

Not Reported in P.3d, 2008 WL 5377852 (Wash.App. Div. 1)

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NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,

Division 1.

STATE of Washington, Respondent,

v.

J.S. (d.o.b.4/10/93), Appellant.

No. 60032-0-I.

Sept. 22, 2008.

DWYER, ACJ., GROSSE, J., and SCHINDLER, CJ.

PER CURIAM.

*1 J.S. appeals his juvenile conviction for first degree child rape. He contends that the trial court erred in admitting a statement he made to a police detective in a counselor's office at his middle school because the detective did not inform him of his constitutional rights under Miranda FN1 and used deceptive interviewing tactics. We disagree and affirm.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FACTS

In November 2006, the Whatcom County Sheriff's Office received a report that thirteen-year-old J.S. had molested seven-year-old T.B. Detective Thomas McCarthy went to J.S.'s school to determine whether the allegation was true and whether J.S. also was a victim of abuse.

Detective McCarthy met with J.S. in the small office of a school counselor. The counselor and a Child Protective Services (CPS) investigator were also present. Detective McCarthy was not in uniform, his jacket was zipped so that his firearm and handcuffs were not visible, and he had arranged the chairs in the room so that J.S. would be seated next to the door. Detective McCarthy did not give Miranda warnings before the interview, but the detective told J.S. that he was not under arrest, was not required to answer any questions, was free to leave at any time, could not get in trouble for refusing to talk or walking out, and would be allowed to return to his classroom after the interview.

Detective McCarthy told J.S. that he had talked to T.B. and T.B.'s brother and mother about things that had happened at J.S.'s home. The detective told J.S. that he knew "those things" happened and wanted to find out why: "[U]sually, what we find out is that um, you (inaudible) your age usually do those things because something like that has happened to them." Detective McCarthy told J.S. that T.B. and his brother reported that J.S. put his mouth on T.B.'s penis. The detective asked whether anyone had done that to J.S. When J.S. said no, Detective McCarthy responded: "No. Okay. I know it's pretty touchy to talk about. Okay, but my goal in here is to find out the truth about everything. And also um, to offer help to people."

When J.S. continued to deny that he had sexual contact with T.B., the detective asked if J.S. wanted to take a lie detector test. J.S. said no, and Detective McCarthy responded that J.S. was not being truthful:

Detective McCarthy: You don't want to do one because you are not being honest with me about it. You are not telling the truth. And the only way that I'm going to be able to help in this situation and figure out what are the reasons why these things are happening is if I'm told the truth. And you are not telling the truth. I know it, you know it and everyone in this room knows it. Okay?

J.S.: Okay.

Detective McCarthy: And all I'm asking is to tell the truth so that we can figure out the reasons, where to go (inaudible) and we can figure out all the dynamics in this and be able to get help. Okay?

J.S.: Uh Huh.

Detective McCarthy: To get help for [T.B. and his brother] and get help for you and everything like that. Okay?

*2 J.S.: (No audible response).

Detective McCarthy: And you are just not being honest. And I can tell. So what is it going to be? The choice is yours. We know it. We know it. It's not a matter of if. We know this and there's no doubt about that. Okay? I'm not saying you are gay. I'm not saying anything other than your [sic] not the first boy to be curious about things. Okay? And they have come forward and said, yeah, yeah I was curious, I was curious and okay. And then I was able to get the assistance and the help that they needed, okay? And it's all (inaudible) here. But if your [sic] not willing to be honest about it, then you know it's, the help situation is over, right?

J.S.: Uh huh.

J.S. then admitted twice putting his mouth on T.B.'s penis.

The State charged J.S. with one count of rape of a child in the first degree and one count of child molestation in the first degree. Before trial, J.S. moved to exclude the statement he made to Detective McCarthy. The court denied the motion after hearing testimony from Detective McCarthy and listening to a recording of the interview at the school. The court concluded that J.S. was not in custody during the interview and, therefore, Miranda warnings were not required, and that J.S.'s statement was voluntary, despite Detective McCarthy's deceptive interviewing tactics. The court found J.S. guilty of child rape, but not guilty of child molestation.

ANALYSIS

J.S. first argues that the trial court should not have admitted the statement he made to Detective McCarthy because the circumstances of the interview were equivalent to a custodial interrogation and, therefore, Miranda warnings were required. We disagree.

Miranda warnings are intended to safeguard a defendant's constitutional right not to make incriminating statements to police while in the coercive environment of police custody. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Juveniles have the same rights against self-incrimination as do adults. *State v. D.R.*, 84 Wn.App. 832, 834 n. 1, 930 P.2d 350 (1997). Before a suspect undergoes a “(1) custodial (2) interrogation (3) by an agent of the State,” Miranda warnings must be given or the statements made during the interrogation are presumed involuntary. *Heritage*, 152 Wn.2d at 214

A suspect is in “custody” for Miranda purposes if he was formally arrested or his freedom of movement was restricted to a degree associated with a formal arrest. *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992). Whether the defendant was in custody is a mixed question of fact and law. *State v. Solomon*, 114 Wn.App. 781, 787, 60 P.3d 1215 (2002).

The factual inquiry determines “the circumstances surrounding the interrogation.” The legal inquiry determines, given the factual circumstances, whether “a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.”

*3 Solomon, 114 Wn.App. at 787-88 (citation omitted) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). We review a trial court's conclusion that the defendant was in custody de novo. Solomon, 114 Wn.App. at 789 (de novo review applies to question whether a reasonable person in the defendant's situation would have believed he was not free to end the questioning and leave). In this case, the facts are undisputed, so we review de novo the trial court's determination that J.S. was not in custody when Detective McCarthy interviewed him.FN2

FN2. J.S. stated in his opening brief that the findings had not yet been filed, but he reserved the right to assign error to them, if necessary. J.S. never assigned error to any findings, and the written findings are not part of the record on appeal, but the trial court's oral findings are sufficient to review the court's decision.

J.S. contends that his case is analogous to *State v. D.R.* In that case, a detective interviewed fourteen-year-old D.R. in the assistant principal's office at D.R.'s school about a report that D.R. was seen having sexual intercourse with his sister. Although the circumstances in D.R. are similar to those in J.S.'s case, there are significant differences. Like Detective McCarthy, the sheriff's detective who interviewed D.R. was not in uniform and his gun was concealed. But the detective showed D.R. his badge, and the interview took place in an assistant principal's office with that principal and a social worker present. Although the detective told D.R. he did not have to answer questions, the officer did not tell D.R. that he was free to leave. Based upon D.R.'s past experience in the assistant principal's office, D.R. did not believe he was free to leave. The detective conceded that his questions may have been leading and that he may have told D.R. that he knew what happened because he had spoken to D.R.'s sister.

The trial court admitted the statements D.R. made to the detective. On appeal, the only question was whether a fourteen-year-old in D.R.'s position reasonably would have supposed that his freedom of action was curtailed. Division 3 considered two Oregon cases before concluding that the trial court erred by admitting D.R.'s statements.

The court in the first Oregon case concluded that the defendant was in custody when interviewed in the principal's office of his junior high school. In *re Matter of v. Killitz*, 59 Or.App. 720, 651 P.2d 1382, 1383 (1982). An armed, uniformed police officer had questioned the defendant in front of the school principal, and neither

adult said or did anything to indicate the defendant was free to leave. The student would have been subject to the usual school disciplinary measures if he had not come to the office, and he did not know that he would be questioned by a police officer. Under those circumstances, the court concluded he did not come to the office voluntarily. D.R., 84 Wn.App. at 837 (citing Killitz, 651 P.2d at 1384).

In the second Oregon case, as in Killitz, the defendant was a junior high school student summoned to the principal's office at his school. *State ex rel. Juvenile Dep't v. Loredo*, 125 Or.App. 390, 865 P.2d 1312 (1993). But in Loredo, the court concluded that the interrogation was not custodial because the police officer who questioned Loredo was in plain clothes, his gun was hidden from view, no one besides the officer and Loredo were present, and the officer told Loredo he was not under arrest, could leave if he wanted, and did not have to answer questions. D.R., 84 Wn.App. at 837-38 (citing Loredo, 865 P.2d at 1315).

*4 The D.R. court found the facts in Loredo strikingly similar to the case before it, except that D.R. was not told he was free to leave. The failure to advise D.R. that he was free to leave was an important factor in the court's conclusion that D.R. was in custody when he was questioned:

We agree this factor is significant, and conclude that D.R. was in custody, in light of Detective Matney's failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation.

D.R., 84 Wn.App. at 838.

This case is more like Loredo, in which the court found the interrogation was not custodial, and less like D.R. and Killitz. As with the defendant in Loredo, J.S. was advised that he was not under arrest, did not have to answer questions, and could leave at any time. Additionally, the detective who questioned J.S. was not in uniform, and his gun was concealed. Moreover, the interview took place in the office of the school counselor, not the principal.

J.S. describes the school counselor and CPS investigator as authority figures whose presence made the environment more coercive. But the roles of school counselors and CPS workers are different from those of school principals. Moreover, the CPS

investigator told J.S. that he could ask any of the adults, including the detective, to leave if he felt uncomfortable answering questions in front of them. The circumstances of J.S.'s interview were less coercive than those in D.R.'s case. We agree with the trial court that the interrogation of J.S. was not custodial.

J.S. next argues that the trial court erred by admitting his statement because Detective McCarthy was not truthful and made false promises during the interview, rendering J.S.'s statement involuntary. But the detective's interviewing tactics were not the sort that have been found to have coerced a defendant into confessing.

A confession must be the product of a rational intellect and a free will to be considered voluntary. *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). To determine voluntariness, the inquiry is whether, considering the totality of the circumstances, the confession was coerced. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Factors to consider may include the defendant's age, physical condition, experience, mental abilities, and the conduct of the police. *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996). Also relevant are the duration and environment of the questioning. *State v. Trout*, 125 Wn.App. 403, 414, 105 P.3d 69 (2005).

If the interrogating officer made promises or misrepresentations, the court must determine whether there was a causal relationship between the promise or misrepresentation and the confession. *Broadaway*, 133 Wn.2d at 132. "Deception alone does not make a statement inadmissible as a matter of law." *State v. Gilcrest*, 91 Wn.2d 603, 607, 590 P.2d 809 (1979). Likewise, misrepresenting the strength of the evidence against the suspect does not render an otherwise valid confession involuntary. *State v. Furman*, 122 Wn.2d 440, 451, 858 P.2d 1092 (1993). A trial court's determination that a confession was voluntary will not be disturbed on appeal if there is substantial evidence in the record from which the trial court could have found it to be voluntary by a preponderance of the evidence. *Aten*, 130 Wn.2d at 664.

*5 J.S. contends that his statement was involuntary because Detective McCarthy deceived and threatened him. According to J.S., Detective McCarthy falsely told him the purpose of the interview was to get him help and threatened J.S. by saying that he could not receive help unless he confessed. That description, however, does not fairly represent what happened.

The detective stated that his goal for the interview was to find the truth and to offer help. He did not threaten J.S. Rather, he assured J.S. that it was common for boys his age to be curious about those things, but that T.B.'s brother was certain he saw sexual contact, and for the adults present to be able to help J.S., they needed to know the truth. When J.S. continued to deny the allegations, the detective reiterated that if J.S. was not truthful, the detective could not help him: "But if your [sic] not willing to be honest about it, then you know it's, the help situation is over, right?"

Even if the detective's offer of help was deceptive, there is substantial evidence in the record to support the trial court's conclusion that J.S.'s statement was voluntary:

- The interview was short, lasting approximately half of an hour.
- J.S.'s physical condition was not impaired.
- The transcript of the interview shows that J.S. was not mentally impaired. J.S. described himself as a mature thirteen-year-old.
- The interview was conducted in the office of the school counselor, not the principal, and there is no indication that J.S. had previous experience in the counselor's office that made him believe he had to confess.
- The detective advised J.S. that he could leave at any time and did not have to answer any questions.
- The detective was not in uniform, did not show J.S. his badge, and his gun and handcuffs were concealed.

Considering all of the circumstances, including J.S.'s age, the detective's implied promise to help only if J.S. confessed was not the type of deception or implied promise that has been held sufficient to overcome the defendant's will to resist. See *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). The trial court did not err when it concluded that J.S.'s statement was voluntary.

CONCLUSION

The trial court did not err when it admitted J.S.'s confession. J.S. was not in police custody when Detective McCarthy interviewed him and, therefore, Miranda warnings were not required. Substantial evidence supports the trial court's conclusion that J.S.'s statement was voluntary. The decision of the trial court is affirmed.

Wash.App. Div. 1,2008.

State v. J.S.

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