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IN THE COURT OF CRIMINAL APPEALS

STATE OF TEXAS

ANTONIO LOPEZ,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

ON DISCRETIONARY REVIEW
FROM THE EIGHTH COURT OF APPEALS OF TEXAS
CAUSE NUMBER 08-17-00039-CR

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE [1]

This is a petition for discretionary review from the judgment of the Eighth Court of Appeals, affirming Appellant's conviction for murder in the 171st District Court. Appellant was indicted for capital murder on September 19, 2012 (1 CR 17-18). The indictment was amended on November 9, 2015 (1 CR 565). After one mistrial, Appellant was convicted of murder on February 8, 2017 in a second trial by jury (2 CR 1017), and assessed punishment on February 8, 2017 by the trial court at confinement in the Texas Department of Criminal Justice for thirty-five (35) years. (2 CR 1033-34) Appellant's conviction and sentence were affirmed by the Court of Appeals in an unpublished opinion. *Lopez v. State*, 2019 WL 3812377 (Tex. App. – El Paso, No. 08-17-00039-CR, Aug. 14, 2019). On January 29, 2020, this Court granted Appellant's petition for discretionary review, and on February 24, 2020 his motion to rely in part on his petition for discretionary review as his brief on the merits.

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[1] "CR" refers to the clerk's record on appeal. "RR" refers to the reporter's record on appeal, the volumes of which are numbered consecutively, beginning with "1" "SX" refers to an exhibit introduced by the State, "DX" to an exhibit introduced by the defense.

ISSUES PRESENTED

1. Whether statements made by police detectives during their interrogation of the Appellant constituted a threat to arrest and charge his wife with capital murder if, and only if, he did not confess to it himself.

2. Whether police detectives had probable cause to arrest Appellant's wife for capital murder.

3. Whether the existence of probable cause to arrest Appellant's wife for capital murder, if it existed, was sufficient to excuse threats to arrest and charge her with capital murder if Appellant did not confess to it himself.

3. Whether truthful statements made to Appellant by police detectives during their interrogation of him were sufficient to excuse threats to arrest and charge his wife with capital murder if he did not confess to it himself.

4. Whether Appellant's involuntary confession to police detectives was harmless beyond a reasonable doubt.

STATEMENT OF FACTS

The relevant facts of this case are summarized with appropriate citations to the record on appeal in Appellant's petition for discretionary review.

SUMMARY OF THE ARGUMENT

The Eighth Court of Appeals agreed that Lopez was threatened with the arrest of his wife at least twice during three hours of interrogation by homicide detectives if he did not confess that he had murdered a foster child entrusted to their care. Indeed, the verbatim recording of that interrogation makes it clear that such threats were the principle focus of the detectives' inquiry throughout their questioning of Lopez, and that overt references to the arrest of his wife were made no fewer than fifteen times in immediate response to his denials of culpability. Moreover, the record of trial, including the hearing of Lopez's motion to suppress his confession, establishes that his eventual capitulation was based entirely on his determination to prevent the arrest and prosecution of his wife. Under long-settled precedent of the United States Supreme Court, the trial court therefore erred to receive Lopez's confession in evidence, and the Eighth Court of Appeals erred to affirm that decision, because his confession was not freely self-determined, but was instead the product of police coercion that overbore his will to resist.

In spite of this, the Court of Appeals held that the coercive effect of repeated threats made by the detectives to arrest Lopez's wife did not violate the Due Process Clause of the Fourteenth Amendment because the detectives actually had probable cause to arrest her and because their statements to that effect were therefore truthful. But the record establishes that no such probable cause actually existed. And even if it had, the detectives did not merely state a belief that Lopez's wife could be charged with capital murder, but made it clear to him throughout their inteview that she would not be charged if, and only if, he confessed to the murder himself. This was not a truthful statement of fact, but a threat, plain and simple, intended to force an inculpatory statement from him. Finally, even if there had been probable cause to believe his wife guilty of capital murder, and even if statements to such effect had been truthful in fact, the detectives were not authorized to further threaten Lopez with the arrest and prosecution of his wife unless, or to forgo her arrest and prosecution if, he confessed to the murder himself.

ARGUMENT AND AUTHORITIES [2]

Appellant commends the Court's attention to the arguments and authorities

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[2] Grounds for Review or Issues Presented which have been grouped for argument have a common or similar basis in law or fact which makes it more comprehensible to present them together and avoids undesirable duplication of material in the brief.

developed at length in his petition for discretionary review. The following additional arguments and authorities are intended to supplemental and elaborate, without unnecessary repetition, some of those previously made.

Since 1936, it has been settled as a matter of federal constitutional law that the Due Process Clause of the Fourteenth Amendment prohibits a state court from using an involuntary confession to prove the guilt of the accused. *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). Accord TEX. CODE. CRIM. PROC. art. 38.21. But there must be some state action rendering the statement of the accused involuntary before the United States Constitution is offended. In short, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473, 55 USLW 4043 (1986).

For at least fifty-nine years, the constitutional standard for determining the voluntariness of a confession induced by police activity has been "whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined[.]" *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 741, 5 L.Ed.2d 760 (1961). "[C]oercion can be mental as well as physical." *Jackson v. Denno*, 378 U.S. 368, 389,

84 S. Ct. 1774, 1787, 12 L. Ed. 2d 908 (1964). Even the exploitation by police interrogators of a defendant's existing disability can qualify as coercive if it is the immediate cause of the defendant's confession. *Connolly*, 479 U.S. at 165.

Ultimately, in determining voluntariness, the courts must consider all of the circumstances under which a confession was obtained. These may include such things as the age and intelligence of the defendant, his mental, physical, and emotional condition, the duration of the interrogation, and the honesty and aggressiveness of the police interrogators. See generally, Dix & Schmolesky, 41 TEX. PRAC., *Criminal Practice and Procedure* § 16:110 (3d ed.). Threats and promises made by law enforcement officers, although not controlling, are also among the factors to be considered. *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991).[3] Each such circumstance is relevant to the question of admissibility under the Due Process Clause only to the extent that it helps the court to answer the dispositive question – whether the defendant's confession was ultimately an independent exercise of his free will or instead the product of pressure applied by the police.

Nevertheless, a few federal courts of appeals have managed to stumble upon the belief that a threat to arrest, or a profmise not to arrest, a relative of the defendant

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[3] The rule is much the same under Texas law, except that promises have often been subjected to particularly strict scrutiny under Texas statutory law. See Dix & Schmolesky, TEX. PRAC., *Criminal Practice And Procedure* § 16:116 (3d ed.).

is permissible under the Due Process Clause, even if it overbears the defendant's will to resist, so long as there is probable cause to make the arrest. As demonstrated in Lopez's petition for discretionary review, and in his briefing before the Eighth Court of Appeals, the cases expressing this belief lack any intelligible rationale consistent with authoritative Supreme Court jurisprudence. But they were still at the core of the Eighth Court of Appeals's opinion in this case, affirming Lopez's murder conviction.

This Court has never resolved the issue. While it has expressly recognized that threats to arrest, or promises not to arrest, a relative of the defendant might amount to the kind of coercion prohibited by the Due Process Clause, *Roberts v. State*, 545 S.W.2d 157, 161 (Tex. Crim. App. 1977), it has not authoritatively examined whether the effect of such threats or promises on the defendant's will to resist might be offset for constitutional purposes by the authority of law enforcement officers to carry out the threats or to perform the promises. Indeed, in *Contreras v. State*, 312 S.W.3d 566, 576-77 (Tex. Crim. App. 2010), this Court introduced doubt about the answer to this question, a doubt that has now lingered for nearly twenty years.

Since it was handed down, *Contreras* has been cited authoritatively for the propositions at issue here on only a few occasions: in this case; in *State v. Luna*, 2019 WL 1925004 (Tex. App. – El Paso, April 20, 2019), a recent unpublished opinion of the Eighth Court of Appeals upon which it mainly relied in this case; and in two

opinions of the Thirteenth Court of Appeals, both unpublished. The former was discussed at length in Appellant's petition for discretionary review, and neither of the latter makes any significant further contribution to the analysis.

Frankly, *Cervantes v. State*, 13-14-00134-CR, 2014 WL 6858840, at **9-10 (Tex. App.—Corpus Christi Dec. 4, 2014, *no pet.*) is disingenuous. It avoids having to confront the issue presented by pretending that relevant Supreme Court case law was actually based on criteria of involuntariness apart from the threats concededly made to arrest the defendant's relative if he did not confess (as in *Harris v. South Carolina*, 338 U.S. 68, 70, 69 S.Ct. 1354, 93 L.Ed. 1815 (1949), or on the absence of an "explicit factual finding that no coercive promises were made" (as in *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963)). But it is clear from a straightforward reading of both *Harris* and *Lynumn* that the Supreme Court did regard the threats in both of those cases as made in fact and coercive in effect.

Diaz v. State is even less helpful. There, the trial court had found that the police never threatened to arrest Diaz's parents unless he confessed, but that they had probable cause to do so. Based on these findings, the Court of Appeals held, without any analysis, that because "there was probable cause to issue a warrant for the arrest of Diaz's parents, based on the trial court's findings[,] . . . Diaz's statements were not involuntary." 13-14-00675-CR, 2017 WL 4987665, at *5 (Tex. App.—Corpus Christi

Nov. 2, 2017, *pet. ref'd*). For this conclusion, the Court of Appeals did not rely directly on *Contreras*, for *Contreras* expressly declined to adopt the holding of the few federal cases that had suggested such a rule. But the Court of Appeals did cite the *Contreras* footnote referencing such federal cases without otherwise citing them or discussing their holdings, apparently thinking that the *Contreras* Court had accepted them as controlling. Of course, as we know, that is not true.

In the end, it seems as though the courts that have thought a threat to arrest supported by probable cause is not improperly coercive have confused cases in which police officers were alleged to have lied to the defendant with those in which officers threatened or promised something to the defendant, often treating the two circumstances, like the Eighth Court of Appeals did in this case, as though they derive from a single underlying principle. But they do not. Clearly, when a defendant claims that his confession was rendered involuntary by the lies of his interrogators, his claim must be rejected if it does not appear that the interrogators actually lied to him. But probable cause to arrest does not render the threat to arrest a true statement of fact. Indeed, it is not a statement of fact at all.

Life is full of hard choices, and a clear understanding of the consequences that may follow is necessary to making an informed choice. When police interrogators honestly discuss those consequences with suspects, their behavior is properly

regarded as noncoercive. Likewise, when interrogators encourage suspects to tell the truth because it is the right thing to do, their conduct cannot reasonably be regarded as undermining the suspect's free choice.

But, when interrogators demand that a suspect confess to wrongdoing, and threaten to bring about an adverse consequence entirely within their discretion if he does not, the objective is necessarily to overbear the suspect's will to resist. It does not matter whether the interrogators have a legal right to bring about the threatened consequence. What matters is the effect that the threat is calculated to have, and is likely to have in fact, on the suspect's will not to incriminate himself. It is different in kind from merely advising the suspect accurately about the risk he actually faces or encouraging him to do the right thing, because it puts him to a choice that he did not otherwise face, the consequence of which is brought entirely under the control of the interrogators.

That is exactly what happened here. The detectives who interrogated Lopez applied persuasion to him, not only in ways that are arguably acceptable, such as appealing to his moral and religious principles, but also and mainly by repeatedly impressing upon him a belief that they, in their sole discretion, could arrest and charge his wife with capital murder if he did not confess to it himself, but would not do so if he did. These were threats, not statements of fact intended merely to advise

Lopez that probable cause existed to charge his wife. Whether the detectives had such probable cause is irrelevant to the question whether their threats were of a kind likely to overbear Lopez's will to resist. In fact, the evidence is clear that their threats were of such a kind, and that they did in fact produce a confession not freely self-determined by Lopez.

Accordingly, even if it were true that probable cause existed to arrest and charge Lopez's wife (which it did not), and even if the detectives were legally authorized to let her go anyway (which they were not), they could not lawfully condition their willingness to do so on Lopez's agreement to confess because it is the kind of threat (or promise) that was likely to, and did in fact, overbear his will to resist. In spite of the several unusual cases in the federal courts of appeals and the intermediate appellate courts of Texas, the only consitutional criterion for voluntariness under United States Supreme Court precedent, applicable in this case, is whether Lopez's confession was actually an independent exercise of his free will. Here it obviously was not, and its receipt in evidence against him at trial therefore violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

PRAYER FOR RELIEF

For the foregoing reasons, Appellant requests that the judgment of the Eighth Court of Appeals be reversed, and that the cause be remanded for a new trial.

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CERTIFICATE OF COMPLIANCE

I hereby certify in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing brief contains 2,245 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

/s/ Robin Norris
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served electronically through the electronic filing manager to the following parties or their attorneys whose email addresses are on file with the electronic filing manager on March 13, 2020.

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