

all but “two acres of its remaining reservation land for \$5,000.”² Quickly regretting its decision, the tribe commenced what would be a 130-year struggle in the federal courts to regain title to its former holdings.

Into the 1970s, the tribe was still litigating its claim that Rhode Island had “misappropriated” the tribe’s land in violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177.³ The litigation was finally resolved by the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*, which codified an agreement between the state and the tribe whereby the tribe would receive an 1800-acre parcel in Charlestown, Rhode Island.⁴

Despite years of litigation, negotiations with the state, and the enactment of federal statutes to specifically address their claim, however, the Narragansetts had yet to be officially recognized as a tribe by the United States. In a move that would prove critical to the litigation,

that recognition did not come until 1983, when the Bureau of Indian Affairs granted the tribe recognized status under federal law.⁵

In 1991, the Narragansett Tribal Housing Authority purchased 31 additional acres in Charlestown, Rhode Island, adjacent to its 1800-acre settlement parcel.⁶ While the tribe skirmished with the State of Rhode Island over whether or not it was required to comply with local land use regulations, it attempted to “free itself from compliance with local regulations” by requesting that the Bureau of Indian Affairs hold its newly purchased 31 acres in trust pursuant to 25 U.S.C. § 465.⁷

The Bureau accepted the parcel into trust, and shortly thereafter, the State of Rhode Island and the Town of Charlestown sought administrative review, arguing that the plain language of § 479 prohibited

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Criminal Confessions and Police Tactics:

TN Supreme Court Tosses Murder Conviction under *Miranda*

by Aaron Chastain

In a unanimous decision in January, the Tennessee Supreme Court suppressed two confessions made by a convicted murderer: a first, non-*Mirandized* confession given when the suspect was not yet formally under arrest, and a second, *Mirandized* confession obtained by police immediately upon his subsequent arrest. The case, *State v. Dailey*,¹ received significant public attention in Tennessee as it resulted in the release of a confessed killer.² Some argued that the court went too far by releasing Dailey on a legal technicality, while others defended the decision as necessary to protecting the constitutional rights of the citizenry at large. Regardless of one’s view of the decision, *State v. Dailey* may have important ramifications in Tennessee, and perhaps beyond, for police interrogation tactics and the admissibility of confessions and other statements made to law enforcement.

I. Dailey’s Non-*Mirandized* & *Mirandized* Confessions

In April of 2004, Metro Nashville Police discovered a woman’s severely decomposed body with a piece of rope around her neck in an abandoned vehicle at Tommy’s Wrecker Service in Davidson County in central Tennessee.³ Detective Mike Roland conducted an investigation that led him to interview employees of the wrecking service. Although the search did not provide forensic evidence incriminating any of them, Detective

Roland felt a “gut instinct” that one of the wrecker service’s employees, Kenneth C. Dailey, III, was involved in the woman’s death.

On this suspicion, Detective Roland arranged through Dailey’s employer for Dailey to come into the police station on the pretense that the police “needed to retake his fingerprints.”⁴ Detective Roland later acknowledged that the fingerprinting was unnecessary and that the real reason for the request was to interview Dailey further. Dailey complied with the request and arrived voluntarily at the police station. Detective Roland later acknowledged that, at this point, the police department lacked probable cause for an arrest.⁵

When Dailey arrived, Detective Roland met him and invited him to talk some more about the investigation. When Dailey agreed, an officer escorted him back to an interview room in the interior part of the building. Detective Roland greeted him there, then left for a moment to gather his paperwork, leaving the door open behind him. When he returned, he brought another officer with him and shut the door.⁶ The men began the interview, which was recorded on videotape.⁷

After a few minutes of casual conversation, the detective began to question Dailey more specifically. He first asked a few questions about Dailey’s weekend work schedule and his actions on the weekend before

the victim's body was found.⁸ He then moved on to a series of questions that indicated his suspicion of Dailey's involvement in the crime. Detective Roland began by indicating to Dailey that the police had evidence that he was guilty of the crime and that it would be better for Dailey to talk to them. After a few more exchanges, Dailey responded to the questions and admitted to picking up the victim as a prostitute and then killing her.⁹

After hearing a short explanation of how the victim died, Detective Roland told Dailey that he would be charged with the crime and that he "want[ed] to make this official" by reading him his rights.¹⁰ The officers then read Dailey his *Miranda* rights. Twenty-one minutes had passed since the conversation began.¹¹ Neither Detective Roland nor the other officer in the room informed Dailey that the statement he had given might not be admissible as evidence against him.

After having his *Miranda* rights read to him, Dailey repeated the substance of his confession with a few additional details. At the end of the conversation, the officers informed him that he would be charged with "standard criminal homicide." The second confession only took eleven minutes.¹²

Dailey's attorneys moved to suppress the incriminating statements Dailey had made to the police officers both

before and after being given his *Miranda* warnings. When the motion was denied, Dailey entered a guilty plea to second degree murder, but reserved for appeal the certified question of whether the statements were taken in violation of his rights under the Tennessee Constitution and the Due Process Clauses of the Fifth and Fourteenth Amendments of the Federal Constitution. Dailey contended that his first confession was invalid under *Miranda v. Arizona* because it was given while he was in custody without the benefit of knowing his rights, and the second statement was barred by *Missouri v. Seibert* because it was forced by a two-tiered coercive interrogation technique of extracting a confession and then sanitizing it by reading *Miranda* rights after the fact.¹³ After going up to the Tennessee Supreme Court once on procedural grounds and being sent back down to the Court of Criminal Appeals for reconsideration, the issue returned to the supreme court on the merits in late 2008, with the court rendering its decision on January 2, 2009.

II. Court Suppresses Dailey's Confessions

In addressing Dailey's claim, the Tennessee Supreme Court analyzed the constitutional question first. The court began with a recitation of the background of the

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DELAWARE CHANCERY COURT ADDRESSES E-DISCOVERY

by Shauna Peterson

The Delaware Court of Chancery issued four decisions in late May and early June clarifying the procedural rules in Delaware courts that govern the discovery of electronically stored information. The chancery court has no procedural rules that specifically govern electronic discovery (e-discovery). Instead, e-discovery is governed by the general rules of civil procedure for the Delaware Court of Chancery.¹ Kevin Brady, a member of the Court of Chancery Rules Committee, has noted that the lack of specific e-discovery rules allows judges flexibility to "adapt the rules when cases involving pending business deals need to move quickly through the docket."² However, it also creates a situation in which "the court's e-discovery case law has more impact on practice."³ Accordingly, the court's recent decisions are likely to encourage companies that anticipate litigation involving e-discovery to alter their business practices in order to comply with the law. Further, because many corporations are chartered in Delaware and may be

likely to face litigation there, these decisions will have an impact on companies whose principle place of business is located outside the state.

The Delaware chancery court's civil procedure rules establish a broad scope of discovery. According to the *Rules of the Court of Chancery of the State of Delaware*, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."⁴ Also, the rules establish that "[i]t is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence."⁵

Two of the court's recent decisions discussed parties' motions to compel the production of discoverable material. The other two discussed litigants' duty to preserve discoverable material from spoliation and sanctions against spoliators.

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Miranda decision, explaining the importance of the right against self-incrimination in its historic context.¹⁴ In keeping with this backdrop, the *Miranda* Court held that, when a criminal suspect is “taken into custody or otherwise deprived of his freedom by the authorities in any significant way,” the Constitution requires him to be afforded certain “procedural safeguards”—namely, the reading of the “Miranda Rights”—to protect his freedom against self-incrimination.¹⁵ This led the Tennessee Supreme Court to conclude that, if Dailey was in custody at the time of his first confession, the confession was inadmissible under the federal and state constitutions.¹⁶

To determine whether Dailey was in custody at the time of the first confession, the court applied its precedent, *State v. Anderson*, where the court had stated that the test for whether a person is in custody for *Miranda* purposes “is whether, under the totality of the circumstances, a reasonable person in the suspect’s position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.”¹⁷ The *Dailey* court noted that the custodial inquiry was “fact specific” and involved the application of a list of factors that aided an “objective assessment.”¹⁸

Applying the test and the factors, the court found that the preponderance of the evidence established that Dailey was, in fact, in custody at the time he made his first confession to the police.¹⁹ Key to the court’s decision were the fact that the tone of the questioning was “accusatory and demanding,” the fact that Dailey’s movements were constrained by his being in the back corner of a room with a single, closed door, and the fact that Dailey repeatedly denied the accusations and inferences made against him early in the questioning.²⁰

Having determined that Dailey gave his first confession while in custody without the benefit of hearing his *Miranda* rights, the court turned to a more complicated issue: did the later *Miranda* warnings cure the first violation so that the second confession was admissible? For guidance, the court looked to *Missouri v. Seibert*, where the U.S. Supreme Court considered whether *Miranda* warnings could sanitize future confessions after a criminal defendant already confessed to the crime without being read his rights.²¹ *Seibert* was a

fractured opinion, written by four different justices with no single opinion commanding the majority of the Court. The four-justice plurality opinion stated that “question-first” confessions were of a dubious nature because they “render[ed] *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.”²² Nonetheless, the plurality would hold that these confessions were made admissible under the Constitution if the late *Miranda* warning was effective, as determined by a five-factor test.²³

Justice Kennedy concurred in the judgment, but did not join the plurality opinion. Finding that the plurality’s test “envision[ed] an objective inquiry from the perspective of the suspect” and therefore “cut[] too broadly,” he instead laid out a simpler inquiry: did the law enforcement officers actually coerce the suspect’s confession or otherwise undermine his ability to exercise his free will?²⁴ Except for these instances of intentional manipulation, Kennedy’s test would hold late *Miranda* confessions admissible.

The *Dailey* court then turned to when it first applied the *Seibert* test to a confession last term in *State v. Northern*.²⁵ In *Northern*, the court faced the difficult question of which *Seibert* test to apply to a two-step confession: the plurality’s test or Justice Kennedy’s narrower test? In the end, the *Northern* court found the distinction to be unnecessary, as the confession obtained in that case—one procured by sitting the defendant in an open area of the police station, surrounded by detectives discussing the crime—“was properly admitted under any of the competing tests.”²⁶

The *Dailey* court also held that the distinction was not important to Dailey’s case, but for an entirely different reason: the second confession by Dailey was inadmissible under either *Seibert* test.²⁷ The court found that all five factors of the *Seibert* plurality test indicated that the *Miranda* warning was not effective enough to allow the admission of the second confession and that Detective Roland acted intentionally to coerce Dailey’s second confession by using the two-step technique without there being any curative measures to make the *Miranda* warnings effective.²⁸ In light of these holdings, the court concluded that Dailey’s “motion to suppress both of his statements should have been granted because his initial statement was taken in violation of his Fifth Amendment right against self-incrimination, and the tardy *Miranda* warnings did not function effectively so as to render his second statement admissible.”²⁹

After holding that the second confession was inadmissible under the federal Constitution, the court

offered an alternative holding—that Dailey’s second confession was also barred by the Tennessee Constitution. The court noted that “the test of voluntariness for confessions under Article I, [section] 9 [of the Tennessee Constitution] is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment.”³⁰ This broad test for confessions includes consideration of nine factors that determine whether the statement was “knowing and voluntary”³¹ under “the totality of the circumstances.”³² The court quickly applied these nine factors and concluded that the confession was also inadmissible under Tennessee law.³³

Notwithstanding the outcome in this case—the release of a confessed killer—the Tennessee Supreme Court ended its written opinion by emphasizing another concern: the importance of limiting the authority of law enforcement officers and “agents of our governments” when their actions intrude on the individual rights guaranteed by the federal and state constitutions.³⁴ The court effectively decided that it would err on the side of protecting personal liberties by barring enforcement officers from utilizing an effective way of persuading defendants to confess to their crimes.

*Aaron Chastain is a student at Vanderbilt University Law School (J.D., anticipated 2010), where he serves as the Senior Notes Editor of Vanderbilt Law Review.

Endnotes

1 273 S.W.3d 94 (Tenn. 2009).

2 See, e.g., NewsChannel5, *Police Video Helps Set A Convicted Killer Free*, January 5, 2009, available at <http://www.newschannel5.com/global/story.asp?s=9621336&ClientType=Printable> (last visited June 8, 2009).

3 The facts of this case come directly from the court’s opinion. 273 S.W.3d at 97-100.

4 *Id.* at 97.

5 *Id.*

6 *Id.*

7 The Tennessee Supreme Court viewed the tape as part of its review of the case and based most of its interpretation of the facts on it.

8 *Id.* at 98.

9 *Id.* at 99.

10 *Id.* at 100.

11 *Id.*

12 *Id.*

13 *Miranda*, 384 U.S. 436 (1966); *Seibert*, 542 U.S. 600 (2004).

14 *Dailey*, 273 S.W.3d at 100-02.

15 *Miranda*, 384 U.S. at 478-79.

16 *Dailey*, 273 S.W.3d at 102.

17 937 S.W.2d 851, 852 (Tenn. 1996).

18 *Dailey*, 273 S.W.3d at 102.

19 *Id.* at 103.

20 *Id.*

21 542 U.S. 600 (2004).

22 *Id.* at 611.

23 *Id.* at 615.

24 *Id.* at 621-22 (Kennedy, J., concurring).

25 262 S.W.3d 741 (Tenn. 2008).

26 *Id.* at 760. The court further explained that “[i]n the absence of evidence that the interrogating officer deliberated [sic] employed such a strategy, a majority of the *Seibert* court-Justice Kennedy and the four dissenting justices-would apply *Elstad* to determine the admissibility of the defendant’s postwarning statement.” *Id.* *Oregon v. Elstad*, 470 U.S. 298, 314 (1985), had held that “[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.”

27 *Dailey*, 273 S.W.3d at 107.

28 *Id.* at 108 & 109-10.

29 *Id.* at 110.

30 *Id.* (citing *State v. Crump*, 834 S.W.2d 265, 268 (Tenn. 1992)).

31 *Dailey*, 273 S.W.3d at 110 (citing *State v. Smith*, 834 S.W.2d 915, 920 (Tenn. 1992)).

32 273 S.W.3d at 110.

33 *Id.* at 112.

34 *Id.* at 113.