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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	122
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	5-487 84-281
JOHN LEE HRBEK,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Pottawattamie County, E. F. Hanson, Judge.

Defendant appeals an adverse final order following a voluntariness hearing held on remand pursuant to the Iowa Supreme Court's directions in State v. Hrbek. **AFFIRMED.**

Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Joseph Hrvol, Assistant Pottawattamie County Attorney, for plaintiff-appellee.

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

Defendant appeals an adverse final order following a voluntariness hearing held on remand pursuant to the Iowa Supreme Court's direction in State v. Hrbek, 336 N.W.2d 431 (Iowa 1983). In July 1983 the Iowa Supreme Court conditionally affirmed defendant's trial court convictions on two counts of murder in the first degree on the condition the trial court hold a hearing as to the voluntariness of defendant's incriminating statements to law officers following his arrest. The remand court after the hearing held that certain incriminating statements defendant made to law officers following his arrest in 1981 were voluntary. Defendant filed a motion for a new trial objecting to certain evidence relied on by the court and requesting a new evidentiary hearing. The motion was overruled and defendant appealed. Defendant asserts this ruling was erroneous on the ground it is not supported by a totality of the circumstances. We affirm.

The point in contention occurred during a meeting on September 21, 1981, instigated by defendant with the law officers. The timing of the Pottawattamie County Attorney's promise to "cut [Hrbek] some slack" regarding one of the victim's, Mrs. Fisher's, death is of the utmost importance. The meeting was not tape-recorded so the four witnesses testified from memory and one person surreptitiously took notes. Defendant contends the prosecutor promised to cut him slack before he made his incriminating statements regarding his presence at the victims' farm and his attempt to run Mrs. Fisher off the road. Two law officers present at the meeting testified the promise came after defendant voluntarily made the incriminating statements. According to the law officers, this promise was made at the very end of the meeting. One officer's testimony, however, was less than clear as to when he thought this promise was made. A tape-recorded meeting occurred the next day and the substance of that discussion is not contested. Defendant points to disputed testimony from the Septem-

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ber 21st meeting regarding the timing of the promise plus other inconsistencies, to claim the court erred in its ruling on the voluntariness of his admission.

The law in this case is well settled. Admissible confessions must be voluntary and not extracted by any direct or indirect promises. State v. Hrbek, at 436. Statements induced by promissory leniency are not voluntarily made. State v. Kase, 344 N.W.2d 223, 225 (Iowa 1984). Our scope of review in this case is based on the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975).

The factual sequence of certain events, however, will be dispositive of this issue on appeal. The September 21st meeting was attended by: Hrbek, the defendant; Richter, the county attorney; Hrvol, the assistant county attorney, Quigley, the deputy sheriff; and Otto, chief deputy, who died prior to trial.

Quigley's testimony is pivotal to defendant's case because Quigley gave contradictory testimony regarding the order of events. Quigley took notes at the September 21st meeting and after the meeting typed a report based on those notes. Quigley was called as a rebuttal witness to bolster the state's case at trial. During cross-examination at trial, Quigley was not certain as to the order of events. Quigley first stated he was "not sure" when the admission was made. Later in the cross-examination, in response to a leading question he said he believed the promise preceded the admission.

At the remand hearing during direct examination, Quigley's notes were introduced which indicated the admission preceded the promise. On cross-examination, the report which indicates the promise preceded the admission was used to highlight the inconsistencies in his testimony. Quigley initially stated he did not recall the order of events, but after his trial testimony was used to refresh his memory he conceded he had said that the promise preceded the admission. On redirect, Quigley stated he reviewed the notes and report before

the hearing and that the notes were more accurate. Quigley then testified that before the trial he only reviewed his report and not his notes. Quigley concluded the recross examination by stating the admission preceded the promise. On recross examination, Quigley testified he was confused because the notes and report were contradictory as to when the promise occurred. Quigley said he did not lie at trial, but that his testimony could have been erroneous because it was based on inaccurate information contained in the report.

The State explains Quigley's testimony by indicating Quigley relied exclusively upon his report at trial and he was unaware at trial that a contradition existed between his notes and report. The State believes Quigley was genuinely confused during his testimony at the remand hearing and did not recall the proper order of events. The State suggests Quigley was not necessarily confused at trial, but gave an inaccurate account of the events because he used an inaccurate report. Defendant submits Quigley told the truth under cross-examination at trial and remand hearing. Defendant also questions the propriety of the remand court referring to Quigley's trial testimony, however this was appropriate because Quigley's trial testimony was drawn from the supreme court opinion.

In addition to Quigley's testimony, Richter and Hrvol testified at the remand hearing and stated the promise came after the defendant's admission. Defendant testified the promise came before his admission. Both sides attempted to discredit the others' testimony by showing their respective interest in the outcome of the case.

The credibility of the witnesses undoubtedly weighs heavily in our decision of which version to adopt. We note that "the matter of probative weight between conflicting testimony of the [law officer] and defendant turns on the question of their respective credibility which was for the trial court." State v. Gates, 260 Iowa 772, 777, 150 N.W.2d 617, 620 (1967). The remand court apparently

resolved all credibility matters in favor of the State and even went so far as to question defendant's integrity. Defendant attempts to show the remand court's credibility findings indicate the court was biased. We disagree with defendant's assertions. If defendant feels the remand court was not impartial, then a motion requesting a new judge would have been the proper avenue because the burden placed on a defendant to show bias provided in State v. Farn, 325 N.W.2d 107, 110 (Iowa 1982), is not met.

In resolving factual issues, credibility findings by the trial court are extremely helpful in assisting the appellate court in reaching its decision even though we review the totality of the circumstances. See State v. Farley, 226 N.W.2d 1, 4 (Iowa 1975); State v. Smith, 242 N.W.2d 320, 326 (Iowa 1976). Our guiding principle is to try to find the true sequence of events; not focus primarily upon a statement made during cross-examination at trial by a confused witness. While various inferences have been drawn from Quigley's testimony by the parties, the best explanation is that Quigley was confused.

Quigley claimed he was not confused at trial, but that he should not have relied exclusively on the written report when he testified as to the order of events. Quigley felt his notes, not the report, more accurately reflected the proper sequence of events. We concur with the remand court that Quigley was confused and he did not remember the sequence of events.

The remand court was of the firm conviction that the State's version represented the events as they actually transpired. Thus, by discounting the value of Quigley's testimony at trial and on remand, because he did not remember the sequence of events, we are faced with the testimony of two county attorneys and a defendant. Despite defendant's attempt to impugn the county attorneys'

testimony[1], we conclude that the State proved by a preponderance of the evidence that the defendant's statement was voluntarily given because the promise came after the admission.

We affirm the ruling of the remand court.

AFFIRMED.

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[1]While defendant indicates that the better practice is for prosecutors to withdraw from a case if it becomes apparent they will have to testify for the State, State v. King, 256 N.W.2d 1, 15 (Iowa 1977), we cannot find that Hrvol's testimony regarding the defendant's signing the waiver form should have been excluded.