

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,

Appellee,

v.

NATHAN SMITH,

Appellant.

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FOR PUBLICATION

Davidson County

Hon. Seth Norman, Judge

No. 01S01-9509-CR-00151

FILED

November 12, 1996

**Cecil W. Crowson
Appellate Court Clerk**

DISSENTING OPINION

WHITE, J.

I am unable to agree with the result reached by the majority in this case. While the analysis of the case under Miranda standards is certainly accurate, it does not follow that the method and manner of interrogation should be sanctioned by the highest court in the state. Our obligation goes beyond following well-established precedent; we must also assure that fundamental fairness is accomplished in our courts. In my opinion, the conclusion reached by the majority, despite its consistency with prior decisions, is fundamentally unfair. Additionally, the opinion encourages the state to use overreaching methods to secure confessions. I cannot agree with the result in this case or the consequences of such a decisions.

Under state law, the Department of Human Services is a part of an investigatory team created to reduce the trauma and enhance the effectiveness of child sexual abuse investigations. Tenn. Code Ann. § 37-1-607(a)(3)(1991 Supp.). The other team members include a representative from the district attorney's office, a juvenile court officer or investigator, and a law enforcement officer. The statute charges the team with the duty to "preserve[] any evidence for future criminal prosecution." Id. Clearly each member of the team functions as an agent of the state whose obligation it is to investigate allegations of child sexual abuse and gather evidence for prosecution.

The circumstances of this case support a finding that defendant's confession was not voluntarily given, but was prompted by implied promises and improper influence. When defendant's wife confronted him with the allegations made by his stepdaughter, defendant and his wife

voluntarily sought the help of Christian counselors. After those sessions, defendant and his wife decided to report the allegation to the Department of Human Services.

From the beginning, defendant expressed grave concern about losing his family. The DHS worker described his as "distraught" over the situation. Upon hearing that concern, the DHS worker advised defendant that "the best thing was to tell the truth and to get into counseling so in the end his family could be reunited." Further, the DHS officer "explained the alternatives; that if there is a problem, should admit it, and more than likely the D.A. will not prosecute if [defendant] gets treatment." Certainly she did not guarantee defendant that he would avoid prosecution by admitting the offense and seeking treatment. She could not immunize him from prosecution and she did not. She did, however, assure defendant that he would be prosecuted if he did not seek treatment.

As a result of their conversations, the counselor referred defendant to the Luton Mental Health Center. In continual cooperation with the counselor's suggestion, defendant went to the mental health center and met with a counselor. There he admitted that he had committed the unlawful sexual act. His admission to the counselor was made without the knowledge that state law abrogated the patient-counselor privilege for communication relates to child sexual abuse. Tenn. Code Ann. § 37-1-614 (1991 Supp.)

While the majority's conclusion that this statement was not a custodial

one is obviously correct, it does not follow that it is admissible. As the majority notes, the test for voluntariness under Article I, Section 9 of the Tennessee Constitution is more protective of individual rights than the test under the Fifth Amendment to the United States Constitution. In order to be admissible, the confession must be "the product of a free and deliberate choice Moreover, the waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." State v. Stephenson, 878 S.W.2d 530, 544-45 (Tenn. 1994). In the final analysis, the issue is whether the admission of the confession accomplishes "fundamental fairness" and "substantial justice." Van Zandt v. State, 402 S.W.2d 130, 135 (Tenn. 1966).

I conclude that the admission of defendant's confession under the circumstances of this case offends the notion of fundamental fairness and fails to accomplish substantial justice. Clearly, defendant trusted the DHS worker to advise him as to how he might preserve his family. He confronted her with that concern and she undertook to advise him. While she did not guarantee that counseling would forestall prosecution, she did assure him that if he did not seek counseling, he would be prosecuted. Based on her advice, defendant sought counseling¹ and, as it was suggested, admitted the problem. Unbeknownst to defendant, his communications to his counselor were not privileged, but were used to prosecute and convict

¹The majority finds that the six-week delay between defendant's conversation with the DHS worker and his counseling appointment "belies [the] contention that Walker compelled his statements to the counselor." I disagree. Nothing happened during this interim period to remove the very clear message from defendant's mind: go to counseling, admit the act, and you most likely will be reunited with your family. Defendant made the appointment indicating a desire to follow the DHS worker's instructions. Her advice had to that point been validated by the fact that he had not been arrested. Hence, it was sensible to continue to follow that advice at the counseling session.

him. Under these circumstances, the state has not met its burden, in my opinion, of showing that defendant's confession was the product of a voluntary, free will.

Penny J. White, Justice