

Harvey Lee SMITH *v.* STATE of Arkansas

CR 83-24

649 S.W.2d 400

Supreme Court of Arkansas
Opinion delivered May 2, 1983

CRIMINAL LAW — CONFESSION OF CRIME — STATEMENT HELD TO BE VOLUNTARY. — The trial court did not err in admitting appellant's confession into evidence where appellant, while sitting in a chair in his hospital room and not appearing drugged, confessed to the attempted robbery three days after its occurrence and after surgery, with three bullets in his body.

Appeal from Pulaski Circuit Court, First Division;
Floyd J. Lofton, Judge; affirmed.

William R. Simpson, Public Defender, by: *Jerome Kearney*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *William C. Mann, III*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. On conviction for aggravated robbery and first degree battery the appellant was sentenced to consecutive 25-year and 30-year sentences. His only argument for a new trial is that the trial judge should not have admitted his confession into evidence. We agree with the trial judge.

When the appellant and a companion attempted to hold up a grocery store, the proprietor thwarted the attempt by opening fire with his own gun, hitting Smith three times. After an operation the bullets were still somewhere in Smith's body when the police took his statement three days later. The nurse told them that it was up to Smith to decide whether to make a statement. The officers testified that Smith was sitting in a chair, that he was warned of his rights, that he understood them, that he gave a coherent account of the attempted robbery, and that he did not appear to be under drugs or sedation. Smith did not testify at the Denno hearing.

Counsel rely for reversal on the holding in *Mincey v. Arizona*, 437 U.S. 385 (1978). There, however, the court held that the statement was involuntary because the accused was barely conscious, was in intensive care, had a tube in his mouth that kept him from talking, and more than once asked in writing for a lawyer. We find no controlling similarity between that case and this one.

Affirmed.
