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POLICE OFFICER'S HANDBOOK

THE CRIMINAL LAW
PART VI

DELAYED CONFESSION

AFFIDAVIT BASED
ON RELIABLE HEARSAY

FLEMING'S NOTEBOOK...Chapter 106

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LAW ENFORCEMENT - ETV TRAINING PROGRAM

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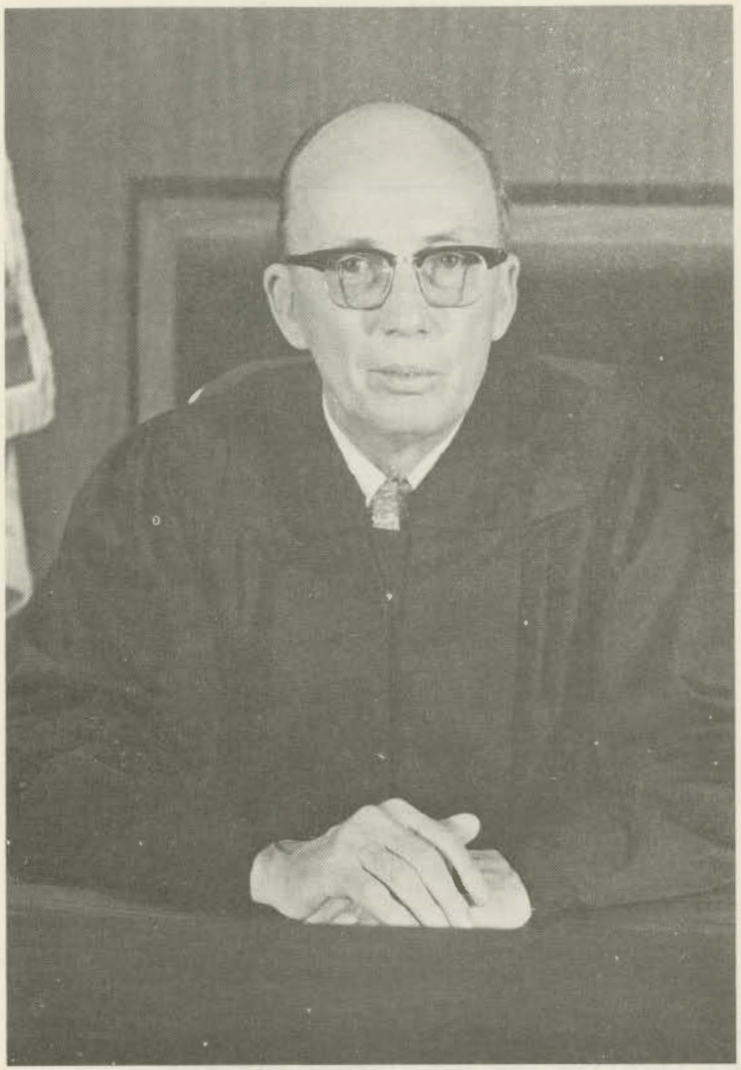

Hon. W.T. McGowan, Jr.
Senior Civil - Criminal Judge
Florence County, S.C.

"Trials are necessarily surrounded with evidentiary rules developed to safeguard men from dubious and unjust convictions... but, before trial, we deal with probabilities only...and these are not technical, but are the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act.

W.T. McGowan, Jr.
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DELAYED STATEMENT MADE AFTER REFUSAL

One of the questions relative to statements made by an accused that has been raised since the Miranda decision involves situations in which an accused first refuses to talk to police officers, but later changes his mind and talks. In what circumstances are such 'delayed' statements admissable, and when are they inadmissable?

In a recent case decided by the Fourth Circuit Court of Appeals in Richmond, the Court that hears appeals from Federal Courts in South Carolina, a defendant was arrested for bank robbery. At 4:30PM, shortly after his arrest, the defendant refused to talk with officers, saying, "I'd better talk to a lawyer". At 8:00PM on the same day, the defendant was being 'printed' by the arresting officers when the following conversation took place:

OFFICER: "If, in fact, you have nothing to do with any of this, you have nothing to fear from us. In other words, you have nothing to lose. On the other hand, if you are involved, then it will come around you."

ACCUSED: (SILENCE)

OFFICER: "You know English (co-defendant) has tied you into it."

ACCUSED: "I won't sign nothin', but I'll tell you about it."

The accused then made a full confession that was used at trial against him. He was convicted and appealed, claiming that the confession was unlawfully obtained, although full Miranda warnings were given. The Court, holding the confession inadmissable, gave a detailed explanation of why it did so:

"During the initial interview by FBI agents (4:30PM) following his arrest, Clark (accused) indicated his desire to speak with an attorney prior to answering any questions.

" 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present'. Miranda v. Arizona, 16 Led 2d 694.

"The Government recognizes this principle, but insists that Clark, at the subsequent interview, waived his right to counsel and voluntarily confessed to the offense charged.

"We recognize the possibility that, under given circumstances, an accused may later waive a right which he previously asserted. Dillon v. US, 351 F 2d 433. However, evidence that an accused has previously asserted his right to confer with counsel is a factor which

weighs heavily against a finding that a subsequent, uncounseled confession is voluntary. US v. Slaughter, 366 F 2d 833.

"Additionally, we note that agent Kenny (FBI) stated unequivocally that he initiated the interview during which Clark allegedly waived his right to speak with an attorney, and confessed. This initiation of the subsequent interview at which the confession was elicited is a factor which, under these circumstances, is a strong indication of involuntariness.

"There is nothing in the record to suggest that (FBI) agent Kenny's decision to conduct a second interrogation of Clark was prompted by any manifestation on the part of Clark that he had changed his mind and desired to be interrogated without the assistance of counsel; 'Once the privilege has been asserted,

...an interrogator must not be permitted to seek its retraction, total or otherwise.' US v. Crisp, 435 F 2d 354.

"Less than four hours had elasped between the time Clark stated that he wanted to talk with an attorney...and the time he confessed; obviously this was an insufficient time for Clark...to retain counsel. At the very least, the agents should have afforded Clark sufficient time to employ and consult with counsel before they initiated any subsequent interview."

CONCLUSION

The Clark Rule (US v. Clark, 499 F 2d 802) might be stated as follows:

1. Once an accused has refused to talk, making known his wishes to consult an attorney, interrogating officers may not initiate further

discussion with him until after he has seen an attorney.

2. Even though an accused has refused to talk, and has stated that he wishes to consult an attorney, his statement may be taken, after Miranda warnings, if the accused's change of mind is entirely his own idea...not suggested by police officers.

3. After an accused has consulted with an attorney, his statement may be taken, after Miranda warnings, even though the officers suggest further talks and the attorney is not present.

INFORMER AFFIDAVITS

RELIABLE HEARSAY RELATED BY INFORMER

It has long been established that a police officer may obtain a search warrant based upon information given to him by a reliable informer. But, may a search warrant be issued when the information given by the informer is not first-hand, but has been told to the informer by someone else? The Fourth Circuit Court of Appeals has given a qualified approval of such procedure. (US v. Neal, 500 F 2d 305) The Court said in Neal:

HEARSAY INFORMATION

"It is now well settled that the facts and circumstances upon which a magistrate may find probable cause for the issuance of a search warrant may be based on reliable hearsay information of criminal activity

furnished by an unidentified informer. It has also been held that a reviewing court should give substantial consideration to the determination of probable cause by a 'neutral and detached magistrate'."

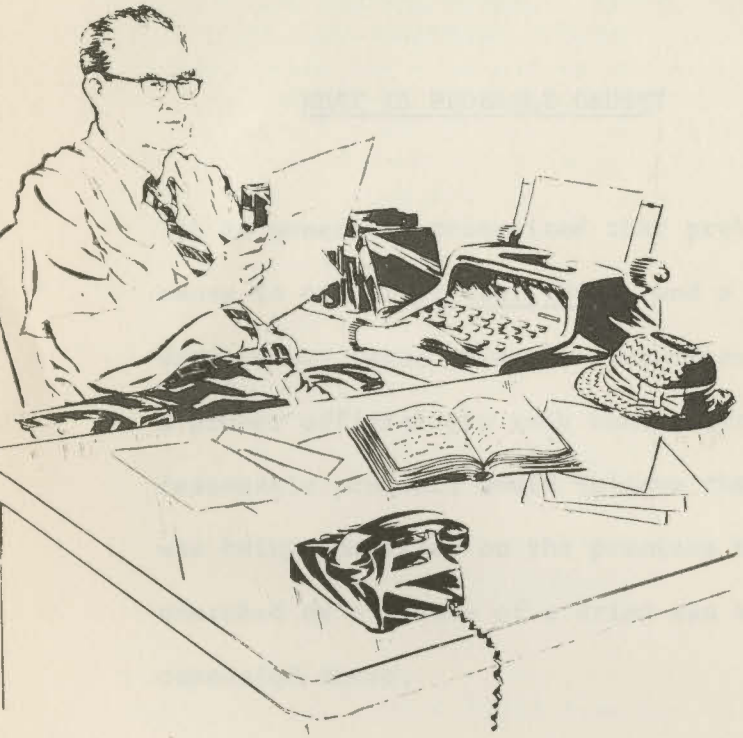
WHAT IS PROBABLE CAUSE?

"It is generally recognized that probable cause is one of probabilities, and a valid warrant may issue when the circumstances before a proper official are such that a person of reasonable prudence would believe that a crime was being committed on the premises to be searched or evidence of a crime was being concealed there.

"Trials are necessarily surrounded with evidentiary rules 'developed to safeguard men from dubious and unjust convictions'...but before trial we deal only with probabilities

that 'are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 106

CONSENT TO SEARCH GIVEN BY CO-TENANT

Police investigating an armed robbery went to an appartment and asked permission to search... Permission was given by a co-tenant, search without a warrant was made, and crime weapon was found. Search was lawful because permission was obtained from the co-tenant. US v. Jenkins, 496 F 2d 57.

FALSE INFORMATION GIVEN BY INFORMER

Information given to a police officer by a 'reliable informer', upon which a search warrant was issued and criminal evidence found, was later proven to have been a lie...the defendant asked the court to suppress the evidence on the ground that the informer was not truly 'reliable'.

A Federal Court ruled that the officer could rely upon what an informer told him when the informer had previously been reliable...the evidence was admitted even though the information actually given was false. US v. Garofalo, 496 F 2d 510.

STATEMENT MADE

AFTER INITIAL REFUSAL

A defendant was arrested, but refused to talk, saying he wished to see his attorney...Later, the defendant made incriminating statements before he saw the lawyer...statements were not the result of police questioning...for that reason, they were admissable. US v. Menichino, 497 F 2d 935.

'RETURN' ON SEARCH

WARRANT NOT MADE

At trial, defense attorneys made the point that officers had not made an inventory 'return' to the magistrate after execution of a search warrant... arguing that such failure invalidated the search. The Federal Court held that such things, although required by law, do not make a search unlawful nor render the evidence inadmissable. US v. Neal, 500 F 2d 305.

PROBABLE CAUSE NOT

EXISTING AT TIME

'Probable cause' to issue a search warrant must exist at the time the warrant is issued...the fact that there was probable cause three months ago does not justify issuance of a search warrant today. US v. Neal, 500 F 2d 305.

MAGISTRATES AND RECORDERS MAY NOT REDUCE DUI CHARGES

On October 30, 1974, the South Carolina Supreme Court ruled plainly for the first time that a magistrate or municipal judge may not reduce a DUI charge to a lesser offense, such as reckless driving.

This does not mean that the arresting officer may not nol pros a DUI charge and issue another uniform traffic ticket preferring another charge. It does mean, however, that the trial judge does not have the authority to 'reduce' a DUI charge to another offense. If a DUI charge is to be dismissed and another charge substituted, the arresting officer must nol pros the DUI ticket and issue another ticket setting forth the new charge.

STATE V. FENNELL

(SC - FILED 10-30-74)

"On May 13, 1973 the respondent, Fannie Dubose Fennell, was charged by the State Highway Patrol with driving a motor vehicle while under the influence of intoxicating liquor. She was served with a copy of a uniform traffic ticket requiring her to appear before Magistrate R.E. Wingard of Ninety Six, Greenwood County, South Carolina. She was tried before the magistrate and a jury on July 10, 1973, but the jury being unable to agree, a mistrial was ordered. The magistrate, thereafter, on the same day accepted from the respondent a plea of guilty of reckless driving, in lieu of proceeding further with respect to the offense with which she was charged. No warrant, uniform traffic ticket or other process had been issued charging the respondent with the offense of reckless driving.

Still later on the same day, July 10, 1973,

the magistrate wrote the respondent a letter informing her that he had been in error in accepting a guilty plea to reckless driving and further informing her that the charge of driving under the influence of intoxicants would be set for retrial. The respondent appealed from such action by the magistrate and the circuit court issued its order under date of January 12, 1974, holding that the magistrate was empowered to accept a guilty plea to the charge of reckless driving and that the State could not further prosecute the offense of driving under the influence of intoxicants. From such order the State appeals.

Code section 46-343 makes it unlawful for "any person who is under the influence of intoxicating liquors *** to drive any vehicle within this State." Code section 46-342 provides that "Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving."

The essential question raised by the appeal is whether or not the lesser offense of "reckless driving" is included within the greater offense of driving under the influence of intoxicating liquors, the only offense with which respondent was properly charged. The general rule is that an indictment will sustain a conviction for a lesser offense included within a greater offense charged. See cases collected in West's South Carolina Digest, Indictment and Information, Key No. 189. This rule is elaborated upon in 42 C.J.S., Indictments and Informations, section 286, where it is said,

> "However, a conviction may be had of an offense different from the one specifically charged only when such offense is an essential element of that charged or when it is included in the offense charged, and only when the greater offense charged includes all the legal and factual elements of the lesser offense. (Emphasis supplied.)"

The rule is also elaborated upon in 41 Am.Jur.(2d), 1074, Indictment and Information, section 313. We quote therefrom as follows:

> "The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, and that the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, in order to sustain a conviction of the latter offense. If the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser, but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater."

Numerous authorities have held that the statutory offense of reckless driving is not a lesser offense included within the statutory offense of driving under the influence, but that the two are separate and distinct offenses, each involving necessary elements of proof not included in the other.

Section 46-871, 1973 Cum.Supp. to the Code, provides for the issuance of uniform traffic tickets and the vesting of traffic courts with jurisdiction to hear and dispose of charges for which such tickets are issued.

Code section 43-111 provides:

> "All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue."

The issuance of either a uniform traffic ticket or a warrant charging a respondent with the offense of reckless driving was necessary to give the magistrate jurisdiction to dispose of that particular offense. State v. Praser, 173 S.C. 284, 175 S.E. 551 (1934); Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E. (2d) 924 (1940); State v. Langford, 223 S.C. 20, 73 S.E. (2d) 854 (1953). An accused cannot waive compliance with statutory requirements essential to the magistrate's acquiring jurisdiction of the particular offense. Town of Honea Path v. Wright, supra.

Since reckless driving is not a lesser offense included within the offense of driving under the influence of intoxicants and respondent was not properly charged with the offense of reckless driving, it follows that the magistrate was without jurisdiction to accept a plea of guilty to the offense of reckless driving and thereby dispose of the case. It follows that the circuit court was in

error and the judgment thereof is reversed. The cause is remanded to the lower court for the purpose of remanding the same to the magistrate's court."

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