Docket No. 08-1695

United States Court of Appeals
For the Seventh Circuit

Jimmie Johnson,

Petitioner-Appellant,

v.

William Pollard,

Respondent-Appellee.

Appeal from an order denying the appellant's 28 U.S.C. § 2254 petition, the Hon. Aaron Goodstein, Magistrate Judge, presiding
District Court No. 06-C-357

Brief and Short Appendix of the Appellant, Jimmie Johnson

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Disclosure Statement

The attorney for the appellant is Jeffrey W. Jensen who is a sole practitioner in Milwaukee, Wisconsin with an office located at the address set forth on the cover of this brief.

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Table of Authority

Jurisdictional Statement

A. The District Court had jurisdiction over the matter pursuant to 28 U.S.C. §2253 in that it is an appeal from an order denying a petition filed pursuant to 28 U.S.C. §2254. On June 7, 2008 the United States District Court issued a certificate of appealability as to the issue of whether Johnson's confession to the police was involuntary.

B. The order denying Johnson's petition was entered on February 13, 2008. Johnson applied to the district court for a certificate of appealability on February 25, 2008. On March 18, 2008 the district court entered an order denying Johnson's motion for certificate of appealability and the clerk filed a notice of appeal for Johnson. On June 7, 2008 the United States Circuit Court of Appeals (7th Cir.) entered an order granting the certificate of appealability and setting a briefing schedule. Therefore the appeal was timely.

D. The appeal is from a final judgment denying the appellant's petition for habeas corpus and, therefore, the appeal is from a final judgment that disposes of all parties' claims,

Statement of the Issues Presented for Review

I. Whether Johnson's confession was involuntary because police coerced the statement by employing improper tactics designed to overcome Johnson's will by: (a) questioning Johnson repeatedly over the course of five days; and, (b) by improperly telling Johnson that he failed a polygraph examination.

Answered by the district court: No

Statement of the Case

On May 1, 2002, following a jury trial, the petitioner-appellant, Jimmie Johnson (hereinafter "Johnson"), was convicted of two counts of first-degree reckless homicide and three counts of first degree recklessly endangering safety, all as a party to the crime, in violation of Wisconsin Statutes § 939.05, 940.02(1), and 941.30(1). (Doc. 6- Ex. A.) Johnson was also convicted of one count of possession of a firearm by a felon, in violation of Wisconsin Statute § 941.29(2). (Doc. 6- Ex. A.) For the homicide counts, he was sentenced to 40 years of initial and 10 years of extended supervision. (Doc. 6- Ex. A.) As to the recklessly endangering safety counts, Johnson was sen-

tenced to 5 years initial confinement and 3 years of extended supervision. (Doc. 6- Ex. A.) As for the felon in possession of a firearm count, he was sentenced to 2 years initial confinement and 2 years extended supervision. (Doc. 6- Ex. A.) The court ordered all these sentences to run consecutively with the exception of two of the recklessly endangering safety counts, for a total term of initial confinement of 87 years initial confinement and 26 years of extended supervision. (Doc. 6- Ex. A.)

Johnson appealed, and on September 9, 2003, the Wisconsin court of appeals affirmed Johnson's conviction. (Doc. 6- Ex. A.) On November 17, 2003, the Supreme Court of Wisconsin denied review. (Doc. 6- Ex. H.)

Johnson then filed a collateral attack to his conviction pursuant to Wisconsin Statute §974.06. On November 15, 2005, the court of appeals summarily affirmed the trial court. (Doc. 6- Ex. B.) On January 20, 2006, the Wisconsin Supreme Court denied review. (Doc. 6- Ex. C)

On March 23, 2006 Johnson filed a petition pursuant to 28 U.S.C. §2254 alleging that his conviction was obtained in violation of his constitutional rights and that he had exhausted his state remedies. (Doc. 1) The court ordered the respondent-appellee, William Pollard, to respond. On

May 17, 2006, Pollard filed a response admitting that Johnson's petition was timely filed and that he had exhausted state appeals remedies on the issues alleged (Doc. 6) but denying that Johnson's conviction was obtained in violation of the constitution. The respondent also submitted to the court the state court record. (Doc. 6) Both parties consented to the matter being heard by a magistrate judge.

On February 13, 2008 the district court issued an order denying Johnson's petition. (Doc. 10) Johnson applied for a certificate of appealability; however, on March 18, 2008 the district court denied the motion and Johnson filed a notice of appeal. The United States Court of Appeals (7th Cir.) granted Johnson a certificate of appealability on June 17, 2008 on the issue of whether his confession to police was involuntary.

Statement of the Facts

Shortly after Johnson was arrested on a warrant unrelated to the present offense (Doc. 6 Ex. L-35 p. 12) he was taken by police detectives to an interrogation room. There Johnson was questioned six times over the course of five days and each time denied that he was involved in the shoot-

ing. Eventually, Johnson submitted to a polygraph examination during which he also denied any involvement in the shootings. The polygraph examination lasted two to three hours. (Doc. 6 Ex. L-35 p. 87) Det. Hargrove, who conducted the polygraph, testified that he would ordinarily convey his opinion concerning the polygraph test to the detectives in charge of the case; however, Hargrove could not recall whether he did so in the present case. (Doc. 6 Ex. L-35 p. 83) However, Det. Hargrove did not tell Johnson the results of the test. (Doc. 6 Ex. L-35 p. 99)

Shortly after that examination Detectives William Jessup and Heier were ordered to conducted another interview with Johnson. (Doc. 6 Ex. L-36 p. 45) Jessup testified that the interview started at 6:24 p.m. on October 3, 2000, and ended at 9:08 p.m. Jessup testified that, at the beginning of the interview, Heier told Johnson: "It's my understanding you must have failed that polygraph because you're still here." (Doc. 6 Ex. L-36 p. 36) Heier testified that he told Johnson:

> I indicated sometime in the first couple minutes that it was my understanding the day before he was so confident that he was going to pass the polygraph, and I made a statement to him right off the bat, I

> believe, in the first couple minutes, it's my understanding you must have failed that polygraph because you're still here.

(Doc. 6 Ex. L-37 p. 34)

According to the detectives, they did not actually review the polygraph charts with Johnson and there were no polygraph machines in the room. *Id.* According to Det. Jessup the polygraph results are never available to them. (Doc. 6 Ex. L-36 p. 37) Additionally, Jessup testified that he believed that Heier never met with Hargrove prior to interviewing Johnson the last time. (Doc. 6 Ex. L-36 p. 40) Heier, himself, admitted that he was never briefed about the polygraph by Det. Hargrove. (Doc. 6 Ex. L-37 p. 70)

During this third interview Johnson confessed to being involved in the shooting. (Doc. 6 Ex. L-37 p. 39)

Summary of the Argument

Before the state trial court Johnson moved to suppress the confession he gave to police on the grounds that it was coerced. Johnson argued that the repeated interrogation over several days combined with the detectives' comment that Johnson had failed the polygraph test coerced Johnson into

giving the incriminating confession. The trial court denied the motion and Johnson appealed. The state appeals court did not address the constitutional issue; rather, the court affirmed on non-constitutional state law. Johnson then filed a petition for habeas corpus in federal court and, still, the district court did not address the voluntariness issue. Thus, the state court decision is not based on federal law and, therefore, it is not entitled to any deference on appeal. When this court considers the record the only reasonable conclusion is that Johnson's statement was not voluntary. Johnson exhibited a will not to incriminate himself. The police detectives employed tactics designed to overcome Johnson's will. These tactics include repeated interrogations over the course of several days and falsely telling Johnson that he had failed a polygraph examination.

Argument

I. The length of the interrogation combined with the police strategy of leading Johnson to believe that he had failed the polygraph test all operated to render Johnson's confession involuntary.

A. Standard of Appellate Review

The standard of appellate review is whether in denying Johnson's claim of constitutional error state courts made "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This is true if Johnson's claim was adjudicated by the state court "on the merits." § 2254(d). If not, the special deference to a state court's determinations that is prescribed by section 2254(d)(1) does not apply. *Braun v. Powell*, 227 F.3d 908, 916-17 (7th Cir. 2000). The state appellate court discussed and disposed of Johnson's claim that his confession was not sufficiently distinct from his polygraph examination; however, the state court did not rely upon federal law in doing so. *See* Appendix A. Even so, as long as the standard the state court applied was as demanding as the federal standard the federal claim is

deemed adjudicated on the merits and its rejection therefore entitled in this habeas corpus proceeding to the deference prescribed by section 2254(d)(1). *See, Mitchell v. Esparza*, 540 U.S. 12, 157 L. Ed. 2d 263, 124 S. Ct. 7, 10 (2003)

As will be set forth in more detail below, though, the state court decision was not based on federal law nor on a state law that is at least as rigorous as the federal law. Therefore, the special deference provided for by § 2254(d) does not apply.

B. The police employed improper tactics designed to over come Johnson's will and, therefore, the statement was not vol untary.

Before the state trial court Johnson moved to suppress the confession he gave to police on the grounds that it was coerced. Johnson argued that the repeated interrogation over several days combined with the detective's comment that Johnson had failed the polygraph test coerced Johnson into giving the incriminating confession. The trial court denied the motion and Johnson appealed. The state appeals court did not address the issue. Johnson filed a petition for habeas corpus and, still, the district court did not address the voluntariness issue. Thus, the state court decision is not based on federal law and, therefore, it is not entitled to any deference on

appeal. When this court considers the record the only conclusion is that Johnson's statement was not voluntary. Johnson exhibited a will not to incriminate himself. The police detectives employed tactics designed to overcome Johnson's will. These tactics include repeated interrogations over the course of several days and falsely telling Johnson that he had failed a polygraph examination.

i. The state court's reasoning

The brief that Johnson filed before the Wisconsin Court of Appeals plainly argued that his confession to police was coerced. Johnson argued that the police employed improper tactics designed to overcome his will when they interrogated him repeatedly over a number of days and when they told him that he had failed the polygraph test (when the police plainly did not even know whether this was true). (Doc. 6-I p. 44)

Nonetheless, the Wisconsin Court of Appeals based its decision only on its conclusion that the final interview was distinct from the polygraph examination. (Appendix A p. 14) The court ignored Johnson's constitutional argument that his confession was not voluntary.

This is important because the law that excludes from evidence state-

ments made during a polygraph examination is not rooted in the Fifth Amendment. Rather, it is rooted in the Wisconsin Supreme Court's policy determination that polygraph evidence is not sufficiently reliable to be presented in court. In, *State v. Dean*, 103 Wis. 2d 228, 265 (Wis. 1981) the Wisconsin Supreme Court explained:

> Several jurisdictions which do not admit polygraph evidence view the polygraph as lacking scientific reliability. On the basis of the record before us the court is not now prepared to say that the polygraph test results are acceptable expert scientific evidence which should be subject to the same rules of evidence as other expert scientific evidence or that polygraph evidence is so unreliable that it cannot be admitted under any circumstances.

The case on which the Wisconsin Court of Appeals relied in Johnson's case was *State v. Greer*, 2003 WI App 112 (Wis. Ct. App. 2003) which went one step further than *Dean* and held that statements that are "related to" the polygraph examination are also not admissible. *Greer* specifically relied upon *Dean.*

Thus, in affirming the trial court's order denying Johnson's motion to suppress his statement the state court did not rely upon federal law nor upon a state law that is at least as rigorous as federal law. In fact, the state

appeals court ignored Johnson's claim that his statement was coerced by police.

ii. The district court's reasoning

It must first be pointed out that the Supreme Court case, *Oregon v. Bradshaw,* 462 U.S. 1039, 1042 (1983), upon which the district court based its decision is inapposite. The issue in *Bradshaw* was whether the police violated the "bright line" rule of *Edwards v. Arizona*, 451 U.S. 477 (1981) that police may not continue to question a defendant after he has invoked his right to counsel unless it is the defendant who re-initiates the questioning. In *Bradshaw* the defendant was being questioned and he then invoked his right to counsel. Thereafter, the police decided to take him to jail. While on the way to jail Bradshaw asked the officer what was going to happen now and the officer suggested that Bradshaw take a polygraph test. Bradshaw did so and the police thereafter informed Bradshaw that he did not pass. Bradshaw then broke down and confessed to the crime. The issue was whether or not Bradshaw re-initiated the interrogation after having invoked his right to counsel by asking the officer what will happen next and then submitting to a polygraph. The Supreme Court found that under the

circumstances of the case Bradshaw did re-initiate the conversation with the police and, therefore, that the *Edwards* rule was not violated.

Thus, like the state court, the district court never addressed Johnson's constitutional claim that his statement was coerced.

iii. The federal law

A confession is voluntary if the totality of the circumstances demonstrates that it was the product of rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics calculated to overcome the defendant's free will. *United States v. Sablotny*, 21 F.3d 747, 750 (7th Cir. 1994). Among the factors relevant to this inquiry are the nature and duration of the questioning used to secure the confession, whether the defendant was prevented from eating or sleeping, and whether the defendant was under the influence of drugs or alcohol. *Sablotny*, 21 F.3d at 750. In addition, because a confession should not be the product of "youthful ignorance or the naivete born of inexperience," *United States v. Oglesby*, 764 F.2d 1273, 1278 (7th Cir. 1985), the court must also consider the defendant's age, intelligence, education, and experience with the criminal justice system. *Holland*, 963 F.2d at 1052. Absent a showing of

some type of official coercion, however, a defendant's personal characteristics alone are insufficient to render a confession involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986) ("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.").

iv. The strategy of the police were improper and were designed to overcome Johnson's will to remain silent

The first step in the inquiry is to ask whether Johnson exhibited a will to avoid incriminating himself in the face of official custodial interrogation? If not, there is no reason to discuss this issue any further. Here, though, the answer is obvious. Johnson, on five separate occasions- including during a polygraph examination- told the police that he had nothing to do with the shooting in question. Thus, something occurred that changed Johnson's mind during the sixth interrogation. If this "something" is an improper police tactic then the statement must be suppressed.

Even if one were to overlook the fact that Johnson was interrogated on six occasions over the course of five days, what about the fact that the

police detective (without knowing whether this was true or not) taunted Johnson during the last interview by telling him that he had flunked the polygraph? The detective's justifications aside, common sense tells us that the detective could have had no other purpose in taunting Johnson in this manner *except* to humiliate Johnson into inculpating himself. Certainly the detective was not simply passing along the information that Johnson had not passed the polygraph- the detective had no idea whether this was true or not. Thus, this was not simply passing along facts to the suspect, it was not an appeal to the suspect to be truthful, rather, it was a deliberate attempt to apply psychological pressure on Johnson to force an inculpatory statement.

One can nearly feel the contempt that Det. Heier had for Johnson even from the "cold record" (i.e. the transcript). Det. Heier testified at the motion hearing that:

> I indicated sometime in the first couple minutes that it was my understanding the day before *he was so confident that he was going to pass the polygraph*, and I made a statement to him right off the bat, I believe, in the first couple minutes, It's my understanding you must have failed that polygraph because you're still here.

* * *

> Q Did you notice any change in his demeanor from your contact with him before that to your contact with him after that?
>
> A He wasn't as confident, I'd say . . . now he was more concerned because he was still there.

(Doc. 6-L p. 34, 35)

The court, however, should *not* overlook the length of the interrogation. Firstly, the law requires the court to consider the totality of the circumstances. But more importantly, the repeated interrogations demonstrate clearly that the police would not stop until Johnson said that he was the shooter. Under the totality of these circumstances it is nigh impossible to persuasively argue that Johnson merely changed his mind and wanted to come clean. On the contrary, through deliberate tactics the police systematically wore down Johnson's resistance. This simply was not a freely, intelligently, and voluntarily give confession. To call it so is a perversion of the concepts of freedom, intelligence, and voluntariness.

Conclusion

For these reasons it is respectfully requested that the court find that Johnson's detention is in violation of the fifth amendment to the United

States Constitution and to order that Johnson be released.

Certification as to Form and Length

The undersigned hereby certifies that this brief meets the length and format requirements of Fed. R. App. P. 32(a)(7). A fourteen point "Book Antiqua" font was used with justification and automatic hyphenation. The length of the brief is 3089 words not counting the table of authority and table of contents. The word court was determined using the word count function of the word processing software *OpenOffice.*

Circuit Rule 31(e) Statement

An electronic copy of this brief consisting of digital media has been uploaded to the Seventh Circuit Court of Appeals Legal Brief System. I certify that the file does not contain a computer virus. I additionally certify that, pursuant to Circuit Rule 31(e)(4), a digital copy of the brief has been served upon each party individually represented by counsel.

Circuit Rule 30(d) Statement

All materials required by Circuit Rule 30(a) and (b) are included in

the attached appendix.

Certificate of Non-Availability of Appendix Materials in Digital Format

None of the materials contained in the appendix are available in digital format and, therefore, have not included in the digital copy of the brief.

Certificate of Service

Fifteen copies of this brief are being served and filed at the Clerk of Court Office, United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn Street, Chicago, Illinois on _____ by placing the same in the United States Mail. Two copies of this brief are being served on Daniel J. O'Brien, Asst. Attorney General, by placing the same in the United States Mail.

Dated at Milwaukee, Wisconsin, this _____ day of July, 2008:

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Short Appendix of the Appellant, Armando Garcia

A. Opinion of the Wisconsin Court of Appeals

B. Petition pursuant to 28 U.S.C. §2254

C. Excerpt of testimony concerning polygraph

D. Memorandum Decision of District Court

E. Docket Entries