

RECENT DEVELOPMENTS IN CRIMINAL LAW

Investigatory Stop and Search

In *State v. Malveaux*, 03-276 (La. App. 3 Cir. 6/4/03), 852 So.2d 463, the Third Circuit overturned the defendant's conviction for possession of cocaine based on the Trial Court's erroneous refusal of defendant's motion to suppress.

The facts of the case showed that the defendant was walking in the middle of Martha Street on the north side of Lake Charles when he was approached by two officers in a police unit. When the officers got out of their unit and asked the defendant to step towards the patrol unit and give his name and address, he allegedly clutched something in his left hand, pointed towards a residence on Martha Street, and "took off running." The officers gave chase, tackled the defendant, cuffed him and patted him down for weapons. Because the defendant had reached into his pocket with his left hand, the officers reached into the left pocket and found particles of cocaine.

The Trial Court denied the motion to suppress, finding that the officers had sufficient probable cause to stop the defendant, and this his flight "enhanced" the probable cause. The pat down was appropriate not only for officer safety, but because the officers had probable cause to arrest, and the evidence would inevitably have been discovered. Defendant entered a *Crosby* plea to the possession charge, and the state dismissed the charge of simple obstruction of a public passage.

On appeal, the Second Circuit held that the evidence was insufficient to establish probable cause to arrest Defendant. The court, however, determined that Defendant's unprovoked flight gave rise to reasonable suspicion for an investigatory stop. Specifically, the court relied on *State v. Benjamin*, 97-3065, p.3 (La. 12/1/98), 722 So.2d 988, 989, in which the Louisiana Supreme Court held that given the highly suspicious nature of unprovoked flight from an officer, the amount of additional information required to constitute reasonable suspicion is diminished.

However, the court found that while the officers were justified in conducting a *Terry* pat-down of the Defendant to search for weapons or contraband, the intrusion into the Defendant's left pocket exceeded the scope permitted under *Terry*. Testimony reflected no indication that officers had detected a weapon or contraband on the Defendant's person. The court noted that the material retrieved from Defendant's pocket was in the form of fragments or particles, not "identifiable by touch."

Confession

The Second Circuit recently held that a defendant's equivocal actions were insufficient in invoking his right to silence and did not render his statements inadmissible.

In *State v. McKinnie*, 36,997 (La.App. 2 Cir. 6/25/03), 850 So.2d 959, the court upheld defendant's conviction of aggravated rape, finding that defendant's decision to stop talking with officer did not constitute an invocation of his right to silence.

Defendant was accused of the aggravated rape of a four-year-old girl. When confronted, the defendant denied the allegations. The child was examined by a physician and diagnosed as having been sexually assaulted by an adult. Defendant was arrested and charged with carnal knowledge of a juvenile, later upgraded to aggravated rape.

Defendant was advised of his *Miranda* rights twice; on July 14, he was orally advised of his rights and the following day, he was again instructed of his rights through use of a rights waiver form, which he signed, acknowledging his understanding of those rights. Defendant confessed to authorities on two separate occasions; the first, on July 15, the day following his arrest; the second on July 19. Defendant claims the former confession should be suppressed on the grounds that he invoked his right to silence at the end of the July 15 confession.

During the July 14 questioning, Defendant admitted to inappropriate touching and molesting the minor child. At this point, one of the investigators left the room to retrieve a tape recorder. However, Defendant ended the interview, deciding to not continue at that time, but indicating that he would talk later. On July 19, officers twice asked Defendant if he wished to make a statement, and both times he responded affirmatively. During this interview, Defendant again confessed. Investigators did not record this conversation but did make handwritten notes of the statements. Officers testified that the confessions were free and voluntary, and that at no time did Defendant request counsel.

On appeal, the Second Circuit cursorily dispensed with Defendant's first assignment of error, finding no merit to his assertion of insufficient evidence to support a conviction for aggravated rape. Before discussing the merits of defendant's second assignment of error, the court noted that Defendant was barred from raising his alleged invocation of silence as a ground for suppression of his confession on appeal, as he failed to raise this issue at trial. Nevertheless, the court did address the issue. Defendant asserted that his decision to stop the questioning on July 15 constituted an invocation of his right to silence. However, officers' testimony indicates that Defendant indicated willingness to speak with officers two times on July 19. The Second Circuit held "such equivocal actions" were enough to lead officers to believe that defendant had the intent to continue his statements and were "insufficient to qualify as an invocation of his right to silence." Additionally, the court noted that the four-day period between Defendant's advising of rights and his confession did not render the confession inadmissible.

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