Thomas S. Biggs Inn of Court
January 12, 2016 Presentation

CRIMINAL LITIGATION SWITCH-UP

PRESENTERS:

HON. JUDGE LAUREN BRODIE

CO-CAPTAIN (RANGER) MIKE MCDONNELL

CO-CAPTAIN RICHIE (THE HAMMER) MONTECALVO

JAMES CHANDLER

TOM GORMAN

SARA HALL

SABSINA KARIMI

MARA MARZANO

JOSE NUNEZ

ERNEST RICCI

INNS OF COURT - Criminal Law Presentation

January 12, 2016

Case Law Memo:

1. Stop Based on Anonymous 911 caller.

Navarette v. California 572 U. S. 1603 (2014)

Facts: A California Highway Patrol officer stopped a pickup truck occupied by petitioners because it matched the description of a vehicle that a 911 caller had recently reported as having run her off the road. The called had not identified herself, but provided details including the plate #, make, model and color of the truck. The officer did not witness any traffic infractions or any of the described driving pattern. The truck matching the description was stopped. As officers approached the truck, they smelled marijuana. They searched the truck's bed, found 30 pounds of marijuana, and arrested petitioners. Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment. Their motion was denied, and they pleaded guilty to transporting marijuana. The California Court of Appeal affirmed, concluding that the officer had reasonable suspicion to conduct an investigative stop.

The Supreme Court held: The traffic stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the truck's driver was intoxicated. The Fourth Amendment permits brief investigative stops when an officer has "a particularized and objective basis for suspecting the particular person stopped of . . . criminal activity." *United States* v. *Cortez*, 449 U. S. 411, 417–418. Reasonable suspicion takes into account "the totality of the circumstances," *id.*, at 417, and depends "upon both the content of information possessed by police and its degree of reliability," *Alabama* v. *White*, 496 U. S. 325, 330. An anonymous tip alone seldom demonstrates sufficient reliability, *White,* 496 U. S., at 329, but may do so under appropriate circumstances, *id.*, at 327.

The 911 call in this case bore adequate indicia of reliability for the officer to credit the caller's account. By reporting that she had been run off the road by a specific vehicle, the caller necessarily claimed an eyewitness basis of knowledge. The apparently short time between the

reported incident and the 911 call suggests that the caller had little time to fabricate the report. And a reasonable officer could conclude that a false tipster would think twice before using the 911 system, which has several technological and regulatory features that safeguard against making false reports with immunity.

Not only was the tip here reliable, but it also created reasonable suspicion of drunk driving. Running another car off the road suggests the sort of impairment that characterizes drunk driving. While that conduct might be explained by another cause such as driver distraction, reasonable suspicion "need not rule out the possibility of innocent conduct." *United States* v. *Arvizu*, 534 U. S. 266, 277. Finally, the officer's failure to observe additional suspicious conduct during the short period that he followed the truck did not dispel the reasonable suspicion of drunk driving, and the officer was not required to surveil the truck for a longer period.

2. Making Promises to Defendant in Exchange for Confessing.

Ramirez v. State, 15 So.3d 852, 854 (Fla. 1st DCA 2009)

A defendant's statements obtained through direct or implied promises, however slight, are involuntary and, thus inadmissible at trial. However an interrogating officer may, without rendering a confession involuntary, promise to make a suspect's cooperation known to the prosecutor or advise the suspect that it would be easier on him if he cooperated. Confessions or inculpatory statements induced by other types of promises may, result in suppression at trial. The presence of an express **quid pro quo** bargain for a confession will render the confession involuntary as a matter of law. The First District held the defendant's confession to be involuntary where law enforcement said, among other comments, "[t]his is your only chance". The First District noted that the statement at issue was made during an interrogation replete with constitutional infringements. 15 So.3d at 856–57. For example, the *Ramirez* defendant "had already protested several times that he was being forced or obligated to answer the detective's questions" and the interrogating detective alluded to helping the defendant but never explained the limits of his authority despite repeated requests by the defendant for information.

Additional Florida Law Promises to Defendant in Exchange for Confessing.

In Florida, "[i]t is well established that a confession cannot be obtained through direct or implied promises. In order for a confession to be voluntary, the totality of the circumstances must indicate that such confession is the result of free and rational choice." *Johnson v. State,* 696 So.2d 326, 329 (Fla.1997). "[P]olice misrepresentations alone do not necessarily render a confession involuntary." *Fitzpatrick v. State,* 900 So.2d 495, 511 (Fla.2005). "[T]o establish that a statement is involuntary, there must be a finding of coercive police conduct." *Schoenwetter v. State,* 931 So.2d 857, 867 (Fla.), *cert. denied,* 549 U.S. 1035, 127 S.Ct. 587, 166 L.Ed.2d 437 (2006); *see also Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."). "[T]he salient consideration in an analysis of the voluntariness of a confession is whether a defendant's free will has been overcome." *Black v. State,* 630 So.2d 609, 614–15 (Fla. 1st DCA 1993). For example, confessions induced by promises not to prosecute or promises of leniency may render a confession involuntary. *See, e.g., Samuel v. State,* 898 So.2d 233, 237 (Fla. 4th DCA 2005) (finding a promise not to prosecute other fictional crimes rendered confession involuntary); *Walker v. State,* 771 So.2d 573, 575 (Fla. 1st DCA 2000) ("Where there is an express quid pro quo, i.e., a promise of protection from prosecution for cooperation, the promise of leniency alone is sufficient to render a confession or inculpatory statement involuntary"); *see also Brewer v. State,* 386 So.2d 232, 235 (Fla.1980) (finding a confession involuntary where the officers "raised the spectre of the electric chair, suggested that they had the power to effect leniency, and suggested to the appellant that he would not be given a fair trial."). Similarly, a confession made in return for a promise of release is involuntary. *See Brockelbank v. State,* 407 So.2d 368, 369 (Fla. 2d DCA 1981). However, not all police statements that arguably could be considered "promises" render a confession involuntary. For example, "[t]he fact that a police officer agrees to make one's cooperation known to prosecuting authorities and to the court does not render a confession involuntary." *Maqueira v. State,* 588 So.2d 221, 223 (Fla.1991). Similarly, "a confession is not rendered inadmissible because the police tell the accused that it would be easier on him if he told the truth." *Bush v. State,* 461 So.2d 936, 939 (Fla.1984). Further, a promise alone is not sufficient to render a confession involuntary. There must also be a *causal connection* between the police conduct and the confession. *See, e.g., Connelly,* 479 U.S. at 164, 107 S.Ct. 515 ("Absent police conduct causally related to the confession, there is simply

no basis for concluding that any state actor has deprived a criminal defendant of due process of law."). Before finding the confession inadmissible, Florida courts have repeatedly required that the alleged promise "induce," be "in return for," or be a "quid pro quo" for the confession. *See, e.g., Bruno v. State,* 574 So.2d 76, 79–80 (Fla.1991) ("Statements suggesting leniency are only objectionable if they establish an express *quid pro quo* bargain for the confession."); *Evans v. State,* 911 So.2d 796, 800 (Fla. 1st DCA 2005) (finding admissible a confession following a statement that the agent was not there to arrest the defendant because the "statement was not made with an intent to deceive" or "to induce a confession" and "was not the cause of the defendant's eventual confession" where there was "no *quid pro quo* for the alleged promise"); *Green v. State,* 878 So.2d 382, 385 (Fla. 1st DCA 2003)

3. Using a Defendant's Silence Against them.

Salinas v. Texas, 133 S. Ct. 2174 (2013).

In *Salinas*, the Supreme Court determined whether or not the Fifth Amendment's Self-Incrimination Clause protects a defendant's refusal to answer questions asked by law enforcement before he has been arrested or read his Miranda rights.

Therein, Houston police officers found two homicide victims. The investigation led the officers to Salinas. Salinas agreed to accompany the officers to the police station where he was questioned for about one hour. Salinas was not under arrest at this time and had not been read his *Miranda* rights. Salinas answered every question until an officer asking whether the shotgun shells found as the scene of the crime would match the gun found in Salinas' home. According to the officer, Salinas remained silent and demonstrated signs of deception. A ballistics analysis later matched Salinas' gun with the casings at the scene. Police also found a witness who said Salinas admitted to killing the victims. In 1993, Salinas was charged with the murders, but could not be located.

15 years later, Salinas was finally captured. The first trial ended in a mistrial. At the second trial, the prosecution attempted to introduce evidence of Salinas' silence about the gun casings. Salinas objected, arguing that he could invoke his Fifth Amendment protection against self-incrimination whether he was in custody or not. The trial court admitted the evidence and

Salinas was found guilty and sentenced to 20 years in prison and a $5,000 fine. The Fourteenth Court of Appeals, Harris County, Texas affirmed, noting that the courts that have addressed this issue are divided. The Court of Criminal Appeals of Texas Affirmed.

A plurality of the United States Supreme Court (Justices Alito, Roberts, and Kennedy) ruled that where a defendant does not expressly invoke the privilege against self-incrimination, the Fifth Amendment does not prohibit the prosecution from commenting on the defendant's pre-arrest, pre-*Miranda* silence.

Specifically, the Supreme Court reasoned that there is a long standing judicial precedent that any witness who desires protection against self-incrimination must explicitly claim that protection. That requirement ensures that the government is put on notice when a defendant intends to claim this privilege and allows the government to either argue that the testimony is not self-incriminating or offer immunity. The Supreme Court further outlined two exceptions to this rule: 1) that a criminal defendant does not need to take the stand at trial in order to explicitly claim this privilege; and 2) that failure to claim this privilege must be excused when that failure was due to government coercion.

Subsequent Opinions:

U.S. v. Okatan, 728 F.3d 111 (2d Cir. 2013).

Okatan further analyzed the meaning of the decision in *Salinas*. The Court addressed the specific issue of "whether the prosecution may use a defendant's assertion of the privilege against self- incrimination during a noncustodial police interview as part of its case in chief." The Court specifically held that when an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as its substantive evidence of guilt.

The Court expanded on the issue holding that "a defendant must only put an interrogating official 'on notice [that he] intends to rely on the privilege.'" *Id.* at 119. (*quoting Salinas,* 133 S.Ct. at 2179). "In the context of custodial interrogation, 'an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease.'" *Id.* at 119 (*quoting Fare v. Michael C.,* 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)).

"'Similarly, even when an individual is not in custody, because of 'the unique role the lawyer plays in the adversary system of criminal justice in this country,'" *Id.* at 119 (*quoting Fare*, 442 U.S. at 719), "a request for a lawyer in response to law enforcement questioning suffices to put an officer on notice that the individual means to invoke the privilege."

Sileo v. Rozum, 2015 U.S. Dist. LEXIS 158463, *1 (E.D. Pa. Nov. 23, 2015)(A plurality of the U.S. Supreme Court has held that, in cases where a witness who is not in custody chooses to stand mute instead of answering a potentially incriminating question, the Fifth Amendment normally does not apply. Therefore, standing mute in response to a police investigation can be probative and is fair fodder when the suspect is tried).

Salinas Applied to Florida Law:

Horwitz v. State of Florida, 40 Fla. L. Weekly D474 (Fla. 4th DCA 2015).

In *Horowitz*, the 4th DCA analyzed the Supreme Court decision in *Salinas*, but ultimately determined that under Florida law, a Defendant's pre-arrest, pre-*Miranda* silence is inadmissible under Florida Law, if a Defendant does not testify at trial. The Court then certified the following question to the Florida Supreme Court "Whether, under Florida Law, the State is precluded from introducing evidence of a Defendant's pre-arrest, pre-*Miranda* silence where the Defendant does not testify at trial."

As of now, *Horwitz* is the only Florida case which addresses *Salinas*.

4. Constructive Possession.

Brown v. State, 8 So.3d 1187 (FLA 4th DCA 2009)

Evidence was insufficient to establish that defendant had knowledge that illegal drug was in jewelry box in center console of vehicle, as required to convict defendant of possession of drug under constructive possession theory, although defendant was found in actual possession of cocaine and defendant moved to close car's console while officers were approaching; vehicle was rental car, defendant was not on rental agreement, vehicle was jointly occupied, and there was no evidence that defendant knew drug was in console.

5. Drug Dog Stiff- Sufficiency of Training .

Florida v. Harris, 133 S. Ct 1050 (2013)

Officer Wheetley pulled over respondent Harris for a routine traffic stop. Observing Harris's nervousness and an open beer can, Wheetley sought consent to search Harris's truck. When Harris refused, Wheetley executed a sniff test with his trained narcotics dog, Aldo.The dog alerted at the driver's-side door handle, leading Wheetley to conclude that he had probable cause for a search. That search turned up nothing Aldo was trained to detect, but did reveal pseudoephedrine and other ingredients for manufacturing methamphetamine. Harris was arrested and charged with illegal possession of those ingredients. In a subsequent stop while Harris was out on bail, Aldo again alerted on Harris's truck but nothing of interest was found. At a suppression hearing, Wheetley testified about his and Aldo's extensive training in drug detection. Harris's attorney did not contest the quality of that training, focusing instead on Aldo's certification and performance in the field, particularly in the two stops of Harris's truck. The trial court denied the motion to suppress, but the Florida Supreme Court reversed. It held that a wide array of evidence was always necessary to establish probable cause, including field performance records showing how many times the dog has falsely alerted. If an officer like Wheetley failed to keep such records, he could never have probable cause to think the dog a reliable indicator of drugs.

The Supreme Court Held: Because training and testing records supported Aldo's reliability in detecting drugs and Harris failed to undermine that evidence, Wheetley had probable cause to search Harris's truck. In testing whether an officer has probable cause to conduct a search, all that is required is the kind of "fair probability" on which "reasonable and prudent [people] act." *Illinois* v. *Gates*, 462 U. S. 213, 235. To evaluate whether the State has met this practical and commonsensical standard, this Court has consistently looked to the totality of the circumstances and rejected rigid rules, bright-line tests, and mechanistic inquiries.

The Florida Supreme Court flouted this established approach by creating a strict evidentiary checklist to assess a drug-detection dog's reliability. Requiring the State to introduce comprehensive documentation of the dog's prior hits and misses in the field, and holding that absent field records will preclude a finding of probable cause no matter how much other proof the State offers, is the antithesis of a totality-of-the-circumstances approach. This is made worse

by the Florida Supreme Court's treatment of field-performance records as the evidentiary gold standard when, in fact, such data may not capture a dog's false negatives or may markedly overstate a dog's false positives. Such inaccuracies do not taint records of a dog's performance in standard training and certification settings, making that performance a better measure of a dog's reliability. Field records may sometimes be relevant, but the court should evaluate all the evidence, and should not prescribe an inflexible set of requirements.

Under the correct approach, a probable-cause hearing focusing on a dog's alert should proceed much like any other, with the court allowing the parties to make their best case and evaluating the totality of the circumstances. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, the court should find probable cause. But a defendant must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant may contest training or testing standards as flawed or too lax, or raise an issue regarding the particular alert. The court should then consider all the evidence and apply the usual test for probable cause—whether all the facts surrounding the alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.

The record in this case amply supported the trial court's determination that Aldo's alert gave Wheetley probable cause to search the truck. The State introduced substantial evidence of Aldo's training and his proficiency in finding drugs. Harris declined to challenge any aspect of that training or testing in the trial court, and the Court does not consider such arguments when they are presented for this first time in this Court. Harris principally relied below on Wheetley's failure to find any substance that Aldo was trained to detect. That infers too much from the failure of a particular alert to lead to drugs, and did not rebut the State's evidence from recent training and testing.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA CASE NO: 86-75309CF

vs.

CAROLINE CAINE

DEFENDANT'S MOTION TO SUPPRESS UNLAWFUL STOP AND DETENTION AND DEFENDANT STATEMENTS

The Defendant, CAROLINE CAINE, by and through his undersigned attorney, pursuant to Fla. R. Crim. P. 3.190, hereby files this Motion to Suppress pursuant to Fla. R. Crim. P. 3.190(h) and requests that this Honorable Court suppress any and all evidence obtained in this cause subsequent to the unlawful detention of the Defendant and any written or oral statements made by the Defendant to law enforcement.

STIPULATED FACTS

On January 1, 2015, Officer Lou Tennant and Officer Miranda Wright were dispatched to a possible drunk driver swerving on the road. The dispatch was the result of a 911 call. A description of the car was given. Based on this description, the officers conducted a traffic stop on Defendant's car that matched the description. The officers did not witness any driving pattern prior to stopping the car. Defendant and passenger were ordered out of car a gun point and a police canine was walked around the vehicle. The dog alerted and upon a search of the vehicle, various drugs were scattered throughout the car. Caroline Caine was arrested for possession of drugs and transported to the substation for interrogation.

ISSUE 1: UNLAWFUL STOP

The Defendant was seized in breach of the Fourth Amendment and any evidence obtained because of the illegal seizure must be suppressed. Defendant committed no traffic violations and there was no probable cause or reasonable suspicion to stop the Defendant's car. The facts in the case do not rise to this level and thus the stop of the Defendant's car was unlawful. Any evidence obtained, including physical evidence and statements, following the government's illegal stop of the car should be suppressed.

RE: Caroline Caine

ISSUE 2: DEFENDANT'S STATEMENT

The Defendant's statement obtained at the police station was in violation of the Defendant's privilege against self-incrimination. No adequate warning of the Defendant's rights was read to Defendant. Additionally, multiple promises were made by the police officers. Under these circumstances, any statement made by the Defendant are involuntary and the result of a quid pro quo whereby the Defendant was provided preferential treatment in exchange for her statement. See Ramirez v. State, 15 So. 3d 852, 854 (Fla. 1st DCA 2009)

WHEREFORE, Captain Justice, Guardian of the Realm Leader of the Resistance, and Defender of the Innocent requests the Court to enter its Order suppressing all evidence and statements obtained due to the unlawful stop.

BY: /s/ Anita Allabye
Anita Allabye
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Fresh out of Law School, Assistant State Attorney, Office of the State Attorney, 3315 East Tamiami Trail, Naples, FL 34112 by United States Mail/Hand Delivery/Electronic Transmission this 12 day of January, 2016.

/s/ Anita Allabye
Anita Allabye
Attorney for Defendant