No. 45833-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

B. J. C.,

Appellant.

Cowlitz County Superior Court Cause No. 13-8-00274-7

The Honorable Judge Gary Bashor

Appellant's Reply Brief

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ARGUMENT

I. THE POLICE EXTRACTED B.J.C.'S STATEMENTS IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

A. In light of the coercive pressure brought to bear, the state did not establish the voluntariness of 13-year-old B.J.C.'s statement.

Courts must exercise "special caution" when dealing with juvenile confessions. *In re Gault,* 387 U.S. 1, 45, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). A court must consider a child's age when evaluating the voluntariness of the child's statement to police. *J.D.B. v. N. Carolina*, ---U.S.---, ___, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). A child is "an easy victim of the law;" thus "special care in scrutinizing the record must be used." *Haley v. State of Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 304, 92 L.Ed. 224 (1948).

Under the "totality of the circumstances" test,[1] B.J.C.'s statement was involuntary. He was 13 years old and had no prior convictions. CP 22; RP 25. Two police officers isolated him from his caregivers and questioned him. They treated him the same as they would an adult. They told him they were not there to arrest him, but didn't explain his statement could be used against him in a criminal prosecution. RP 12, 16, 17, 21, 27. They asked for his "cooperation" in answering questions. RP 22.

[1] *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985).

Respondent does not dispute these facts. Instead, Respondent's sole focus is on the absence "oppressive" police coercion. Brief of Respondent, pp. 6-8. Respondent's focus is misplaced.

Whether or not a particular police tactic qualifies as coercive depends on the characteristics of the person being questioned.[2] *United States v. Preston*, 751 F.3d 1008, 1019 (9th Cir. 2014).[3] Respondent's approach—requiring police conduct that is coercive in the abstract, without considering the suspect's individual characteristics— "cannot be reconciled with the Supreme Court's totality-of-the-circumstances analysis applicable to the voluntariness inquiry [or] with the Court's specific directives…concerning the role of individual characteristics—including mental characteristics—in the voluntariness inquiry." *Id*

Police action here qualified as coercive when understood through the eyes of a child. When two police officers separated B.J.C. from his caretakers, questioned him, failed to ensure that he knew his statements could be used at a future criminal trial (while reassuring him they didn't plan to arrest him), the officers engaged in conduct that would be coercive

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[2] This is so because the totality of the circumstances test takes into account *all* the circumstances – from the conduct of the police to the individual qualities of the person being questioned. *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 2331, 147 L.Ed.2d 405 (2000).

[3] Furthermore, as the U.S. Supreme Court has noted, "[a]ny police interview of an individual suspected of a crime has 'coercive aspects to it.'" *J.D.B.* ---U.S. at ___ (citation omitted).

to an inexperienced 13-year-old. An adult suspect's confession would have been voluntary under the circumstances; B.J.C.'s statement was not.

B.J.C.'s statement was not the product of "a rational intellect and a free will,"[4] but stemmed from inexperience, immaturity, and ignorance. His convictions must be reversed, the case remanded, and the evidence suppressed.

B. B.J.C was in custody for *Miranda* purposes and should have been advised of his rights.

The risk of false confessions is especially acute when the subject of custodial questioning is a child. *J.D.B.*--- U.S. at ___. Because of this, the court must take into account a child's age when determining whether or not the child is in custody for *Miranda* purposes. *Id.,* at 2406.

A child's age is more than just a chronological fact. *Id.,* at 2403. A child's age will affect how the child would perceive her or his freedom to leave when being questioned by police. *Id.* A reasonable child might feel pressured to submit to police questioning even when a reasonable adult would feel free to go. *Id.* at 2403.

Here, B.J.C. was in custody for *Miranda* purposes during his interrogation. Under the circumstances, a reasonable 13-year-old would

[4]*Reck v. Pate*, 367 U.S. 433, 440, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961) (internal quotation marks and citation omitted).

not have felt free to leave once the interrogation commenced, despite the officers' initial statement that he could return to his apartment. *J.D.B.*, --- U.S. at ___. Two officers directed him to speak with them away from the adults in his home. RP 16. They did not *Mirandize* him (although they did tell him he could refuse to answer questions. RP 17-18. They confronted him when he denied their accusations, and told him they thought he was lying. RP 54, 70-71.

Lacking prior experience with the police, no reasonable 13-year-old prior experience with the criminal justice system would have felt able to walk away. *J.D.B.*, --- U.S. at ___. The officers took advantage of the compliant nature of this average middle-schooler and questioned him away from any adults. RP 12-27.

Yarborough is completely inapposite. *See* Brief of Respondent, pp. 5-6 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 653, 124 S.Ct. 2140, 2142, 158 L.Ed.2d 938 (2004)). First, the juvenile in *Yarborough* was 17 years old, not 13. *Id.,* at 660. Second, *Yarborough* predated J.D.B., and the trial court did not take into account the child's youth. *Id.,* at 659. Third, *Yarborough* involved a highly deferential standard of review under the AEDPA:[5] the Supreme Court decided only that the state court decision was not an unreasonable application of clearly established federal

[5] 28 U.S.C. § 2254

law as it stood in 2004.[6] *Id.*, at 655, 663, 668. Here, by contrast, review is *de novo*. *In re Cross*, 180 Wn.2d 664, 681 n. 7, 327 P.3d 660, 673 (2014).

B.J.C. was in custody, and should have been provided full *Miranda* warnings. *J.D.B.*, 131 S.Ct. at 2402. His convictions must be reversed and his statement suppressed. *Id.*

II. THE COURT'S DISPOSITION ORDER VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT INFRINGES B.J.C.'S FUNDAMENTAL RIGHTS TO TRAVEL AND TO FREEDOM OF MOVEMENT.

Washington's sex offender registration statute burdens the right to travel and to freedom of movement, but is not narrowly tailored to achieve the government's interest. *See* Appellant's Opening Brief, pp. 10-17. Accordingly, it violates substantive due process, and the trial court's order requiring B.J.C. to register as a sex offender must be vacated. *Lawrence v. Texas*, 539 U.S. 558, 593, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *State v. J.D.*, 86 Wn. App. 501, 506, 937 P.2d 630 (1997).

C. Respondent's arguments reflect a misunderstanding of federal constitutional law.

Respondent erroneously claims that a statute only implicates the right to travel if "'it actually deters such travel and where impeding travel is its primary objective.'" *See* Brief of Respondent, pp. 9-10 (emphasis

[6] Of course, were Yarborough decided today, it would involve an unreasonable application of clearly established federal law under AEDPA, because it would be contrary to *J.D.B.*

omitted) (quoting *State v. Enquist*, 163 Wn. App. 41, 256 P.3d 1277 (2011), *review denied* 173 Wn.2d 1008 (2012)).[7] This is incorrect.

A statute "implicates the right to travel when it actually deters such travel..., when impeding travel is its primary objective..., *or* when it uses any classification which serves to penalize the exercise of that right." *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 S.Ct. 2317, 2321, 90 L.Ed.2d 899 (1986) (emphasis added) (internal quotation marks and citations omitted). The *dicta* in *Lee* conflicts with *Soto-Lopez,* and thus cannot control here, even apart from its status as *dicta.*

Much of Respondent's argument rests on this misunderstanding of the law. Brief of Respondent, pp. 10-11. B.J.C. does not challenge the statute on the grounds that its primary objective is to impede travel. *See* Appellant's Opening Brief, pp. 10-17. Those portions of Respondent's brief addressing the statute's primary objective are wholly irrelevant to B.J.C.'s argument.

The sex offender registration statute implicates the right to travel because it actually deters travel and because it uses a classification to

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[7] *Enquist's* "primary objective" language stems from *dicta* in *State v. Lee*, 135 Wn.2d 369, 957 P.2d 741, 751 (1998). The *dicta* in *Lee* misrepresents *dicta* from *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982). The *Zobel* case includes one oblique reference to a statute's "objective," and notes that a statute intended to "inhibit migration" would encounter "insurmountable constitutional difficulties." *Id.,* at 62 n. 9. It is not clear why the *Lee dicta* uses "and" rather than "or."

penalize the exercise of the right to travel. *Soto-Lopez*, 476 U.S. 903. This is so regardless of the statute's primary objective.

Respondent erroneously suggests that B.J.C. need not re-register when he goes on vacation or travels for any other purpose, so long as he intends to return to his current residence. Brief of Respondent, pp. 11 (citing *State v. Pickett,* 95 Wn.App. 475, 975 P.2d 584 (1999). This is incorrect. The current version of RCW 9A.44.130 has not been limited in the manner suggested by Respondent.[8] The phrase "fixed residence" is defined without reference to a person's intent to return. RCW 9A.44.128(5).

Furthermore, even if the registration requirement applies only to those who relocate without intending to return, the statute penalizes the right to travel based on "a classification." Therefore, it must be examined under the strict scrutiny standard. *Soto-Lopez*, 476 U.S. 903.

D. Respondent fails to address numerous arguments made by B.J.C.; these implied concessions require reversal.

Respondent does not address several arguments made by B.J.C. In particular, Respondent does not suggest that the law is narrowly tailored. Nor does Respondent dispute that children convicted of sex offenses have

[8] Indeed, appellate counsel has more than one case pending in which the defendant was convicted following temporary absence from the address of registration, despite intending to return.

very low recidivism rates. Nor does Respondent claim that B.J.C. is dangerous. Brief of Respondent, pp. 8-11.

Respondent's failure to argue these points may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Respondent cannot show that the registration requirement passes strict scrutiny. Accordingly, the registration provision of the disposition order must be vacated, and the case remanded with instructions to enter an order exempting B.J.C. from the registration requirement.

III. RESPONDENT'S SENTENCING ARGUMENT REFLECTS A MISUNDERSTANDING OF THE LAW.

Respondent concedes that the offenses here involved the same victim, and transpired at the same time and place. Brief of Respondent, p. 15. Respondent erroneously contends that the two offenses should be considered separate and distinct because in "each of the underlying statutes the required intents are different." Brief of Respondent, pp. 15-16. This reflects a fundamental misunderstanding.

The "same intent" prong is not a mechanical inquiry into the *mens rea* element required for conviction. Contrary to Respondent's assertion, convictions for molestation and rape can comprise the same criminal conduct. *See State v. Dolen,* 83 Wash.App. 361, 365, 921 P.2d 590

(1996), abrogated on other grounds by *State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2013).

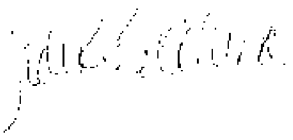
The facts here are similar to those in *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999). As in *Tili,* B.J.C. committed two sex offenses upon the same victim within a very short period of time. The offenses were the same course of conduct. Accordingly, the court erred by imposing a disposition that violated the 150% rule. RCW 13.40.180(1)(a).

CONCLUSION

For the foregoing reasons, B.J.C.'s convictions must be reversed and his statement suppressed. The order requiring him to register as a sex offender must be vacated. The disposition must be vacated for violation of the 150% rule and the case remanded for sentencing.

Respectfully submitted on October 6, 2014,

BACKLUND AND MISTRY



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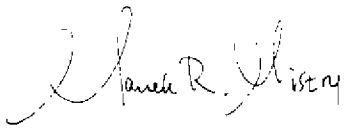

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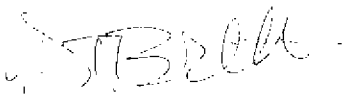

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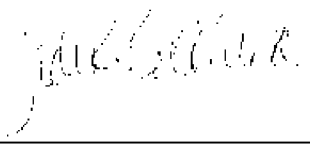

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