scene or later at the police station. The district court suppressed the statements made at the arrest scene but refused to suppress the confession made at the police station. In suppressing the statements made at the arrest scene, the district court did not specifically articulate the rationale for the ruling. The district court stated that in spite of the suppression of the statements made at the arrest scene, the later confession at the police station was not fatally tainted because there was a "substantial lapse" in time, atmosphere, and environment between the arrest scene and the later confession.

The defendant was tried to a jury. He was found guilty of the crimes of first-degree murder and assault with intent to inflict serious injury. He has appealed from the resulting convictions.

When issues of constitutional violations are raised, we are required to make our own de novo-type evaluation of the totality of the circumstances under which the ruling on those constitutional rights was made. Dickinson Co.,

Inc. v. City of Des Moines, Iowa, 347 N.W.2d 436, 439 (Iowa Ct. App. 1984). When a trial court's ruling on a suppression motion involving the voluntary nature of a confession is challenged, the burden of proof is on the State to prove by a preponderance of the evidence that the defendant's waiver and confession were made knowingly and intelligently. State v. Davidson, 340 N.W.2d 770, 771 (Iowa 1983). Our courts have recognized that "[t]here is no talismanic definition of voluntariness. The 'totality of the circumstances' encompasses the characteristics of the accused and the details of the interrogation process. [We] determine the facts surrounding the inculpatory statement, assess their psychological impact on defendant, and evaluate the legal significance of defendant's reactions." State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975), citing Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854, 862 (1973).

The crucial test as to the voluntariness of defendant's statement is whether the accused's will was overborne at the time he confessed. State v. Coburn, 315 N.W.2d 742, 745 (Iowa 1982). In the present case, the district court suppressed the inculpatory statements made by defendant at the scene of his arrest and at the police station while he was being booked, but determined that the third statement made by defendant was admissible because there had been a substantial lapse of time, atmosphere, and environment. When faced with the question of the validity of a confession given subsequent to an illegally-obtained confession, the Iowa Supreme Court, adopting the standard set forth by the United States Supreme Court, has held that to find the subsequent confession admissible, "there must be a 'break in the stream of events' . . . sufficient to insulate 'the final events' from the effect of all that went before." Cullison, 227 N.W.2d at 130 (citations omitted). In applying this standard, there are several factors which bear upon the determination of whether there was a sufficient break in the stream of events to insulate the subsequent statement from the

earlier suppressed statements: (1) the time that passes between confessions; (2) a change in place of interrogation; (3) a change in identity of the interrogators; (4) the degree of composure exhibited by the defendant; and (5) whether the Miranda warnings were given and a waiver made prior to the subsequent confession. See Oregon v. Elstad, ____ U.S. ____, ____, 105 S. Ct. 1285, 1294, 84 L. Ed. 2d 222, 232-33 (1985); Westover v. United States, decided together with Miranda v. Arizona, 384 U.S. 436, 496, 86 S. Ct. 1602, 1639, 16 L. Ed. 2d 694, 735-36 (1966); United States v. Ayres, 725 F.2d 806, 810 (1st Cir. 1984).

Applying the foregoing principles to the present case, we find upon our own independent evaluation of the totality of the circumstances that defendant's subsequent confession and waiver was knowingly and voluntarily made. The State concedes that the statements made by the defendant at the scene of the shooting and at the police station shortly after his arrival were properly excluded. The State argues that whatever "taint" had infected defendant's previous two statements, such "taint" did not affect the later waiver and confession made by the defendant to the two police detectives. The defendant, however, argues that once he let the "cat out of the bag" at the scene of the shooting by stating why the shooting had taken place, he was never totally free from psychological coercion and that therefore any subsequent confessions were inherently "tainted." We disagree.

The record reveals that after defendant had been apprehended and handcuffed, Officer Dennis Murphy yelled the Miranda rights at the defendant. Apparently there was much noise, shouting, and confusion at the scene of the shooting. Officer Murphy then proceeded to turn on a tape recorder and began asking the defendant questions about the shooting. In response, the defendant stated that he had discovered that his wife had been "playing around" at the bar and that he had come home and got a gun. Officer Murphy then questioned

the defendant about who he had shot at, but before the defendant could answer Sergeant David Johnson intervened and instructed the officers to take the defendant to the police station.

Shortly after arrival at the police station, the defendant was taken to the booking area for processing, which lasted about ten minutes. A video tape of the booking process offered into evidence revealed that throughout the booking process the defendant appeared subdued but cooperative. When defendant was asked whether he wanted to make a phone call, the defendant stated that he had nothing to say. At one point the defendant began to explain the reason for his actions, but was cut short by a police officer. When the officers were told that defendant had been read his Miranda rights, the defendant stated the following: "The reason I did this, my wife was messing around with a guy—kissing a guy in a tavern."

The defendant was then placed in a holding cell for ten to fifteen minutes. Between 11:30 and 11:40 p.m., the defendant was taken to the identification bureau, at which time his handcuffs were removed. The defendant did not request to make a phone call and, when asked if he wanted to make one, the defendant stated that it wouldn't make any difference. The defendant remained at the identification bureau for approximately one hour.

Police Detectives Douglas Fuller and Donald Rosdail were called to participate in the investigation of the incident shortly after the shooting. Both Fuller and Rosdail were briefed by the Chief of Police regarding the events surrounding the shooting, but neither was informed of the fact that the defendant had been questioned at the scene nor were they made aware of defendant's prior statements. At approximately 12:40 a.m., about one and one-half hours after defendant's arrest, the defendant was advised of his Miranda rights by Detective Fuller and given a rights waiver form which he read aloud. The defendant was

then asked if he understood his rights, and the defendant, stating that he did, signed the waiver form. The defendant then proceeded to provide a detailed accounting of the incident. A written statement of defendant's accounting was dictated in the presence of the defendant, which the defendant reviewed and signed.

The record clearly shows that the confession made by the defendant to Detectives Fuller and Rosdail was sufficiently attenuated from the two prior inadmissible statements to be free of any "taint" that may have rendered the two prior statements inadmissible. Whatever psychological or practical coercion the defendant may have experienced at the scene of the shooting and at his initial arrival at the police station, the record reveals that the defendant was afforded several opportunities to make a phone call, but refused to do so. Defendant appeared alert and cooperative throughout the booking and identification process. Though the police officers' emotions were running understandably high up to the time the defendant was brought to the police station, there is no evidence showing that defendant suffered any undue coercion during the booking and identification procedures. No offers of leniency were made. There were no threats made by Detectives Fuller and Rosdail during their interview of the defendant. At no time did defendant request an attorney, nor did defendant request that the questioning stop. Detectives Fuller and Rosdail were not informed of the fact that defendant had been questioned at the scene of the shooting, nor at any time were they aware of any statements made by defendant prior to their interview. The defendant was properly given his Miranda rights before the interview and was advised of the consequences of the rights waiver form, which the defendant signed.

The defendant cites to United States v. Bayer, 332 U.S. 532, 540, 67 S. Ct. 1394, 1398, 91 L. Ed. 1654, 1660 (1947), for support of his contention that

once he stated his reasons for the shooting at the scene of the crime, all other confessions may always be looked upon as the fruit of the first illegally-obtained confession. The Bayer court specifically noted, however, that "this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." 331 U.S. at 540-41, 67 S. Ct. at 1398, 91 L. Ed. at 1660. We believe that removing the defendant from the scene of the crime where he was originally questioned, the approximately one hour and fifteen minute interval between defendant's statement during the booking process and the subsequent interview, the interviewing of the defendant in a different room by Detectives Fuller and Rosdail who were not connected with or informed about any prior statements made by defendant, the defendant's cooperative manner at the police station, and defendant's knowledge of his Miranda rights and rights concerning waiver may well have dissipated whatever taint may have infected defendant's prior statements. We therefore find a sufficient break in the stream of events to insulate the confession made by the defendant during the interview with Fuller and Rosdail from the two prior "tainted" statements. The trial court was therefore correct in denying defendant's motion to suppress.

AFFIRMED.