

cess standard set forth by the United States Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992). The district court dismissed Mr. Revels' petition for a writ of *habeas corpus* with prejudice. He then turned to the Eighth Circuit Court of Appeals for *habeas* relief.

Ruling and Reasoning

The United States Court of Appeals for the Eighth Circuit granted a certificate of appealability as to Mr. Revels' claim that his due process rights were violated when his June 2003 application for release was denied. This was based on whether the Missouri Court of Appeals' conclusion that he was required to show that he "currently does not suffer from mental illness and [is] not likely to have a mental disease or defect in the reasonable future and that he . . . no longer . . . poses a danger to society" (*Revels*, p 739) was wrong in light of the U.S. Supreme Court's decision in *Foucha v. Louisiana*.

The Eighth Circuit emphasized that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection (*Jones v. United States*, 463 U.S. 354 (1983)). The court reviewed the ruling of the Supreme Court in *Foucha* and found it to be the applicable precedent in the substantive due process protections for insanity acquittees. The Supreme Court held in *Foucha* that an insanity acquittee could be held only so long as he is both mentally ill and dangerous, and no longer. It also held that future dangerousness, without mental illness, is not a proper basis for continued confinement of an insanity acquittee and that the continued confinement of an insanity acquittee, in the absence of present mental illness, constitutes punishment.

In reviewing the decision of the Missouri Court of Appeals, the Eighth Circuit held that the lower court violated Mr. Revels' due process rights by applying a standard for unconditional release that was more restrictive than that set by Supreme Court in *Foucha*. It reversed the judgment of the lower court and remanded the case with instructions that the district court order that Mr. Revels be released from state custody unless the State of Missouri afforded him a new hearing within a reasonable time as set by the district court. Regarding the question of commitment, the Eighth Circuit quoted the finding in *Foucha* that unless an acquittee has an identifiable mental condition, he cannot be held by the state merely because he may be dangerous.

Discussion

Mr. Revels was unable to meet the burden of proof demonstrating that he would not be mentally ill and dangerous in the reasonable future. The Eighth Circuit held that the requirement that Mr. Revels show the absence of probability of mental illness and dangerousness in the reasonable future was stepping beyond the standard drawn by the U.S. Supreme Court in *Foucha*.

Although the Missouri standard was overturned, it would be interesting from an academic standpoint to note whether mental health professionals in that state were asked to give opinions on the probability of mental illness and dangerousness in the "reasonable" future. The term reasonable future is not defined in this case, and there is certainly potential that it could mean many years in cases involving violent crimes. Also, the task of assessing the probability of future mental illness in an individual without apparent present mental illness (such as Mr. Revels) would present practical and ethics-related challenges to psychiatrists and other mental health professionals. Would mental illness include substance-induced psychotic disorders? What experience and training do mental health professionals have to make accurate evaluations about future mental illness? These are interesting academic questions. Ultimately, the decision of the Eighth Circuit made these questions moot, as it removed the issue of future mental illness in commitment and release decision-making.

Admissibility of Demeanor Evidence From a Police Interrogation Videotape

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A Police Interrogation Videotape May Provide Demeanor Evidence Even When Invocation of *Miranda* Rights Makes Testimonial Evidence From the Interrogation Inadmissible

In *Iowa v. Decker*, 744 N.W.2d 346 (Iowa 2008), the Supreme Court of Iowa ruled that a police interrogation videotape, initially ruled inadmissible, was admissible for demeanor evidence only.

Facts of the Case

In 2003, Amy McNeal began dating Errol Edward Decker. The relationship was difficult, and in 2004, Ms. McNeal permanently ended it. Ms. McNeal unsuccessfully attempted to obtain a no-contact order, and local police advised her to send Mr. Decker a letter stating that she desired no further contact with him. On August 24, 2004, Ms. McNeal returned to her home around noon to take care of her dog. She noted that her attic door was ajar and that a rug normally pushed against the door had been moved. Mr. Decker emerged from the hallway and attacked her, repeatedly hitting her with a hammer on her head and neck. He also stabbed her with a knife in her chest, stomach, and back. He told her that she had ruined his life and that he had already killed her son Jacob, who was later found safe at school. She attempted to call 911, but he hit her with a hammer and choked her before the call was completed. He left the home after she promised not to call the police.

Mr. Decker turned himself in to the Iowa City Police Department and was arrested for attempted murder. The following morning, Detective Anne Deutmeyer began to interrogate him. She verbally informed him of his *Miranda* rights and provided him with a written copy of his *Miranda* rights for signature. He refused to sign the document. When Detective Deutmeyer asked him if he understood the information, he responded, "I can read." She asked him if he wanted to talk to her, and he responded, "Not really." Over the next 20 minutes, Detective Deutmeyer repeatedly asked him if he wanted to talk with her. He either did not reply or stated, "I don't want to talk about it," or, "I don't have nothing to say about it."

Mr. Decker entered a plea of not guilty and later asserted the defenses of insanity and diminished capacity. He moved to suppress videotaped statements made during his interrogation. Judge Douglas Russell granted Mr. Decker's motion, finding that the detective failed to honor his repeated invocations of

his right to remain silent. Judge Russell also found that Detective Deutmeyer made a promise of leniency that was in violation of Mr. Decker's right to avoid self-incrimination. In a nonjury trial, Mr. Decker called several witnesses who described his mental condition. Dr. Stuart Scott, an expert witness, concluded that at the time of the attack Mr. Decker had untreated schizophrenia and was, as a result, unable to distinguish between right and wrong.

The state offered as evidence the videotape of Mr. Decker's interrogation, contending that although the tape was initially suppressed, it should be allowed to demonstrate his demeanor shortly after the incident, given his insanity defense. Mr. Decker's attorney objected to the introduction of the videotape evidence, but the district court overruled and admitted the videotape. He was convicted of attempted murder, willful injury, and burglary, and sentenced to a total of 25 years.

Ruling and Reasoning

Mr. Decker alleged that the admission of the interrogation video violated his right to due process in violation of the Iowa Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The Iowa Supreme Court ruled that due process prohibits the use of a defendant's invocation of *Miranda* rights as evidence of his sanity, noting that it would be unjust to inform a suspect that his silence would not be used against him and then subsequently renege on that assurance to attack his proffered defense (*Wainwright v. Greenfield*, 474 U.S. 284 (1986)). Because Mr. Decker repeatedly asserted his right to remain silent, the court found that the videotaped interrogation was not admissible to show sanity. However, the court also ruled that only evidence that is testimonial is protected by the Fifth Amendment. Nontestimonial evidence is unprotected and unaffected by *Miranda* and Fifth Amendment protections. In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the U.S. Supreme Court attempted to draw the line between testimonial evidence and nontestimonial evidence obtained from a police interrogation. Based on that ruling, the Iowa Supreme Court found Mr. Decker's fidgeting and slow speech pattern to be nontestimonial evidence while the quality and content of his communication was deemed testimonial. The court judged only the latter to be protected by the Fifth Amendment.

Mr. Decker declared that while the videotape of his interrogation contained nontestimonial evidence, this evidence could not be separated from the testimonial evidence that had been ruled inadmissible. The Iowa Supreme Court noted that before a jury, the limited probative value of the nontestimonial portion of the videotape would outweigh the prejudicial aspect of the testimonial evidence contained therein. It did not believe that an untrained jury could consider only the physical demeanor evidence and not consider the invocation of *Miranda* rights and related testimonial content. Relying on *Robinette v. State*, 741 N.E.2d 1162 (Ind. 2001), the court reasoned that a trial court's limiting instructions could not cure the wrongful admission of *Miranda* invocations in a jury trial. However, based on an earlier decision in *State v. Matheson*, 684 N.W.2d 243 (Iowa 2004), the court noted that legal training allows those in the legal profession to remain unaffected by matters that should not influence the determination. According to this supposition, judges are deemed capable of ruling on a case despite knowledge of evidence that is excluded during the course of a trial. Because Mr. Decker did not sit before a jury, and because inadmissible portions of the videotaped interrogation were not admitted into evidence at his bench trial, the court reasoned that the tape was properly admitted for limited purposes and was not wholly inadmissible. The court found no evidence that the trial court considered inadmissible aspects of the videotape.

Discussion

The protection against self-incrimination is a cornerstone of the United States judicial system, although the nuances of this right and its applicability to psychiatric examination have been unclear at times. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the U.S. Supreme Court held, "If the individual indicates in any manner, at any time before or during questioning, that he wishes to remain silent, the interrogation must cease" (*Miranda*, p 473). The role of the psychiatrist has also been limited. In *Estelle v. Smith*, 451 U.S. 454 (1981), the U.S. Supreme Court held that a state may not use information from a pretrial evaluation at a later sentencing hearing when the defendant and his attorney have not been notified that information from that evaluation would be used in the sentencing hearing.

In order for the forensic psychiatrist to make a valid determination of the mental state of a person at the time of an alleged crime, it is critical that any information relevant to the person's mental state be available for review. When evidence of mental state such as a police interrogation video exists, it is imperative that the forensic psychiatrist be able to access this information; however, it is also important to recognize the rights afforded the accused. In this case, there is concern that the police continued an interrogation despite the repeated invocations of *Miranda* rights by the defendant. While this method may have yielded evidence useful to a forensic examiner, one does not want to encourage investigators to push the limits of interrogation techniques for the purposes of gaining insight into the accused person's mental state.

In this case, it is likely that the outcome would have been different had the trier of fact been a jury. It is well reasoned that a jury would not be able to separate testimonial evidence from demeanor evidence, as a layperson lacks the training and ability to disentangle the different forms of information. However, a judge is able to view the videotaped interrogation without error, due to specific training and experience in weighing different elements of evidence. Arguably, the forensic psychiatrist should also be able to discern testimonial evidence from demeanor evidence. Although this may limit the usefulness of a videotaped interrogation in determining sanity, it still affords some ability to augment the forensic psychiatric evaluation while continuing to protect Fifth Amendment rights.

Limitations of Attorney Work Product and Physician-Patient Privilege

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