

As many of you know in August, 2004 the Massachusetts Supreme Court, in the case of *Commonwealth v. DiGiambattista*, issued a decision that discussed the issue of electronic recording or taping of interrogations, and the use of trickery and deceit during an interrogation.

Oftentimes what a court says about these issues gets distorted and misinterpreted so we wanted to be sure to give you exactly what the court said and some of our observations on these issues.

Electronically Recording Interrogations

In this case the voluntariness of the defendant's confession was examined. There was no electronic recording of the interrogation. The Court felt that in the absence of a recording it was difficult for them to determine the voluntariness of the confession based on the conflicting statements from the defendant and the police officers. They reached the following conclusion:

"... when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt."

Clearly the court is suggesting that without an electronic recording of the interrogation the confession may (perhaps even should) be found to be involuntary and inadmissible.

Every department should meet with their local prosecuting attorney and determine the best strategy to deal with this situation.

If the decision is made to record the interrogation, once the suspect's consent is obtained (Massachusetts is listed as a two party consent state) the recording device should be placed out of the immediate view of the suspect. Research has suggested that the suspect is more likely to be truthful and candid when they don't know they are being recorded or when the recording device is "out of sight."

Trickery and Deceit

In this case the court found that the defendant's confession should have been ruled as inadmissible because the prosecution failed to establish that it was voluntarily given. In this case the court examined the police officers' use of trickery and deceit (using such props as a case evidence folder and two videotapes – 1 of which was blank.) and the use of what the court called "minimization" – downplaying the seriousness of the crime. The court also examined alleged references from the interrogators **"that "counseling" would be an appropriate avenue for him to pursue after making a confession, and that the interrogating officer would endorse such an approach."**

To properly frame this issue it is important to carefully read exactly what the court has said in their discussion of confession voluntariness. Consequently, we will provide you with some quotes from the Court's decision.

"We have, however, repeatedly held that while the use of false statements during interrogation is a relevant factor on both waiver and voluntariness, such trickery does not necessarily compel suppression of the statement.... Rather, the interrogator's use of trickery is to be considered as part of the totality of the circumstances, the test that is used to determine the validity of a waiver and the voluntariness of any statement."

"Close analysis of our case law on the subject of trickery suggests that where the use of a false statement is the *only* factor pointing in the direction of involuntariness, it will not ordinarily result in suppression, but that if the circumstances contain additional indicia suggesting involuntariness, suppression will be required."

"We have recognized that false statements concerning ostensibly irrefutable evidence against a suspect are particularly troublesome when combined with suggestions of leniency in exchange for a confession."

[re the reference to counseling] ... **"we must consider whether the interrogators communicated to DiGiambattista, expressly or implicitly, the impression that a confession would result in a lenient disposition."**

"We do not suggest that an officer's use of the standard interrogation tactic of "minimization," by itself, compels the conclusion that a confession is involuntary."

When such trickery is then combined with multifaceted and repeated "minimization," and then further combined with overt references to "counseling," that "instant doubt" as to voluntariness is worsened, not dispelled."

As the Court has stated, misrepresenting evidence "does not necessarily compel suppression of the statement." Also, the court said that "We do not suggest that an officer's use of the standard interrogation tactic of "minimization," by itself, compels the conclusion that a confession is involuntary." However, what seemed to disturb the Court the most was the apparent reference to counseling which they felt "implicitly suggested

to him that "counseling" would be an appropriate avenue for him to pursue after making a confession." In other words, if he confessed he would get counseling instead of jail.

There may also have been other factors that influenced the Court's thinking on this issue. They specifically point out that "At the hearing on the motion to suppress and at trial, DiGiambattista testified that other pressures were brought to bear to obtain his confession, namely, that the troopers threatened to arrest both him and Miscioscia, warned that a high bail would keep him in custody over the weekend (with an even higher bail likely to be imposed at arraignment on Monday), and predicted that State officials would take their children away. He also testified that the officers told him that, if he confessed, the case could be resolved with his participation in counseling. He also claimed that he asked for an attorney, but was told that the involvement of any attorney would be the end of the "deal."

We teach at our seminars and in our books that the interrogator should not suggest a more lenient outcome or punishment if the suspect confesses. Furthermore, any threat to a suspect that their children will be taken away or that they will be thrown in jail for the weekend will certainly nullify a confession, as well as ignoring a suspect's request to see an attorney in a custodial situation.

In summary, it appears as though the misrepresentation of the strength of the evidence and the minimization of the moral seriousness of the crime in and of themselves would not have jeopardized the confession, but when combined with the "implied promise" of a more lenient outcome (counseling) there was created an "instant doubt" about the voluntary nature of the confession.

Consequently,

- Do not discuss counseling during an interrogation as a possible outcome
- Do not threaten to take a person's children away
- Do not threaten to throw the suspect in jail
- Do not try to talk a suspect out of his request to see an attorney in a custodial situation
- Remind the suspect that "I am not a judge or a jury. I can't promise you what will happen. I would be a liar if I did that."

* The complete case can be found on our web page at www.reid.com – click on the What's New link and scroll down to the 1/25/05 entry.