OCT 19 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed October 19, 1978
vs.)
ROGER DELAINE SMITH,) 599/61150
Appellant.)

Appeal from Mills District Court - Harold L. Martin, Judge.

Defendant appeals conviction of the crime of breaking and entering asserting an involuntary waiver of his constitutional rights resulted when he made incriminating statements after an officer promised to keep them secret and that the court erred in overruling his motion to suppress them. - Affirmed.

Timothy I. Markel, Glenwood, for Appellant.

Richard C. Turner, Attorney General of Iowa, Ray Sullins, Assistant Attorney General, and Walter Green, Mills County Attorney, for Appellee.

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

PER CURIAM

Defendant Roger Delaine Smith appeals his conviction by jury of the crime of breaking and entering in violation of § 708.8, The Code, 1977. On appeal, defendant alleges the trial court erred in overruling his suppression motion and allowing into evidence the testimony of a Mills County deputy sheriff that defendant admitted he and two others committed the breaking and entering after the deputy promised Smith he would keep any information received in strict confidence.

Specifically, defendant argues the incriminating statements were involuntary, being the result of a deceptive promise or trick, and as such, in violation of his Miranda 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); State v. Fetters, 202 N.W.2d 84, 89 (Iowa 1972). 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.

Defendant relies on State v. Williams, 182 N.W.2d 396 (Iowa 1970) and State v. Snethen, 245 N.W.2d 308 (Iowa 1976) for reversal. In Williams, the supreme court stated the State must demonstrate that statements made after the Miranda warnings were given "were not secured by force, threats or promises, or by artifice, deception, trickery or fraud." Failure to so demonstrate would call for rejection of a claim of waiver. 182 N.W.2d at 401. In Snethen, the court stated "[i]nterrogation

within the meaning of Miranda is not limited to the asking of questions; it includes police conduct which is calculated to, expected to, or likely to, evoke admissions." 245 N.W.2d at 313.

In the instant case, defendant argues the admission complained of was clearly obtained by a deceptive promise or trick, which was the false statement by the deputy that the admission if made, would be kept in strict confidence. Williams, supra. Smith argues the promise was calculated to or likely to evoke an admission. Snethen, supra.

In the case at bar, Smith was advised of his Miranda rights orally and was given a form stating them, which he signed. When Smith stated he did not want to be tape recorded and indicated he did not want to make a written statement, the questioning stopped and was never resumed. On the way to the Mills County sheriff's office, defendant repeatedly asked the deputy how they knew it was him. Finally, the deputy told him it was through an informant. At no time was questioning resumed. Smith then asked the deputy that if he told him something in confidence would he keep it to himself. The deputy said he would and thereafter, the defendant told him he and two others were responsible for the breaking and entering.

This is not a case where defendant elected to exercise his constitutional rights and the interrogation of the officers continued nevertheless. State v. Moon, 183 N.W.2d 644 (Iowa 1971). See also State v. Hilpipre, supra. Nor is this a case of "promisory leniency" where promises are made to the defendant during the course of the investigation. Hilpipre, supra (lesser charge); Snethen, supra (non-indictment of brother); State v. Cullison, supra (submit to physical examination or continuaton of investigation); State v. Ware, 205 N.W.2d 700 (Iowa 1973) ('it will go easier on you'). See also State v. Franks, 239 N.W.2d 588 (Iowa 1976).

Defendant's incriminating statements are inadmissible only if the waiver of his constitutional rights was involuntary under a totality of the circumstances test. State v. Cooper, 217 N.W.2d 589, 596 (Iowa 1974). We find that although the deputy promised to keep Smith's statement in confidence, under the totality of the circumstances, defendant's admission was nevertheless voluntary. In Fraizer v.

Cupp, 394 U.S. 731, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684, 693 (1969), the United States Supreme Court stated the fact that the police intentionally misrepresented the fact that an accomplice had confessed is, while relevent, insufficient to make an otherwise voluntary confession inadmissible. The court stated "these cases must be decided by viewing the 'totality of the circumstances'."

In the instant case, Smith's statement was not made in response to questioning by the police. There was no physical or phychological coercion. Defendant was not tricked or deceived into giving the statement. See e.g., People v. Yerdon, 51 App. Div. 2d 875, 380 N.Y.S.2d 141, 142 (1976). The deputy testified he revealed the conversation after he overheard the defendant telling another deputy that he, Smith, had done it, and figured it was no longer a secret. Although the other deputy was not called, we find the statement made was a product of defendant's own free will and rational intellect. The statement by Smith as to how the police knew it was him would be independently admissible despite any promises as a spontaneous remark. See Smith v. People, 167 Colo. 19, 445 P.2d 67, 68 (1968).

From the totality of the circumstances, we find defendant's statement was voluntary and the trial court was correct in so holding. See also State v. Novak, 109 Iowa 717, 728-29, 79 N.W. 465, 469 (1899).

AFFIRMED.