

FILED

JUN 24 1977
232

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

STATE OF IOWA,	)	
Appellee,	)	Filed June 24, 1977
vs.	)	
JAMES JUNIOR BROWNING,	)	$\frac{129}{59246}$
Appellant.	)	

Appeal from Linn District Court - Louis W. Schultz, Judge.

Defendant appeals conviction of violating section 713.1, The Code, aiding and abetting the attaining of money and goods by false pretenses. - Judgment affirmed.

Richard C. Turner, Attorney General of Iowa, and Eugene F. Kopecky, Linn County Attorney, for Appellee.

Emmit J. George, of Cahill, Johnston, Poula & Goetz, of Iowa City for Appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, James Junior Browning, appeals his conviction for receiving goods and money by false pretense in violation of section 713.1, The Code. He was charged with aiding and abetting one Pamela Collins in the crime. Defendant raises two issues on appeal: (1) whether the trial court erred in admitting incriminating statements made by defendant when he was allegedly in a state of withdrawal distress and incapable of voluntarily waiving his constitutional rights and (2) whether the question of deception should have been decided as a matter of law.

I. Defendant's initial contention is trial court erred in overruling his motion to suppress statements made to two Cedar Rapids Police officers during an alleged state of withdrawal distress as an involuntary waiver of his constitutional rights. When a criminal defendant challenges statements made to the police as involuntary he is entitled to a separate hearing on their admissibility, *Jackson v. Deno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *State v. Walton*, 247 N.W.2d 736 (Iowa 1976), and the State has the burden of proving the voluntariness of the statements by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 30 L.Ed.2d 618, 627 (1972); *State v. Feters*, 202 N.W.2d 84, 88 (Iowa 1972). It is then the responsibility of the trial judge to determine from the totality of the circumstances whether the statements were in fact voluntary. *Boulden v. Holman*, 394 U.S. 478, 480, 89 S.Ct. 1138, 22 L.Ed.2d 433, 437 (1969). It cannot depend on any one factor for determination. 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. *Townsend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770, 782 (1963); *State v. Cullison*, 215 N.W.2d 309, 314 (Iowa 1974).

Since this assignment of error presents federal constitutional issues, we make an independent evaluation of the totality of the evidence from which the assertion of unconstitutionality arises. We review the evidence *de novo*. *State v. Snethen*, 245 N.W.2d 308, 311 (Iowa 1976); *State v. Conners*, 241 N.W.2d 447, 453 (Iowa 1976).

Defendant was arrested, taken to the Cedar Rapids police station and advised of his **Miranda** rights which he declined to waive. He was then asked if he had a drug habit and if being locked up would create any problems for him. Defendant denied having any habit and stated his use of heroin was infrequent. Thereafter he was

processed and transferred to the county jail. Once Browning asserted his constitutional rights, all questioning ceased.

The next day, December 25, 1975, defendant asked to speak to the arresting officers. The jailor returned with the information that the officers were unavailable and could not see him until the next day. Defendant became angry and upset. Shortly thereafter, defendant complained of withdrawal symptoms and stated he was experiencing pain and cramps. He was given aspirin and although he requested a doctor none was summoned.

On December 26, 1975, the officers went to the county jail to speak to the defendant as he requested. A modified **Miranda** warning was given to him. One of the officers stated he knew Browning had an attorney and that no deal could be made for him. Thereafter, Browning disclosed his involvement in the crime in order to involve another, one Michael Johnson. Both officers stated that defendant appeared and talked normally, that he was aware of what was being said and of what was going on. Also he did not exhibit any symptoms of withdrawal. Defendant denied that he talked to the officers voluntarily and stated that what he remembered would indicate that he was suffering from withdrawal distress. Defendant's motion to suppress was subsequently denied.

There is no necessity for investigating officers to advise a defendant of his full **Miranda** rights prior to each and every interrogation. The ultimate question is whether defendant with a full knowledge of his legal rights knowingly and intelligently relinquished those rights. *State v. Cooper*, 217 N.W.2d 589, 597 (Iowa 1974). When defendant was initially arrested he was given his full **Miranda** rights warnings, asked if he understood them and elected to exercise them by remaining silent. Later, after he initiated the request for the second visit by the officers, he was again advised of those rights. There is no assertion by the defendant that he did not understand those rights and that he did not intelligently waive them nor do we find any contrary evidence in the record. The only issue is the voluntariness of the statements.

The evidence that the defendant was suffering from withdrawal was contradicted by both the officers and a jailor. It was the trial judge's responsibility at the suppression hearing to decide what weight should be given to this claim of involuntariness due to withdrawal distress. In addition, the Supreme Court's adoption

of the "orthodox rule" which places the decision of admissibility of incriminating statements on the trial court but which places the weight to be given to those statements on the finder of fact, allows the defendant to introduce evidence of surrounding circumstances in an effort to persuade the jury. *State v. Holland*, 258 Iowa 206, 215, 138 N.W.2d 86, 91 (1965); *State v. Fetters*, 202 N.W.2d at 90. Defendant had the opportunity to introduce evidence at trial but chose not to.

This is not a case where defendant elected to exercise his constitutional rights and the interrogation by the officers continued nevertheless. *State v. Moon*, 183 N.W.2d 644 (Iowa 1971). See also, *State v. Hilpipe*, 242 N.W.2d 306 (Iowa 1976). In *State v. Winfrey*, 221 N.W.2d 269 (Iowa 1974), defendant initially exercised his constitutional right; later, he signed a note requesting that he speak to a jailor and later again requested to speak to a Des Moines police officer. The officer repeated the **Miranda** warnings and told defendant he did not want to talk to him until his attorney was present. However, Winfrey insisted on detailing his involvement in the murder. The court stated there was no merit to his belated contentions of involuntariness and the right to counsel during the period of custodial interrogation may be waived by the accused. 221 N.W.2d at 273.

Whenever a defendant indicates a reluctance to talk or otherwise invokes his right to remain silent, any subsequent waiver should be scrupulously examined. The burden on the State to show voluntariness may in part be established by the elapsed period of time between the exercise and the alleged waiver of rights. *State v. McClelland*, 164 N.W.2d 189, 196 (Iowa 1969).

Defendant's claim of involuntariness due to drug addiction is without merit in this case. The mere fact a defendant is under the influence of self-administered drugs does not render his statements inadmissible although it might affect the weight given such evidence by the fact finder. *State v. Rank*, 214 N.W.2d 136, 139 (Iowa 1974). See also, *United States v. Harden*, 480 F.2d 649, 651 (8th Cir. 1973), where the defendant was in fact suffering from withdrawal symptoms and the court held the statements made admissible where there was no evidence that they were not the product of a free will and rational intellect. The court refused to adopt a per se involuntary rule. We find the evidence in the instant case was admissible.

II. Defendant's second assignment of error is that the trial court should have decided the issue of deception as a matter of law. The elements necessary to sustain a conviction of obtaining goods and money by false pretenses in violation of 713.1, The Code, are set out in *State v. Warren*, 212 N.W.2d 509, 513 (Iowa 1973). Defendant claims that the Eagles Discount Store could not have legally been deceived because their agent, the cashier, knew Pam Collins was not the person whom she presented herself to be.

On a defense motion for directed verdict, the evidence is considered in the light most favorable to the State. *State v. Feyer*, 243 N.W.2d 1, 8 (Iowa 1976). On appeal it is viewed in the same light and it is necessary to consider only the supporting evidence whether conflicting or not. The finding of guilty by the trier of fact is binding on this court unless it is without substantial support in the record or clearly against the weight of the evidence. Questions of fact and credibility are for the jury. *State v. Overstreet*, 243 N.W.2d 880, 884 (Iowa 1976).

There was a legitimate question whether the cashier was deceived. She thought she knew who Pam Collins was, though she had not seen her for four years. When she checked with her supervisor he asked if Collins had the proper identification; the cashier responded that the signature matched the woman's driver's license signature. A question of fact existed and it was properly decided by the jury. *State v. Mullin*, 225 N.W.2d 305 (Iowa 1975), is not applicable.

Finding no error, the case is affirmed.