Tainted Fruits

Cause No. F96-39973-MJ

Kerr County No. A96-253

Court of Criminal Appeals No. 72,795

The State of Texas v. Darlie Lynn Routier
In the Criminal District Court NO 3
Dallas County, Texas

DEFENDANT' S AMENDED MOTION TO SUPPRESS THE INVOLUNTARY STATEMENT THAT THE PROSECUTORS OBTAINED FROM COURT REPORTER SANDRA HALSEY ABOUT THE AUDIO TAPES AND ITS TAINTED FRUITS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the defendant, Darlie Lynn Routier, by and through her attorneys of record, and moves this Honorable Court to suppress the involuntary statement that prosecutors Lindsey Roberts and Toby Shook obtained from court reporter Sandra Halsey about the audio tapes and its tainted fruits. In support of this motion, the defendant will show:

> PROSECUTOR LINDSEY ROBERTS TRICKED COUNSEL INTO AGREEING TO STIPULATE THAT HALSEY TOLD HIM THAT THERE WERE AUDIO TAPES OF THE TRIAL BY GIVING COUNSEL A MISLEADING ACCOUNT OF HOW HE OBTAINED THAT STATEMENT AND THE TAPES FROM HALSEY.

On November 13th, 1999, Assistant District Attorney Lindsey Roberts asked counsel for the defendant to stipulate that Sandra Halsey told him that there were audio tapes of the trial on the merits and turned those tapes over to him. Roberts informed counsel

that Halsey recanted her sworn testimony that no tapes existed because her daughter persuaded her to do so. Counsel accepted Roberts' explanation and agreed to the stipulation on the condition that it would not be used to authenticate the audio tapes (Nov. 13th Hearing at 37-39).

On April 1, 1999, counsel learned that Roberts' description of the circumstances surrounding Halsey's recantation was incomplete and misleading. Roberts revealed the whole truth in a sworn affidavit that he gave to a disciplinary board that is reviewing a complaint against Halsey for her misconduct in this case. A copy of that affidavit is attached to this motion in Exhibit A.

Roberts admitted that he repeatedly questioned Halsey about the existence of the audio tapes

before the October 30, 1998 hearing without persuading her to change her sworn testimony.

Roberts made another unsuccessful attempt to extract a recantation from Halsey on October 30, 1998.

Roberts tried to extract a recantation from Halsey on November 4, 1998, and failed again. Thereafter, the Court ordered the attorneys for both parties not to question Halsey.

On November 12, 1998, Roberts asked Judge Francis for permission to meet with Halsey "one last time." Judge Francis refused to allow this, but he promised to confront Halsey about the existence of audio tapes instead. Halsey continued to deny that the tapes existed when Judge Francis questioned her alone in his office.

After Judge Francis completed his interrogation of Halsey, he gave Roberts permission to ask Halsey again if she had the audio tapes and to inform Halsey and her daughter, Suzy Crowley, that they had to appear in court on the following day to testify. Everyone understood that Judge Francis only authorized Roberts to repeat his previous *requests* for the tapes. No reasonable person could have interpreted Judge Francis' statement as an authorization for Roberts to enlist Toby Shook as his tag team partner and use promises and threats to coerce Halsey.

When Roberts approached Halsey, she asked him why everyone was insisting that the audio tapes existed. Roberts used her question as an excuse to disobey Judge Francis' clear order not to talk to Halsey again about the tapes. He explained why the court's three independent expert reporters believed that she must have used audio tapes to edit the record. Halsey still insisted that there were no tapes.

When Roberts finally told Halsey and Crowley that they would have to testify under oath, Crowley asked for an opportunity to speak with her mother privately. Roberts left the room. Crowley and Halsey called him back a few minutes later. This time, they were joined by Assistant District Attorney Toby Shook. Halsey asked Roberts and Shook what would happen if there were audiotapes for the trial on the merits. The two prosecutors told her that the audio tapes would be used to certify the accuracy of the appellate record and *"the District Attorney's office would not pursue perjury charges for her prior sworn statement concerning the audio tapes."* Halsey admitted that the audio tapes existed immediately after that promise was made to her. She surrendered some tapes to Roberts that day. Her attorney, George Milner, delivered additional tapes to Roberts at a later time.

THE AUDIO TAPES THAT HALSEY AND HER ATTORNEY SURRENDERED TO ROBERTS MUST BE SUPPRESSED BECAUSE THAT EVIDENCE IS A TAINTED FRUIT OF AN INVOLUNTARY STATEMENT THAT THE PROSECUTORS COERCED BY PROMISING NOT TO CHARGE HER WITH PERJURY IF SHE RECANTED HER SWORN TESTIMONY.

The audio tapes that Halsey and her lawyer surrendered to Roberts must be suppressed because that evidence is the tainted fruit of an involuntary statement that she made to Roberts and Shook after her will was overborne by repeated accusatory questions and an explicit promise that she would not be prosecuted for perjury if she said what the prosecutors wanted to hear. The defendant has standing to object to this evidence regardless of whether it is

reliable, because it is necessary to achieve the deterrent purpose of the exclusionary rule.

The requirements of the due process clause of the Fourteenth Amendment apply at a hearing on a motion to determine the accuracy of the record in a capital case. Chessman v. Teets, 354 U.S. 156 (1957). The due process clause forbids the State from using an involuntary statement and its fruits, Sossamon v. State, 816 S.W.2d 340 (Tex.Cr.App. 1991), even if "independent corroborating evidence left little doubt of the truth" of the evidence. Rogers v. Richmond, 365 U.S. 534, 540 (1961)

Halsey's confession to Roberts and Shook about the existence of the audio tapes was involuntary because it was not "the free and unconstrained choice of its maker." Columbe v. Connecticut, 367 U.S. 568, 602 (1961). The prosecutors did not have to beat Halsey with a rubber hose or threaten her with violence to overcome her free will. Blackburn v. Alabama, 361 U.S. 199, 206 (1960). A specific promise not to prosecute like the one that Roberts and Shook made to Halsey can also be coercive. Dikes v. State, 657 S.W.2d 796, 797 (Tex.Cr.App. 1983). Roberts drastically increased the pressure on Halsey to make an involuntary statement by repeatedly informing Halsey that he did not believe her exculpatory statements before he promised not to prosecute her if she incriminated herself. Escobedo v. Illinois, 378 U.S. 478, 485 (1964)

No reasonable person can doubt that there was a cause and effect connection between Roberts' accusatory questions, Halsey's expression of concern about the consequences of a confession, the promise that she would not be prosecuted and her recantation. Halsey's private meeting with her daughter was not an intervening circumstance that attenuated Halsey's statement from that promise because the promise was made after the meeting.

The fact that Halsey initiated a conversation with Roberts about the tapes did not make her statement voluntary. In Levra v. Denno, 347 U.S. 556 (1954), the Supreme Court held that a defendant's statement to a prosecutor during a conversation about the case that the defendant initiated was coerced by the conduct of an agent of the prosecution before that conversation took place. The involuntariness of Halsey's statement is clearer because the prosecutor who took her statement engaged in coercive conduct during the conversation that she initiated.

It is also beyond dispute that the audio tapes are tainted fruits of Halsey's involuntary statement. No claim can be made that the discovery of the tapes was attenuated from the statement or the tapes would inevitably have been discovered without it. In any event, the inevitable discovery doctrine is superseded by Art. 38.23, V.A.C.C.P. State v. Daughtery, 931 S.W.2d 268, 272-73 (Tex.Cr.App. 1996).

Involuntary statements and their fruits are typically excluded in cases where the defendant's confession was coerced, but many courts have held that a defendant also has standing to object to the involuntary statement of a witness and its fruits. United States v. Fredericks, 586 F.2d 470, 481 (5th Cir. 1978); United States v. Chiavola, 744 F.2d 127 1273 (7th Cir. 1984); United States ex rel Cunningham v. DeRobertis, 719 F.2d 892, 895 (7th Cir. 1983); LaFrance v. Bohlinger 499 F.2d 29 (1st Cir. 1974); Bradford v. Johnson, 476 F.2d 66 (6th Cir. 1973); Vargas v. Brown, 512 F.Supp. 271 (D. R.I. 1981); United States ex rel Blackwell v. Franzen, 540 F.Supp. 151, 155 (N.D. Ill. 1981); People v. Newman, 197 N.E. 2d 12 (Ill. 1964); People v. Tate, 197 N.E.2d 26 (Ill. 1964); People v. Underwood, 389 P.2d 937 (Cal. 1964). The rationale

for this rule is obvious:

> Involuntary confessions have been excluded both because of the danger of unreliability and, more importantly, out of a sense of fundamental unfairness best expressed as the "deep-rooted feeling that the police must obey the law while enforcing the law." Since a statement coerced from an accused is neither less trustworthy than one from a witness nor more offensive to society's sense of fairness, it would seem illogical invariably to require a Jackson hearing in the first case but never in the second.

LaFrance v. Bohlinger, 499 F.2d at 33 (citations omitted).

The defendant does not have to show that Halsey's statement was coerced with force or the threat of violence to acquire standing to suppress that evidence and its fruits. A defendant's statement and its fruits are inadmissible when the statement was coerced with a promise and "methods offensive when used against an accused do not magically become less so when used against a witness." Clanton v. Cooper, 129 F.3d 1147, 1157 (10th Cir. 1997)

This case vividly illustrates why the State should not be permitted to use involuntary witness statements and their fruits. The "State's inherent information-gathering advantages" provided the prosecutors with powerful tools to gather evidence that were not available to the defendant, including offering Halsey judicial use immunity in exchange for her *truthful* testimony. See Wardius v. Oregon, 412 U.S. 470, 476 n.9 (1973). That promise would not have tainted the evidence at all. People v. Douglas, 788 P.2d 640, 657 n.7 (Cal. 1990). There was no legitimate reason for a tag team of heavyweight prosecutors to corner Halsey after she repeatedly refused to *say* what they wanted to hear, accuse her of lying in front of her daughter and deliver the coup de grace by promising not to prosecute her if she recanted her sworn testimony.

> WHEREFORE, for the reasons stated above, the court should suppress Halsey's statement to the prosecutors and the audio tapes that she and her lawyer turned over or, alternatively, conduct a hearing to determine whether that evidence must be suppressed.

Respectfully submitted,

J. STEPHEN COOPER
3524 Fairmount Street
Dallas, Texas 75219
214-522-0670
FAX 214-522-0670
SBN 04780100

STEVEN LOSCH
906 Delia Drive
Longview, **Tx.** 75601

903-234-1373
SBN 00789805

Counsel for Defendant

CERTIFICATE OF SERVICE

A true and correct copy of this motion was served on Libby Lange, Assistant District Attorney, by fax, on this the 6th day of September, 2000.

STEPHEN COOPER