STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 8, 2002
v	No. 234708 Wayne Circuit Court
JUSTINE GARRETT, Defendant-Appellee.	LC No. 01-000229

Before: Talbot, P.J. and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(d). Prior to trial, defendant brought a motion to suppress the statements he made to a high school counselor, which the trial court granted. The prosecution appeals by leave granted. We reverse.

The prosecution argues that the trial court erred in granting defendant's motion to suppress the statements on the ground that those statements were involuntarily made and coerced. A trial court's factual findings following a suppression hearing are reviewed for clear error. MCR 2.613(C); *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997). A finding of fact is clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

We review the entire record and make an independent determination of the voluntariness of a defendant's statements. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the statement 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 Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). The following factors are considered in determining whether a juvenile made a statement voluntarily:[1]

[1] At the time of the offense and when defendant made the statement, he was sixteen years old.

> (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 waived those rights, (2) the degree of police compliance with MCL 764.27[2] 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 defendant was injured, intoxicated, in ill health, physically abused, or threatened with abuse, or deprived of food, sleep, or medical attention. [*Givans, supra* at 121, citing *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990) (footnote added).]

However, the presence or absence of any one of these factors is not determinative because the ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the statement indicates that the accused made the statement freely and voluntarily. *Cipriano, supra* at 334.

First, although the counselor did not give *Miranda* warnings to defendant, they were not required because the school counselor was not acting as an agent of the police. *Grand Rapids v Impens*, 414 Mich 667, 673-674; 327 NW2d 278 (1982). Second, although defendant was only sixteen years old, his age is not enough, by itself, to establish that he made the statements involuntarily. Rather, this Court must consider the totality of the circumstances. *Givans, supra* at 121. Here, defendant attended high school and the record did not indicate that he was uneducated, illiterate or unintelligent.[3] Third, there was no indication in the record that the discussion involved repeated or prolonged questioning. To the contrary, defendant did not show any reluctance in speaking with the counselor about the incident, and did not show that his statements were the result of a lengthy period of questioning. Fourth, there was no indication that the counselor detained defendant for a lengthy period of time to obtain a confession. Rather, the testimony shows defendant's willingness to discuss the incident. He made immediate responses to the counselor's initial statement, and the counselor had to instruct defendant to stop talking because he was incriminating himself. We also find it is questionable whether defendant was "detained" as a suspect at all. Fifth, although defendant's parents were not present during the discussion with the counselor, there was no indication of manipulation of defendant by the counselor, nor did defendant request his parents' presence. *In re SLL*, 246 Mich App 204, 210; 631 NW2d 775 (2001); *Givans, supra* at 121. Moreover, if the counselor was attempting to manipulate defendant, he would not have contacted defendant's parents in an effort to protect defendant from making further incriminating statements. Finally, there is no evidence that the counselor was overbearing or did anything threatening to extract incriminating statements from defendant. The counselor testified, without contradiction, that he did not threaten defendant,

[2] MCL 764.27 provides arrest procedures for offenders less than seventeen years old.

[3] Compare *Givans, supra* at 121-122, where this Court found that the defendant made a voluntary statement where the defendant was sixteen years and ten months old, with a ninth grade education and could read and write.

physically approach defendant, coerce defendant or raise his voice during the discussion. Considering the factors[4] listed in *Givans*, there is no indication that the statements were involuntarily made or coerced.

On appeal, defendant also cites additional factors that he claims render his statements involuntary and coerced. Defendant first contends that he made the statements under inherently coercive conditions because a school official compelled him to report to his office, questioned him, and because he was not free to leave. We disagree.

Although the school's mandatory rules required defendant to report to the counselor when summoned, there is no indication in the record that defendant could not leave, that he desired to leave, or that he felt he could not leave if he failed to answer the counselor's questions. Even assuming defendant, fearing potential reprimand, reasonably believed he had to report to and could not leave the counselor's office, that belief existed because of his status as a student, not as a suspect in a criminal matter. An obligation to report to a school counselor because of school rules does not convert otherwise voluntary statements into coerced statements.[5] These conditions, while a consideration to be weighed with all other aspects surrounding the communications between the counselor and defendant, do not in themselves render defendant's statements involuntary because these conditions were not likely to overcome defendant's will and impair his capacity for self-determination. *Cipriano, supra* at 334.

Defendant next contends that the counselor's statement to defendant, that defendant either tell him what happened, or tell the police,[6] constitutes an implied statement of leniency rendering defendant's resultant statement inadmissible. We disagree. Contrary to defendant's contention, a promise of leniency does not, in itself, automatically render a defendant's statements involuntary and inadmissible. *Givans, supra* at 119-120. Rather, a promise of leniency is one factor to consider in the evaluation of the voluntariness of a defendant's statement. *Id*. at 120.[7] Furthermore, in the present case, we find the complained of statement does not constitute a promise of leniency at all. There is no indication that the counselor ever suggested, either implicitly or explicitly, that if defendant told him about the incident, things would be easier for defendant with respect to a possible criminal case. *Id*.

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[4] There was no testimony regarding defendant's prior experience with the police, his personal background or any illness, deprivation of food, sleep or medical attention.

[5] See *Minnesota v Murphy*, 465 US 420, 430; 104 S Ct 1136; 79 L Ed 2d 409 (1984), where a probationer's obligation to appear before a probation officer and his obligation to provide truthful answers to questions asked did not convert otherwise voluntary statements into coerced statements.

[6] It is questionable from the review of the record whether this statement was ever made. For purposes of this decision, we assume, without deciding, that the counselor made such a statement.

[7] Defendant mistakenly relies on *People v Conte*, 421 Mich 704; 365 NW2d 648 (1984), for the proposition that a statement induced by an implied promise of leniency is involuntary and inadmissible. A majority of the *Conte* Court concluded that a defendant's inculpatory statement is not inadmissible per se if induced by a promise of leniency. *Givans, supra* at 120.

We further find that any reliance by defendant on the counselor's statement was unreasonable. In determining whether a promise of leniency induced a defendant to confess, the inquiry is whether the defendant was likely to have reasonably understood the statement in question to be a promise of leniency. *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992). If the person promising leniency is not an agent of the police, it is unreasonable for a defendant to understand the statement to be a promise of leniency or to rely on it in making an incriminating statement. *Id*. Defendant made statements to a high school counselor, not an agent of the police. We find any reliance by defendant on a promise of leniency offered by the counselor was unreasonable.

Considering the totality of these circumstances, we conclude that the trial court clearly erred in finding that defendant's statements were involuntary and coerced. *Givans, supra* at 119. Defendant cited no combination of factors indicating that his "will was overborne and his capacity for self-determination critically impaired, or that his [statements were] not the product of an essentially free and unconstrained choice." *Id*. at 124. The circumstances establish that defendant made the statements freely and voluntarily and under conditions that were not coercive. *Cipriano, supra* at 338-339.

Defendant also argues on appeal that his statement was inadmissible because the counselor never advised him of his *Miranda* rights.[8] We disagree.

The protections afforded by the *Miranda* warnings pertain only to custodial interrogations. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Custodial interrogation means express questioning *initiated by law enforcement officers* after a person is taken into custody or otherwise deprived of his freedom in a significant manner. *Id*., citing *Illinois v Perkins*, 496 US 292, 296; 110 S Ct 2394; 110 L Ed 2d 243 (1990). For the constitutional safeguards imposed by *Miranda* to apply there must be a police-initiated interrogation. A person who is not a police officer and is not acting in concert with, or at the request of the police is not required to give *Miranda* warnings before eliciting a statement. *Impens, supra* at 673-674; *Anderson, supra* at 533-534.

Defendant contends that the school counselor served in a law enforcement capacity for *Miranda* purposes because he regularly provided assistance to the police. There is no evidence supporting defendant's contention. There is no indication in the record that the counselor was acting as an agent or instrumentality of the police when he elicited the statement from defendant. The record does not indicate that the counselor performed typical law enforcement duties or appeared to be a law enforcement agent. There is no indication that the counselor wore a police uniform, carried a weapon, possessed authority to arrest or detain defendants, or interrogated criminal suspects. *Impens, supra* at 675; *Anderson, supra* at 527; *People v Porterfield*, 166 Mich App 562, 567; 420 NW2d 853 (1988). Rather, his duties were limited to enforcing discipline at

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[8] Generally, *Miranda* requires that, before custodial interrogation begins, criminal suspects must be advised that they have the right to remain silent, to consult with an attorney, and to have an attorney appointed if the suspect cannot afford one, and that anything they say may be used against them in a court of law. *Miranda, supra* at 444.

the school. Therefore, we find that the communication between defendant and the counselor did not constitute a "police-initiated interrogation" invoking the constitutional safeguards imposed by Miranda. *Impens, supra* at 673; *Anderson, supra* at 534.

Further, the counselor initiated the investigation on his own and not at the behest or direction of the police. *Impens, supra* at 674-675; *Anderson, supra* at 534; *Porterfield, supra* at 567. It is evident from the record that the counselor's actions were motivated by furthering the school's interest in preserving order at the school, and not in furthering the interests of the police. Once he became aware that the incident did not involve the school and defendant began incriminating himself, the counselor advised him to remain silent. Further, the counselor called defendant's parents to prevent defendant from further incriminating himself. Although he addressed disciplinary problems and investigated issues involving students that sometimes yielded information that he eventually turned over to the police, his sole function was to determine whether the incident occurred on school grounds. In this capacity, the counselor was acting independently as a fact-finder for the school, not the police, and there is no indication that the police generally instigated or motivated his actions. Rather, the counselor had the independent responsibility to investigate incidents involving students through his duties as a school counselor. We therefore agree with the trial court that the counselor was not an agent of the police.

On appeal, the prosecution also argues that the trial court erred as a matter of law in concluding that the statements constituted privileged communications between a school administrator and a student. We review issues of law de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). In Michigan there is a statutory teacher-student privilege, which, by its terms, includes counselors. MCL 600.2165 provides:

> No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and institutions, who maintains records of students' behavior or who has records in his custody, or who receives *in confidence* communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or if the person is a minor, with the consent of his or her parent or legal guardian. [Emphasis added.]

The student-teacher privilege protects only confidential communications. *People v Pitts*, 216 Mich App 229, 235; 548 NW2d 688 (1996). Where there is no indication that the communication was confidential, the teacher-student privilege is neither at issue, nor violated. *Id*. In the case at bar there is no indication that the communication between the counselor and defendant was confidential. Defendant made the incriminating statements in the presence of two other students allegedly involved in the incident, another school counselor, and an administrative

assistant. Therefore, the statements do not constitute *confidential* communications to which the teacher-student privilege applies. *Id*.

Reversed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder