Journal of Criminal Law and Criminology

Volume 35 | Issue 2 Article 8

1944

Questions and Answers

QUESTIONS AND ANSWERS

Rollin M. Perkins (Guest Editor)

Question 1: If an accused person confesses while in the custody of officers but before he has been taken before a committing magistrate, is this confession admissible in evidence?

Answer:

It might be excluded because of other circumstances not mentioned here, such as threats or promises; but the facts stated in the question would not render the confession inadmissible. This is true even in a federal prosecution, although there seems to have been some misunderstanding on this point since the decision in the case of *McNabb* v. *United States,* 318 U.S. 332, 63 S.Ct. 608 (1943). There need be no further doubt in this regard since the more recent case of *United States* v. *Mitchell,* 64 S.Ct. 896 (April 24, 1944).

Mitchell was arrested for housebreaking and larceny, and admitted his guilt almost as soon as he reached the police station. He told the officers of various articles of stolen property to be found in his home and consented to their going to his house to recover such property, which they did at once. He was then held in custody for eight days before being taken to a committing magistrate for arraignment. Upon trial before the United States District Court, he attempted to have this confession and the property found as a result thereof, excluded from evidence. The judge permitted all of this evidence to be introduced, however, and Mitchell was convicted. The United States Court of Appeals for the District of Columbia reversed this conviction on the theory that the admission of the confession, and of the stolen property secured from his home through his consent, was barred by the rule of the *McNabb* case. The Supreme Court of the United States held that this was a misunderstanding of the *McNabb* case, and that Mitchell was properly convicted.

The Supreme Court, reiterating the position it had taken in the *McNabb* case, refused to limit the issue to the "constitutional question of ascertaining when a confession comes from a free choice and when it is extorted by force, however subtly applied." It emphasized, however, significant differences between the two cases. In the *McNabb* case one of the defendants was subjected to unremitting questioning by half a dozen police officers for five or six hours and the other for two days. This was in flagrant disregard of the legally required procedure and the *McNabb* case stands for the rule that inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, will render the evidence thus obtained inadmissible in a federal case without an actual finding that the confession was "involuntary."

In the *Mitchell* case the confession was made while the accused was in custody and before he had been taken before a committing magistrate for arraignment. Moreover, the accused was illegally held in custody eight days before arraignment. The court emphasizes that this detention was illegal. But this illegality had no bearing upon the confession itself. Mitchell admitted his guilt to the officers within a very few moments after his arrest. He then told them of the stolen property in his house and consented to their going for it. The unlawful conduct of the officers in holding him in custody without taking him promptly before a committing

magistrate, occurred after his confession had been made and the stolen property had been recovered.

The facts of the two cases are so widely different that more decisions will be needed to indicate just where the line is to be drawn. But the *Mitchell* case makes the answer to this question perfectly clear. A confession is not inadmissible (even in a federal case) merely because it was made by an accused person while he was in custody and before he had been taken before a committing magistrate for arraignment.

Question 2: If a defendant is convicted in a state court, and claims that a confession was improperly admitted in evidence against him, is it possible for him to carry this point to the Supreme Court of the United States? If so, will the case be in all respects the same as if the prosecution had started in a federal court?

Answer:

The answer is yes and no: yes to the first part of the question and no to the second.

The admission of a coerced confession over the objection of the coerced defendant is a violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. Hence, if this is the defendant's claim there is a federal question involved which may be carried to the Supreme Court of the United States. In such a case, however, the sole authority of the Supreme Court is to ascertain whether basic safeguards of the Fourteenth Amendment have been violated. In the *Mitchell* case, referred to in the answer to the previous question, while holding that the court was not limited to this constitutional issue in passing on a federal conviction, the distinction was emphasized in these words: "Therefore, in cases coming from the state courts in matters of this sort, we are concerned solely with determining whether a confession is the result of torture, physical or psychological and not the offspring of reasoned choice. . . But under the duty of formulating rules of evidence for federal prosecutions we are not confined to" this constitutional question.

Shortly after the *Mitchell* case the court had occasion to pass upon a confession admitted in evidence against the defendant in a state prosecution. Ashcraft was arrested by Tennessee officers and by them held incommunicado for 36 hours. During that time relays of officers, experienced investigators, and lawyers questioned him without respite. From 7 o'clock Saturday evening until 6 o'clock Monday morning Ashcraft steadily denied that he had anything to do with the murder of his wife. He was then said to have confessed that he hired another to kill her. This alleged confession was admitted in evidence against him and he was convicted in the state court. This conviction was reversed by the Supreme Court of the United States, on the ground that this confession was *not voluntary* and hence there was a denial of "due process of law" in permitting this alleged confession to be admitted in evidence against him. *Ashcraft* v. *Tennessee,* 64 S.Ct. 921 (May 1 ,1944).

Question 3: A search warrant described the premises by street and number. When the officer arrived at this street and number he found it was an apartment house made up of twenty different apartments occupied by twenty different families. What should the officer do?

Answer:

He should return for a new warrant with a more accurate description.

It would be as unreasonable to search twenty different apartments under one roof, when only one was under suspicion, as to search twenty different houses each having its own roof. A description so general that it merely indicated the house to be searched as included within a group of twenty houses would be so obviously inadequate that no experienced officer would think of attempting to execute it. The description of the premises by street and number does not disclose any inadequacy on the face of the warrant. But as soon as it is discovered that the place so described is an apartment house, sheltering more than a single family or other unit, it is apparent that a mistake has been made.

It may be added, although this is not the peace officer's problem, that unless the magistrate was himself at fault, he will need additional sworn evidence before he can issue a proper warrant in this case.

Question 4: What is the situation of an officer who has legally seized certain property but has omitted to take some step required by law after such seizure?

Answer:

In many jurisdictions his position is practically the same as if the seizure had been illegal in the first place. The criminal law has frowned upon the notion of retroactive crime, but the law of torts has not hesitated to make use of the "relation back" device. Thus one who enters upon the land of another lawfully and while there commits a trespass, is said to be a *"trespasser ab initio."* That is, he is treated as if he had entered without lawful authority,—he is a trespasser from the beginning. In the same way, one who is authorized to deal with another's chattel in a certain way, and takes it lawfully for this purpose, becomes a *trespasser ab initio* if he makes an unlawful use of the thing after it is in his possession. A sheriff or other officer, for example, who seizes goods lawfully under a writ becomes subject to liability as a trespasser if he sells them otherwise than pursuant to a court order.

One of the leading cases applying this theory to the problem presented in the question, involved the carcass of a bull moose. A hunter lawfully killed the moose in the Province of New Brunswick and transported it to Bangor, Maine. This, however, was during the closed season in Maine and under the statute in that state the possession of such a carcass was unlawful during the closed season "whenever or wherever taken, caught or killed." A Maine game warden seized the carcass of the bull moose on October 15. Over two months later the hunter sued the game warden for the value of the carcass. The court held that the seizure was lawful when made, but that it was based upon an alleged crime and that the accused had a constitutional right to a speedy trial of that issue. During the period of nearly two and a half months between the seizure and the suit, the game warden had held the carcass without securing a warrant for the arrest of the hunter or taking any other steps to determine his guilt or innocence of the alleged offense. The game warden was justified at the time of the original seizure, but that justification ceased long before the civil suit was brought against him, and by his neglect he had become a *trespasser ab initio. Woods* v. *Perkins,* 119 Me. 257, 110 Atl. 633 (1920). The same result has been reached in cases under statutes authorizing the seizure of intoxicating liquor without a warrant under certain circumstances but requiring the officer to institute forfeiture proceedings. The failure of an officer to institute such proceedings within a reasonable time after the seizure has been held to make him a *trespasser ab initio.*

For this reason it is important for the officer to know what the law requires him to do with property he has seized, and to be sure no required step is omitted.

Question 5: Is it a crime for a person to steal food if taking that food is necessary to save himself from starvation?

Answer:

No, it is not a crime for him to take that food if the taking is really necessary to preserve his life. The law recognizes this excuse only where it is actually necessary for the taker to help himself to avoid starvation (or reasonably seems to him to be necessary) and does not extend it to cases where it is merely more convenient for him to resort to self-help than to obtain sustenance by other means. Under ordinary circumstances in the modern community it is not *necessary* to take another's food without his consent to avoid starvation because appeal may be made to the public authorities. But if a man should be lost in the mountains and should come upon a remote cabin whose owner was away, he might be so exhausted at the time as to present a case of real necessity. And if so, his taking of food without an opportunity to secure the consent of the absent owner would not be a crime. The necessity would excuse the deed. (It may be added, that although the word "steal" is broader than the word "larceny", it also involves the element of unlawfulness. Hence this word is not properly used in the question. If the taking is really necessary to avoid starvation it is not "stealing.")

Question 6: What is a principal?

Answer:

If one man employs another to represent him in a lawful transaction the first is a principal and the second is his agent. But if one person employs another to commit murder and the homicide is perpetrated according to this plan, the one who carries out the order is the principal while the "employer", if not present at the time, is an accessory before the fact.

If only one person is guilty of a certain crime he is always a principal. This is true whether he played a lone hand in the literal sense, or whether he made use of an innocent agent. If, for example, a doctor should prepare a poison to kill his patient, and should inform the nurse that it was a beneficial medicine and direct her to administer it to the patient at a certain time, the doctor would be a principal, and not an accessory before the fact, if homicide resulted from this plan, whether the doctor was present when the fatal dose was innocently administered by the nurse or not. And the lone murderer who destroys his enemy by an infernal machine set to go off at a certain time, is a "principal", no matter how far he may be from the fatal scene at the time of the explosion.

Whenever two or more are guilty of the same felony, only those who were present at the time of its commission are principals, according to the common law, although one who was actively aiding at the moment of perpetration may be held to have been constructively present, even if he was actually some distance away at the time. Thus a confederate who aided in a stage coach robbery by signaling its approach to the appointed spot by means of a fire on a distant mountain top, was held to be constructively present at the time and therefore a principal rather than an accessory. Similarly, if two should go the house of a third for the purpose of murdering him, and one should remain at the door, to watch for approachers and be

ready to give instant aid if needed, while the other should go in and strike the fatal blow, both would be principals even if the one on guard could not see or hear the actual killing. On the other hand, if two or more have planned a felony, and one of them is not actually present at the time, and not constructively present in the sense that he is giving actual aid to the scheme at the moment of its commission or is prepared to do so if needed, such a one is an accessory before the fact and not a principal,—according to the common law.

After what has been said it is hardly necessary to speak further of the accessory before the fact. He is one who has commanded or procured the principal to commit the felony, or has aided and abetted him in its perpetration, but was not present, either actually or constructively at the time. An accessory after the fact is one who gives assistance to the offender after the felony has been committed and with knowledge of the other's guilt. A typical illustration is the case of a man who conceals a felon in his house and misleads officers who are seeking him by giving false directions for the pursuit,—assuming, of course, that he had knowledge of the felony at the time.

Returning to the subject of principals, it may be pointed out that these are of two degrees. The principal in the first degree is he who either commits the prohibited act himself or procures it to be committed by the hand of an innocent agent. The principal in the second degree is one who aids and abets the perpetration of the crime and is present, actually or constructively at the time.

The distinction between the two kinds of principals seems to have been one of description only, the procedure and punishment being the same. But the common law made a very important difference in this respect between principals and accessories. One result of this difference was found in the rule that there could be no conviction of an accessory unless the principal had been convicted previously, or was convicted jointly with the accessory. In one case, for example, the accessory persuaded the principal to commit suicide before trial (upon a promise to make ample provision for his family) and this barred any prosecution against the accessory for this felony.

The difference between principals and accessories was not recognized in cases of treason or misdemeanor, but was limited to the felony cases. In most states the rule that an accessory cannot be convicted without the conviction of the principal has been removed by statute, and frequently the distinction between principals and accessories before the fact has been abolished entirely.