IN THE SUPREME COURT OF OHIO

STATE OF OHIO	**Case No.**
Appellant,	
vs.	**On Appeal From The Montgomery County Court Of Appeals, Second Appellate District**
L.G.	
Appellee,	**Court of Appeals Case No. 27296**

MEMORANDUM IN SUPPORT OF JURISDICTION, STATE OF OHIO

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TABLE OF CONTENTS

WHY THIS CASE INVOLVES A MATTER OF PUBLIC OR GREAT GENERAL INTEREST AND PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION

State action is a prerequisite to application of constitutional protections, including, in this case, the Fifth Amendment and the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This case presents a question of public or great general interest and a substantial constitutional question because the decision of the trial court and court of appeals violated this fundamental maxim, and applied the protections of the Fifth Amendment and requirements of *Miranda*, to an interview by a private citizen.

The requirements of *Miranda* only apply to custodial interrogation by law enforcement officials. In determining whether or not *Miranda* warnings are required, the first question is therefore whether there was action by the state, i.e. whether the questioner was a law enforcement officer or a person acting under their direction and control. If there is no state action, then the protections of the Fifth Amendment do not apply, and it is irrelevant whether or not a reasonable person in the suspect's position would have felt free to terminate the encounter with a private citizen interviewer.

The error in both the decision of the trial court and the court of appeals was in conflating these two questions. Both courts began the inquiry with whether or not the alleged juvenile delinquent was in custody, before considering whether the interviewer was a state actor. Once the lower courts reached the critical inquiry of whether or not the interviewer was a state actor, they incorrectly included in their determination factors only relevant to the question of custody – whether or not a reasonable 13 year old in the juvenile's position would have felt free to terminate the encounter. The trial court also erred in considering whether or not a "reasonable thirteen (13) year old child would view [the interviewer] as anything other than law enforcement." The opinion of a reasonable juvenile in L.G.'s position as to whether or not

Director Jamie Bullens was operating as a law enforcement official has no bearing on that question.

In this case, the lower courts erred in confusing the inquiries regarding state action and custody, and ultimately erred in expanding the protections of the Fifth Amendment and requirements of *Miranda* to an interview conducted by a private citizen. For these reasons, leave to appeal should be granted.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

On October 28, 2015, the Dayton Police Department filed a complaint alleging that L.G. was a delinquent child; that he, on October 27, 2015, and at thirteen years of age, did commit Inducing Panic in violation of R.C. 2917.31(A)(1) and R.C. 2152.02, which would be a felony of the second degree if committed by an adult. On November 16, 2015, L.G. filed a motion to suppress, alleging that he was interviewed in violation of his Fifth Amendment rights. The magistrate held a hearing and granted the juvenile's motion to suppress, a decision later adopted by the trial court judge. The State appealed and the Second District Court of Appeals, in a divided opinion, affirmed.

B. Statement of the Evidence at the Suppression Hearing

At the suppression hearing held on December 22, 2015, Dayton Police Officer Jeremy Stewart and the Executive Director of Safety and Security for Dayton Public Schools, Jamie Bullens, testified for the State. L.G. and L.G.'s mother testified on his behalf.

Jamie Bullens is employed by the City of Dayton Public Schools as the executive director of safety and security. He oversees the school resource officers, none of whom are armed. On October 27, 2015, Director Bullens responded to Longfellow School because of a bomb threat.

On October 27, 2015, Dayton Police Officer Jeremy Stewart was also dispatched due to the bomb threat. Once Officer Stewart and others searched the school and determined that there was no bomb, he informed Director Bullens that the school was clear. Director Bullens decided to bring all the children back into the school, and took them all to the school gym. Officer Stewart was not in the gym with the students.

Director Bullens spoke to the students and informed them that a reward for any information was being offered by the Miami Valley Crime Stoppers, which is not a law enforcement agency but rather an independent entity. Two students came forward and provided information to Director Bullens. Director Bullens spoke to them in the cafeteria, which he chose to operate out of. After the alleged juvenile delinquent, L.G., was identified as a suspect he was brought to see Director Bullens in the cafeteria by a school resource officer, on Director Bullens' instructions.

Director Bullens informed L.G. that he did not have to answer any of his questions (L.G. disputes this in his testimony). Director Bullens interviewed L.G. for approximately ten minutes, and L.G. admitted that he had called in the bomb threat. No one disputes that Director Bullens was the only person who interviewed L.G. in the cafeteria.

Officer Stewart was in the cafeteria while L.G. was questioned. Officer Stewart testified that no other uniformed police officers were present in the cafeteria, while L.G. testified that there were two uniformed officers present. Officer Stewart did not question L.G. in the cafeteria (L.G. corroborated this). Prior to the interview, Officer Stewart did not discuss L.G.'s questioning with Director Bullens. Director Bullens testified that neither Officer Stewart nor any other law enforcement officer directed his questioning of L.G. in any way. After L.G. was identified as a suspect, Director Bullens had no conversation with any member of the police until

after he had concluded his interview of L.G. L.G. corroborated this, testifying that no officer ever spoke to him, or to Director Bullens, during his interview in the cafeteria.

Officer Stewart testified that during the interview he was about ten to fifteen feet away from L.G., while L.G. testified that the closest officer was about five feet away. Director Bullens did not contact L.G.'s mother prior to questioning him. L.G.'s mother testified that she had told L.G. to never talk to police without her being present.

C. Decision of the Trial Court

The trial court granted L.G.'s motion to suppress. The Court found that because "given the circumstances surrounding the investigation, no reasonable thirteen (13) year old child would feel he or she was at liberty to terminate the interrogation and leave," L.G. was in custody for the purposes of *Miranda*. The trial court next turned to the question of whether or not the interviewer, Director Jamie Bullens, was a state actor. The trial court found that, given the circumstances of the investigation, "no reasonable thirteen (13) year old child would view Mr. Bullens as anything other than law enforcement," and that Director Bullens was therefore functioning as a state actor.

D. Decision of the Court of Appeals

The State appealed to the Second District Court of Appeals, arguing that Director Bullens was not functioning as a state actor and *Miranda* warnings were therefore not required. The State further argued that L.G. was not in custody when he was interviewed. In a divided opinion, the majority affirmed the decision of the trial court and held that Director Bullens was a state actor and L.G. was in custody. To reach this decision the Court relied on several factors that are not relevant to the determination of whether or not one is a state actor, most notably the trial

court's conclusion that "no reasonable thirteen (13) year old child would view Mr. Bullens as anything other than law enforcement."

ARGUMENT

Proposition of Law:

The Protections of the United States Constitution only apply where there is action by the State. The Fifth Amendment protection against self-incrimination does not apply to interviews conducted by private citizens.

A. State Action is a Necessary Prerequisite to the Application of Constitutional Protections

Miranda warnings are only required when a suspect has been subject to custodial interrogation. *Miranda*, 384 U.S. 436. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. L.G. was not subject to interrogation by law enforcement officers during the interview in question on October 27, 2015, and only interrogation by law enforcement officers will trigger the protections of *Miranda*. "From a careful examination of the language of the opinion of Chief Justice Warren in *Miranda v. Arizona*, *supra* we think it clear that the term, custodial interrogation, was limited to questioning initiated by law enforcement officers." *State v. Bolan*, 27 Ohio St.2d 15, 18, 271 N.E.2d 839 (1971). "The Miranda requirements 'do not apply when admissions otherwise admissible are given to persons who are not officers of the law or their agents.'" (Internal citations omitted.) *State v. Watson*, 28 Ohio St.2d 15, 26, 275 N.E.2d 153 (1971).

The trial court concluded that "no reasonable thirteen (13) year old child would view Mr. Bullens as anything other than law enforcement." The question of whether L.G. (or a reasonable person in his position) would have felt free to leave the cafeteria – which would be a crucial determination if he had been questioned by police – is irrelevant in the instant case, because L.G.

was questioned by a private citizen. Feeling compelled to stay and speak with a teacher or a parent by school rules or social convention will not result in custody for the purposes of the Fifth Amendment.

> Custodial interrogation as covered by the *Miranda* decision consists of questioning initiated by "law enforcement officers" after the accused is taken into custody or otherwise deprived of his freedom in any significant way. Because of this requirement and also because of the general doctrine that state action is a prerequisite to the application of constitutional protections, it is clear that *Miranda* does not govern interrogation by private citizens acting on their own.

(Internal citations omitted.) *Matter of Gruesbeck*, 2d Dist. Greene No. 97-CA-59, 1998 WL 404516, *2 (Mar. 27, 1998).

Even questioning by one who possesses more power than the average citizen will not suffice to render an interview a police action. "It might be argued that the protections of *Miranda* would be appropriate where the defendant is questioned by a person who is not a government employee but who has employment responsibilities of a law enforcement nature, such as a private security guard. * * * The courts, however, have rather consistently held that such persons as security officers, railroad detectives, insurance investigators, and private investigators are not required to comply with *Miranda*." *Gruesbeck*, supra at *2.

This holding has been consistently applied to interviews by private citizens, even security personnel, who are seeking evidence of suspected crimes. For example, *Miranda* warnings were not required for "[d]etention and questioning by department store security guards in connection with a suspected shoplifting," nor for questioning by a "security guard employed by a governmental agency, a county hospital." (Internal citations omitted.) *Bolan*, 27 Ohio St.2d at 18–19. Nor were *Miranda* warnings required for "the questioning of an employee of a gambling casino in the manager's office while one of the casino's security guards waited outside," "[t]he

questioning of a suspected shoplifter by the manager of a grocery store," or "[a] grocery store merchant's questioning of an apprehended shoplifter." (Internal citations omitted.) *Id.*

Courts have similarly held that *Miranda* warnings were not required for "interrogation by private investigators," "as to statements made to private citizens who had seized a suspected rapist and were holding him for the police," "to admissions made by a defendant to armed private citizens who had apprehended him after he had shot at them," and "to admissions made to an insurance investigator." (Internal citations omitted.) *Id.*

Even interviews of probationers by their probation officers, with whom the probationer is obliged to meet and cooperate, do not amount to the custodial interrogation contemplated by *Miranda*:

> The obligation to appear and answer questions of a probation officer does not turn an otherwise voluntary statement into a compelled statement. For purposes of *Miranda,* a suspect is not in custody when speaking to his probation officer, as there is no formal arrest or restraint on freedom of movement. A probation officer is not required to give *Miranda* warnings before questioning a client, even if the officer is consciously seeking an incriminating statement.

(Internal citations omitted.) *In Matter of Johnson*, 5th Dist. Morgan No. CA-95-13, 1996 WL 363811, *1 (June 20, 1996), citing *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

The decisions of this Court and the courts of appeal have made clear that the Fifth Amendment protections apply only to custodial interrogation by law enforcement or those acting under their direction and control, and not to interviews by private citizens. The court below erred in failing to properly recognize that fact.

B. The Lower Courts Erred in Finding that Director Bullens was a State Actor

The lower courts also erred in their finding that Director Jamie Bullens was functioning as a state actor when he questioned L.G. If a private citizen is acting as an agent of the police,

the Fifth Amendment will apply. "*Miranda* requirements do not apply to admissions made to persons who are not officers of the law or their agents * * * [I]n order to qualify as an agent of law enforcement, the agent must act under the direction or control of a law enforcement agency." *State v. Jackson*, 8th Dist. Cuyahoga No. 103957, 2016-Ohio-8144, ¶ 17-18. "Police may not avoid *Miranda* by delegating the questioning * * * ." *Gruesbeck*, 1998 WL 404516 at *3. However, there must be "a great deal of entanglement between the police and the private searcher before agency can be found." *State v. Cook*, 149 Ohio App.3d 422, 2002-Ohio-4812, 777 N.E.2d 882, ¶ 10 (2nd Dist.)(regarding the Fourth Amendment).

That the private citizen's actions eventually aided the police is not dispositive, nor is it enough for the private citizen to act with the intention of helping the police. "[T]he duty of giving 'Miranda warnings' is limited to employees of governmental agencies whose function is to enforce law * * * it does not include private citizens *not directed or controlled by a law enforcement agency,* even though their efforts might aid in law enforcement. " (Emphasis sic.) *In re G.J.D.*, 11th Dist. Geauga No. 2009-G-2913, 2010-Ohio-2677, ¶ 21-22, quoting *Bolan*, 27 Ohio St.2d at 18. The Second District similarly held that a search conducted by hospital security personnel was not a police action, though their aims overlapped with those of the police:

> The courts have not hesitated to admit into evidence * * * the fruits of illegal searches conducted by persons who, while not employed by the government, have as their responsibility the prevention and detection of criminal conduct. * * * In such circumstances it makes no difference that the private employer's objections in keeping the business operation free of criminal activity coincides with the government interest in law enforcement.

State v. Chung, 2d Dist. Montgomery No. 17154, 1999 WL 76945, *3 (Feb. 19, 1999)(finding that a search by hospital security personnel was not a police action).

The fact that Director Bullens is a retired police officer – which both the trial court and court of appeals discuss in their finding that he was a state actor – is also irrelevant to this

determination. Director Bullens testified that he did not maintain his status as a peace officer. *See United States v. Parr-Pla*, 549 F.2d 660, 663 (9th Cir.1977)("The hotel investigator had been a deputy sheriff for 18 years. He had retired, however, and had no affiliation with any government law enforcement agency at the time he questioned appellant."). Even the involvement of an off-duty police officer, when acting in the scope of his employment as a private security guard rather than a law enforcement officer, will not transform the interview into a state action. *See Gruesbeck*, 1998 WL 404516 at *3, citing *City of Grand Rapids v. Impens*, 414 Mich. 667, 677, 327 N.W.2d 278 (1982).

In *Peterson v. Douma*, 751 F.3d 524 (7th Cir.2014), the court found that defense counsel was not constitutionally ineffective for failing to move to suppress statements made to an off-duty officer, even though the defendant knew the person was a police officer, because such a motion to suppress was likely to fail.

> Although Peterson knew Liethen was a police officer, she was off-duty and out of uniform at the time of their conversation. * * * Liethen did not display her badge, draw her weapon, or take any other action that would have led Peterson to believe she was acting in her role as a police officer rather than as a private citizen. Liethen told him (we will assume quite sternly) to come up from the basement and then told him what she had just heard from the children. These were the actions of a responsible adult, and we agree with the state court that Peterson was not in custody simply because he knew that Liethen was a police officer.

Id. at 533.

In the instant case, there is no evidence that L.G. was aware of Director Bullens' past career. But even if L.G. had known Bullens was a retired police officer, Bullens was acting in his usual role as the director of safety and security for the school.

The Court of Appeals cited the decision of the trial court that, "no reasonable thirteen (13) year old child would view Mr. Bullens as anything other than law enforcement * * * ." The

view of a reasonable thirteen year old as to whether or not Director Bullens was law enforcement is, however, wholly irrelevant. The question of whether Director Bullens was a state actor is answered by the level of entanglement between his actions and those of the police – the extent to which the police controlled and directed his questioning – facts of which L.G. would be largely ignorant.

In L.G.'s eyes, or indeed, in the view of a reasonable thirteen year old, Director Bullens may have possessed the same authority as a law enforcement officer. One would hope that a student would view a teacher, a school official, or a parent as an authority figure to be trusted and obeyed as much as they would a law enforcement officer. But the Fifth Amendment does not intercede every time a juvenile is interviewed by a parent, just because the juvenile may view his parent's authority as unquestionable. These factors only bear on the issue of whether or not the juvenile is in custody, not on whether it is the state which has taken action, and subjected the juvenile to custodial interrogation requiring constitutional protections.

The crucial factor in determining if the private citizen interviewer was acting as an agent of the police is whether "the questioner is acting on behalf of the police." *In re G.J.D.*, 11th Dist. Geauga No. 2009-G-2913, 2010-Ohio-2677, ¶ 25-26. Police presence alone during an interview is not sufficient to transform the private citizen interviewer into an agent of the police. *See In re W.J.L., Jr.*, 2d Dist. Clark No. 2003 CA 81, 2004-Ohio-3787 at ¶ 12. "There must be some evidence that police directed private persons where and how to search and what to look for." *State v. Ellis*, 2d Dist. Greene No. 05CA78, 2006-Ohio-1588, ¶ 16 (regarding the Fourth Amendment).

Although law enforcement was present during the interview, Director Bullens was not acting under their direction and control when he interviewed L.G. on October 27, 2015. L.G.

was initially determined to be a suspect by Director Buellens after Bullens alone interviewed two other students. When he was identified as a suspect, L.G. was brought to see Bullens in the cafeteria by a school employee, on Bullens' instructions. Both Director Bullens and Officer Stewart testified that the police did not direct the questioning of L.G. in any way. Any control by the police of Director Bullens' interview would have been impossible, since both Director Bullens and Officer Stewart testified that, after L.G. was identified as a suspect, they did not even talk to one another until after the interview was concluded. L.G. himself corroborated this fact, testifying on direct examination that the officers present remained silent throughout Bullens' interview of him.

Director Bullens was not acting under the Dayton Police Department's instructions when he interviewed L.G. He received no direction from any police officer to interview L.G. in the first place, no instructions on what questions to ask him, or any advice from the police on interviewing techniques. In fact, there was not even any conversation between Bullens and the police leading up to the interview. Director Bullens was clearly not acting as a police agent when he interviewed L.G. As is *In Re: G.J.D.*, 2016-Ohio-2677, and *Chung*, 2d Dist. 1999 WL 76945, Director Bullens' aims in ensuring the safety of the school and the students overlapped with those of law enforcement. However, Director Bullens was acting under his own direction, and in line with his own duty as a school official; police had not merely "delegated" their questioning to him.

Because L.G. was never interviewed by the police or their agent, he was never subjected to custodial interrogation, and the requirements of *Miranda* did not apply. His statements to Director Bullens should not have been suppressed.

C. Even if Bullens was a State Actor, L.G. was Not in Custody

Even if Director Bullens had been functioning as a state actor, *Miranda* warnings would still not be required because L.G. was not in custody at the time of his interview. The requirement of *Miranda* warnings only attaches when one is subjected to custodial interrogation. *Miranda*, 384 U.S. at 478–79. To determine if a person is in custody, courts look at the totality of the circumstances to determine whether, given those circumstances, a reasonable person would have felt free to terminate the encounter. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 27 (2004). The "ultimate inquiry" is whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id*, quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983).

The test for custody is objective and the relevant factors include "whether the encounter takes place in surroundings that are familiar to the suspect; the number of law enforcement officers present, as well as their conduct and demeanor; the degree of physical restraint imposed; and the duration and character of the interrogation." *State v. Magnone*, 2016-Ohio-7100, 72 N.E.3d 212, ¶ 23 (2d Dist.).

Here, the evidence showed that L.G. was not in custody when he was questioned by Director Bullens. The fact that the interview took place at school does not make it inherently coercive. *See State v. Spahr*, 2d Dist. Miami Nos. 2008 CA 21, 2008 CA 22, 2009-Ohio-4609, ¶ 15 ("Although Spahr would have us believe that this was a coercive atmosphere, courts have previously rejected the argument that a school is necessarily a coercive setting for a juvenile to be questioned by police."); *In re Haubeil*, 4th Dist. Ross No. 01CA2631, 2002-Ohio-4095, ¶ 16 ("Ohio courts generally have found that the act of law enforcement officers questioning minors while they are at school does not amount to custodial interrogation where there is no evidence that the student was under arrest or told he was not free to leave. * * * Absent some evidence

that the student is under arrest or restrained to a degree associated with a formal arrest, we see nothing so inherently coercive in the school setting that would require *Miranda* warnings.").

The interview took place in the school's cafeteria, an area that a reasonable thirteen year old student would have associated with a more relaxed atmosphere than, for example, the principal's office. *Johnson*, 1996 WL 363811 at *1("Further, the circumstances demonstrate that the setting was not custodial in nature. Appellant was questioned in the school library, a setting that is not intimidating.").

The interview lasted less than ten minutes, and no police officer participated in the interview. L.G. was not informed that he was under arrest. Director Bullens testified that he told L.G. he did not have to answer his questions (L.G. disputes this). L.G. had been instructed by his mother not to answer any questions by police unless she was present. As Judge Hall, writing for the dissent below, pointed out, "during the interview, L.G. refused to provide the names of anyone else involved, demonstrating a lack or compulsion of coercion arising from the interview setting and demonstrating that L.G. knew he could refuse to answer." *In Re: L.G*, 2017-Ohio-2781 at ¶ 27. That L.G. refused to answer some questions is strong evidence that he knew he did not have to cooperate with Director Bullens' questioning. Given the totality of the circumstances, L.G. was not subject to a restraint on freedom of movement of the degree associated with a formal arrest, and was not in custody for purposes of *Miranda*.

CONCLUSION

The State asks the Court to accept jurisdiction and allow its appeal of the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 26th Day of June 2017, to: Michael Deffet, 117 South Main Street, Suite 400, Dayton, OH 45422, and the Officer of the Ohio Public Defender, 250 East Broad Street, Ste. 1400, Columbus, OH 43215.

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