STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JULIAN DE LOS SANTOS, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellant,

v

JULIAN DE LOS SANTOS,

Respondent-Appellee.

UNPUBLISHED
December 28, 2001

No. 232592
Kent Circuit Court
Family Division
LC No. 95-113801-DL

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Petitioner appeals by delayed leave granted from the trial court's October 18, 2000, order granting respondent's motion to suppress. We reverse.

Respondent, a minor, is charged with second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with person under thirteen years of age). Following an interview with police on February 17, 2000, respondent confessed to his involvement in this offense. On appeal, petitioner challenges the trial court's determination that respondent's confession was involuntary. Specifically, petitioner contends that the trial court erred in considering the fact that if convicted respondent would be required to register as a sex offender in conformance with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, when determining whether respondent's confession was voluntary. We agree.

Whether a defendant's confession was given voluntarily is a question of law for the court. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). While affording great deference to a trial court's factual determinations at the suppression hearing, this Court conducts an independent review of the record to determine whether a defendant's confession was voluntary. *In re SLL*, 246 Mich App 204, 208; 631 NW2d 775 (2001). This Court will not disturb the trial court's finding regarding voluntariness unless it is clearly erroneous. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404 (1998). A finding is clearly erroneous where this Court is left with the definite and firm conviction that the trial court made a mistake. *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).

"To admit a defendant's confession in its case-in-chief, the state bears the burden of proving that the confession was voluntarily given by the defendant, thereby fulfilling the due process guarantee of the Fourteenth Amendment." *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996) (Boyle, J.); see also *Brown v Mississippi*, 297 US 278, 286; 56 S Ct 461; 80 L Ed 682 (1936). As this Court observed in *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997), "[t]he admissibility of a juvenile's confession depends upon whether, under the totality of the circumstances, the statement was voluntarily made."

> The test of voluntariness is whether, considering the totality of the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).
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> The factors that must be considered in applying the totality of the circumstances test to determine the admissibility of a juvenile's confession include (1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990). [*Givans, supra* at 121.]

The absence or presence of any of these factors is not necessarily conclusive on the issue of voluntariness. *People v Wells*, 238 Mich App 383, 387; 605 NW2d 374 (1999).

Applying the *Givans* factors to the present case, we are left with a definite and firm conviction that the trial court erred in concluding that respondent's confession was involuntary. First, the trial court erroneously considered whether respondent would be required to register as a sex offender pursuant to the SORA if he was convicted of the instant offense when weighing the issue of voluntariness. During the *Walker*[1] hearing, the trial court observed:

> One of the reasons that I find this particular situation so extremely troubling is that we are dealing with an area of the law in which there have been tremendous changes in the fairly recent past. The CSC second degree charge that [respondent] is faced with now carries an entirely different set of repercussions than has ever existed before. The legislature, in adding to the mandatory results of a conviction for this charge mandatory registration, created an impact which will reach into [respondent's] adult life, and could, in fact, accompany him for the

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

> rest of his days. To be registered as a sex offender on a public list for all of his life is a result that I don't think was contemplated under the tests that have been in place regarding th[e] [voluntariness] issue until now.
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> While there isn't any case law indicating that that actually changes the requirements as to when, for instance, *Miranda* warnings would have to be given, I think that does enter into the seriousness of the obligation placed on the State to show that voluntariness exists in reality as well as theory. [Emphasis supplied.]

We believe the trial court clearly erred as a matter of law when weighing the possibility that respondent may be required to register under the SORA as a relevant factor in the determination of the voluntariness of his confession. As noted above, the proper test for determining a confession's voluntariness requires the court to weigh the totality of the circumstances. To the extent that the trial court's bench opinion can be interpreted as holding that a court may properly consider the fact that a defendant may be required to register under the SORA when determining whether a confession was voluntary, we disagree. The primary flaw of the trial court's reasoning is that it fails to recognize that the voluntariness of a defendant's confession is to be ascertained in light of the totality of the circumstances "*surrounding the making of the statement*." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000) (emphasis supplied); *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The potential penalty a defendant may face on conviction has no part in the voluntariness analysis because it is not relevant to whether the defendant's confession was "'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *Peerenboom, supra* at 198, quoting *Cipriano, supra* at 333-334. In other words, it is a peripheral matter that does not shed light on the court's inquiry into the factual circumstances surrounding the confession.

Likewise, the United States Supreme Court recently recognized that the due process voluntariness test has been "refined . . . into an inquiry that examines 'whether a defendant's will was overborne' by the *circumstances surrounding the giving of a confession*." *Dickerson v United States*, 530 US 428, 434; 120 S Ct 2326; 147 L Ed 2d 405 (2000) (emphasis supplied), quoting *Schneckcloth v Bustamonte*, 412 US 218, 226; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Chief Justice Rehnquist, speaking for the Court, further clarified that the totality of the circumstances test focuses on the factual circumstances attendant to the giving of the challenged confession.

> The due process test takes into consideration "the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." [*Schneckcloth, supra* at 226.] See also *Haynes* [*v Washington*, 373 US 503, 513; 83 S Ct 1336; 10 L Ed 2d 513 (1963)]; *Gallegos v Colorado*, 370 US 49, 55; 82 S Ct 1209; 8 L Ed 2d 325 (1962); *Reck v Pate*, 367 US 433, 440; 81 S Ct 1541; 6 L Ed 2d 948 (1961) ("[A]ll the circumstances attendant upon the confession must be taken into account"); *Malinski v New York*, 324 US 401, 404; 65 S Ct 781; 89 L Ed 2d 1029 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant"). The determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person

> confessing." *Stein v New York*, 346 US 156, 185; 73 S Ct 1077; 97 L Ed 2d 1522 (1953). [*Dickerson, supra* at 434 (emphasis supplied).]

Because the possibility that respondent may be required to register as a sex offender pursuant to the SORA does not bear on the voluntariness of his statement, we believe that the trial court clearly erred in its consideration of this factor.

We also disagree with the trial court's conclusion that respondent's confession was involuntary where it expressly found that the police did not engage in coercive tactics. After hearing the testimony of Detectives Kristen Rogers and Kris Westmoreland at the *Walker* hearing, the trial court made the following observations:

> I put absolutely no efforts at coercion or at forcing a statement out of [respondent] on the police officers. I think they truly made an effort to interview [respondent] in a setting that was appropriate for him.

In *Colorado v Connelly*, 479 US 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986), the United States Supreme Court recognized that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." More recently, this Court has recognized that the admission of a defendant's confession at trial does not violate due process where there the record does not indicate that the statement was causally connected to coercive police activity. *Wells, supra* at 388; see also *People v DeLisle*, 183 Mich App 713, 721; 455 NW2d 401 (1990).

After an independent review of the record, we are unable to find any indication that respondent's statement was involuntary to the extent that its admission at trial would violate due process. A thorough review of the record against the backdrop of the totality of the circumstances, *Givans, supra*, supports our conclusion. As an initial matter, the trial court found that the police officers were not required to advise respondent of his *Miranda* rights because he was not in custody. See, e.g, *SLL, supra* at 207.[2] Further, respondent makes no claim, nor does our independent review of the record reveal, that the police failed to comply with MCL 764.27 and the juvenile court rules.

Respondent was questioned by Detectives Rogers and Westmoreland on February 17, 2000. According to Rogers' testimony, she first spoke with respondent's caseworker, Deb Reynolds, in January 2000 and informed her that she was investigating respondent in relation to allegations of sexual abuse. After Rogers expressed an interest in interviewing respondent on February 17, 2000, Reynolds advised Rogers that respondent was a temporary ward of the court, and that he was residing at a children's home. Reynolds also told Rogers that respondent could be found at his school. Rogers and Westmoreland arrived at respondent's elementary school at

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[2] *Miranda* rights need only be given where the police engage in custodial interrogation. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001); *People v Hill*, 429 Mich 382, 391; 415 NW2d 193 (1987).

approximately 11.00 a.m. on February 17, 2000, and interviewed respondent, twelve years old at the time of the interview,[3] in a room adjoining the school's main office.

According to both Rogers' and Westmoreland's testimony, they informed respondent of the reason for their visit when he was brought into the room. Specifically, respondent was advised that he was not under arrest, that he could leave the room at any time, and that the police were there to hear his side of the story with regard to the victim's allegations of sexual abuse. According to the officers, respondent told them he understood the reason for their visit, and responded to their questions in a coherent and articulate manner. Rogers, the lead investigator on the case, questioned respondent for the most part. Both she and Westmoreland testified that respondent appeared to be in good physical condition, was lucid, and that he did not display any obvious mental or developmental deficiencies. Rogers testified that after she asked respondent his side of the story, he initially denied any sexual misconduct, but after she continued to question him, he gave an incriminating statement and began to cry. Respondent left the room at that point to blow his nose and wipe his eyes. According to Rogers, the entire interview lasted less than an hour, and respondent did not ask for a parent, guardian, or attorney, and was not deprived of food, sleep, or medical attention. Following the interview, respondent returned to class.

Rendering its factual findings on the record, the trial court emphasized the lack of a parent or guardian at the February 17, 2000, interview.[4] The trial court found that respondent was in a state of "legal limbo" at the time of the interview because he was removed from his mother's custody, but was not officially adjudicated a ward of the court until March 2, 2000. Although noting that Reynolds was aware of Rogers' intention to interview respondent about the allegations of sexual abuse and had not expressed a desire to be present, the court expressed concern that Reynolds was also the caseworker for the alleged victim. The court further found "major fault" with the police's failure to "ma[ke] a reasonable effort to ascertain what adult individual stood reasonably in a position to act as a parent and as an informed adult regarding [respondent]."

Our courts have clearly indicated that the presence or absence of a single factor in the totality of the circumstances is not determinative of voluntariness. *Cipriano, supra* at 334. Consequently, the fact that a concerned adult was not present does not itself invalidate an otherwise voluntary statement. *People v Inman*, 54 Mich App 5, 9; 220 NW2d 165 (1974); see also *State v Stewart*, 176 Ohio St 156, 159; 198 NE2d 439 (1964). Rather, the pertinent inquiry is whether "the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Cipriano, supra* at 334. Although we recognize that the absence of a concerned adult may cast doubt on the voluntariness of a juvenile's statement,

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[3] It is unclear from the record what grade respondent was in at the time of the interview. During her testimony Rogers indicated that she believed that respondent was in fifth grade at the time of the interview, but could not recall for certain.

[4] According to Rogers, she did not attempt to contact respondent's mother before the interview because she understood respondent to be a temporary ward of the court. Rogers also indicated that she did not ask Reynolds to be present at the interview.

see *SLL*, *supra* at 210, we believe that proper consideration of the totality of the circumstances in this case leads to a finding of voluntariness.

Significantly, there is no indication in the record that respondent expressed a desire to speak with his mother or another concerned adult, or that the police deliberately prevented respondent from speaking with a parent or other concerned adult. Likewise, the record does not reveal any indication that respondent "demonstrated any trouble understanding the interrogation process."[5] *In re GO*, 191 Ill 2d 37, 55; 727 NE2d 1003 (2000). In addition, the present case is distinguishable from the United States Supreme Court's decision in *Gallegos*, *supra*. In that case, the Court concluded that the fourteen-year-old respondent's due process rights were violated when he confessed to a crime after being held in custody for five days without being permitted to speak to counsel or his parents. *Gallegos*, *supra* at 54-55. In the instant case, although respondent was of a tender age, he was questioned by the police for less than one hour, and was not detained. According to Rogers' and Westmoreland's undisputed testimony, respondent understood the questions put to him and answered in an intelligible manner. During the interview respondent was permitted to get up and leave the room, and when it was completed respondent returned to his classroom. The police did not physically threaten respondent, their voices were not raised, and there is nothing in the record demonstrating that the police coerced respondent.

Having reviewed the totality of the circumstances surrounding the confession, we are left with a definite and firm conviction that the trial court erred in concluding that it was involuntary.

Reversed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell

[5] According to the record, respondent had previous interaction with the police in 1995 on an unspecified charge when he was six or seven years of age.