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## ADMISSIBILITY OF CONFESSIONS MADE DURING DETENTION

The United States Supreme Court in the recent case of *Upshaw v. United States*<sup>1</sup> stated that a confession is inadmissible if made during illegal detention due to failure to promptly carry a prisoner before a committing magistrate, regardless of whether the confession is the result of torture, physical or psychological. The decision is based upon Federal Rule of Criminal Procedure 5a<sup>2</sup> and is in effect, an amplification of the much discussed McNabb rule,<sup>3</sup> presented below

Rule 5a provides that "An officer making an arrest under a warrant. . . or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer a complaint shall be filed forthwith." The Notes to the Rules<sup>4</sup> state that the reasonable time within which the prisoner should be brought before a committing magistrate "must be determined in the light of all the facts and circumstances of the case".

The *McNabb* rule is that confessions are improperly admitted where they are the plain result of holding and interrogating persons without carrying them forthwith before a committing magistrate. The *McNabb* case aroused much comment at the time it was handed down and the dissenting opinion in the *Upshaw* case indicates the two extremes that this conflict took by use of the following language: "Some courts thought that any confession obtained before commitment was inadmissible and some other courts have understood the case to determine admissibility of confessions by the coercion test".

Following the *McNabb* case, in *Mitchell v. United States*,<sup>5</sup> it was held that, notwithstanding an illegal detention of eight days duration, a confession made "promptly and spontaneously within a few minutes after his arrival at the police station" was admissible.

The facts in the *Upshaw* case<sup>6</sup> show that Upshaw was arrested about 2:00 o'clock Friday morning and shortly after 9:00 o'clock Saturday morning confessed to the theft for which he had been taken into custody. He was not taken

<sup>1</sup> *Upshaw v. United States*, 69 S. Ct. 170 (1948).

<sup>2</sup> Rules of Criminal Procedure for the District Courts of the United States, Rules 5 (a), 18 U.S.C.A. (1946).

<sup>3</sup> *McNabb v. United States*, 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1943).

<sup>4</sup> Rules of Criminal Procedure for the District Courts of the United States, together with Notes to the Rules, 79th Cong., 2d Sess., S. Doc. No. 175. (1946).

<sup>5</sup> *Mitchell v. United States* 322 U.S. 65, 64 S. Ct. 896, 88 L. Ed. 1140 (1944).

<sup>6</sup> *Upshaw v. United States supra*, and also *infra*, 168 F. 2d. 167.

before a committing magistrate until Monday morning. The trial court stated that without these confessions the prosecution would not have made out its case. This trial court also sent to the jury the issue of whether or not physical coercion had been used to secure the confessions, and since the jury found there was none, this phase of the case was not argued on appeal. The trial court felt that the detention was not unreasonable as a matter of law, and ruled the confessions admissible over the objections of the counsel for the defendant.

On appeal the Circuit Court of Appeals for the District of Columbia<sup>7</sup> in sustaining the lower court decision held that the *McNabb* case only pointed out that "coercion without physical brutality may extort a confession, and that an admission so induced is involuntary. Specifically, it was there held that illegal detention aggravated by undenied continuous questioning for five or six hours by half a dozen officers amounted to such invalidating coercion as a matter of law." The Court said illegal detention standing alone, and without more does not invalidate a confession unless the detention produced the disclosure and this was not contended by *Upshaw*. The Circuit Court was then overruled by the Supreme Court in holding, as it did, that a confession if made during an illegal detention due to a failure promptly to carry a prisoner before a committing magistrate is inadmissible.

The view of the Circuit Court in this case is by far the closest to the Pennsylvania view on the matter. Pennsylvania has held that the mere fact that a person is under arrest or that he is in charge of armed police officers when he makes a confession does not make such a confession involuntary.<sup>8</sup>

Furthermore, in Pennsylvania, a confession to a homicide by a boy fourteen and a half years old was held admissible although it was made to police officers and obtained late at night after questioning him at great length, "if the confession was not obtained by improper means".<sup>9</sup> In this case the attorneys for the young defendant took a position very close to the rule announced by the United States Supreme Court in the *McNabb* and the *Upshaw* cases.

One of the more recent cases was that of *Commonwealth v. Jones*.<sup>10</sup> The Pennsylvania Court here was faced with several of the more usual arguments. In answering them, the Court stated the law of this state in the following language:

"The mere fact that the defendant was under arrest, or was in the charge of armed police officers when he made his confession will not make a confession involuntary. Nor are the statements invalidated by reason of the fact that appellant was not represented by counsel, no request for such representation ever having been made. Similarly the admissibility of the statements is not affected by the fact that in

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<sup>7</sup> *Upshaw v. United States* 168 F. 2d. 167 (1948).

<sup>8</sup> *Commonwealth v. Spardute*, 278 Pa. 37, 47, 122 A. 161 (1923).

<sup>9</sup> *Commonwealth v. Cavalier*, 284 Pa. 311, 315, 131 A. 229 (1925).

<sup>10</sup> *Commonwealth v. Jones*, 341 Pa. 541, 19 A. 2d. 389 (1941).

the interrogation appellant was accused of lying or because his guilt was assumed. And the application of a lie detector did not vitiate the statements."

In the case of *Commonwealth v. Dolan*<sup>11</sup> the Pennsylvania Supreme Court considering psychological coercion discussed the problem in the following language:

"Marge DeLenko denied that she confessed her guilt. [Of prostitution.] She admitted that she signed the statement but said that she was so tired that she signed what was put before her to end the questioning so that she could go home. Even if so, that will not affect the *admissibility*<sup>12</sup> of her written confession, such testimony, at most will raise an issue for the jury as to whether her statements in fact were voluntarily made."

In this *Dolan* case, the defendants were arrested in a raid on an alleged disorderly house and detained about twenty hours but "were not ill-treated except for a wearing down process".

Thus it would seem that the question of coercion, by physical means or by psychological means including detention in Pennsylvania is a question for the jury to determine if, in fact, the means employed resulted in sufficient coercion to produce, or was calculated to produce, an untruth.<sup>13</sup>

The apparent extreme of the Pennsylvania approach to the question of admissibility of confessions is indicated in the Hipple case.<sup>14</sup> Here it was said that a confession "procured by a trick or artifice not calculated to produce an untruth is never vitiated thereby".

Where the Commonwealth's witnesses show that a confession is made voluntarily without such threat or inducement as might secure a false confession, it must be admitted. If afterwards the defendant testifies, or produces other witnesses to testify that it was not voluntarily made, it becomes a question for the jury.<sup>15</sup> In *Commonwealth v. Weiss*<sup>16</sup> the Pennsylvania Supreme Court held that the weight to be given to the various statements is entirely a matter for the jury to determine, and then added the provision that they must keep in view the circumstances that led to the making of the declaration alleged by the defendant to be involuntary. Presumably an unlawful detention for a long period of time could be such a circumstance but, under the Pennsylvania view, little more.

<sup>11</sup> *Commonwealth v. Dolan*, 155 Pa. Sup. 433, 459, 38 A. 2d. 497 (1944).

<sup>12</sup> Italics are the Court's own.

<sup>13</sup> *Commonwealth v. Hipple*, 333 Pa. 33, 3 A. 2d. 353 (1939).

<sup>14</sup> *Commonwealth v. Hipple*, *supra*.

<sup>15</sup> *Commonwealth v. Jones*, *supra*. See also *Commonwealth v. Aston*, (1910) 227 Pa. 112, 75 A. 1019, and *Commonwealth v. Shaw*, 190 Pa. 23, 42 A. 377 (1899).

<sup>16</sup> *Commonwealth v. Weiss* 284 Pa. 105, 111, 130 A. 403 (1925).

The United States Supreme Court's rule in the *McNabb* and the *Upshaw* cases does not override what has been said about the law of Pennsylvania. The Supreme Court in the *McNabb* case, speaking of review of state action said, "State action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Such considerations are wholly irrelevant to the formation and application of proper standards for the enforcement of the Federal Criminal Law in the Federal Courts. This court has from the beginning formulated rules of evidence in federal criminal trials quite apart from constitutional restrictions alone, and in formulating such rules of evidence. . .the court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

EARL H. PARSONS