Supreme Court of Ohio Clerk of Court - Filed May 24, 2019 - Case No. 2019-0621

NO. 2019-0621

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 105742

IN RE: M.H.

MEMORANDUM IN RESPONSE TO JURISDICTION

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EXPLANATION OF WHY APPELLANT'S PROPOSITIONS OF LAW DO NOT PRESENT SUBSTANTIAL CONSTITUTIONAL QUESTIONS OR ISSUES OF GREAT PUBLIC OR GENERAL INTEREST

In a 2-1 decision, the Eighth District Court of Appeals held that a social worker was not required to administer a *Miranda* warning prior to speaking with a fifteen-year-old accused of committing a sexual crime against a child. *In re M.H.*, 8th Dist. Cuyahoga No. 105742, 2018-Ohio-4848. In reaching its decision, the lower court relied upon this Court's holding that a "social worker's duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement . . . when the social worker interviews an alleged perpetrator unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement." *State v. Jackson*, Slip Opinion No. 2018-Ohio-2169, cert denied, *Jackson v. Ohio*, 87 U.S.L.W. 43 (2019).

Like the defendant in Jackson, the social worker's interview of M.H. involved no police presence and there was no evidence that the social worker was acting as an agent of law enforcement. Unlike *Jackson*, M.H. was not in custody during the social worker interview. He was voluntarily brought to be interviewed by his mother. Because M.H. was not in custody and the social worker was not acting as an agent of law enforcement, *Miranda* is inapplicable.

Separate from the issue of *Miranda*, M.H. argues that his statements were involuntary. He argues that as a child he was forced to speak with the social worker by his mother. While it is true that his mother drove him to the interview, there is nothing in the record indicating that the mother ordered him to speak with the social worker. As the Eighth District noted, "M.H. never told the social worker that he did not wish to speak with her or express reluctance or hesitation in answering [her] questions." *In re M.H.*, ¶ 34. M.H. has identified no case in which a court has held that a

child's statements are involuntary merely because the child was transported to the interview by a parent.

Finally, M.H. argues that the lower court addressed issues that the State did not specifically assign as an error. In the trial court, M.H. gave three reasons in support of his motion to suppress. The State of Ohio challenged the suppression ruling in its assignment of error. M.H. was afforded the opportunity to brief all three issues. Ultimately, the Eighth District rejected each of them. M.H. has not shown that the Eighth District abused its discretion in addressing issues that M.H. raised in the first instance.

The State of Ohio respectfully submits that this appeal does not present a substantial constitutional question or issue of great public or general interest. For these reasons, the State asks this Court to decline to exercise jurisdiction.

STATEMENT OF THE CASE

M.H., a fifteen-year-old male, was charged in August 2016 with Rape and Gross Sexual Imposition. He allegedly committed the crimes when he was fourteen. The victim was identified as J.M., his twelve-year-old step-sister. M.H. filed a motion to suppress challenging statements he made to a social worker. M.H. argued that his statement was obtained in violation of his due process rights and his right against self-incrimination. The trial court granted the motion and the State appealed.

In a 2-1 decision, the Eighth District Court of Appeals reversed. *In re M.H.*, 8th Dist. Cuyahoga No. 105742, 2018-Ohio-4848. It held that *Miranda* was not implicated because the social worker was not an agent of law enforcement and M.H. was not in custody when the interview occurred. *In re M.H.*, ¶ 31, 35. The Eighth District also rejected M.H.'s due process argument and found that his statements "were not involuntary." *In re M.H.*, ¶ 40.

STATEMENT OF THE FACTS

At the motion to suppress hearing, the mother of M.H. (identified herein as "Mother") testified. She testified that she lives with M.H., his two siblings and L.P., an adult male. L.P. is not the father of M.H. but is the father of the victim, J.M. In the end of 2015, Mother received a letter from the Cuyahoga County Department of Children and Family Services ("CCDCFS") setting an appointment time for her and M.H. The letter did not state the purpose of the interview. Mother called Esther Bradley, a CCDCFS Child Protection Specialist, who merely confirmed the location and time of the appointment. Mother testified that she suspected at the time that the interview related to accusations that J.M. made against M.H.

Mother and M.H. met with Bradley. Bradley introduced herself and led M.H. to a private room where they met for forty minutes. Mother never asked to be present for the interview. After the interview, M.H. was quiet but not crying. Bradley then told Mother that she would receive a letter indicating whether the allegations made against M.H. were substantiated.

Esther Bradley testified that she investigates whether children have been sexually abused. She stated that her protocol is to notify minors of the allegations made against them and provide them an opportunity to make a statement. In this case, she sent a letter to Mother telling her that M.H. was named as an alleged perpetrator in an open sex abuse case. Bradley testified that a few days later, Mother called Bradley and Bradley again notified her that M.H. was an alleged perpetrator of sexual offenses. The phone conversation was fifteen to twenty minutes long.

The interview between Bradley and M.H. lasted approximately forty minutes. The room had windows, the door was unlocked, and M.H. was not restrained. Bradley testified that the purpose of the interview was to assess the safety of the victim and to determine if a safety plan was necessary. There was no police interaction with Bradley or M.H. during the interview. At no

point did M.H. request to terminate the interview or did Mother request to be present. During the interview, M.H. admitted to being sexually active with his half-sister J.M. Bradley prepared a report that was then provided to Cleveland Police Detective Christina Cottom, as required by statute. Bradley also made a referral to Ohio Guidestone.

Detective Cottom testified at the hearing as well. She stated that Bradley and her never actually spoke about the case and exchanged voicemails. Cottom requested a write-up of Bradley's interview of the victim. She did not direct or request Bradley to interview M.H. She did not instructed Bradley on what questions to ask. Cottom only learned about Bradley's interview after the fact.

LAW AND ARGUMENT

Appellant's Proposition of Law 1: The statement of a child to a government social worker may be involuntary and violate due process even when the government social worker was not required to give Miranda warnings.

Nothing in the lower court's decision contravenes M.H.'s first proposition of law. He argues, essentially, that a statement may be involuntarily uttered regardless of whether a *Miranda* warning was required. This is obviously true. Statements, for example, that are coerced through physical violence would not be voluntary under the Due Process Clause. *See Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461 (1936).

In this case, the majority below specifically rejected M.H.'s argument that his statement was involuntary. It noted that he was voluntarily brought to the interview by his mother, the interview was "relatively brief," "lacked any police presence", there was no evidence of "any threats, coercion, suggestions, restraints, or physical deprivation or harm to M.H." and there was no evidence that he did not wish to speak to the social worker. *In re M.H.*, ¶ 40.

M.H. focuses upon Judge Keough's concurring opinion in which she noted that "no constitutional safeguards need to be implemented to protect an alleged perpetrator's rights." *In re M.H.*¸ ¶ 51 (Keough, J., concurring). He argues that the lower court ignore his Due Process rights. But earlier in J. Keough's opinion she clarified that the constitutional safeguards she referred to are "procedural safeguards." *Id.* at ¶ 50. This is the phrase used in *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). The *Miranda* warning is a "set of prophylactic measures to safeguard the constitutional privilege against self-incrimination." *State v. Barker*, 149 Ohio St.3d 1, 2016-Ohio-2708, 73 N.E.3d 365 (2016) (internal citations omitted). The point made in the concurring opinion, and the effect of the lower court's decision, is not that M.H. lacked the right to due process of law. Rather, because Bradley was not an agent of law enforcement and M.H. was not in custody, the State was not required to demonstrate the use of a procedural safeguard i.e., *Miranda* warning.

> ***Appellant's Proposition of Law 2: A child does not feel free to leave when he is driven to government agency for questioning by a parent and separated from the parent and interrogated in a private interrogation room without being told he is free to leave and free to not cooperate.***

M.H.'s failure to separately argue his second proposition from his third makes response difficult. He seems to imply that a thirteen-year-old child is categorically unable to voluntarily converse with a social worker because he is not free to leave without the permission of his parent. But custody, for purpose of *Miranda*, is not determined by simply asking if the person is free to leave. *See City of Cleveland v. Oles*, 152 Ohio St.3d 1, 2017-Ohio-5834, 92 N.E.3d 810, ¶ 30 (citations omitted) ("If the inquiry were whether the driver felt free to leave, then every traffic stop could be considered a custodial interrogation because few motorists would feel free either to disobey a directive to pull over or to leave the scene.") Rather, "custody is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes*

v. Fields, 565 U.S. 499, 508-09, 132 S.Ct. 1181 (2012). Put differently, "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"? *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457 (1995). In traffic stops, the inquiry is whether the situation "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Oles*, ¶ 31.

The only fact weighing in favor of custody is M.H.'s young age. The Supreme Court has rejected the idea that, in the context of *Miranda*, age is dispositive of the issue. *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394 (2011) ("This is not to say that a child's age will be a determinative, or even a significant factor in every case.") The lower court recognized that the remaining facts weighed against a finding of custody: "no charges had been filed," "M.H. was not under arrest," the interview was "40 minutes" and conducted "in a private room . . . while M.H.'s mother waited in the lobby," there was "no police presence at any time," the interview room was "unlocked," M.H. was "not physically restrained," M.H. never expressed "reluctance or hesitation in answering Bradley's questions," and "there is no evidence of over intimidation or coercion." *In re M.H.*, ¶ 33-34.

M.H. asks this Court to infer the existence of facts which are not in the record. There is no evidence that M.H. felt obligated to speak with Bradley because his mother coerced him to do so. He fails to identify any case in which a court held that a child was in custody during a social worker interview because he was not free to leave without the permission of his parent. This Court should decline to adopt the bright-line rule that M.H. proposes in this proposition of law.

<u>Appellant's Proposition of Law 3</u>: A child-suspect must be provided Miranda warnings when that child is interrogated by a social worker who is exercising her statutory duty to investigate child abuse allegations and does so cooperatively with the police on a regular and institutional basis.

In M.H.'s third proposition, he essentially asserts that Bradley was acting as an agent of law enforcement for purposes of *Miranda*. This Court held that a "social worker's duty to cooperate and share information with law enforcement with respect to a child abuse investigation does not render the social worker an agent of law enforcement . . . when the social worker interviews an alleged perpetrator unless other evidence demonstrates that the social worker acted at the direction or under the control of law enforcement." *Jackson*, ¶ 22. M.H. does not ask this Court to overrule *Jackson*, so it is unnecessary to explain why his citations to *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503 (1968) and *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981) are unavailing. *See Jackson*, ¶ 25-29. It is sufficient to note that Bradley's statutory duty to share information with police did not make her an agent of law enforcement.

M.H. argues that Bradley went beyond her statutory duty to share information when she "compelled M.H.'s mother to bring M.H. for an interview then separated M.H from his mother and interrogated him in a separate private room." Mem. at 9. He offers no support for his assertion that the mother was "compelled". It is also unclear how such facts, if true, establish that Bradley was an agent of law enforcement. The lower court recognized that Detective Cottom and Bradley "never spoke concerning the case" and Cottom was "not aware of M.H.'s interview until after Bradley completed the interview." *In re M.H.*, ¶ 13. Bradley was not serving as an agent of law enforcement in this case.

Appellant's Proposition of Law 4: ***Where a trial court makes alternative findings in support of a ruling and each is independently sufficient to use as a basis for its ruling, a court of appeals shall not review a finding that was not challenged on appeal.***

The appellate court below found that the trial court's reason for granting the motion to suppress was ambiguous. *In re M.H.*, ¶ 36-37. M.H. argued that his statements to the social worker were inadmissible under Evid.R. 403, were made in violation of *Miranda*, and were involuntary in violation of the Due Process Clause. The Eighth District addressed each of these reasons and rejected them in turn. *In re M.H.*, ¶ 38-42. M.H. argues now that the appellate court should not have addressed the non-*Miranda* reasons because they were "not challenged on appeal." Mem. at 11.

The State's assignment of error was as follows: "THE TRIAL COURT ERRED WHEN IT SUPPRESSED THE STATEMENTS MADE BY M.H. DURING AN INTERVIEW WITH A SOCIAL WORKER BECAUSE THE INTERVIEW WAS NOT CONDUCTED AS PART OF A CUSTODIAL INTERROGATION AND BECAUSE THE SOCIAL WORKER WHO CONDUCTED THE INTERVIEW WAS NOT ACTING AS AN AGENT OF POLICE." The "purpose of the assignment of error is merely to identify the trial-court action leading to the appeal – not to establish the merits of the appellant's position or to articulate the proposition of law the appellant believes the appellate court should adopt." Painter and Pollis, *Ohio Appellate Practice*, Section 5.12 (2017-18 Ed.) The State's assignment of error correctly identified the trial-court action it was challenging, i.e. the motion to suppress.

Even assuming that the State did not specifically appeal from the non-*Miranda* reasons for suppression, M.H. fails to show the existence of a substantial constitutional question or an issue of great public or general interest. M.H. was afforded the opportunity to make arguments about Evid.R. 403 and the Due Process Clause in the merit briefing. The Eighth District addressed all

the issues and found that they were not well-taken. Courts have discretion in dealing with failures to designate proper assignments of error. *Davis v. Byers Volvo*, 4th Dist. Pike No. 11CA817, 2012-Ohio-882, fn1.

CONCLUSION

For these reasons, the State of Ohio respectfully asks that this Court decline to exercise jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was provided by electronic mail this 24th day of May, 2019 to Paul Kuzmins, Assistant Public Defender, at pkuzmins@cuyahogacounty.us and John Martin, Assistant Public Defender, at jmartin@cuyahogacounty.us.

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