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Criminal Procedure—Court of Appeals Adopts New Procedure for Determining Voluntariness of Confessions

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RECENT CASES

CRIMINAL PROCEDURE—COURT OF APPEALS ADOPTS NEW PROCEDURE FOR DETERMINING VOLUNTARINESS OF CONFESSIONS

Involuntary confessions were initially excluded from consideration in criminal cases because of the probability that they were unreliable. This protection to the defendant is now guaranteed by the fourteenth amendment, regardless of reliability, because of a "strongly felt attitude . . . that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will."[1] The due process clause of the fourteenth amendment mandates that a defendant's conviction may not be based, in whole or in part, upon an involuntary confession.[2] Traditionally, there have been three procedures used in the United States for determining the voluntariness of a confession. The simplest of these is the "orthodox" or Wigmore rule[3] which appears to be followed[4] in twenty states.[5] Under this rule, the judge alone makes the determination of voluntariness for the purposes of admissibility. If he decides that the confession was voluntary it is admitted into evidence, and the jury passes only on its credibility. The protection afforded the defendant under this rule is that the judge makes the determination out of the presence of the jury. Thus, if he decides that the confession was involuntary the jury never knows of its existence. A second procedure is the Massachusetts rule which is followed in fourteen states.[6] Under this rule the judge, in the absence of the jury, hears the evidence concerning voluntariness and makes an initial decision. If he finds beyond a *reasonable doubt* that the confession was voluntary it is submitted to the jury with instructions that they should disregard it if, upon all of the evidence, they believe it to be involuntary.[7] A third procedure, formerly followed in New York, allows the judge to exclude a confession only if it is clearly involuntary. If there is an evidentiary conflict on the question, the issue of voluntariness is submitted to the jury. They determine this issue, along with

1. Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960); see also Rogers v. Richmond, 365 U.S. 534, 541 (1961).

2. Payne v. Arkansas, 356 U.S. 560 (1958); Malinski v. New York, 324 U.S. 401 (1945); People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951).

3. 3 Wigmore, Evidence § 861 (3d ed. 1940).

4. Jackson v. Denno, 378 U.S. 368, 378-79 n.9 (1964).

5. Alabama, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Tennessee, Utah, Vermont, Virginia, Washington and West Virginia (as noted in the appendices to Mr. Justice Black's dissent in Jackson v. Denno, 378 U.S. 368, 411-14 (1964)).

6. Alaska, Arizona, California, Delaware, Hawaii, Idaho, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, Oklahoma and Rhode Island (as noted in the appendices to Mr. Justice Black's dissent in Jackson v. Denno, 378 U.S. 368, 417-20 (1964)). It is unclear whether Nevada follows the Massachusetts rule or the Orthodox rule; see State v. Fouquette, 67 Nev. 505, 533-34, 221 P.2d 404, 419 (1950), *cert. denied*, 341 U.S. 932 (1951).

7. See, *e.g.*, Commonwealth v. Sheppard, 313 Mass. 590, 603-04, 48 N.E.2d 630, 639 (1943); Commonwealth v. Russ, 232 Mass. 58, 122 N.E. 176 (1919); Commonwealth v. Preece, 140 Mass. 276, 277, 5 N.E. 494, 495 (1885).

the ultimate issue of guilt or innocence, at the close of all the evidence. In this situation, the judge, in his charge directs the jury to reject the confession if they are satisfied it was not the voluntary act of the defendant.[8] This procedure has been followed in approximately fifteen states[9] and was long upheld by the United States Supreme Court.[10] In *Stein v. New York*[11] decided in 1953, the Supreme Court, upon review of this procedure, found it to be constitutional[12] although the Court raised serious doubts as to its fairness. The Court's principal objection was that some jurors might never reach a separate and definite conclusion on the issue of voluntariness, but would merely return an "unanalytical and impressionistic verdict based on all they had heard."[13]

These doubts raised in the *Stein* case became the basis of the constitutional objections to the New York procedure raised in the recent case of *Jackson v. Denno*.[14] Jackson contended that the issue of the voluntariness of his confession "should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence."[15] The Court saw two principle threats to a defendant's rights under the New York procedure. First, since at the conclusion of a case the jury has heard all the evidence and is in a position to determine the truth or falsity of a particular confession, it may decide that the confession was voluntary simply because other evidence shows it to be true. Secondly, even if the jury were to find that the confession was involuntary they might be unable to disregard it completely when determining guilt or innocence.[16] The very fact that an accused has confessed may unavoidably color their thinking. The Supreme Court in *Jackson* concluded that the New York procedure "poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined."[17] Further, in instances where the jury believes that the defendant is guilty but knows that there is not enough other evidence to sustain a conviction, there is pressure to find the confession voluntary. This self-imposed pressure on the

8. People v. Doran, 246 N.Y. 409, 416, 159 N.E. 379, 382 (1927); *accord*, People v. Pignataro, 263 N.Y. 229, 188 N.E. 720 (1934); People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928); People v. Nunziato, 233 N.Y. 394, 135 N.E. 827 (1922); People v. Trybus, 219 N.Y. 18, 113 N.E. 538 (1916); People v. Roach, 215 N.Y. 592, 109 N.E. 618 (1915); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909); People v. Brasch, 193 N.Y. 46, 85 N.E. 809 (1908).

9. Arkansas, District of Columbia, Georgia, Iowa, Michigan, Minnesota, Missouri, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Texas, Wisconsin and Wyoming (as noted in the appendices to Mr. Justice Black's dissent in Jackson v. Denno, 378 U.S. 368, 414-17 (1964)).

10. Stein v. New York, 346 U.S. 156 (1953); Wilson v. United States, 162 U.S. 613, 624 (1896).

11. 346 U.S. 156 (1953).

12. *Id.* at 177: "If the method of submission [to the jury] is, as we believe, constitutional. . . ."

13. *Id.* at 177-78.

14. Jackson v. Denno, 378 U.S. 368 (1964).

15. *Id.* at 394.

16. *Id.* at 389.

17. *Id.* at 389.

jury to find a confession voluntary makes objective consideration of the conflicting evidence difficult and the implicit finding on this issue suspect.[18] The Court in *Jackson* held that "it is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence."[19] This decision expressly overruled *Stein v. New York* and thereby declared unconstitutional the New York procedure for deciding the voluntariness of confessions.

Several years before the Supreme Court's mandate in *Jackson v. Denno*, Charles Huntley was tried and convicted of first degree robbery in New York State. A confession was admitted into evidence and the issue of its voluntary character was submitted to the jury under the same New York procedure struck down by *Jackson v. Denno*. Huntley's conviction was unanimously affirmed by the Appellate Division[20] and his application for leave to appeal to the Court of Appeals was denied. After *Jackson v. Denno* was decided Huntley renewed his application and it was granted. Upon rehearing, the Court of Appeals ruled that Huntley was entitled to a new determination of the voluntariness of his confession. In its opinion, the Court set out the tentative procedures New York would now follow with respect to trials already concluded and trials to be held in the future.

(I) As to trials already concluded:

(a) A *Jackson-Denno* hearing will be necessary in cases where:
1) the admission of a confession was objected to by the defendant, or
2) the defendant or his witnesses made any assertion as to the voluntariness of the confession, or
3) the trial court has charged the jury on voluntariness, regardless of whether the defendant or his witnesses made any assertion as to the voluntariness of the confession, or the admission of the confession was objected to by the defendant.

(b) The hearing will be held where possible before the judge who presided at the *voir dire* or the trial proper. " . . . [T]here is no constitutional impediment to using the prior record provided that the defendant and the People are permitted to put in additional proof if either side so desires."[21]

(c) The defendant should be provided counsel if he so desires.

(d) The court shall put into the record a decision containing specific findings of fact and conclusions of law; and if the judge finds that the confession was not voluntary beyond a reasonble doubt, a new trial

18. *Id.* at 382.
19. *Id.* at 395.
20. 15 A.D.2d 735 (1st Dep't 1962).
21. People v. Huntley, 15 N.Y.2d 72, 77, 204 N.E.2d 179, 183, 255 N.Y.S.2d 838, 843 (1965).

is required. If he decides that the confession was voluntary, there is no need to submit the issue to a jury since one jury has already passed on the matter.

(e) If the normal appellate processes have been exhausted or are no longer available, defendants shall seek *Jackson-Denno* relief by coram nobis motion.[22]

(II) As to trials to be held in the future:

(a) New York State adopts the Massachusetts rule "under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused . . ."[23] and has made express findings upon the disputed fact question of voluntariness.

(b) The judge must find voluntariness beyond a reasonable doubt before the confession can be submitted to the jury. "The burden of proof as to voluntariness is on the People."[24]

(c) In every case where the District Attorney intends to make use of written confessions or oral admissions of the defendant, the District Attorney must notify defense counsel of any alleged confessions or admissions which he will attempt to offer into evidence at the trial. Then, the defense counsel, if he intends to put into issue the question of the voluntariness of the confessions or admissions, must notify the prosecutor that he desires a preliminary hearing on this issue.[25] *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

The principle difference between the old New York procedure and the Massachusetts rule is the quantum of proof necessary before a judge may decide that a particular confession is admissible. Under the old procedure a confession would be admissible unless clearly involuntary; under the Massachusetts rule a confession would be admissible only if considered voluntary beyond a reasonable doubt. It is argued that the Massachusetts rule really gives the defendant a second chance because the jury is allowed to decide the question of voluntariness after the judge has already resolved the issue against the accused. However, it may be that this "second chance" is more illusory than real. When the question of voluntariness appears extremely close the judge may wish to avoid making an irrevocable decision; therefore he might resolve the issue against the accused in order to leave the final determination to the jury.[26] For this reason

22. For the Court's reasons for selecting coram nobis rather than habeas corpus, see People v. Huntley, 15 N.Y.2d 72, 76-77, 204 N.E.2d 179, 182, 255 N.Y.S.2d 838, 842 (1965).

23. Jackson v. Denno, 378 U.S. 368, 378 (1964).

24. People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 183, 255 N.Y.S.2d 838, 843-44 (1965).

25. *Cf.* N.Y. Code Crim. Proc. § 813c-e.

26. Jackson v. Denno, 378 U.S. 368, 438 (Mr. Justice Harlan's dissent); Instant case at 85, 204 N.E.2d at 187-88, 255 N.Y.S.2d at 849 (1965) (Judge Van Voorhis' dissent); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and*

it has been suggested that there is no real difference between the old New York rule and the Massachusetts rule.[27] This would imply that the defendant's position is not altered by the change in procedure. In fact it may be that the defendant is put in a worse position by the change in procedure because of the possibility that ". . . when a confession does come before a jury it will have the judge's explicit or implicit stamp of approval on it."[28] The jury will know, if they are at all familiar with the New York procedure, that the judge has already heard all the evidence and decided that the confession was voluntarily given. In this situation it can certainly be argued that the jury may not make an independent determination of the issue at all, but will merely rubber stamp the judge's initial decision. If, in fact, this is what will happen, the Massachusetts rule seems to run counter to the requirement in New York state that the issue be resolved by the jury.[29] In form the jury will pass on the issue; in fact it will not. If the judge has resolved the issue against the accused in order to leave the final determination up to the jury, and the jury has not made an independent determination of the issue, neither the judge nor the jury has found the confession voluntary beyond a reasonable doubt. Further, even if it is presumed that the jury will make an independent determination of the issue, can they really disregard the confession in their determination of guilt or innocence if they find it involuntary? The Supreme Court assumes that they cannot[30] because they are also in a position to know that it was true (assuming this to be the case). Thus as to the jury's determination concerning the voluntariness of a confession, the Massachusetts rule is subject to at least the same criticisms applied to the New York procedure. The jury may find the confession voluntary either because they know it to be true (in light of all the evidence) or because they know the judge has already so found. Even if they find it involuntary, the very fact that a confession was given may still color their thinking on the ultimate issue of guilt or innocence.

Should New York follow a procedure which, in practice, may not provide a proper jury determination of the voluntariness of a defendant's confession? It would seem more reasonable either to adopt the Wigmore rule which admittedly removes this issue from consideration by the jury, or to formulate a new

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Jury, 21 U. Chi. L. Rev. 317, 329 (1954): "In a close case, it would not be surprising if the judge resolved doubts in favor of admissibility, thereby avoiding the painful responsibility of an irrevocable decision."

27. Jackson v. Denno, 378 U.S. 368, 436 (1964) (Mr. Justice Harlan's dissent in which Justices Clark and Stewart join): "Whatever their theoretical variance, in practice the New York and Massachusetts rules are likely to show a distinction without a difference."

28. *Id.* at 404 (Mr. Justice Black's dissent).

29. Instant case at 78, 204 N.E.2d at 183, 255 N.Y.S.2d at 843: ". . . our State Constitution (art. I, § 2) mandates a jury trial of the issue of voluntariness." See N.Y. Code Crim. Proc. 419.

30. Jackson v. Denno, 378 U.S. 368, 388 (1964): "—— that the jury found the confession involuntary and disregarded it—is equally unacceptable." It should be noted that the assumption that juries do not or cannot follow instructions is contrary to prior language of the Court. See Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963); Delli Paoli v. United States, 352 U.S. 232, 242 (1957).

rule which would truly assure the defendant of a reliable jury determination of the voluntariness of his confession. The most obvious approach is to have a separate jury determine the issue of voluntariness. Although this procedure poses practical difficulties of increased expense and delay it is least vulnerable to attack on any substantive ground. The defendant would have the issue fairly and reliably determined by a jury. If they found the confession to be involuntary, the jury which ultimately determines guilt or innocence would not know that a confession existed. Only under a procedure such as this is it possible to have a jury determination of the issue of the voluntariness of a confession and be certain that if a confession has been found involuntary, it has not influenced the convicting jury.

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CRIMINAL PROCEDURE—INCLUSION OF BRIEFCASE IN "FRISK" DOES NOT CREATE A CONSTITUTIONALLY PROTECTED SEARCH

Defendant had been under investigation in connection with a matter which had occurred on June 15, 1959. Incident to this investigation three police officers went by squad car to the building in which defendant had an office. As they arrived, they saw defendant approach and enter the building. He was carrying a briefcase. Two of the officers got out of the car and followed defendant into the building where they stopped him at the elevator and questioned him about the "other matter." At the request of the officers, defendant accompanied them to the parked squad car and entered the back seat. Defendant sat in the middle with one officer on each side. The third officer was in the front seat on the passenger's side. Defendant placed the briefcase on his lap with the opening facing him. The officers on either side of defendant proceeded to "frisk"[1] him. Prior to opening his coat to facilitate the "frisk," defendant placed the briefcase between his legs. After the "frisk" had been completed defendant picked up the briefcase and placed it on his lap in the original position. One of the officers reached over and took the briefcase and placed it on the floor in front of him and opened it. Inside was a loaded revolver. At the trial defendant was convicted of illegal possession of a weapon in violation of section 1897 of the Penal Law. No mention was made as to the "other matter" for which the investigation was originally conducted.[2] Defendant contended that in the absence of disclosure of this "other matter" there were no reasonable grounds for his arrest and therefore the search of the briefcase was illegal. Defendant's motion to suppress the evidence obtained by the "frisk" was denied. The Appellate Division affirmed. The Court of Appeals *held*, affirmed; one judge dissenting. A "frisk" is

1. A frisk is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried. People v. Rivera, 14 N.Y.2d 441, 446, 201 N.E.2d 32, 35, 252 N.Y.S.2d 458, 463 (1964).

2. The defendant was later indicted and convicted for the acid blinding of his lady-friend. No mention was made of this at this trial for fear it would be prejudicial error.