

Confession From Counseling Session

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Is a Mental Health Counselor Who Learns about a Crime During Treatment and Discloses It an Agent of Law Enforcement?

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In *United States v. Higgins-Vogt*, 911 F.3d 814 (7th Cir. 2018), the court considered the case of a man who pled guilty to committing and conspiring to commit a Hobbs Act robbery, brandishing a firearm during the robbery, and possessing a firearm as a previously convicted felon, who then appealed the federal district court's admission into evidence of his confession made to police. Matthew Higgins-Vogt claimed that his confessions, made as a pretrial detainee in jail on two dates, May 20 and May 27, 2015, were tainted because he was not administered a *Miranda* warning, and that he was coerced by a "mental health counselor," Sharon Brown, to offer the confessions.

The U.S. Court of Appeals for the Seventh Circuit upheld the district court's finding that the defendant's confessions were admissible. The court held that Mr. Higgins-Vogt voluntarily sought out police to offer his confessions and made them knowingly and voluntarily. The court also ruled that, while Ms. Brown acted as an agent of law enforcement by being present and assisting detectives in questioning Mr. Higgins-Vogt on May 20 and 27, her behavior did not amount to coercion and did not overwhelm Mr. Higgins-Vogt's free will.

Facts of the Case

On April 3, 2015, Mr. Higgins-Vogt and his friend, Kelton Snyder, used a stolen shotgun to rob a Circle K gas station of \$700 in Illinois. During the robbery, Paige Mars waited outside as the getaway driver. Mr. Higgins-Vogt shot Ms. Mars multiple times shortly after the robbery because he feared she would provide information to the police. Ms. Mars' body was found by a sanitation worker three days

later. Police arrested Mr. Higgins-Vogt later that month and charged him with armed robbery.

While awaiting trial on the robbery charge at the Macon County Jail in Illinois, Mr. Higgins-Vogt asked to meet with and voluntarily underwent "counseling" with Ms. Brown, a contract employee who identified herself as a mental health professional but carried the title of "Senior Law Enforcement Officer." Ms. Brown had no licenses or training in the field of mental health beyond an undergraduate degree in psychology. Ms. Brown purportedly provided counseling to help inmates develop a sense of empathy for their victims and previously met Mr. Higgins-Vogt when he was incarcerated as a juvenile.

On April 16, 2015, Mr. Higgins-Vogt revealed to Ms. Brown that he murdered Ms. Mars. In response, Ms. Brown told Mr. Higgins-Vogt that she could not reveal the murder to the police due to confidentiality but advised him to inform his attorney of this information. But Ms. Brown wrote a "clinical progress note" after the encounter with Mr. Higgins-Vogt in which she documented that he told her about a person he had killed, going into "great detail" about the murder and murder weapon. Mr. Higgins-Vogt continued to meet with Ms. Brown. He discussed various topics, including the abuse he experienced as a child. Ms. Brown tried to help Mr. Higgins-Vogt gain empathy for the victim by discussing Ms. Mars' family with him. Ms. Brown also suggested to Mr. Higgins-Vogt that he was suffering from "dissociation," which might affect his criminal case and speculated that he may be eligible for placement in a mental health facility.

On May 20, 2015, Mr. Higgins-Vogt informed Ms. Brown that he wanted to meet with Detective Joe Patton, the lead detective investigating the Circle K robbery, and the Macon County State's Attorney. Ms. Brown arranged the meeting and remained present for its entirety. After waiving his right to an attorney and moving to an interview room so the questioning could be recorded, Mr. Higgins-Vogt admitted that he knew the location of the shotgun (information allegedly obtained secondhand from Mr. Snyder) used to kill Ms. Mars. During the interview, Ms. Brown was not silent. Rather, she asked questions and elicited incriminating information from Mr. Higgins-Vogt by urging him to discuss the location of the murder weapon and type of ammunition used, some of which she presumably learned from her prior "confidential" meetings with him.

Mr. Higgins-Vogt denied having played any role in the murder, however. Ms. Brown pressed him to reveal more information, strongly suggesting through her comments and questions that Mr. Higgins-Vogt was not telling the whole story. The police then used this information to recover the murder weapon.

On May 27, 2015, Mr. Higgins-Vogt decided that he wanted to confess to murdering Ms. Mars after a conversation with his girlfriend, who encouraged him to confess if he had any involvement. Detective Patton arrived to interview him again. Mr. Higgins-Vogt confirmed that he knew his rights were still in effect and confessed to the murder of Ms. Mars. Ms. Brown was again present for this interview, questioned Mr. Higgins-Vogt, and offered commentary on his statements. Later, Mr. Higgins-Vogt described his discussion with his girlfriend as the primary motivator leading him to confess to the murder. He also reported that additional motivation to confess to the murder flowed from his desire to “do what’s right” because he could no longer live with it, and from his desire to inform his family and friends of the murder before it became public knowledge. The next day, outside of the police interrogation, Mr. Higgins-Vogt also confessed to the murder to his girlfriend, his mother, and a family friend.

Mr. Higgins-Vogt’s state charges were dismissed and he was indicted on federal charges. In federal court, Mr. Higgins-Vogt moved to suppress statements that he made on May 20 and May 27, claiming that his confessions were coerced by Ms. Brown. At a hearing, Mr. Higgins-Vogt testified that he would not have confessed but for Ms. Brown’s pressure. Ms. Brown testified that she thought it was important that police be apprised of criminal activity that she learned about from inmates; however, she denied any role in assisting law enforcement and reaffirmed her role to “allow him to heal and have peace” (*Higgins-Vogt*, p 820).

The district court denied Mr. Higgins-Vogt’s motion and found that his statements were made voluntarily. Mr. Higgins-Vogt pled guilty to committing and conspiring to committing a Hobbs Act Robbery (18 U.S.C. § 1951(a) (1994)), brandishing a firearm during the robbery (18 U.S.C. § 924(c) (2006)), and possessing a firearm as a previously convicted felon (18 U.S.C. § 922(g) (2005)), but retained his right to appeal. The district court sentenced Mr. Higgins-Vogt to 60 years’ imprisonment.

Mr. Higgins-Vogt appealed to the U.S. Court of Appeals, Seventh Circuit, presenting two arguments. First, Ms. Brown should have administered the *Miranda* warning, and her failure to do so tainted Mr. Higgins-Vogt’s confessions on May 20 and May 27. Second, Ms. Brown, by holding herself out as a mental health professional, but then questioning him during police interviews, acted as an agent of law enforcement and coerced his confession.

Ruling and Reasoning

Citing the U.S. Supreme Court’s holding in *Howes v. Fields* (565 U.S. 499 (2012)), the court reasoned that imprisonment alone does not establish custody for *Miranda* purposes. Rather, “custody” is a term of art “that specifies circumstances that are thought generally to present a serious danger of coercion” (*Howes*, pp 508–9). The court also cited evidence that Mr. Higgins-Vogt voluntarily sought to meet with Ms. Brown on his own initiative; he was also free to end his discussions with her at any time. Therefore, Ms. Brown was under no obligation to issue a *Miranda* warning simply by Mr. Higgins-Vogt being incarcerated in jail as a pretrial detainee.

The court sought to answer the question of whether Ms. Brown, despite portraying herself as a mental health counselor, acted as an agent of law enforcement and placed enough pressure on Mr. Higgins-Vogt to coerce his confessions on May 20 and May 27. The court turned to *United States v. D.F.*, 115 F.3d 413 (7th Cir. (1997)), which dealt with a juvenile patient who confessed to murder to the staff of a county mental health facility. In *United States v. D.F.*, the court held that the facility staff functioned as agents of law enforcement when they elicited statements from the juvenile because the staff had a close relationship with protective services, the court system, and the FBI, and “saw themselves as an arm of law enforcement” (*D.F.*, p 419–20). Following suit, in the case at hand the court determined that Ms. Brown acted as an agent of law enforcement because she made clear in her testimony that she acted with the purpose of assisting law enforcement by emphasizing her goal of aiding in community safety (i.e., notifying police of criminal activity reported by inmates) and by attending and participating in the police interviews. Furthermore, Ms. Brown assisted law enforcement in their interviews by eliciting incriminating information. The fact that Mr. Higgins-Vogt asked Ms. Brown to participate in

the interviews on May 20 and May 27 did not negate her role as an agent of law enforcement.

The court concluded that even though Ms. Brown acted as an agent of law enforcement, her involvement was insufficient to overcome Mr. Higgins-Vogt's free will. The confessions he gave on May 20 and May 27 were made knowingly and voluntarily. While the court acknowledged Ms. Brown's unique position to earn his trust and exert influence over him by portraying herself as a mental health provider and pledging to maintain his confidentiality, the record indicates that Mr. Higgins-Vogt took numerous steps to confess on his own. Mr. Higgins-Vogt initiated and requested both police interviews. He attributed his May 27 confession to a conversation with his girlfriend rather than any undue influence from Ms. Brown. Finally, Mr. Higgins-Vogt was not influenced by any false promises of leniency made by Ms. Brown. The court concluded that Mr. Higgins-Vogt's confession was the product of his own free will and affirmed the district court's ruling that his confession was not coerced. They also admonished Ms. Brown's portrayal of herself as a "mental health professional" who served the dual role of therapist and law enforcement agent.

Discussion

Higgins-Vogt is instructive for several reasons. First, persons who profess to offer mental health services must possess the requisite education, licensure, and expertise to qualify as a mental health professional. Second, mental health professionals must accurately portray their qualifications (or lack thereof) to potential clients to truly obtain informed consent for evaluation and treatment. Third, dual agency should be avoided in treatment encounters. In those situations wherein dual agency is inherent to the treatment setting and unavoidable (most often in correctional and military settings), informed consent requires that the mental health professional inform the client or patient of the exceptions to confidentiality. In *Higgins-Vogt*, the purported "counselor" was not professionally qualified to render mental health services, and the dual and competing objectives (promising confidentiality yet prodding disclosure) were exposed in this case.

Higgins-Vogt is also a reminder that the U.S. Supreme Court emphasized in *Colorado v. Connelly*, 479 U.S. 157 (1986) that some form of overreaching by the state must be present before a confession will

be deemed involuntary: "[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause" (p 167).

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Pretrial Detainee's Right to Medical Care

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Evaluation of Alleged Violations of a Pretrial Detainee's Right to Adequate Medical Care Requires Objective Deliberate Indifference Standard

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In *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018), the Ninth Circuit Court of Appeals reviewed the decision by the U.S. District Court for the Central District of California regarding the death of a pretrial detainee. The successor-in-interest to the detainee brought a 42 U.S.C. § 1983 (1996) action against jail staff, county, and other entities, alleging that the detainee's right to adequate medical care had been violated under the Fourteenth Amendment's due process clause. The district court granted summary judgment in favor of the defendants. On appeal, the Ninth Circuit held that claims for violations of the right to adequate medical care for pretrial detainees made under the Fourteenth Amendment should be evaluated under an objective deliberate indifference standard.

Facts of the Case

Matthew Gordon was arrested by the Placentia Police Department on heroin-related charges on September 8, 2013, and taken to the Orange County Men's Central Jail. Nurse Debra Finley conducted an intake evaluation of Mr. Gordon and learned that he had been using heroin daily. Ms. Finley used the Clinical Institute Withdrawal Assessment for Alcohol (CIWA) to evaluate Mr. Gordon's heroin with-