THE TRUTH (AND LAW) ABOUT PERMISSIBLE POLICE DECEPTION

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July 10th, 2020

Police officers are (or at least used to be) generally considered to be honest public servants who tell the truth when dealing with everyday people or lawyers and/or judges who work in the criminal justice system. When it comes to interactions with persons suspected of committing crimes, however, police don't always tell the truth, and the law affords them a certain degree of latitude to bend, stretch or even misrepresent it in their efforts to obtain evidence or an admission of guilt. (see generally People v Colbert 60 AD3d 1209 [3d dep't 2009]).

The key to judicial tolerance of strategic deception by police (e.g. falsely telling a defendant that he's been identified by an eyewitness, implicated by a co-defendant, connected to a crime by forensic evidence), is that it not be so fundamentally unfair as to deny due process or be based upon a threat or promise that is likely to induce a false confession. (People v Tarsia 50 NY2d 1 [1980]).

In Tarsia, a homicide case, the police invited the defendant (who was suspected of shooting his wife with a shotgun), to take a voice stress test (which purportedly measures vocal changes when a person is lying), and submit to an interview to discuss "the possibility of a shooting violation." After submitting to the test (the results of which are not admissible in court), the defendant broke down during the ensuing interview and admitted, both orally and in writing, to having killed his wife.

At trial, the defendant claimed he gave a false confession, having been misled about the purpose of the interview and his will overborne by the stress test. Specifically, he argued that he was falsely led to believe that somehow the test could prove that he was lying. The court rejected his argument, distinguishing other cases (e.g. People v Leonard 59 AD2d 211[2d dep't 1977] and People v Zimmer 68 Misc2d 1067[Wayne County Ct. 1972]) where the test administrators falsely claimed that the test was infallible and would be admissible in court.

Here, while the officer may have seriously understated the purpose of the interview, the court noted that such strategies (presumably not to scare off the interviewee), need not result in suppression if they do not abridge the suspects due process rights or create a risk of a false confession.
In People v Dishaw 30 AD3d 689 (3d dep't 2006), a trooper falsely informed the defendant (an after-hours cleaner suspected of stealing lottery tickets from her customer's business), that he had a video tape of her in the act of theft whereupon she admitted stealing lottery tickets over the course of a few months. The court held that this act of deception was not so unfair as to violate due process or create a likelihood of a false confession. (Presumably, an innocent person who knew she didn't steal would demand to see the proof which, in this case, didn't exist, even though the trooper held a dummy tape in hand to sell the lie).

In contrast see People v Keene 148 AD2d 977 (4th dep't 1989), a burglary case, where the police pulled the defendant over while he was in his car with his pregnant wife and young son, transported them to the station and first "sweated" the wife in an interview that he could see through a one-way mirror. She was then taken to the hospital due to labor pains. A CPS worker threatened to take the child and the officer told the defendant that if he confessed to the burglaries they were investigating, his wife would only be charged with a misdemeanor and given an appearance ticket.

In reversing the trial court's denial of suppression, the Appellate Division held, referencing CPL 60.45 that not only was the promise of leniency toward the wife (after grilling her and sending her to the hospital), likely to induce a false confession, but the threats to charge the wife with a felony and take away their child if he didn't fess up rendered the admission involuntary.

The court went on to note that it doesn't matter whether the police make good on their promises (which, here, they did), because the very fact of the promises and the circumstances under which they were made created a substantial risk of a false confession.

CPL 60.45 noted just above, sets forth the statutory standard for voluntariness as follows:

1.Evidence of a written or oral confession, admission or other statement made by a defendant with respect to his/her participation (or non-participation) in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.

Subdivision 2 states that a statement is involuntarily made by a defendant when it is obtained from him: (a) by any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical and mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or

(b) By a public servant engaged in law enforcement activity or by a person then acting under his/her direction or in cooperation with him/her: (i) BY MEANS OF ANY PROMISE OR STATEMENT OF FACT...WHICH CREATES A SUBSTANTIAL RISK THAT THE DEFENDANT MIGHT FALSELY INCRIMINATE HIMSELF; or (ii) in violation of such rights as the defendant may derive from the state or federal constitution.

When evaluating whether police tactics have violated a defendant's constitutional right of due process, the Court of Appeals in People v Thomas 22 NY3d 629 (2014) held that a coerced confession, elicited by threats, deception and/or false promises, is involuntary as a matter of law, regardless of its truth or falseness, because it effectively nullifies the defendant's ability to choose whether or not to make a statement, and turns our adversarial system of justice into an inquisitorial one. (In the Court's view, CPL 60.45(2) provides an additional basis to exclude statements as involuntary).

In Thomas, a shaken-baby death case, the interrogating officers used every heavy-handed tactic they could think of including threats, cajolery and flat-out falsehoods to extract a begrudging admission (including a coached, videotaped demonstration) from the defendant that he injured his four-month-old son in the exact manner (throwing child down onto a mattress from over his head) that they believed had occurred.

When the child was first brought to the hospital, limp and unresponsive, he was initially diagnosed as suffering from septic shock (with instructions to rule our intracranial injuries). A subsequent examination in the pediatric ICU led to a diagnosis of blunt force trauma.

A police detective and CPS worker went to the defendant's home, removed the other six children and took the defendant to the police station where he underwent two interviews (the first one lasting two hours, after which the defendant was taken to a psychiatric facility for a psychiatric evaluation after threatening to commit suicide). After several hours, the defendant was returned to the police station where he was interrogated for 15 more hours.

The detective told the defendant (who repeatedly denied hurting the child), that the child was slammed into something at a high-speed (based on information from the doctor), but he (the detective) believed that it was "an accident." He assured the defendant that he would not be arrested if he admitted what he had done.

During the initial interview when the defendant persisted in his denials, the detective warned that "if you don't take responsibility for this, we will scoop up your wife from the hospital (where she was staying with the injured child), since one of you must have done this.

Before the second interview began, the child died from his injuries. Nevertheless, the police told the defendant that they needed to know exactly how he injured his son so that the doctors would know how to properly evaluate and treat him and save his life. (They told him over twenty times that his son's life was in his hands).

Eventually the defendant relented and admitted to dropping the baby from a low height but he was flatly told to stop beating around the bush and minimizing his conduct. With further pressure he said it happened more times and he agreed to take the fall for his wife. The detective then egged the defendant through a video re-telling of what happened (clearly trying to get him to conjure up the anger and frustration he must have felt living in a small household with six screaming kids and a brow-beating wife). The defendant did as he was told and eventually was charged with murder.

In reversing the Appellate Division's affirmance of the trial court's denial of suppression, the Court of Appeals found that the police had engaged in a pattern of highly coercive deceptions that completely upended the defendant's ability to make a free and voluntary choice whether to incriminate himself or stay silent. The Court also rejected the Appellate Division's analysis (that telling him the child was still alive would encourage a truthful rather than false statement from a concerned parent) because the overriding concern was with the underhanded and coercive police tactics which the Court found offended due process and our system of justice.

The Court said that it was plain that the police had allayed the defendant's fears by repeatedly (67 times) representing that it was an accident (and that he would not be arrested), leading him to believe that he would be protecting his wife (by taking the fall), and saving his son by confirming and literally acting out their theory of how the child was injured.

While pressuring a suspect with threats or promises directed at a suspect's family or other loved ones (e.g. "we won't arrest your girlfriend if you admit you did it"; see, for example People v Keene supra), can sometimes overbear a suspect's will so as to render a subsequent statement involuntary, as long as the police don't engage in tactics that create a substantial risk of false incrimination, the police are permitted to capitalize on a suspect's "sense of shame or reluctance to involve his loved ones in a pending investigation."(see, for example, People v Mateo 2 NY3d 383 [2004], People v Balkum 71 AD3d 1594[4th sep't 2010], People v Lewis 2012 NY Slip Op. 02184 [4th dep't 3/23/12]).

In Lewis, the court held that the rights of the defendant (convicted of attempted murder during a home invasion and murder of a man for talking to his girlfriend), were not violated when the police used a video as a prop during their interview of him and focused on the potential culpability of his girlfriend (as a way to get him to confess).

In assessing what kinds of tactics, stratagems or falsehoods are sufficient to violate due process, counsel should focus, as the courts do, on the totality of the circumstances (including the defendant's age, intelligence, mental condition, the location and duration of the interview, whether the defendant's freedom of movement was restricted, the nature and tone of the interrogation [i.e. investigatory or accusatory], whether the defendant was cooperative or resistant, whether the defendant was deprived of sleep, food or beverage), and determine whether the representations made or tactics employed were such as to leave the defendant with no choice but to tell the police what they wanted to hear.

The first step is to determine whether the defendant was "in custody" which is measured not by the defendant's (or officer's) subjective belief but by whether an innocent person in the defendant's place would have felt that he was not free to leave. (People v Yukl 25 NY2d 585, People v Figueroa 156 AD3d 1348 [4th dep't 2017]). While a police station generally qualifies as a restrictive environment, that fact alone does not necessarily render a statement custodial (especially where the defendant is told he can leave whenever he wants and/or is allowed to go home when the interview is over. (See People v Drennan 81 AD3d 1279 [4th dep't 2011], People v Vargas 109 AD3d 115 [4th dep't 2013]).

Other considerations include whether the defined was confined to a locked or unlocked room (People v Cade 110 AD3d 1155 [2014]), the duration of the interrogation (though even a several hour interview, in itself, may not render a statement involuntary; see People v McWilliams 48 AD3d 1266 [4th dep't 2005], People v Weeks 15 AD3d 845 [4th dep't 2005], whether the police were confrontational and/or accusatory during the interview). But that fact alone won't necessarily create a custodial environment. (see People v Brown 153 AD3d 1664 [4th dept 2017], People v Morris 173 AD3d 1797 [4th dep't 2019]).

In Brown, the defendant/suspect in the murder/robbery of his friend's roommate, was deemed not to be in custody after the police took him to the station (upon his agreement to go with them), to discuss a "missing person," and was interviewed for almost three hours before confessing.

The courts will also take into account the defendant's age and whether he/she is a novice or veteran in terms of contact with law enforcement and the justice system (and if the former, more susceptible to police pressure or misdirection). (see, for example, People v KN 2018 NY Slip Op. 28363 [Crim Ct City of NY 11/14/18]: 17-year-old suspect was not informed of the purpose and significance of DNA evidence, nor allowed to speak to his mother, who was at the station, before "consenting" to a buccal swab). (See also People v Thomas supra where the defendant had no prior involvement with police).

Of course, if a defendant is subject to questioning (or statements by the police that are intended or reasonably likely to elicit an incriminating response, (People v Ferro 63 NY2d 316 [1984]), and he/she is deemed to be in custody, then the police must precede any questioning with Miranda warnings (which the defendant must waive knowingly and voluntarily. (People v Berg 92 NY2d 701 [1999]). The giving of the warnings, even when unnecessary, is also a factor that the court may consider in assessing the voluntariness of a confession or consent to the taking of non-testimonial evidence.

In People v Paulman 5 NY3d 122 (2005), the defendant, suspected of sexually abusing several young children, spoke to police at his home (where he gave an inculpatory statement), and then agreed to go to the police station, where, without yet being Mirandized, was told by an officer to "write down what you remember," on a pad that the officer provided. Thereafter, a detective read the defendant his rights after which he made oral admissions followed by two written statements.

The Court of Appeals held that the statements made at the defendant's home were non-custodial but that the invitation at the station to write down what he remembered was tantamount to custodial interrogation without Miranda warnings. The Court further held, however, that the subsequent Mirandized statements were not part of a single, continuous chain of events and there was a sufficient break (with pizza and beverage), and change in police personnel to undo any taint from the un-Mirandized direction to write down his recollections. The Court also noted that the defendant was cooperative from start to finish. (see generally People v Chapple 38 NY2d 112 [1975]).

At a hearing on motion to suppress statements as involuntary, the People bear the ultimate burden of proving voluntariness beyond a reasonable doubt. With physical evidence (whether personal property or non-testimonial evidence like a buccal swab or hand swabbing for DNA testing and analysis), the People also have the burden to show, based on the totality of the circumstances, that consent was truly voluntary (i.e. an act of free will) and not the product of any express or implied coercion by law enforcement. (Schneckloth v Bustamonte 412 US 218 [1973]).

As noted in People v Fioletti 2017 NY Slip Op. 0833 (4th dep't 4/17/17), " a consent to search is not voluntary unless it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle. The Supreme Court in Bumper v North Carolina 39 US 543 (1968) added that there should not even be a "scintilla of coercion".

The same factors that apply in analyzing the voluntariness of a confession pertain to consent to search for and/or seize evidence, except that there is no requirement (unlike for Miranda warnings when there is custodial interrogation), that the police specifically inform the defendant that he has the right to refuse consent. (See People v Gonzalez 122 [1976], People v Mule 46 AD2d 414 [1975]). The failure to do so, however, as noted above, is a factor that a court can consider in determining whether consent was given freely or as the result of coercive tactics such as those employed in People v Thomas supra.

In People v Gonzalez supra, the Court held that consent to search an apartment of a newlywed couple in their early twenties and negligible prior contact with police (other than the husband's recent sale of drugs to an undercover officer), was far from voluntary when numerous officers and agents, following a scuffle with the husband in the hallway, broke down the door, kicked out the wife's mother and grandparents, separated the two defendants and extracted separate written consents to search the bedroom. The court described the scene as a "highly coercive atmosphere".

Coercion, as noted above, need not only consist of physical force, threats or intimidation but can consist of any conduct, including subtle mind games and misrepresentations that adversely affect the defendant's ability to make a choice whether or not to submit to a search.

Though the standard of proof in the context of consent searches is not beyond a reasonable doubt (as is the case with statements), courts have nevertheless described the People's burden as a "heavy" or "high" one inasmuch as it involves the waiver of a constitutional right (e.g. Fourth Amendment right to be free from unlawful search and seizure) in situations where legal authority (i.e. probable cause) might otherwise be lacking. (See People v Kuhn 33 NY2d 203 [1973], People v Kendrick 147 AD3d 1419 [4th dep't 2017]). In People v Zimmerman 101 AD 294 (2d dep't 1984), the court described it as requiring "clear and positive evidence."

Whether accomplished by physical force, verbal threat and/or trickery, coercion is the antithesis of the exercise of free will, and counsel should make every effort to take the officers to task at suppression hearings to expose their occasional underhanded tactics. And if unsuccessful in suppressing the evidence, counsel should consider exposing the witness's on cross examination at trial. Perhaps something like:

Q.Detective, as a law enforcement officer, one of your main duties is to investigate crimes and obtain sufficient evidence to support an arrest of the perpetrator and, ultimately, a conviction at trial, true?

A, Yes.

Q. And, in order to obtain evidence, you often interview witnesses?

A.Yes.

Q. You follow up on leads that may come to your attention?

A.Yes.

Q. You also may collect physical evidence that is relevant to your investigation?

A.Yes.

Q.Sometimes, the perpetrator is known to the victim?

A.Yes.

Q.In those cases, if the perpetrator is not on the scene, you try to track him or her down to arrest him if you have probable cause, or perhaps, at least, to interview him to see whether he admits or denies it?

A.Yes.

Q. Sometimes, the perpetrator may be unknown, and in those cases, your job is to find the perpetrator and have him or identified by the victim or eyewitness, correct?

A.Yes.

Q.And until they're actually identified by a witness or connected to the crime by other evidence, the person whom you believe committed the crime based on what you've learned so far, would be a suspect, correct?

A.Could be, yes.

Q.And if you really "like" a particular suspect, to use police lingo, for a crime, you want to either confirm or rule out that person as the perpetrator, true?

A. Sure.

Q.And you would agree that interviews with suspects can be very valuable to the investigation right?

A. Yes.

Q.Sometimes, they admit the crime?

A.Sometimes.

Q.Sometimes they deny it?

A. Yes.

Q. And even when they deny it, you have at least locked them into a version of what happened that can be used against them if they say something different at trial or the statement is contradicted by other evidence, true?

A. That can happen, yes.

Q. Officer, do you consider yourself to be an honest person?

A.Why yes I do.

Q. A truthful person?

A.Of course.

Q. Now, when you interviewed my client at police headquarters, in your mind, he was a suspect for this murder, true?

A.Yes he was.

Q. And you wanted to talk to him with the goal, I presume, of confirming your suspicions?

A.I wanted to get his side of the story.

Q.I understand that, but in getting his side of it, were you not hoping that he would say something that would give you sufficient evidence to elevate your suspicion to probable cause to arrest him?

A.I didn't know what he would say.

Q.That's not what I'm asking. You were hoping that he might confirm your suspicion?

A.I don't know that I'd say that.

Q.Well, you told my client five hours into the interrogation, that a neighbor heard a gunshot and then saw him running out of the victim's home with a gun in his hand, didn't you?

A. Yes I did.

Q. Up to that point, you had canvassed the neighborhood, spoken to several neighbors to see if anyone had seen or heard anything or anyone, isn't that right?

A.Yes.

Q.Fair to say that not one person had told you anything like that, much less that they had seen my client running from the scene with a gun in his hand?

A.I had no such information.

Q.In fact, to this day, you are not aware of anyone who saw or heard what you told my client?

A.Correct.

Q.Cutting to the chase, detective, you flat-out lied to my client when you told him there was an eyewitness who saw him running from the scene.

A. I would call it strategic deception which is a permissible investigative tool to get the witness to rethink his repeated denials.

Q.So you lied to him in the hopes you could get him to admit what you believed to be true?

A. And eventually he did admit it.

Q. So, in your mind, the ends, meaning an admission, justified the means, which was lying?

A.You could say that.

Q. So you lied then with the objective of getting my client to say that he committed this murder so that you would have what you believed was enough evidence to arrest him?

A. I was hoping that he would fess up and with that, I would place him under arrest.

Q.Yet when you started the interview, you told him that you just had a few things you wanted to clear up and that when you were done, he could go back home if he cooperated, did you not?

A. I did say that but that was before he admitted his involvement.

Q.Well that's exactly what you were hoping he would do from the start, isn't that right?

A. You could say that, yes.

Q.I didn't imagine this was the first time you have lied to someone in the course of an investigation?

A. I only do it when I feel it's necessary.

Q. Such as in a high profile murder case, where there's a lot of pressure to make an arrest and you don't have enough evidence to charge anyone?

A. I didn't make this up. He admitted it.

Q. But only after you made up a false story about a non-existent eyewitness?

A.Sometimes, you do what you have to do achieve justice?

A.Justice? I don't imagine that you would lie to a jury in court of law to achieve what you believe to be justice, would you?"

Whether or not the jury is sufficiently offended by such methods to acquit the defendant may well depend on the quality of the other evidence in the case and whether the defendant comes across in the interview (or on the stand if he testifies),as a hardened, double-talking criminal or as an average (preferably vulnerable) Joe or Jane who was taken advantage of and skillfully led down the primrose path to prison by overbearing and/or manipulative members of law enforcement.

While deception and trickery by police can sometimes be an effective investigative tool (especially with seasoned criminals who may have no compunction against lying themselves), when it reaches the point where the defendant's confession or consent is nothing more than a capitulation to coercive measures rather than a true act of choice, well-crafted motions to suppress and vigorous cross examination are essential to keeping officers honest and clients out of jail.