

FILED
September 16, 2016
Court of Appeals
Division I
State of Washington

NO. 74263-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION

STATE OF WASHINGTON,

Respondent

v.

ALEX I.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

When a youth makes a statement to the police, courts must analyze the youth's age, education, experience, intelligence, background, comprehension of *Miranda* and appreciation of the consequences of a waiver before admitting the statement. *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). Because youth are more susceptible to coercion than adults, age must be taken into consideration to determine what legal protections should be afforded to a youth before a confession may be admitted. *J.D.B. v. N. Carolina*, 564 U.S. 261, 264, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). The failure of the State to demonstrate Alex's waiver was voluntary should have resulted in suppression. *Michael C.*, 442 U.S. at 724.

1. CREDIBILITY IS NOT ESTABLISHED WITH REGARD TO WHETHER THE POLICE PROVIDED ALEX WITH THE PROTECTIONS REQUIRED TO PROTECT YOUTH FROM COERCED CONFESSIONS.

Courts employ a substantial evidence standard in determining issues of credibility for evidentiary conflicts. *City Bellevue v. Pine Forest Properties, Inc.*, 185 Wn. App. 244, 264, 340 P.3d 938 (2014), *review denied*, 183 Wn.2d 1016 (2015). Here, the court should not be

satisfied the testimony of Sergeant Sjolín was credible with regard to circumstances he had trouble remembering, especially in light of the trial court's decision to find the sergeant's testimony credible with regard to actions and statements he made which were seen in the video of Alex's arrest. CP 27 (Finding of Fact 15).

In fact, the trial court did not find the sergeant's testimony to be credible with regard to the way he treated Alex's cousin. CP 27 (Finding of Fact 15). The court instead found the audio-video testimony heard during the hearing to be in direct conflict with the sergeant's testimony. *Id.*

Next, the sergeant could not provide clear testimony on the special protections he provided to Alex or whether Alex expressed confusion about the warnings he had provided RP 123. Instead, the officer said he did not have "much independent memory" of what Alex said. RP 123. The sergeant could not remember whether Alex had any questions regarding the warnings. RP 123.

Most importantly, there is no record of what warnings were provided to him, beyond *Miranda* warnings.

In the face of the sergeant's other incredible testimony, this Court cannot have confidence Alex's statement was not coerced or that it was voluntary.

2. ALEX'S WAIVER OF HIS *MIRANDA* RIGHTS IS INVALID BECAUSE THE STATE FAILED TO PROVIDE HIM WITH THE SPECIAL PROTECTIONS REQUIRED FOR JUVENILES.

"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." *J.D.B.*, 564 U.S. at 264. Because a "reasonable child" will feel pressured to submit when a "reasonable adult" would not, additional protections are required. *Id.* at 272. *J.D.B.* makes clear courts must conduct a "reasonable child" before admitting a statement made by a youth to the police. *J.D.B.*, 546 U.S. at 272.

Many of the cases analyzed by the State with respect to when a statement made by a youth are voluntary predate the clear directive both the United States and Washington's courts have made with respect to juveniles in the last decade. Juveniles are not "miniature adults" and courts cannot analyze them this way. *J.D.B.*, 564 U.S. at 272 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-16, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). Washington recognizes this same principle, understanding youth have less ability to control their emotions, identify

consequences and make reasoned decisions about their actions. *State v. O'Dell*, 183 Wn.2d 680, 692-93, 358 P.3d 359 (2015). These cases do not stand for the principle, nor does appellant argue, statements from juveniles are per se inadmissible. Rather, Alex's status as a youth entitles him to protections he did not receive.

The State cites *Dutil v. State* for the proposition a youth may waive *Miranda*. 93 Wn.2d 84, 93, 606 P.2d 269 (1980). Respondent's brief at 18. *Dutil* predates the Supreme Court's analysis of when special protections must be provided to juveniles but also does not address the core issue here, which is what protections are required. Likewise, the State cites *State v. Blair* for the same principle. 56 Wn. App. 209, 210, 783 P.2d 102 (1989). Respondent's brief at 20. *Blair* also predates *J.D.B.*, but does not appear to be in conflict with it. Finally, the State cites *State v. Ellison* as another example of a case which predates *J.D.B.* where a confession was upheld. 36 Wn. App. 564, 571-72, 676 P.2d 531 (1984). Respondent's brief at 20-21. Like *Dutil* and *Blair*, *Ellison* does not address the special protections a juvenile is entitled to, instead addressing exculpatory statements made by Mr. Ellison, which were then used by the State to impeach him. *Ellison*, 36 Wn. App. at 572.

Rather than provide Alex with special protections because of his age, the police used Alex's age to coerce his statement. The officers taunted him with being a child, telling him it was time to "man up." RP 30. The officer told Alex "he doesn't know what being a man is." RP 34-35. The officers used their status as adults to intimidate Alex, telling Alex "I've been an adult long enough." RP 34-35. They made specific references to his vulnerabilities as a youth says specifically, "He's a kid." RP 34.

Further, while the court found Alex was read *Miranda* warnings to Alex, including juvenile warnings and never requested an attorney or interpreter, the record does not support these findings. CP 27 (Finding of Fact 21-23). Importantly, this officer's testimony was not found to be credible with regard to his use of force. CP 27 (Finding of Fact 15). The officer also did not have an independent memory of providing Alex with warnings or any questions he might have had. RP 123.

Unlike an adult, a juvenile who waives the right to remain silent is unlikely to understand the consequences of such a decision. *J.D.B.*, 564 U.S. at 264, *see also* Richard Rogers, et al, *The Comprehensibility and Content of Juvenile Miranda Warnings, Psychology, Public Policy, and Law*, 63, 65 (2008). The record only establishes the police used

Alex's age to get him to make a statement. It fails to establish any special protections given to him because of his youth. As a result, suppression of this statements is required.

3. ALEX'S ABILITY TO WAIVE *MIRANDA* WAS IMPACTED BY HIS ABILITY TO SPEAK AND UNDERSTAND ENGLISH.

The State argues Alex's English was sufficient for him to waive his rights. Respondent's brief at 11. A suspect's ability to make a knowing and intelligent waiver of his *Miranda* rights may be limited by language barriers. *State v. Teran*, 71 Wn.App. 668, 672, 862 P.2d 137 (1993) (waiver will be valid if warnings are given in the person's "native tongue" and the person claims to understand the rights). To be sustained, *Miranda* warnings must be given in "words easily understood." *State v. Prok*, 107 Wn.2d 153, 156, 727 P.2d 652 (1986) (citing JCrR 2.11(c)(1)).

Instead, the State did not sustain its burden of establishing the waiver of *Miranda*, by a boy with limited English skills was voluntary. No attempt was made to find a Romanian speaker or provide the warnings in Romanian, as is frequently done with non-native speakers from other countries. See, e.g., *Teran*, 71 Wn.App. at 672. Instead, the recording from the night indicates Alex had difficulty communicating

in English. RP 34. This record is supported by his trouble communicating in court. RP 288.

It is important to emphasize again that the State was unable to elicit testimony regarding the substance of the juvenile warnings or whether Alex had any questions regarding those warnings. RP 123. This is especially important because language barriers are among the factors a court should consider when determining whether a person was properly advised of their *Miranda* rights. *United States v. Gonzales*, 749 F.2d 1329, 1335–36 (9th Cir.1984); *see also United States v. Heredia-Fernandez*, 756 F.2d 1412, 1415 (9th Cir.1985). When considered in conjunction with the failure to properly consider the protections which should be afforded a juvenile, this Court should not feel confident the trial court’s inquiry into Alex’s ability to speak and understand English. The trial court’s order finding Alex’s statements to be voluntary should be reversed.

4. THE POLICE TOOK ADVANTAGE OF ALEX’S AGE TO COERCE HIS STATEMENT.

“We must disabuse ourselves of the notion that an innocent person would not confess to a crime he or she did not commit.” *State v. Unga*, 165 Wn.2d 95, 121, 196 P.3d 645 (2008) (citing Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal*

Safeguards in the Twenty-First Century, 2006 Wis. L.Rev. 479, 514–16 (2006) (citing numerous studies on false confessions). “That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.” *J.D.B.*, 564 U.S. at 269.

The State cites *State v. Rupe* regarding coercion. 101 Wn.2d 664, 679, 683 P.2d 571 (1984). Respondent’s reply at 13. *Rupe* predates *J.D.B.* and involves adults. Unlike the physical threats made and the pressure put on Alex regarding his parents, *Rupe* involves the use of a polygraph machine. *Id.* While the State suggests it is always permissible to use psychological coercions to elicit a statement, the *Rupe* court writes otherwise, acknowledging there are circumstances, including a weakened physical or emotional state, below normal intelligence, or the conduct of the police officers to have been sufficient for the statement to have been found to be coercive. *Id.* at 678. *Rupe* does not, as the State suggests, stand for the principle psychological appeals are not coercive, but instead is an analysis of the circumstances of Mr. Rupe’s case and the use of polygraph tests.

While the tactics used to produce a statement from *Rupe* were found to be constitutional, the starkest problem with the State’s

analysis is not the difference in the procedures used by the police, but the fact that Alex is a youth and the police took advantage of his age to coerce his statement. His youthfulness is clear from the record. Not only was he chronologically a child, but he was treated like one. He was in the company of older family members when he was arrested. RP 30, 33, 34. He did not have a permanent driver's license. RP 25. He lived with his mother, who he was released to. RP 44. He was being home schooled. RP 288.

The coercion employed by the police here was impermissible. In analyzing whether the police used unconstitutional coercion, the court will examine both the conduct of law enforcement in exerting pressure on a person to confess and the ability of that person to resist the pressure. *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir.2005). Where a youth is asked to give a statement, the court must examine whether a child felt pressured to submit when an adult would not. *J.D.B.*, 564 U.S. at 277.

While an adult may not have felt pressured to give a statement when stopped by police with their guns drawn and immediately being placed in handcuffs, this is not the case for juveniles. RP 75. Alex was not warned of his right to remain silent until after he was already in

handcuffs. RP 51. In fact, the court found the officer made coercive statements in the course of this incident, telling Alex's cousin his wrist "might get broken again" if he did not cooperate. RP 59. His explanation for why he would threaten Alex's cousin was not found to be credible. CP 27 (Finding of Fact 15).

Again, it is important to emphasize these were not the only tactics used to coerce a statement from Alex. The police told Alex on more than one occasion that he should "man up." RP 30, 34. He was belittled for being a "kid" and told a man would "tell us the truth." RP 34. The police also suggested Alex's van would not be impounded and how his family's vehicle would be taken away from them for what Alex had done. RP 43. This statements suggested Alex's parents would not lose their van if Alex made a statement to the police. RP 33, 43.

For a youth, these are unreasonable psychological and physical pressures. This is especially true for an older child, who wants to act like a man and is already under the pressure and humiliation of accusations of juvenile delinquency which could have been a potentially serious crime. The statements made by Alex should be suppressed. They were made in a coercive environment. Alex was

subject to both psychological and physical coercion. As a result, the trial court erred in failing to suppress Alex's statements.

B. CONCLUSION

This court should find the statements made by Alex were not voluntary. Alex was entitled to special protections he was not afforded when the police used coercive tactics to elicit a statement. Because the State has not met its burden of persuasion, this Court should suppress Alex's statement.

DATED this 15th day of September 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 74263-9-I
)	
A.I.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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