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## YEAR 2006 CASE SUMMARIES

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By  
**The Honorable Pat Garza**

Associate Judge  
386th District Court  
San Antonio, Texas

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### **In a case out of Michigan, a minor defendant's inculpatory statement induced by a promise of leniency was not considered inadmissible "per se." [Michigan v. Osantowski](06-2-5)**

**On February 29, 2006, the Michigan Court of Appeals held that because any alleged promises of leniency by law enforcement did not induce the minor's confession, the confession was freely and voluntarily made.**

¶ 06-2-5. **Michigan v. Osantowski**, UNPUBLISHED, No. 263211, 2006 Mich.App.Lexis 545, (Mich. Ct. App., Feb. 28, 2006).

**Background:** The prosecution appeals by leave granted an order granting defendant partial suppression of his confession. n1 The trial court found that defendant's confession was involuntary because it was induced by promises of leniency.

n1 The court's order precludes admission of the transcript or video of defendant's interrogation by police, or any testimony thereon, beginning with the bottom of page 21 of the transcript and continuing to the end of said transcript.

**Facts:** The prosecution maintains that defendant's confession was voluntary, and, therefore, this Court should reverse the trial's court order partially granting defendant's motion to suppress the confession and rule that the entire confession or interrogation may be admitted into evidence at trial. This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich. App. 545, 563; 675 N.W.2d 863 (2003). Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker* n2 hearing unless those findings are clearly erroneous. *Id.* at 563-564. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that the trial court has made a mistake. *Id.* at 564.

n2 *People v Walker (On Rehearing)*, 374 Mich. 331; 132 N.W.2d 87 (1965).

**Held:** Reversed

**Opinion:** A criminal confession is admissible under the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the Fifth Amendment's compelled self-incrimination provision, if made freely, voluntarily, and without compulsion or inducement of any sort. *People v Daoud*, 462 Mich. 621, 631; 614 N.W.2d 152 (2000). Promises of leniency play a role in determining whether a defendant's confession is voluntary and admissible. *People v Conte*, 421 Mich 704, 739-740; 365 N.W.2d 648 (1984) (WILLIAMS, C.J.). Mere adjurations or exhortations to tell the truth, without more, are insufficient to

vitiates the voluntariness of a confession because they are not promises of leniency. *Id.* at 740. A promise of leniency need not be express, as subtle intimations can convey as much as express statements. *Id.* Even if a promise of leniency is made, it must be established that the promise causally induced the confession. *Id.* at 741.

Importantly, a promise of leniency is but one factor to be considered in the evaluation of the voluntariness of a defendant's confession. *People v Shipley*, 256 Mich. App. 367, 373; 662 NW2d 856 (2003), citing *People v Givans*, 227 Mich. App. 113, 120; 575 N.W.2d 84 (1997). n3 "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Givans*, *supra* at 121. When considering whether a juvenile confession was voluntary, the following factors must be considered by the court:

(1) whether the requirements of *Miranda v Arizona*, 384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL764.27 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. [*Givans*, *supra* at 121, citing *People v Good*, 186 Mich. App. 180, 189; 463 N.W.2d 213 (1990).]

n3 The *Givans* panel noted the following concerning the *Conte* case:

In the lead opinion in that case, three justices (WILLIAMS, KAVANAGH, and LEVIN) did support a rule that a confession obtained by a law enforcement official's promise of leniency automatically renders the confession involuntary and inadmissible. However, four justices (BOYLE, RYAN, BRICKLEY, and CAVANAGH), and hence a majority of the Court, rejected this rule. These four held that a defendant's inculpatory statement is not inadmissible per se if induced by a promise of leniency. Rather, a promise of leniency is merely one factor to be considered in the evaluation of the voluntariness of a defendant's statements. [*Givans*, *supra* at 119-120 (citations omitted).]

The absence or presence of any one of these enumerated factors is not necessarily conclusive, and the ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *Shipley*, *supra* at 374.

After careful scrutiny of the record, with a focus on defendant's interview with police, we conclude that the trial court erred in ordering partial suppression of defendant's confession. Several of the communications or comments directed at defendant during the interview were in the nature of adjurations or exhortations to tell the truth, and thus not constitutionally offensive. Additionally, there were several statements made to defendant indicating that if he cooperated and responded honestly during questioning, the interrogating officer would in return "go to bat" for defendant, do whatever he could to help defendant, and tell the judge that defendant was cooperative. These comments, and any similar remarks, did not constitute promises of leniency, but were merely statements indicating that the officer would speak favorably of defendant in any communications with the court and the prosecutor's office if defendant cooperated and was truthful. Such comments, at most, reflected a promise to make an effort to possibly gain a more lenient outcome for defendant through the exercise of whatever influence the officer carried; however, there was no specific promise of actual leniency. This interrogation method is a useful police tool in conducting interviews, and it does not render a resulting confession involuntary.

The interrogating officer never made explicit promises to defendant with respect to any criminal charges and sentencing.

That being said, there were some instances when the interrogating officer made statements that could be interpreted as promises of leniency, especially by a minor, and which implicitly suggested better treatment in the criminal prosecution if defendant was honest and cooperated. However, it is evident from the record that any such interpretation of the officer's remarks did not ring true with defendant, nor did they motivate defendant to confess. We note that the interview appears to have been as much an effort by defendant to discover exactly what was known by authorities and what investigation measures were being pursued as it was an effort by police to acquire evidence against defendant. The interrogation reflects that defendant is an intelligent young man who at first attempted to play a game of misdirection with police. Examples of defendant's disbelief that he would receive leniency are as follows:

*Officer.* I'm trying to give you a break here.

*Defendant.* Yeah, but how is that giving me a break if you're going to force me to tell you anything. **I'm going to have the same charges against me anyhow.** . . .

*Officer.* [I] think you have a lot of potential.

*Defendant.* How can you think I'm a good kid if they're finding all this stuff in my house[?]

*Officer.* [I] know you're not a bad kid and I know you don't do those things. . . .

*Defendant.* Yeah, but are you going to charge me with those pipes? I mean, that's weapons of mass destruction right there . . . . **I mean, I'm still going to get charged with that.**

*Officer.* Listen to me, Andrew, I'm going to do what I can to help you. You're not a bad kid.

*Defendant.* I'm going to spend 20 years in prison.

*Officer.* Listen - listen to me. I'm going to tell the judge you were cooperative.

*Defendant.* **It doesn't matter if I was cooperative. I've got illegal weapons. I got weapons.** [Emphasis added.] n4

n4 With respect to "threats" by the interrogating officer that the police would rip apart defendant's home during the execution of a search warrant, defendant responded that the police "can't tear down someone's house," and he indicated his belief that insurance would pay for any damage to the house. Defendant was not swayed to confess by the officer's remarks relative to harm that might occur to the home during the search.

It is clear that even if defendant construed the officer's statements as promises of leniency, defendant was not convinced that he would actually be treated with leniency; therefore, defendant's responses during the interrogation are inconsistent with a conclusion that he confessed or made incriminating admissions because he was promised leniency. The promises did not causally induce the confession. Moreover, it becomes abundantly evident in reviewing the interrogation that defendant confessed and incriminated himself after he was confronted with evidence that was being discovered during the execution of a search warrant of defendant's home. This evidence, found in various areas of the house such as the attic and a crawl space, included firearms, n5 knives, ammunition, pipes, nitrates, videos, writings, and Nazi films. The search was being conducted at the same time defendant was being interrogated, and the interrogating officer was periodically communicating with officers involved in the

search. The interview was punctuated with instances where the interrogating officer would confront defendant regarding some piece of evidence that was just uncovered at the home by police, followed by defendant's acknowledgement that the evidence belonged to him and an explanation with respect to how he acquired the particular item. Defendant did not confess in response to promises of leniency; he confessed because he realized that the police had discovered incriminating evidence in his home.

n5 One of the weapons was an AK-47 assault rifle.

**Conclusion:** Reviewing and considering all of the various factors enunciated in *Givans, supra*, along with the totality of the circumstances, and given our finding that any alleged promises of leniency did not induce defendant's confession and admissions, we conclude that the confession was made freely and voluntarily, i.e., it was the product of an essentially free and unconstrained choice by defendant. The entire interrogation or confession is admissible for the reasons stated above, and the trial court clearly erred in partially suppressing the confession and portions of the interrogation. n6

n6 We also note that the court's ruling apparently relied almost exclusively on conceived promises of leniency without consideration of other factors, which is inconsistent with the case law as cited above, including *Conte*.