Supreme Court of Ohio Clerk of Court - Filed June 12, 2018 - Case No. 2017-0877

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	**CASE NO. 2017-0877**
Appellant,	**On Appeal from the Montgomery County Court of Appeals, Second Appellate District**
vs.	
L.G.,	**Court of Appeals Case No. CA-27296**
Appellee.	

MERIT BRIEF OF L.G., APPELLEE

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STATEMENT OF THE CASE

The question presented is whether the supervisor of 26 school police officers, while working hand in glove with City and County police departments investigating a felony, is the equivalent of law enforcement and/or is an agent of law enforcement and therefore required to give Miranda warnings when questioning a 13 year old alternative school student in the presence of armed City police officers. The Juvenile Court and the Court of Appeals found that a person acting in such a manner and capacity is either working in a law enforcement capacity or is an agent of law enforcement. He is therefore required to provide *Miranda* warnings prior to questioning.

After an investigation with Dayton police officers, Dayton Public School's Executive Director of Safety and Security questioned 13 year old seventh grader L.G. regarding his involvement in a bomb threat. Based on L.G.'s response to questioning, he was charged with Inducing Panic, a felony of the second degree. L.G. filed a motion to suppress his statements on the grounds that any statements were taken in violation of his right against self-incrimination as found in the Ohio and United States Constitutions. A Juvenile Court Magistrate held a hearing on the motion to suppress and granted it. The State objected. Judge Kuntz upheld the Magistrate's decision. The State appealed to the Second District Court of Appeals, which also upheld the suppression of L.G.'s statements. The State has appealed that decision.

STATEMENT OF THE FACTS

On October 27, 2015 Dayton Police responded to an apparent bomb threat at Longfellow Alternative School. (T. 5) Dayton Police Sergeant Keller, Sergeant Anderson, Officer Stewart, and Officer Speelman along with his K-9, all met with security personnel at the school. (T. 5, 11) Dayton Public Schools Executive Director of Safety and Security, Jamie Bullens ("Director

Bullens"), also arrived at the school. Director Bullens is a retired police officer and detective of 23 years. (T. 18) He oversees 26 school resource officers who are sworn in by the Dayton Police Department ("DPD") as institutional police officers. (T. 24) All of the officers supervised by Bullens are extensively trained as police officers (including firearm training), carry handcuffs, and have the power to arrest. (T. 24-25) These officers receive an initial 143 hours of training, then must pass a State certification test, and then get 70-80 hours of training each year. (T. 26)

Bullens was first contacted about the incident by DPD Sergeant Anderson (T. 29) and soon thereafter by Sgt. Leslie Bunch of the Montgomery County Regional Dispatch Center. (T. 11, 30-31) The first thing Director Bullens did when he arrived at the scene was meet with Sgt. Keller. (T. 29, 30) Director Bullens described Sgt. Keller as the "supervisor" of the scene. (T. 30) After Longfellow Alternative School had been evacuated due to the threat, Director Bullens and Dayton Police Sgt. Keller made the decision "in unison" to have dogs check the school for possible explosive devices. (T. 31, 32) Soon after, Bullens, again after consultation with Sgt. Keller, decided to allow students back into the school gym. (T. 31, 32) Students were required to remain in the gym. (T. 33) After placing the students in the gym, (T. 32) Bullens, with a uniformed officer by his side (T. 47), advised students that Miami Valley Crime Stoppers had offered a reward of "up to $1,000" for information about the bomb threat. (T. 33) Bullens testified that he had spoken with Dayton Police Detective Elmer Querubin regarding Miami Valley Crime Stoppers' involvement in the case and that Bullens was required to get Det. Querubin's permission before offering that reward. (T. 33-34) Bullens also testified that Crime Stoppers is an organization that works "very closely" with police to investigate crimes and that any information gathered resulting from a Crime Stoppers reward offer was required to be provided to police. (T. 33-35)

Soon after offering the reward to students, L.G. was identified as a suspect. (T. 14, 20-21) After consulting and communicating directly with DPD Sgt. Anderson, Sgt. Bunch of the Regional Dispatch Center, various members of the Dayton Police Department, Miami Valley Crime Stoppers, as well as various police officers who worked under his supervision, Bullens ordered one of the officers he supervised (Officer Ivy) to "retrieve" L.G. for questioning. (*supra*, T. 20, 36) L.G. was escorted by School Resource Officer Ivy (a sworn institutional police officer) (T. 24-25, 36) to the cafeteria where Bullens had set up operations. (T. 12, 36) L.G. was placed across a table from Director Bullens. (T. 14) Bullens then began questioning L.G. as Officer Stewart, Sgt. Keller, both in uniform and armed, (T. 49) and other detectives or police officers stood as close as five feet away. (T. 14, 30, 38, 49) Bullens claimed not to remember how many officers were present while he questioned L.G. (T. 30) but the record shows that the two armed, uniformed officers were closer to L.G. than they were to anyone else. (T. 50) Other officers or detectives stood by the door. (T. 50)

Bullens' purpose was obviously to investigate a crime (as opposed to a school infraction). There is no evidence that Bullens at any time during the investigation spoke to a Principal, Assistant Principal, the Superintendent, an Assistant Superintendent, or any school personnel other than the school officer he instructed to "retrieve" L.G. Bullens was explicitly required by school policy to report any and all information he gathered to the Dayton Police. (T. 28) As stated above, Bullens knew he was also required to report any information collected after the Crime Stoppers reward offer directly to the police. (T. 33-35) Bullens did not, nor did anyone else, inform L.G. of his *Miranda* rights prior to questioning. (T. 39) Although Bullens first testified that he told L.G. he did not have to answer his questions, Mr. Bullens later testified, after reviewing his own report, that "no, I did not" inform L.G. that he could refuse to answer

questions. (T. 38; 54) Bullens knew that L.G. was only a seventh grader (T. 38) at the Longfellow Alternative School but made no effort to contact L.G.'s mother or other adult before questioning him. (T. 43) Nor did Bullens make any effort to determine L.G.'s functioning level before questioning despite his placement at an alternative school. (T. 40-41) In fact, L.G. suffers from post-traumatic stress disorder and has never spoken to police on his own. (T. 57)

During the questioning, L.G. admitted to making the bomb threat according to Director Bullens. (T. 21, 38) Immediately after questioning by Bullens, Dayton Police Officer Stewart, who was present during questioning, took L.G. to DPD West Patrol Operations and handed him over to Detective Meeker. (T. 15-16, 40)

ARGUMENT

Proposition of Law:

> **Fifth Amendment protections apply where school officials work in a law enforcement capacity or as agents of law enforcement and interrogate children in a school setting.**

The State's Proposition of Law: "*Protections of the U.S. 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*" is not specifically relevant to the facts of the case before the Court. In this case there is clearly action by the State and/or an *agent* of the State in connection with the questioning of 13 year old L.G. Moreover, Director Bullens is not a mere "private citizen." L.G. respectfully submits that the State is asking this Court to engage in error correction. That is, the Court of Appeals found that Director Bullens was acting as an agent of law enforcement and that L.G. was in custody when questioned, but the State is unhappy with that result. The Court of Appeals utilized the appropriate tests and it distinguished case law cited

by the State. This Court should therefore decline to consider this appeal because no question is presented that needs answered by the Court.

I. The second district court of appeals applied the correct test to determine that a school official was working in a law enforcement capacity or as an agent of law enforcement.

As this Court has noted, *Miranda* requirements apply when admissions are given to "officers of the law or their agents." *State v. Watson*, 28 Ohio St. 2d 15, 275 N.E.2d 153 (1971); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Although its Proposition of Law does not mention it, the State concedes in its brief that *either* a law enforcement officer or a person acting as an *agent* of law enforcement would be required to ensure that a suspect's rights are protected by a *Miranda* warning prior to custodial interrogation. The law is clear on that point and the cases cited by the State support L.G.'s position to that extent. *See State v. Bolan*, 27 Ohio St.2d 15, 271 NE2d 839 (1971); *State v. Watson, supra.*

Director Bullens is the head of a governmental (school) police force and supervises 26 sworn institutional police officers. The record shows that Director Bullens was first notified about the bomb threat by Dayton police and stayed in contact with police throughout his investigation of the matter. From the time he was alerted to the incident by Dayton Police Sgt. Anderson and the Montgomery County Regional Dispatch, to the time he turned L.G. over to an armed police officer to be taken to police headquarters, Bullens worked extremely closely with police. There were no actions taken by Director Bullens that were not taken with the permission of, or as required by, or in unison with, or under the direct supervision of, law enforcement. Moreover, the State provided no evidence that Bullens took any actions or made any decisions regarding "school matters" such as attendance, academics, discipline, *etc.* In fact, Bullens testified that he didn't take attendance at the scene because "the Principal...would have done

that." (T. 33) Clearly, Bullens was not concerning himself with educational issues, he was working with police to investigate a crime, *i.e.,* he was acting in a law enforcement capacity.

This Court has held that a probation officer, though not necessarily a "law enforcement officer," will cause certain psychological pressure when interviewing probationers such that "the better rule is … to require a probation officer to give *Miranda* warnings prior to questioning an in-custody probationer." *State v. Roberts,* 32 Ohio St.3d 225, 231; 513 N.E.2d 720, 726 (1987). Similarly, this Court has held that statements made to a parole officer without *Miranda* warnings are subject to suppression since a parolee is under heavy pressure to cooperate with a parole officer. *State v. Gallagher*, 46 Ohio St. 2d 225 (1976). Questioning by someone like Director Bullens, *especially questioning of a 13 year old student*, will certainly create similar psychological pressure.

The U.S. Supreme Court has held that a psychiatric examiner can be an agent of law enforcement when s/he testifies for the prosecution about statements made by the defendant at an assessment. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981). Other courts have found that when, as in this case, a duty to report information to law enforcement exists, an actor is most likely an agent of law enforcement. *See Kansas v. Benoit* (1992), 21 Kan.App.2d 184, 194, 898 P.2d 653, 661; *State v. Robledo* (Colo.1992), 832 P.2d 249; *Commonwealth v. A Juvenile (1988),* 402 Mass. 275; *United States v. D.F.* (C.A.7, 1997), 115 F.3d 413; *Commonwealth v. Chacko* (1983), 500 Pa. 571, 459 A.2d 311. Although this Court has recently held that a statutory duty to communicate in some way with police did not, by itself, make a social worker an agent of law enforcement, when coupled with a continuing alliance and direct coordination and cooperation as in L.G., it can certainly be a factor. *See State v. Jackson*, Slip Opinion No. 2018-Ohio-2169.

Even if Bullens is not found to be a law enforcement official himself, he was undoubtedly an agent of law enforcement. The courts below found that there was a "great deal of entanglement" between Bullens' actions and those of law enforcement officials he worked so closely with. A "great deal of entanglement" is indicative of a person acting as an instrument or agent of the police. *See e.g. State v. Cook*, 149 Ohio App. 3d 422, 777 N.E.2d 882 (2d Dist. 2002); *State v. Jedd*, 146 Ohio App. 3d 167, 765 N.E.2d 880 (4th Dist. 2001). In *Cook* and *Jedd* the "private actors" were not connected to any governmental entity, much less a school police department, and there was either no police involvement prior to the actions of the would-be agent or there was very little prior contact with police. *See Cook, supra; Jedd, supra.* The facts in this case are obviously different. In fact, Bullens admittedly consulted with and made decisions "in unison" with Dayton police and at times needed permission from police to take certain actions. Additionally, he was mandated to turn over certain information he had gathered to the police. Not only were Bullens' actions completely intertwined with those of Dayton police, but Bullens also used his authority over school police officers to take physical control of L.G. (*e.g.* by having L.G. "retrieved" from the gym, separated from all other students, and brought to be questioned in front of at least two armed, uniformed Dayton officers as well as other officers or detectives).

The State's attempt to equate Mr. Bullens's questioning to that of a private citizen "acting on his own" is not supported by the record. Although the State cites *State v. Bolan, supra,* to support its contention that Bullens acted as a "private citizen" and therefore no *Miranda* warnings were required, the facts of *Bolan* are not similar to the facts in this case. For instance, there were no armed police officers present at the questioning in *Bolan*, nor was there even any police involvement in the questioning. Further, the juvenile in *Bolan* was not questioned about a felony and the security guard questioning him was not the head of a force of 26 institutional

police officers nor even a member of such a force. Notably, *Bolan* was decided only a few years after *In Re: Gault*, 387 U.S. 1 (1967), when juvenile rights were just beginning to be recognized. *Gault* of course held that when dealing with admissions by children:

> the greatest care must be taken to assure that the admission was voluntary in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

Id. at 55. *Bolan*, besides being factually inapposite, and therefore not supportive of the State's argument, also failed to consider *Gault's* cautionary words regarding juveniles' rights.

The State repeats many times that a "private citizen" "acting on their own" does not constitute State action or implicate *Miranda*. The State is indicating that it simply does not agree with the lower courts' findings in this matter that Director Bullens was not a "private actor" and/or was never "acting on his own." The State's disappointment with the findings of the Court of Appeals, however, does not mean that a question of great public interest exists. As the Court of Appeals noted, its decision is specific to the facts of this case and will certainly not affect a broad range of student interactions with authorities.

And Director Bullens clearly was not a private citizen who stumbled upon a crime scene and decided to get involved. In this regard, the State cites many cases that are distinguishable from the case before the Court. For instance, in *State v. Gattis*, 3d District Logan No. 8-97-23, 1998 WL 126069 (March 4, 1998) an adult, not a juvenile was questioned, and the questioning was done by a store security guard – again, not a supervisor of 26 sworn institutional police officers or even *member* of a sizeable police force, and city police only arrived at the very end of questioning as opposed to being involved in the entire investigation and standing in close proximity to the suspect with uniforms and firearms. In *Matter of Gruesbeck*, 2d Dist. Greene No. 97-CS-59, 1998 WL 404516 (March 27, 1998), the juvenile suspect was 16 years old, at a

regular high school, not an alternative school for junior high kids, and no police officers were involved in the questioning or investigation of the matter prior to a security guard questioning the suspect. In *Gruesbeck*, the private security guard questioned the student alone, with no armed police escort. Further, although *Gruesbeck* was decided well before *JDB v. North Carolina,* 131 S. Ct. 2394 (2011), the *Gruesbeck* court had the insight to suggest that it may be appropriate to argue that:

> 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. In such circumstances, it might be argued that Miranda protections should apply, for such security personnel utilize detention, privacy, the appearance of authority, and psychologically coercive methods to facilitate fruitful interrogation. It also could be contended that in such cases the "state action" hurdle may be overcome by a public function analysis, i.e. that persons performing functions essentially like those left to governmental agencies are also subject to constitutional restraints.

Id. at 2. The Second District Court of Appeals, in the decision below, has come closer to its suggestion above, at least on behalf of *juveniles*, although it did not, and was not required to in order to find in L.G.'s favor, go as far as the suggestions in the quoted portion of *Gruesbeck*, *supra*.

Many cases cited by the State are earlier Second District cases. These cases are factually distinguishable from the case before this Court (*e.g.* they deal with adult suspects, police are not involved in the interrogation in any way, *etc.*) and, more importantly, even if they did in some small respect support the State's argument, the Second District obviously ruled in L.G.'s favor. Prior Second District cases dealing with different fact scenarios do not support the State's position in any way as that court has spoken through its decision below.

The most egregiously inapposite case cited by the State is *In Re: Harris*, 5th Dist. Tuscarawas No. 1999AP30013, 2000 WL 748087 (June 7, 2000). The *Harris* case resulted in a

12 year old being wrongly imprisoned for two years and who later received a multi-million dollar judgment against entities involved in his extremely inappropriate and manipulative interrogation and prosecution. *See e.g. Harris v. Bornhorst*, 513 F.3d 503, (CA 6th Circuit). Moreover, Harris was actually read his *Miranda* rights, unlike L.G. Further, the statement the juvenile gave to police was ordered to be suppressed by the Court of Appeals. *Id.* The State apparently is arguing that the fact that the 12 year old Harris's mother asked some questions during the extremely inappropriate police interrogation somehow makes that case similar to L.G.'s. First, the *Harris* court held that the presence of Harris's mother, including her agreement to a voice stress test, only added to the coercion felt by the 12 year old. Strangely, the court later decided that Harris's answers to his mother's questions during the police interrogation need not be suppressed. That aspect of the *Harris* decision is inappropriate and troubling. Nevertheless, *Harris* did not need to be appealed to the Supreme Court because Harris prevailed on other issues. Obviously, L.G.'s mother was not the interrogator in this case. L.G. was instead interrogated by the Executive Director of Dayton Public Schools Security Office and supervisor of dozens of sworn police officers. Director Bullens was not there to support L.G. and had no close connection to him as a mother obviously would. *Harris* is a truly tragic case which demonstrates how important it is that juvenile rights be respected and that children not be manipulated and abused by law enforcement or its agents. It is a harrowing example of why the U.S. Supreme Court, and this Court, have been more and more careful regarding the rights of juveniles.

II. The Second District Court of Appeals applied the appropriate "reasonable juvenile" test to determine that L.G. was in custody during his interrogation at school.

"(W)hen an individual is taken into custody or otherwise deprived of his freedom by the

authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Miranda, supra*, at 478. In such a situation, "inherently compelling pressures" must be guarded against by advising the person whose freedom has been affected that he has certain rights. *Id.* As the trial court stated on page two of its decision, the U.S. Supreme Court has established a simple two-pronged test to determine whether a suspect is in custody during an interrogation: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt s/he was free to terminate the interrogation and walk away. Judge Kuntz clarified that a person's age and mentality is properly considered in the custody analysis. *See e.g. Thompson v. Keohane*, 516 U.S. 99, 112 (1995). *JDB v. North Carolina*, 131 S.Ct. 2394 (2011). *JDB* made clear that:

> the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer.

Id. at 2405

In this case L.G., a 13 year old seventh grader at an alternative school, was significantly deprived of his freedom when he was escorted by a sworn institutional police officer from a gymnasium full of students to a cafeteria with no students – but with uniformed, armed Dayton police officers and the school district Director of Security, a retired police officer who supervises 26 school police officers. The 26 police officers supervised by Director Bullens are sworn in by Dayton Police before they are permitted to be employed as such. (T. 25) These institutional police officers receive over 140 hours of initial training, must pass a State certification test, and then take 70-80 hours additional training per year. Their training includes firearm training, they carry handcuffs, are empowered to make arrests, and answer to Mr. Bullens.

As found by the courts below, L.G. was made to sit alone in the school cafeteria and face questioning by Director Bullens. Other persons present during questioning were armed and uniformed Dayton police officers (at least two, possibly more) who stood within five to fifteen feet of L.G. at all times. (Trial Court's decision, p.3) In fact, the armed police officers stood closer to L.G. than to anyone else. The trial court found that L.G.'s age would have been objectively apparent to Mr. Bullens, who specifically knew L.G. was a seventh grader. (Trial Court's decision, p.4) Bullens was also aware that he was at an alternative school (a school for students who have had trouble succeeding in a regular school environment). In light of these facts, the trial court determined that no reasonable 13 year old would have felt at liberty to terminate the interrogation and leave. (Trial Court's decision, p.4) The Court of Appeals agreed that "given the circumstances surrounding the investigation, no reasonable 13 year old child would feel he or she was at liberty to terminate the interrogation and leave." Court of Appeals Decision ¶18.

Contrary to the State's assertion that L.G. was questioned in a relaxed atmosphere and told he did not have to answer questions, as clarified above, he was actually isolated from all other students as he was "retrieved" by a school police officer and escorted to the school cafeteria. There he was seated at a table across from the Supervisor of all school district police officers, with two armed Dayton Police officers standing very close by. The cafeteria had been transformed from what normally would have been a boisterous scene of students and lunch ladies, into a nearly empty space populated by several armed police officers, detectives, the school district's highest level security official, and no students, teachers, or administrators who L.G. would have been familiar with. As opposed to the circumstances in cases cited by the State, *e.g. State v. Magnone*, 2d Dist. No 2015-CA-94, 2016-Ohio-7100 and all of the cases the

Magnone court refers to, L.G. was never told he could leave the cafeteria, and was certainly never permitted to leave. Instead he was escorted out after questioning by a Dayton police officer to a police cruiser and onto the West Patrol Operations headquarters where he met with detectives. Moreover, *Magnone* and the cases that decision refers to dealt with *adult* suspects, not a 13 year old child, and so are, again, factually distinguishable on several levels.

As the U.S. Supreme Court recently noted, "the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.'" *Corley v. United States*, 556 U. S. 303, (2009) (citing Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906–907 (2004)); *See also Miranda*, 384 U. S., at 455, n. 23. "That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile." *JDB supra,* at 2400.

Whereas most adults would feel intimidated when questioned by security officers in the presence of armed Dayton police officers and with other officers standing at the exit, it would make little sense to assert that L.G., or a reasonable 13 year old in his position, would feel free to walk away.

> It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the Miranda custody analysis.

JDB, at 2395 (*13 year old seventh grader was escorted by police officer from class to a conference room where he was questioned by a police investigator and school administrators*). In fact, L.G. was never permitted to walk away, he was instead handed over to one of the

uniformed, armed DPD officers and taken directly to the police station to be further questioned by Detective Meeker.

As the U.S. Supreme Court has recently made very clear by its holdings in *JDB*, *supra*, *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. ____, (2012); a child's mind is different than an adult's mind. The Court cites scientific and sociological studies that support its holdings that a juvenile is entitled to *more* protections than an adult because of his/her vulnerable developmental status. And a younger child even more so than an older child. It is therefore submitted that the facts would overwhelmingly support a finding of custody even if the suspect had been a young adult - and it is clear that no 13 year old child in such a situation would feel that he was at liberty to walk away.

CONCLUSION

In light of the above, it is clear that 13 year old, Alternative school seventh grade student L.G. was in custody and entitled to *Miranda* warnings when he was isolated from his peers and questioned in the presence of armed Dayton police officers by the school's Director of Security. It is respectfully requested that the decision by the Second District Court of Appeals be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee was delivered by U.S. mail to Christina Mahy, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, 301 W. Third Street, Dayton, OH 45422, on the date same was filed.

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