56 A.D.3d 973, 870 N.Y.S.2d 472, 2008 N.Y. Slip Op. 09128

Supreme Court, Appellate Division, Third Department, New York.

In the Matter of RICHARD UU., Alleged to be a Juvenile Delinquent.

Richard Spinney, as Delaware County Attorney, Respondent;

Richard UU., Appellant.

Nov. 20, 2008.

Background: Following denial of juvenile's motion to suppress, the Family Court, Delaware County, Becker, J., adjudicated juvenile to be juvenile delinquent, based upon finding that juvenile committed acts which, if committed by adult, would constitute crime of criminal sexual act in the first degree. Juvenile appealed.

Holdings: The Supreme Court, Appellate Division, Peters, J., held that:

(1) failure to contact law guardian assigned to represent juvenile in his permanency proceedings prior to questioning did not violate juvenile's right to counsel;

(2) juvenile's waiver of his Miranda rights was voluntary;

(3) juvenile's statements were voluntary;

(4) finding that juvenile committed acts which, if committed by adult, would constitute crime of criminal sexual act in the first degree was both legally sufficient and in accordance with the weight of the evidence; and

(5) county attorney's office was not disqualified from prosecuting juvenile delinquency proceeding.

Affirmed.

West Headnotes

[1] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(D) Proceedings

Key211k205 k. Counsel or Guardian Ad Litem. Most Cited Cases

Failure to contact law guardian who had been assigned to represent juvenile in his permanency proceedings prior to questioning of juvenile in juvenile delinquency proceeding did not violate juvenile's right to counsel, given that permanency proceedings were wholly unrelated to juvenile delinquency proceeding, such that juvenile could validly waive his right to counsel in juvenile delinquency proceeding outside law guardian's presence.

[2] Headnote Citing References KeyCite Citing References for this Headnote

Key110 Criminal Law

Key110XXXI Counsel

Key110XXXI(B) Right of Defendant to Counsel

Key110XXXI(B)3 Waiver of Right to Counsel

Key110k1751 k. Capacity and Requisites in General. Most Cited Cases

An individual, in custody on matters unrelated to the matter upon which he or she was assigned counsel in a prior separate proceeding, is competent to waive the right to counsel in the absence of counsel.

[3] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Juvenile's waiver of his Miranda rights was voluntary, given that juvenile was 14 years old at time of questioning, that juvenile was not taken for questioning on night of underlying incident and questioned at late hour but, rather, was removed from home and interviewed on next day at reasonable time, that both juvenile and caseworker responsible for his care were advised of juvenile's rights prior to questioning and juvenile unequivocally indicated that he understood his rights and was willing to speak to investigator, and that juvenile had prior experience with law enforcement and was aware of significance of his Miranda rights. McKinney's Family Court Act § 305.2(3, 7).

[4] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Although a juvenile may effectuate a knowing, intelligent, and voluntary waiver of his Miranda rights, special care above and beyond ordinary constitutional safeguards must be provided to ensure that the rights of youthful suspects are adequately protected.

[5] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Ultimate inquiry in determining whether juvenile made knowing and intelligent waiver of his Miranda rights is whether the prosecuting entity proved that juvenile's statement was voluntary beyond a reasonable doubt, which is evaluated through a consideration of the totality of the circumstances, and relevant factors to be considered include juvenile's age, prior criminal experience, evidence of coercion by police prior to obtaining waiver, and whether Miranda warnings were fully, clearly, and adequately administered to juvenile.

[6] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Statutory requirements were met when caseworker with county social services department, who was person legally responsible for juvenile's care, was notified and present for administration of juvenile's Miranda warnings, notwithstanding juvenile's contention that department was incapable of providing him with guidance and support contemplated by statute, such that his waiver of Miranda rights was involuntary, and notwithstanding fact that caseworker advised juvenile to speak with investigator, which did not, in and of itself, establish that she was not acting in juvenile's best interests. McKinney's Family Court Act § 305.2(3, 7).

[7] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Although parent or legal guardian of a juvenile may invoke the right to counsel on the child's behalf in questioning by police, there is nothing that requires it.

[8] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Even when parent or guardian required to be notified and present during Miranda warnings being administered to juvenile is also “accuser” or victim of alleged crime, that dual role is but one factor to be considered, along with all of the other circumstances, in resolving the factual issue of voluntariness of juvenile's statement.

[9] Headnote Citing References KeyCite Citing References for this Headnote

Key92 Constitutional Law

Key92XXVII Due Process

Key92XXVII(G) Particular Issues and Applications

Key92XXVII(G)24 Juvenile Justice

Key92k4465 k. Proceedings. Most Cited Cases

Key211 Infants Headnote Citing References KeyCite Citing References for this Headnote

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k173 Admissibility

Key211k174 k. Admissions, Declarations, and Confessions. Most Cited Cases

Admissions made by juvenile when being questioned by investigator, after he voluntarily waived his Miranda rights, were voluntary, given that approximately 45-minute interview was brief in duration and took place at reasonable time of day in room certified for questioning of juveniles, caseworker was present with juvenile during entirety of interview, and there was no evidence that juvenile was tricked, threatened, or coerced into confessing, or that strategies used by investigator were so fundamentally unfair as to have denied juvenile due process or create substantial risk that he might falsely incriminate himself. U.S.C.A. Const.Amend. 14; McKinney's Family Court Act §§ 305.2(4)(b), (8), 344.2(2)(b)(i).

[10] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k175 Weight and Sufficiency

Key211k176 k. Delinquency; Violation of Law. Most Cited Cases

Finding that juvenile engaged in oral sexual conduct with child under age 11, thereby committing acts which, if committed by adult, would constitute crime of criminal sexual act in the first degree, was both legally sufficient and in accordance with the weight of the evidence, given juvenile's admission that he pulled four-year-

old victim's pants down, put his finger inside her vagina, and kissed her vaginal area, as well as foster mother's written statement and testimony that she observed juvenile's head very close to victim's vaginal area and heard "lip smacking" noises and foster mother's allegations that victim, pointing to her vaginal area, had stated that juvenile had licked her. McKinney's Penal Law § 130.50(3).

[11] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k175 Weight and Sufficiency

Key211k176 k. Delinquency; Violation of Law. Most Cited Cases

Discrepancies between foster mother's written statement and her testimony at fact-finding hearing raised credibility issues for family court to resolve in juvenile delinquency proceeding.

[12] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(C) Evidence

Key211k175 Weight and Sufficiency

Key211k176 k. Delinquency; Violation of Law. Most Cited Cases

In juvenile delinquency proceeding, corroborating evidence need only provide some proof that the crime occurred.

[13] Headnote Citing References KeyCite Citing References for this Headnote

Key211 Infants

Key211VIII Dependent, Neglected, and Delinquent Children

Key211VIII(D) Proceedings

Key211k205 k. Counsel or Guardian Ad Litem. Most Cited Cases

County attorney's office was not disqualified from prosecuting juvenile delinquency proceeding on grounds that it was unable to exercise independent judgment required of it, as sole agency for presentation of juvenile delinquency proceedings, since it consisted of same attorneys who represented county social services department, given that department was not party to juvenile delinquency proceeding, that it was department caseworker, rather than department attorney, who was present when juvenile waived his rights and agreed to speak with investigator, such that department was performing in its role as person legally responsible for juvenile, and not acting as his attorney, at the time of questioning, and that county attorney was not alleged to have used any information obtained at questioning to gain unfair advantage in prosecution of juvenile delinquency petition.

[14] Headnote Citing References KeyCite Citing References for this Headnote

Key110 Criminal Law

Key110XXXI Counsel

Key110XXXI(A) Counsel for Prosecution

Key110k1691 Disqualification of Prosecutor

Key110k1692 k. In General. Most Cited Cases

Public prosecutor should only be removed upon a showing of actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence; appearance of impropriety alone is not enough.

*474 Larisa Obolensky, Law Guardian, Delhi, for appellant.

Richard B. Spinney, County Attorney, Delhi (Amy B. Merklen of counsel), for respondent.

Before: MERCURE, J.P., PETERS, LAHTINEN, MALONE JR. and KAVANAGH, JJ.

PETERS, J.

Appeal from an order of the Family Court of Delaware County (Becker, J.), entered May 23, 2007, which granted petitioner's application, in a proceeding pursuant to Family Ct. Act article 3, to adjudicate respondent a juvenile delinquent.

Respondent (born in 1992) has been committed to the care and custody of the *475 Delaware County Department of Social Services (hereinafter DSS) since August 2003. In January 2006, respondent's foster mother allegedly observed him engaging in certain sexual contact with her four-year-old daughter. The following day, respondent's DSS caseworker brought respondent to DSS for questioning by the police. After respondent and the caseworker were advised of respondent's Miranda rights and agreed to waive those rights, respondent made incriminating statements.

A juvenile delinquency proceeding was then initiated. Respondent moved to suppress his statements on the grounds that he did not make a knowing and intelligent waiver of his Miranda rights and that the waiver was obtained in violation of his right to counsel. Following a hearing, Family Court denied the motion. A fact-finding hearing ensued, after which Family Court found respondent to have committed acts which, if committed by an adult, would constitute the crime of criminal sexual act in the first degree. Following a dispositional hearing, respondent was adjudicated a juvenile delinquent. This appeal ensued.

[1] Headnote Citing References[2] Headnote Citing References We reject respondent's contention that the failure to contact the Law Guardian assigned to represent him in his permanency proceedings prior to questioning violated his right to counsel. It is now settled that an individual, "in custody on matters unrelated to the [matter] upon which he or she was assigned counsel in a prior separate proceeding, is competent to waive the right to counsel in the absence of counsel" (People v. Kent, 240 A.D.2d 772, 773, 658 N.Y.S.2d 530 [1997], lvs. denied 90 N.Y.2d

1012, 666 N.Y.S.2d 107, 688 N.E.2d 1391 [1997], 91 N.Y.2d 875, 668 N.Y.S.2d 573, 691 N.E.2d 645 [1997]; see People v. Steward, 88 N.Y.2d 496, 502, 646 N.Y.S.2d 974, 670 N.E.2d 214 [1996]; People v. Lawrence, 1 A.D.3d 625, 626, 766 N.Y.S.2d 261 [2003], lv. denied 1 N.Y.3d 630, 777 N.Y.S.2d 28, 808 N.E.2d 1287 [2004]; see generally People v. Bing, 76 N.Y.2d 331, 559 N.Y.S.2d 474, 558 N.E.2d 1011 [1990]). As the permanency proceedings for which respondent had been assigned a Law Guardian are wholly unrelated to the juvenile delinquency proceeding at issue here, he could validly waive his right to counsel in this matter outside the presence of that Law Guardian (see People v. Kent, 240 A.D.2d at 773, 658 N.Y.S.2d 530).

[3] Headnote Citing References[4] Headnote Citing References[5] Headnote Citing References Respondent next contends that his statements must be suppressed because he did not make a knowing and intelligent waiver of his Miranda rights. While a juvenile may effectuate a knowing, intelligent, and voluntary waiver of his Miranda rights (see People v. Stephen J.B., 23 N.Y.2d 611, 616-617, 298 N.Y.S.2d 489, 246 N.E.2d 344 [1969]), "special care above and beyond ordinary constitutional safeguards must be provided to insure that the rights of youthful suspects are adequately protected" (Matter of Robert P., 177 A.D.2d 857, 858, 576 N.Y.S.2d 626 [1991]; see People v. Charles M., 286 A.D.2d 942, 943, 731 N.Y.S.2d 307 [2001]). The ultimate inquiry is whether the prosecuting entity proved that the statement was voluntary beyond a reasonable doubt through a consideration of the totality of the circumstances (see Matter of Paul QQ., 256 A.D.2d 751, 751-752, 681 N.Y.S.2d 644 [1998]). "Relevant factors to be considered include respondent's age, prior criminal experience, evidence of coercion by the police prior to obtaining the waiver and whether 'the Miranda warnings were fully, clearly and adequately administered to the youth' " (Matter of Phillip J., 256 A.D.2d 654, 656, 683 N.Y.S.2d 293 [1998], quoting People v. Boykins, 81 A.D.2d 922, 923, 439 N.Y.S.2d 181 [1981], lv. denied 54 N.Y.2d 761, 443 N.Y.S.2d 1051, 426 N.E.2d 775 [1981]; see *476 Fare v. Michael C., 442 U.S. 707, 729, 99 S.Ct. 2560, 61 L.Ed.2d 197 [1979]).

[6] Headnote Citing References[7] Headnote Citing References[8] Headnote Citing References We disagree with respondent's contention that DSS was "incapable as a matter of law of providing the guidance and support to respondent contemplated by [Family Ct. Act § 305.2(3) and (7)]" (Matter of James OO., 234 A.D.2d 822, 822, 652 N.Y.S.2d 783 [1996], lv. denied 89 N.Y.2d 812, 657 N.Y.S.2d 405, 679 N.E.2d 644 [1997]), thereby rendering his Miranda waiver involuntary. The applicable statutory provisions were fully complied with when the DSS caseworker, the person "legally responsible for [respondent's] care" (Family Ct. Act § 305.2[3]), was notified and present for the administration of respondent's Miranda warnings (see Family Ct. Act § 305.2[7]). Despite respondent's assertions to the contrary, the fact that the DSS caseworker advised him to speak with the investigator does not, in and of itself, establish that she was not acting in respondent's best interests (see Matter of Arthur O., 55 A.D.3d 1019, 1020, --- N.Y.S.2d ---- [2008]; Matter of James OO., 234

A.D.2d at 822-823, 652 N.Y.S.2d 783). While the parent or legal guardian of a juvenile may invoke the right to counsel on the child's behalf (see People v. Mitchell, 2 N.Y.3d 272, 276, 778 N.Y.S.2d 427, 810 N.E.2d 879 [2004]), there is nothing that requires it, and we find no compelling evidence that DSS acted contrary to respondent's interests in permitting him to speak with the police.FN1

FN1. This is not a case where the parent or guardian required to be notified and present during Miranda warnings was also the “accuser” (see e.g. Matter of James OO., supra; Matter of Candy M., 142 Misc.2d 718, 538 N.Y.S.2d 143 [1989]) or the victim of the crime (see e.g. People v. Benedict V., 85 A.D.2d 747, 445 N.Y.S.2d 798 [1981]; Matter of Michelet P., 70 A.D.2d 68, 419 N.Y.S.2d 704 [1979]). Even in those circumstances, such a “dual role” is but one “factor to be considered, along with all of the other circumstances, in resolving the factual issue of the voluntariness of [the] respondent's statement” (Matter of James OO., 234 A.D.2d at 823, 652 N.Y.S.2d 783).

[9] Headnote Citing References Viewing the totality of the circumstances surrounding the Miranda waiver and subsequent confession, we conclude that Family Court correctly declined to suppress respondent's statements as involuntary. Respondent was 14 years old at the time of questioning and was not taken the night of the incident and questioned at a late hour, but rather removed from the home and interviewed the next day at a reasonable time (compare Matter of Robert P., 177 A.D.2d at 858-859, 576 N.Y.S.2d 626). Both respondent and the caseworker were advised of respondent's Miranda rights prior to any questioning (see Family Ct. Act § 305.2[3], [7]) and respondent unequivocally indicated that he understood his rights and was willing to speak with the investigator. Moreover, the record establishes that respondent had prior experience with law enforcement and was aware of the significance of his Miranda rights.

Furthermore, upon a review of the videotape of respondent's interview, we find no basis to conclude that respondent's admissions were involuntary. The entire interview was brief in duration, lasting approximately 45 minutes (see People v. Williamson, 245 A.D.2d 966, 967, 667 N.Y.S.2d 114 [1997], lv. denied 91 N.Y.2d 946, 671 N.Y.S.2d 726, 694 N.E.2d 895 [1998]; People v. Perry, 77 A.D.2d 269, 272, 433 N.Y.S.2d 138 [1980]), and took place at a reasonable time of the day in a room certified for the questioning of juveniles (see Family Ct. Act § 305.2[4][b]). Additionally, a DSS caseworker was present with respondent during the entirety of the interview (see Family Ct. Act § 305.2[8]). There is no evidence that respondent was tricked, threatened or *477 coerced into confessing, or that the strategies used by the investigator were so fundamentally unfair so as to have denied respondent

due process or “create[d] a substantial risk that [he] might falsely incriminate himself” (Family Ct. Act § 344.2[2][b][i]; see Matter of Wilinston BB., 175 A.D.2d 322, 322, 572 N.Y.S.2d 413 [1991], lv. denied 78 N.Y.2d 858, 575 N.Y.S.2d 454, 580 N.E.2d 1057 [1991]; People v. Donson, 147 A.D.2d 815, 816, 537 N.Y.S.2d 904 [1989], lv. denied 73 N.Y.2d 1014, 541 N.Y.S.2d 768, 539 N.E.2d 596 [1989]; see generally People v. Tarsia, 50 N.Y.2d 1, 11, 427 N.Y.S.2d 944, 405 N.E.2d 188 [1980]). Considering the totality of the circumstances surrounding respondent's questioning, we cannot say that his statements were involuntarily made.

[10] Headnote Citing References[11] Headnote Citing References[12] Headnote Citing References Family Court's finding that respondent committed acts which, if committed by an adult, would constitute the crime of criminal sexual act in the first degree is both legally sufficient and in accordance with the weight of the evidence. The presentment agency met its burden of establishing that respondent engaged in oral sexual conduct with a child under the age of 11 (see Penal Law § 130.50[3]). In his confession, which was properly considered by Family Court in rendering its order of fact finding, respondent admitted to pulling the four-year-old victim's pants down, putting his finger inside her vagina and, despite initial denials, kissing her vaginal area. Further, in both the foster mother's written statement and her testimony at the fact-finding hearing, she stated that she observed respondent's head very close to the girl's vaginal area and heard “lip smacking” noises. The foster mother also alleged in her statement that the victim, pointing to her vaginal area, stated that respondent had “lick[ed]” her. Although there were certain discrepancies between the foster mother's written statement and her testimony at the fact-finding hearing, this raised credibility issues for Family Court to resolve (see Matter of Brittenie K., 50 A.D.3d 1203, 1205, 854 N.Y.S.2d 799 [2008]). Therefore, inasmuch as the corroborating evidence need only provide some proof that the crime occurred (see Matter of Carmelo E., 57 N.Y.2d 431, 433, 456 N.Y.S.2d 739, 442 N.E.2d 1250 [1982]; Matter of David B., 259 A.D.2d 986, 986, 688 N.Y.S.2d 863 [1999]; see also People v. Booden, 69 N.Y.2d 185, 187, 513 N.Y.S.2d 87, 505 N.E.2d 598 [1987]), we find sufficient evidence to support Family Court's conclusion that respondent committed the act charged beyond a reasonable doubt. Moreover, giving due deference to Family Court's credibility determinations (see Matter of Zachary A., 307 A.D.2d 464, 465, 761 N.Y.S.2d 407 [2003]; Matter of Manuel W., 279 A.D.2d 662, 662, 717 N.Y.S.2d 812 [2001]), respondent's adjudication was not against the weight of the evidence.

[13] Headnote Citing References[14] Headnote Citing References We also reject respondent's argument that petitioner's office was disqualified from prosecuting the instant proceeding because it was unable to exercise independent judgment required of it as the sole agency for presentation of juvenile delinquency proceedings, since it consists of the same attorneys that represent DSS. “A public prosecutor should only be removed upon a showing of ‘actual prejudice arising from

a demonstrated conflict of interest or a substantial risk of an abuse of confidence' " (Matter of Nathalia P., 22 A.D.3d 496, 497, 802 N.Y.S.2d 467 [2005], quoting People v. English, 88 N.Y.2d 30, 33-34, 643 N.Y.S.2d 16, 665 N.E.2d 1056 [1996] [citations omitted]). The appearance of impropriety alone is not enough (see Matter of Stephanie X., 6 A.D.3d 778, 779-780, 773 N.Y.S.2d 766 [2004]). Here, DSS was not a party to this juvenile delinquency proceeding and it *478 was a caseworker, rather than a DSS attorney, who was present when respondent waived his rights and agreed to speak with the investigator. Thus, at the time of questioning, DSS was performing its role as the person legally responsible for respondent, not acting as respondent's attorney. Moreover, respondent does not allege that petitioner used any information obtained to gain an unfair advantage in the prosecution of the juvenile delinquency petition (see Matter of Matthew FF., 179 A.D.2d 928, 928-929, 579 N.Y.S.2d 178 [1992]).

Respondent's remaining contentions, to the extent not addressed herein, have been considered and found to be unavailing.

ORDERED that the order is affirmed, without costs.

MERCURE, J.P., LAHTINEN, MALONE JR. and KAVANAGH, JJ., concur.

N.Y.A.D. 3 Dept.,2008.

In re Richard UU.

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