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R.W. Gilcrest

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MISSOURI SECTION

NOTES

THE McNABB RULE AND THE MISSOURI COURTS

In the federal courts illegal detention will cause a confession to be inadmissible at trial as a matter of law. The Missouri courts have refused to adopt this rule. This note will consider the federal rule, Missouri's refusal to follow the rule, and the procedure in this state by which the admissibility of a confession is questioned.

I

In 1943 the Supreme Court, in *McNabb v. United States*,¹ ruled that detention in violation of a statute² interpreted to require that an arrested person must be taken within a reasonable time before the nearest judicial officer having jurisdiction would render inadmissible, as a matter of law, a confession obtained during the illegal period of detention. The rule was declared to be a sanction to enforce compliance with the statute³ and the policy behind the statute. The decision was based upon the Court's power to make rules governing criminal procedure in the federal courts,⁴ rather than upon the Constitution⁵ or the

1. 318 U.S. 332 (1943). See also *Anderson v. United States*, 318 U.S. 350 (1943); 56 HARV. L. REV. 1008 (1943).

2. 28 STAT. 416 (1894).

3. *McNabb v. United States*, 318 U.S. 332, 342-344 (1943). It is interesting to note that the statute involved in the case is one controlling the payment of fees to the various personnel of the Department of Justice. A reading of the entire act discloses that the legislature did not have in mind the controlling of third degree methods or development of any "civilized standard" of police administration. 28 STAT. 415 (1894). See Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 445 (1948).

4. *McNabb v. United States*, 318 U.S. 332, 341 (1943):

In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . .

Id. at 347:

[W]e confine ourselves to our limited function as a court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. . . .

The inconsistency with which the rule has been applied by the Court has given rise to speculation that perhaps it is founded on some other principle than the Court's power of supervision over the procedure and practice of federal courts in the trial of criminal cases. The question soon arose in *United States v. Mitchell*, 322 U.S. 65 (1944), where the rule was not applied to a confession obtained while detention was legal though it later became illegal. This was inconsistent with the concept of the rule being a sanction. Note, 47 COL. L. REV. 1214 (1947). *But cf.* *Upshaw v. United States*, 335 U.S. 410 (1948), indicating the contrary. Nor does it appear from the language used by the Court or the application of the rule that it could be an exclusionary rule of evidence based on truthfulness. *Upshaw v. United States*, *supra*; *McNabb v. United States*, 318 U.S. 332 (1943). *But see* *United States v. Bayer*, 331 U.S. 532, 539-541 (1947), where a second confession

traditional test of voluntariness.⁶ A short time later in *United States v. Mitchell*,⁷ however, the Court indicated that there were to be narrow restrictions to the rule. The *Mitchell* case was misleading, for in *Upshaw v. United States*⁸ the broad terms of the *McNabb* case were again used, dispelling any hope that the rule was to be strictly construed.

Even before the pronouncement of the *McNabb* Rule there was evidence of legislative disapproval of laws restricting police arraignment and detention procedures.⁹ Shortly after the *McNabb* decision the Hobbs bill, which would have nullified the decision, was intro-

obtained six months after the first confession had been excluded under the *McNabb* rule and supplemental to the first was allowed into evidence.

It has also been suggested by some writers that the rule is no more than a presumption of fact that where there has been illegal detention the confession was involuntary. Notes, 47 COL. L. REV. 1214 (1947); 21 ROCKY MT. L. REV. 98 (1949); 53 YALE L.J. 758 (1944). It is doubtful that such a conclusion can be sustained in light of the *Upshaw* case and because such a rule would seem to find its basis in the due process clause of the Constitution. See *Brown v. Mississippi*, 297 U.S. 278 (1936) (dealing with coercion by physical violence). These positions cannot be sustained in light of recent language of the Court:

The rule of the *McNabb* case . . . is not a limitation imposed by the Due Process Clause. . . . Compliance with the *McNabb* rule is required in federal courts by this Court through its power of supervision over procedure and practices of federal courts in the trial of criminal cases. That power over state criminal trials is not vested in this Court. . . .

Gallegos v. Nebraska, 342 U.S. 55, 63-64 (1951).

5. *McNabb v. United States*, 318 U.S. 332, 340, 341 (1943):

In the view we take of the case, however, it becomes unnecessary to reach the constitutional issue pressed upon us. . . .

... Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. . . .

6. *Id.* at 340, 341:

Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. . . .

... The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

7. 322 U.S. 65, 69-70 (1944) (confession obtained before detention became illegal). The Court indicated that the confession had to be obtained during the period of illegal detention and that if it was obtained while the detention was legal, the *McNabb* rule was not applicable. See Note, 53 YALE L.J. 758, 765 (1944).

8. 335 U.S. 410 (1948). See 62 HARV. L. REV. 696 (1949).

9. A bill backed by the American Civil Liberties Union in the New York Legislature, dealing with removing the custody of prisoners from the control of the police and prosecution and putting it in the hands of the court, was defeated. See Assem. J. 162d Sess. 1939, vol. I, p.453 Int. 1336; *id.* 163 Sess. 1940, vol. I, p.44 Int. 182, Int. 188; Sen. J. 162d Sess. 1939, vol. I, p.291 Int. 920. Citation taken from Fraenkel, *From Suspicion to Accusation*, 51 YALE L.J. 748, 758 (1942).

duced in Congress.¹⁰ The bill gained widespread support, not only from legislators but also from persons in law enforcement agencies. The bill was dropped, however, after the *Mitchell* case had apparently greatly limited the rule.¹¹ During this same period there was an attempt to incorporate the *McNabb* Rule as part of the Federal Rules of Criminal Procedure in rule 5.¹² This move was defeated, but there was a partial victory as commitment section 5(a) did slightly alter the former arraignment statutes by stating that the arresting officer ". . . shall take the arrested person without unnecessary delay before the nearest available commissioner. . . ." ¹³ It appears that this slight change will have no effect on the rule but will merely give the Court another standard in determining when detention becomes illegal.

Desirable as civilized standards in police administration may be, yet the principle of the *McNabb* case has not been considered favorably, nor does it appear to be the proper answer.¹⁴ The practical and philosophical objections to the rule are beyond the scope of this note, as are the several proposed methods of reaching the same end result.¹⁵

10. *Hearings before Subcommittee 2 of the Committee on the Judiciary on H.R. 1690*, 78th Cong., 1st Sess. (1944). For the history of the bill and the general critical attitude toward the *McNabb* case see 90 CONG. REC. 9197-9200 (1944); 90 CONG. REC. 9366-9376 (1944); 91 CONG. REC. 2505-2508 (1945); 92 CONG. REC. 10379-10380 (1946); 93 CONG. REC. 1376-1387 (1947). The expressed purpose of the bill was to nullify the *McNabb* case. In effect the bill provided: Failure of compliance with the commitment statutes does not render inadmissible evidence otherwise admissible. It is also noted that the bill expressly stated that no such policy as that stated in the *McNabb* case underlies the arraignment statutes. It is interesting to note that Mr. Kefauver proposed an amendment to the Hobbs bill which was a consolidation of all arraignment statutes into one. 90 CONG. REC. 9367 (1944).

A reading of the bill and the discussion thereon clearly indicates that the legislation was fostered by people sympathetic to the problems of law enforcement. See 42 MICH. L. REV. 679, 689-691 (1944), for a reprint of a letter by Mr. J. Edgar Hoover to the Secretary of the Committee on the Federal Rules of Criminal Procedure in which Mr. Hoover points out what possible retarding effects the *McNabb* rule can have on criminal investigation.

11. See note 10 *supra*.

12. PRELIMINARY DRAFT OF FED. RULES CR. PROC. (1943).

13. FED. RULES CR. PROC. rule 5(a), 18 U.S.C.A.

14. Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133 (1953); Inbau, *Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239 (1946); Notes, 47 COL. L. REV. 1214 (1947); 42 MICH. L. REV. 679 (1944); 21 ROCKY MT. L. REV. 98 (1949); 53 YALE L.J. 758 (1944). For the attitude of writers on the problem prior to the *McNabb* case see Fraenkel, *From Suspicion to Accusation*, 51 YALE L.J. 748 (1942); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 452-457 (1938).

15. In Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 176 (1953), the author in speaking of the *McNabb* and similar cases has illustrated that the answer does not lie in judicial legislation:

These cases compel us to face the fact that sometimes judicial decisions, if they do not aggravate present difficulties, do not contribute appreciably to their solution. For example, whatever view one takes of the *McNabb* rule—that a confession obtained during illegal detention without the slightest

II

The commitment statutes of Missouri command that a person arrested without warrant or process shall be *released within twenty (20) hours* if not committed,¹⁶ or if arrested by the highway patrol he is to be taken *forthwith* before a magistrate;¹⁷ and if the arrested person is an escapee, he is to be taken before a magistrate *immediately*.¹⁸ A reading of the cases indicates that violations of these statutes are not unusual.

Before the *McNabb* case the Missouri Supreme Court had been presented with the theory that a confession should be inadmissible because of illegal detention, but at that time the contention was rejected the *McNabb* Rule.²² One judge, who had indicated before these cases the court was confronted directly with the issue in *State v. Ellis*²⁰ and *State v. Sanford*.²¹ The majority of the court unqualifiedly rejected the *McNabb* rule.²² One judge, who had indicated before these cases that he had been influenced by the *McNabb* decision,²³ dissented rather strongly.²⁴ At present, however, the dissenting judge appears to have reconsidered his earlier positions and now stands with the majority in rejecting the rule.²⁵

The Missouri courts are not required to follow the *McNabb* case since it is based on the Supreme Court's power to declare rules governing criminal procedure in federal courts which are not binding on the states. Evidently either the Missouri Supreme Court sees no need for the rule as a sanction to the commitment statutes or believes

coercion, physical or psychological, is inadmissible—the unfortunate fact is that the rule widens the gap between law and police practices. And the dubious efficacy of dealing with serious abuses indirectly, by a rule of evidence, again emphasizes the need of actual remedies for harms committed by officials as well as of discipline and better training of the police.

For other suggested remedies see Inbau, *Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315 (1942); Note, 53 YALE L.J. 758 (1944).

16. MO. REV. STAT. § 544.170 (1949).

17. MO. REV. STAT. § 43.210 (1949).

18. MO. REV. STAT. § 544.130 (1949).

19. *State v. Menz*, 341 Mo. 74, 94, 106 S.W.2d 440, 450 (1937), in which the court said:

There is nothing in the proposition that the failure to release a person upon the expiration of twenty hours . . . a charge not having been filed, constitutes, as a matter of law, such duress as to render any statement or confession made thereafter to an officer presumptively involuntary. . . .

See also *State v. Mitchell*, 339 Mo. 228, 96 S.W.2d 341 (1936); *State v. Hoskins*, 327 Mo. 313, 36 S.W.2d 909 (1931); *State v. Raftery*, 252 Mo. 72, 158 S.W. 585 (1913).

20. 354 Mo. 998, 193 S.W.2d 31. The concurring and dissenting opinions appear under *State v. Sanford*, 193 S.W.2d 37 (Mo. 1946).

21. 354 Mo. 1012, 193 S.W.2d 35 (1946).

22. *State v. Ellis*, 354 Mo. 998, 1005, 193 S.W.2d 31, 34 (1946).

23. See opinion by Tipton, J. writing for the court in *Skiba v. Kaiser*, 352 Mo. 424, 429, 178 S.W.2d 373, 376 (1944).

24. *State v. Ellis*, 354 Mo. 998, 1007 (*State v. Sanford*) 193 S.W.2d 37, 38 (1946) (dissent by Tipton, J.).

25. *State v. Lee*, 361 Mo. 163, 166, 233 S.W.2d 666, 668 (1950).

that it is not its duty to provide such a sanction. The traditional test of voluntariness (covered in section III *infra*) is established in this state by a long line of decisions; the court feels that the test is adequate and that there should be no deviation from it.²⁶ The court has also declared that the *McNabb* Rule has no place in the voluntary test:

It does not make any difference in so far as a prisoner is concerned whether a warrant has been or has not been issued. In either case the prisoner is in custody and the fact that a warrant has been issued does not render the confinement any more comfortable. The ultimate question must be, was the confession voluntarily made.²⁷

It may be noticed at this point, that Mr. Justice Frankfurter, who wrote the majority opinion of the *McNabb* case, joined Mr. Justice Jackson in *Gallegos v. Nebraska*, in pointing out what disastrous effects could result if the *McNabb* Rule was made binding upon the states.²⁸

Missouri's rejection of the rule has been complete.²⁹ The court apparently does not even consider illegal detention as one of the factors that could make a confession involuntary.³⁰ The court has indicated that it is error in this state to instruct the jury that "illegal" custody is a factor which can be taken into account when determining the admissibility of a confession.³¹ This position seems to be consistent with the views of the Bar Association in this state as illustrated by its rejection of an attempt to incorporate the *McNabb* Rule in the Missouri Proposed Code of Evidence.³²

III

The basic principle upon which the admissibility of a confession is determined is whether the facts surrounding the confession, in human

26. See note 22 *supra*.

27. *State v. Bradford*, 362 Mo. 226, 231, 240 S.W.2d 930, 933 (1951).

28. 342 U.S. 55, 72-73 (1951).

29. See *e.g.*, *State v. Bradford*, 362 Mo. 226, 240 S.W.2d 930 (1951); *State v. Lee*, 361 Mo. 163, 233 S.W.2d 666 (1950); *State v. Higden*, 356 Mo. 1058, 204 S.W.2d 754 (1947); *State v. Golden*, 353 Mo. 585, 183 S.W.2d 109 (1944). See note 22 *supra*.

30. See *State v. Ellis*, 354 Mo. 998, 1004, 193 S.W.2d 31, 34 (1946). At trial Ellis was given a requested instruction which told the jury that if his confession was involuntary because of flattery, hope, torture, fear or as a result of long protracted questioning, they should reject the confession. An instruction that would have withdrawn the confession from the jury, if they found that Ellis had not been committed in accordance with the statute, was rejected.

Though there is language in the *Ellis* case that could lead to a contrary conclusion, in *State v. Higdon*, 356 Mo. 1058, 204 S.W.2d 754 (1947), the court cleared any possible ambiguity by stating that an instruction on illegal detention was not required even where illegal detention was a fact before the jury.

31. *State v. Aitkens*, 352 Mo. 746, 179 S.W.2d 84 (1944). See also *State v. Golden*, 353 Mo. 585, 183 S.W.2d 109 (1944).

32. McCormick, *Impressions of the Proposed Missouri Evidence Code*, 17 KAN. CITY L. REV. 4, 5 (1949).

probability, support the truthfulness of the confession.³³ Normally the courts verbalize this principle in terms of voluntariness,³⁴ and in so doing have to some extent shifted the emphasis from the dependability of the confession to the willingness of the defendant to make the statement. The test in this form has served as the traditional criteria and veritable rule of thumb for the United States Supreme Court.³⁵

In Missouri a criminal confession must be "voluntary" to be admitted into evidence at trial.³⁶ At one time the test was based upon the literal definition of the word and it was stated that the confession must be spontaneous, of the defendant's own will, without influence or impelled by others.³⁷ The court, however, has declared that this test was too broad, and now states it in negative terms: "The ultimate question is whether the accused acts on his own judgment and volition uninfluenced by methods and devices employed by the officers which the law denounced."³⁸ As has been pointed out, illegal custody is not considered to fall within the statement "methods and devices employed by officers which the law denounced."³⁹

On behalf of the state it is inferred that all confessions offered into evidence are voluntary.⁴⁰ The defendant must raise, by timely objection, the question of whether the confession is valid.⁴¹ When the objection is made the inference of voluntariness drops out and the burden is on the state to prove that the confession was voluntary.⁴² The burden is the risk of nonpersuasion and not merely that of going forward with the evidence. When a proper and timely objection is taken, the trial judge is to hold a preliminary hearing away from the jury to hear the evidence on the issue.⁴³ The defendant, although he may not be denied the opportunity to present all relevant

33. WIGMORE, EVIDENCE § 822 (1940). See also *Brown v. Mississippi*, 297 U.S. 278 (1936); *Wilson v. United States*, 162 U.S. 613 (1896).

34. *Brown v. Mississippi*, 297 U.S. 278 (1936); *Wilson v. United States*, 162 U.S. 613 (1896). Dean Wigmore is not in accord with the test verbalized in terms of voluntariness. WIGMORE, EVIDENCE §§ 824, 825, 826, 843 (1940).

35. *Ibid.*

36. See notes 22, 30 *supra*. See 20 KAN. CITY L. REV. 66 (1952), for a discussion on Missouri law as to what is voluntary or involuntary.

37. See *State v. White*, 330 Mo. 737, 745, 51 S.W.2d 109, 113 (1932); *State v. Hershon*, 329 Mo. 469, 483, 45 S.W.2d 60, 65 (1931); *State v. Lowry*, 321 Mo. 870, 881, 12 S.W.2d 469, 473 (1928).

38. *State v. Gibilterra*, 342 Mo. 577, 588, 116 S.W.2d 88, 95 (1938).

39. See notes 31, 32 *supra*. See WIGMORE, EVIDENCE, § 823 (1940).

40. *State v. Higdon*, 356 Mo. 1058, 204 S.W.2d 754 (1947); *State v. Menz*, 341 Mo. 74, 106 S.W.2d 440 (1937).

41. *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938); *State v. Menz*, 341 Mo. 74, 106 S.W.2d 440 (1937).

42. *Ibid.*

43. *Ibid.*

evidence at the hearing, may withhold it for presentment to the jury.⁴⁴ If, on the evidence at the hearing, the judge finds that the confession was involuntary, he may so rule as a matter of law and the issue is closed.⁴⁵ If, on the other hand, he is not convinced that the confession was involuntary, the confession is admitted into evidence and the evidence on the question of voluntariness is presented to the jury, for it to determine under proper instruction whether or not the confession was involuntary.⁴⁶

The defendant is not entitled to an instruction on the issue as a matter of course. This issue of voluntariness is only a collateral issue in the case and not an issue of law under the instructions statute.⁴⁷ Absent a proper request the trial judge commits no error in failing to give an instruction on voluntariness.⁴⁸ Also, if there has been no evidence to show that the confession was involuntary it is not error to refuse a requested instruction on the issue.⁴⁹ If, however, there has been evidence on the issue and the defendant wants an instruction on it, he must submit a formal written instruction to the court. It is not enough to make an oral request.⁵⁰ But if the written instruction submitted is wrong in some aspect the judge is required to formulate a correct instruction and submit it to the jury unless the other instructions in the case adequately cover the issue.⁵¹

The instruction may include for the jury's consideration the facts of physical or mental duress, threats or promises and inducements which operate upon the mind or body of the defendant creating a hope of escaping punishment or obtaining leniency. The jury is allowed to consider the various factors which surround the making of the confession. But the court has stated that an instruction which states that illegal custody is one of the factors for the jury to consider is faulty.⁵²

Since the confession is competent only if it is voluntary, it must be rejected completely if the jury finds that it is involuntary, even though it is believed that the confession is true.⁵³

44. *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938); *State v. Menz*, 341 Mo. 74, 106 S.W. 2d 440 (1937).

45. *Ibid.* See *State v. Bradford*, 262 S.W.2d 584, 586 (Mo. 1953).

46. *Ibid.*

47. Mo. REV. STAT. § 546.070 (1949). See also *State v. Lee*, 361 Mo. 163, 233 S.W.2d 666 (1950); *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938); *State v. Menz*, 341 Mo. 74, 106 S.W.2d 440 (1937).

48. *State v. Higdon*, 356 Mo. 1058, 204 S.W.2d 754 (1947); *State v. Ramsey*, 355 Mo. 720, 197 S.W.2d 949 (1946); *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938); *State v. Menz*, 341 Mo. 74, 106 S.W.2d 440 (1937).

49. *State v. Higdon*, 356 Mo. 1058, 204 S.W.2d 754 (1947); *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938).

50. *State v. Lee*, 361 Mo. 163, 233 S.W.2d 666 (1950).

51. *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938).

52. See notes 31, 32 *supra*. See also *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938); *State v. Menz*, 341 Mo. 74, 106 S.W.2d 440 (1937).

53. *State v. Gibilterra*, 342 Mo. 577, 116 S.W.2d 88 (1938).