IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellant, v. MICHAEL HILLERY, Defendant-Appellee.	)))))))))	SUPREME COURT 19-0725

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HONORABLE MONICA ZRINYI WITTIG, JUDGE

APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED JULY 22, 2020

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CERTIFICATE OF SERVICE

On August 7, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellee by placing one copy thereof in the United States mail, proper postage attached, addressed to Michael M. Hillery, 32549 Little Rd., Dyersville, IA 52040.

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QUESTION PRESENTED FOR REVIEW

Investigator Leitzen's promise not to arrest Hillery resulted in the discovery of the physical evidence. Should the district court's order suppressing the controlled substances and Hillery's statements be affirmed?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

The Court of Appeals reversed the district court's order granting Hillery's motion to suppress. Dubuque Police Officer Leitzen induced Hillery's confession and subsequent production of controlled substances by improper promises of leniency. Leitzen testified:

> . . . I told him that I was sure that he bought something, and he needs to give it to me. Um, I also told him that I was not looking to take him to jail that day. I said, I'm looking more for your cooperation to try and get your help to get into that place. Um, I said, That's not to say that you're not going to go to jail someday for this, but I'm not looking to take you to jail today for it. I just want your cooperation.

(Tr. p. 27L14-22). Up until that point, Hillery maintained that he had done nothing wrong. (Tr. p. 37L16-p. 38L4). Leitzen promised Hillery he was not going to jail prior to Hillery producing the cocaine. Leitzen crossed the line. The district court correctly found Hillery's actions were induced by an improper promise of leniency.

STATEMENT OF THE CASE

Appellee Michael Hillery seeks further review of the Court of Appeals decision reversing the district court's order granting his motion to suppress.

ARGUMENT

I. Investigator Leitzen's promise not to arrest Hillery resulted in the discovery of the physical evidence. The district court's order suppressing the controlled substances and Hillery's statements should be affirmed.

Hillery's disclosure of the controlled substances and subsequent confession were induced by improper promises of leniency

Under the evidentiary test, a " 'confession can never be received in evidence where the prisoner has been influenced by any threat or promise.' " State v. McCoy, 692 N.W.2d 6, 27 (Iowa 2005)(other citation omitted). The Supreme Court in Polk summarized the benefits of the evidentiary test:

> We review challenges to confessions based on a promise of leniency under a common law evidentiary test. The defendant's confession is to be suppressed if it follows the officer's improper promise of leniency. We have adopted this exclusionary rule out of concern that " 'the law cannot measure the force of the influence used, or decide upon its effect upon the mind.' " The exclusionary rule eliminates the

need for the court to attempt to read the mind of the defendant to determine if his confession in fact was induced by or made in reliance upon the promise of leniency.

State v. Polk, 812 N.W.2d 670, 674 (Iowa 2012).

Leitzen's testimony demonstrates that his promises improperly induced Hillery's incriminating action of handing over the controlled substances and subsequent confession.

Leitzen testified:

[] I told him that I was sure that he bought something, and *he needs to give it to me. Um, I also told him that I was not looking to take him to jail that day*. I said, *I'm looking more for your cooperation to try and get your help to get into that place*. Um, I said, *That's not to say that you're not going to go to jail someday for this, but I'm not looking to take you to jail today for it. I just want your cooperation*.

And at that time he reached into his left pants pocket and pulled out his hand, which was a balled-up fist at that time, and, um, as soon as he pulled out his balled-up fist, he again told me that he didn't buy anything, um, and that he didn't do anything wrong. And I held out my right hand underneath his -- his left hand, it was balled in a fist. *I told him he needed to drop what he had in his hand*, and at that time, he dropped one, it was just a little plastic baggy of what I clearly recognized to be crack cocaine. ***.

(Tr. p. 27L8-27L12, 29L13-24)(emphasis added).

I caught him, and I -- as soon as I caught him, he -- he immediately said, *I thought you said I'm not going to jail today.*

And I said, I told you that I need your cooperation, and you're not going to go to jail today if you start cooperating, but that better happen pretty quickly, because there's officers coming, and I could hear them coming.

(Tr. p. 28L18-25)(emphasis added). Leitzen promised Hillery he was not going to jail prior to Hillery producing the cocaine. Leitzen's statements additionally implied that Hillery might never go to jail for the suspected offense – "*That's not to say that you're not going to go to jail someday for this, but I'm not looking to take you to jail today for it. I just want your cooperation.*" (Tr. p. 27L16-22)(emphasis added). Up until that point, Hillery maintained that he had done nothing wrong. (Tr. p. 37L16-p. 38L4).

An officer can tell a suspect that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant. However, the line is crossed "if the officer also tells the suspect what advantage is to be gained or is likely from making a confession." Under the latter circumstances, the officer's statements ordinarily become promises of leniency, rendering the statements involuntary.

State v. McCoy, 692 N.W.2d at 28 (other citation omitted).

Leitzen crossed the line. Hillery would not have confessed and produced the controlled substances but for Lietzen's promise

not to arrest him that day. The district court correctly found Hillery's actions were induced by an improper promise of leniency.

The district court may be affirmed on other grounds urged in the district court but not ruled upon.

Hillery's statements and actions were not voluntary

The issue of voluntariness arises when the court considers whether a defendant provided voluntary consent or voluntarily confessed. Voluntary consent and voluntary confessions have been analyzed under two similar sets of factors. Voluntariness does not differ whether a defendant ultimately consents to a search or confesses to a crime. The nature of voluntariness resides with personal characteristics of the defendant and the pressures exerted by the police.

The United States Constitution requires voluntariness for confessions and consent. The Fifth and Fourteenth Amendments require that a confession be voluntary, controlled by the Fifth Amendment where, "no person 'shall be compelled in any criminal case to be a witness against

himself.'" Dickerson v. United States, 530 U.S. 428, 433, 120 S. Ct. 2326, 2330 (2000) (other citation omitted). The Fourth and Fourteenth Amendments require that "consent not be coerced, by explicit or implicit means, implied threat or covert force." Schneckloth v. Bustamonte, 412 U.S. 218, 228, 93 S.Ct. 2041, 2048 (1973) (citing Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535 (1886)).

Involuntary statements cannot be used against a defendant at trial. State v. Hrbek, 336 N.W.2d 431, 435 (Iowa 1983)(citing Mincey v. Arizona, 437 U.S. 385, 398, 98 S.Ct. 2408, 2418 (1978)). Involuntary confessions cannot be used because of their "inherent lack of reliability." State v. McCoy, 692 N.W.2d at 28 (quoting State v. Quintero, 480 N.W.2d 50, 52 (Iowa 1992)). Admission of an involuntary statement in a criminal trial denies the defendant due process and requires reversal. State v. Trigon, Inc., 657 N.W.2d at 441, 445 (Iowa 2003)(citing State v. Davis, 446 N.W.2d 785, 788 (Iowa 1989)).

Voluntariness is dependent upon the circumstances surrounding the defendant. There is no "talismanic definition" of voluntariness. Schneckloth v. Bustamonte, 412 U.S. 218, 224, 93 S.Ct. 2041, 2046 (1973). The court looks to the totality of the circumstances when determining voluntariness for both consent and confessions. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973); United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976). For consent cases, the court ultimately considers whether consent was the product of "duress or coercion, express or implied." United States v. Mendenhall, 446 U.S. 544, 557, 100 S.Ct. 1870, 1879 (1980). But see United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976) (considering whether defendant's will had been overborne). For confession cases, the court ultimately considers "'whether a defendant's will was overborne by the circumstances surrounding the giving of the confession." Dickerson v. United States, 530 U.S. 428, 434, 120 S.Ct. 2326, 2331 (2000)

(quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973)). There is no meaningful difference between these two inquiries into voluntariness although the language of each inquiry is different. Taken together, the inquiry for voluntariness may be posed as whether a defendant's will was overborne through duress or coercion. No single factor is determinative of a confession's voluntariness. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975). The confession must be considered in light of the totality of the circumstances of the defendant's case. Id.

Federal courts have considered various, albeit not exclusive, factors for voluntary consent and voluntary confessions under the totality of the circumstances test. There are many factors considered for voluntary confessions. See Withrow v. Williams, 507 U.S. 680, 694, 113 S.Ct. 1745, 1754 (1993)(factors the court considers for voluntary confessions include police coercion, length of interrogation, location, continuity of custody, defendant's maturity,

defendant's education, defendant's physical condition, defendant's mental health, and advisement of rights while in custody); See also Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047 (1973)(additional factors include defendant's age, defendant's intelligence, and use of punishment); United States v. Greer, 566 F.2d 472, 473 (5th Cir. 1978)(additional factors include pattern of interrogation, intervening occurrences, and violation of legal processes); Brown v. Illinois, 422 U.S. 590, 603, 95 S.Ct. 2254, 2262-63 (1975)(additional factors include the temporal proximity between police illegality and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct).

Iowa has consistently used the federal factors to determine voluntary confessions. See State v. Smith, 546 N.W.2d 916, 926 (Iowa 1996)(factors the court considers for voluntary confessions include the defendant's age; prior experiences with law enforcement; intoxication; intellectual

capacity; physical and emotional reaction to the interrogation; whether *Miranda* warnings were provided; whether officers acted in a deceptive manner; whether defendant appeared to understand and respond to questions; the length of the detention and interview; and whether the defendant was subject to physical punishment); See also State v. Payton, 481 N.W.2d 325, 328-29 (Iowa 1992)(additional factors include whether defendant was mentally "subnormal").

Federal courts have generally used similar factors to determine voluntary consent. See United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 828 (1976)(factors the court considers for voluntary consent include threat of force, use of actual force, promissory leniency, subtle coercion, arrest, custody, location, defendant's knowledge of rights, defendant's prior experience with law enforcement, defendant's intelligence, advisement of rights, and defendant's ability to make free choice); See also United States v. Perry, 437 F.3d 782, 785 (8th Cir. 2006)(additional factors include defendant's

age, defendant's education, whether defendant was intoxicated, duration, intimidation, punishment, police misrepresentations, and whether defendant objected to search).

Interestingly, one factor that is not generally considered for voluntary confessions but is considered for voluntary consent cases is the assertion of police authority. See Florida v. Royer, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326 (1983) (holding police conduct amounted to show of authority where reasonable person would not have felt free to leave); See also Johnson v. United States, 333 U.S. 10, 13, 68 S.Ct. 367, 368 (1948)("Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right."); Amos v. United States, 255 U.S. 313, 317, 41 S.Ct. 266, 268 (1921)("We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his

constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.").

Iowa has consistently used the federal factors to determine voluntary consent. See State v. Reiner, 628 N.W.2d 460, 465-66 (Iowa 2001)(factors the court considers for voluntary consent include knowledge of the right to refuse consent, assertion of police authority, show of force or other coercive action by police, threats by police, illegal police action prior to consent); See also State v. Lane, 726 N.W.2d 371, 383 (Iowa 2007)(additional factors include the temporal proximity between police illegality and the consent, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct).

The Fourth, Fifth, and Fourteenth Amendments require voluntariness for a defendant's consent to search and confession to a crime. The factors enumerated above are considered in the totality of the circumstances analysis to

determine voluntariness for consent and confession cases. Although different courts have used different factors for each analysis, all the factors are rooted in the central inquiry of whether a defendant's will was overborne through duress or coercion by considering an individual's characteristics and pressures exerted by the police. Voluntary confession and voluntary consent factors have been, and should be, used interchangeably.

"The State bears the burden of proving by a preponderance of the evidence that an accused's confession is voluntary." State v. Bowers, 661 N.W.2d 536, 541 (Iowa 2003). The State concedes Hillery was not provided Miranda warnings. State's brief p. 46. The record does not show Hillery's level of education or intelligence. Hillery had some prior involvement with the criminal justice system. (Tr. p. 11L17-p. 12L3, p. 24L1-8). Hillery has several convictions for drug possession which suggests he is a user as opposed to a trafficker. (TI)(App. pp. 4-6). While Hillery smelled of raw

marijuana, there was no evidence whether Hillery was under the influence of marijuana. (Tr. p. 26L3-7, p. 27L1-4, p. 37L3-12). The evidence shows that Leitzen's statements were coercive. (Tr. p. 25L22-p. 30L4, p. 37L16-p. 39L1). Hillery was induced to provide incriminating evidence and statements based on Leitzen's promise of leniency. This is not a case involving a violation of a cooperation agreement. There was no cooperation agreement at the time Hillery turned over the drugs. The totality of the circumstances demonstrate Hillery's statements and actions were involuntary. The district court should be affirmed.

Leitzen failed to provide Hillery with his Miranda warnings

Any statements a defendant makes during a custodial interrogation are presumed coerced unless he is advised of his constitutional rights under the Miranda doctrine. State v. Davis, 446 N.W.2d 785, 787-88 (Iowa 1989) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966)). Statements made without an adequate Miranda warning require

suppression. Id. Miranda warnings are required where the record establishes both custody and interrogation. State v. Trigon, Inc., 657 N.W.2d 441, 444 (Iowa 2003).

To determine whether a defendant was in custody, the court must consider whether there was a formal arrest or restraint on defendant's freedom of movement to the degree of a formal arrest. State v. Miranda, 672 N.W.2d 753, 759 (Iowa 2003). The appropriate test is "whether a reasonable person in the [defendant's] position would understand himself to be in custody." Id. (quoting State v. Countryman, 572 N.W.2d 553, 557 (Iowa 1997)). Four factors are considered to determine whether a defendant was in custody: (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of [his] guilt; and (4) whether the defendant is free to leave the place of questioning. State v. Trigon, Inc., 657 N.W.2d at 444. Hillery was in custody for the purposes of requiring a Miranda warning.

Arguably, Hillery was free to ignore Leitzen when Leitzen first started requesting he stop to speak to Leitzen.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

State v. Pickett, 573 N.W.2d 245, 247 (Iowa 1997)(quoting Florida v. Royer, 460 U.S. 491, 497–98, 103 S.Ct. 1319, 1324 (1983)). However, when Leitzen "stepped in front of his bicycle and stopped him, [], from walking any farther" Hillery was no longer free to go about his business. (Tr. p. 26L14-17). Cf. State v. Fogg, 956 N.W.2d 664 (Iowa 2019)(Appel, J. dissenting)("the cases suggest that where the facts

demonstrate a police vehicle blocks another vehicle from egress, a seizure ordinarily occurs."). Hillery was not free to leave. Additionally, Hillery ran away and was apprehended by Leitzen. (Tr. p. 28L13-25). At that time, Hillery was clearly not free to leave.

Hillery was stopped on the sidewalk in public. Leitzen confronted Hillery with the allegations he had purchased controlled substances and he *needed* to give him what he had just purchased. (Tr. p. 25L22-p. 28L12). The Court examines "whether a confrontational and aggressive style is utilized in questioning, or whether the circumstances seem more relaxed and investigatory in nature." State v. Smith, 546 N.W.2d 916, 924 (Iowa 1996). The record shows that Leitzen's demand that Hillery give him what he had just purchased was more confrontation than relaxed in nature.

The record does not specify how long Leitzen's interaction with Hillery lasted. Even if the interaction was relatively brief, the Court has held that custody can be found where the

defendant believes questioning will not stop until the "interrogators receive the answers they seek." State v. Miranda, 672 N.W.2d 753, 760 (Iowa 2003)(citing United States v. Griffin, 922 F.2d 1343, 1348-49 (8th Cir. 1990)). Leitzen impeded Hillery's travel on the sidewalk, he demanded that Hillery produce what he had purchased. Hillery denied any wrongdoing, but Leitzen persisted. (Tr. p. 27L8-p. 28L25).

The facts establish that a reasonable person in Hillery's position would believe that he was in custody for Miranda purposes. Hillery was interrogated.

Interrogation, for Miranda purposes, refers to express questioning by police and any words or actions by police that are "reasonably likely to elicit an incriminating response from the suspect." State v. Peterson, 663 N.W.2d 417, 424 (Iowa 2003)(quoting Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1692, 1689-90 (1980)). Leitzen's statements to Hillery were reasonably likely to elicit incriminating responses from Hillery. Leitzen challenged Hillery's assertion he had not

done anything wrong. Leitzen "told him he needed to give me what he had just bought"; Leitzen "told him that I was sure that he bought something, and he needs to give it to me"; Leitzen said he was "looking more for [his] cooperation" to get into Watkins' place; Leitzen told Hillery "he needed to drop what he had in his hand"; and Leitzen told Hillery he needed his "cooperation, and [he was] not going to go to jail today if [he] start[ed] cooperating". (Tr. p. 27L8-25).

Hillery was subject to a custodial interrogation prior to making incriminating statements and producing the controlled substances. Leitzen failed to read the Miranda warnings before questioning Hillery, and, as a result, his incriminating statements and resulting physical evidence should be suppressed. The district court should be affirmed.

CONCLUSION

Michael Hillery respectfully requests this Court grant his application for further review.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.51, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,328 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Martha J. Lucey *Dated: 8/7/20*

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