NO. COA11-370
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

IN THE MATTER OF:

R.P. Durham County
No. 09 JB 58

Appeal by defendant from judgment entered 10 August 2010 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 12 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General LaToya B. Powell, for the State.

Morrow Porter Vermitsky & Fowler, by Benjamin D. Porter, for defendant-appellant.

STEELMAN, Judge.

Where we are unable to discern whether the trial court considered defendant's age in determining whether he was in custody for purposes of its *Miranda* and N.C. Gen. Stat. § 7B-2101 analysis, this case is remanded to the trial court for entry of a written order containing findings of fact and conclusions of law. Possession of eight Diazepam pills, a schedule IV controlled substance, is a Class 1 misdemeanor.

I. Factual and Procedural Background

On 15 March 2010, Deputy J.W. Henderson (Deputy Henderson) of the Durham County Sheriff's Office was assigned to Northern Durham High School as the school resource officer. That day, during a class change, Deputy Henderson observed R.P., a minor juvenile, (defendant) engage in a hand-to-hand transaction with a female student. Deputy Henderson was 25 to 30 feet away from the students when he observed defendant reach into his pocket and pull something out like he was trying to conceal it. The female student stuck her hand close to defendant and he handed the item to her. Deputy Henderson was unable to identify what was exchanged. However, based on his training and experience, Deputy Henderson believed it to be a drug transaction.

Deputy Henderson requested assistance from the assistant principal who was standing inside the cafeteria area fifteen to twenty feet from Deputy Henderson. Deputy Henderson asked the assistant principal to detain the female student and he would "get" defendant. Deputy Henderson entered defendant's classroom and advised defendant that he needed to speak with him. Deputy Henderson stated that he had observed what had transpired in the commons area of the school and asked defendant "what he handed

the student." Defendant responded that he had given the female student a cigarette. Deputy Henderson also asked defendant "if he had anything illegal on his person." Defendant responded that he had cigarettes. Deputy Henderson asked if "there was anything else illegal on his person that [he] needed to know about." Defendant stated, "[Y]es, I have pills on me."

Defendant further stated that he did not have a prescription for the pills and that he received them from someone in his neighborhood. Defendant then pulled eight pills out of his pocket, which were located in a "black velvet type bag" and stated that he believed the pills were Oxycodone. Defendant was taken to the front administrative office, and Deputy Henderson advised defendant and his mother that he would be filing a juvenile petition.

On 17 March 2010, a juvenile petition was filed against defendant for possession with intent to sell and deliver Oxycodone, a schedule II controlled substance. The petition was subsequently amended, without objection, to reflect that the controlled substance was "eight Diazepam pills," which are Schedule IV controlled substances. On 22 June 2010, defendant filed a motion to suppress his statements to Deputy Henderson and the physical evidence seized from his person on the basis

that they were obtained as a result of a custodial interrogation, without defendant first having been advised of his *Miranda* rights.

On 10 August 2010, a hearing was held and the trial court denied defendant's motion to suppress on the basis that defendant was not in custody nor interrogated by Deputy Henderson. At the close of the evidence, defense counsel made a motion to dismiss the charge of possession with intent to sell and deliver because the evidence was only sufficient to establish simple possession. The trial court agreed and adjudicated defendant delinquent of felony possession of a schedule IV controlled substance. The trial court entered a Level 2 disposition order. The trial court imposed level 2 confinement on an intermittent basis for up to 14 days and placed defendant on supervised probation for 12 months upon several conditions.

Defendant appeals.

II. Motion to Suppress

In his first argument, defendant contends that the trial court erred in denying his motion to suppress. We remand for findings of fact and conclusions of law.

In addition to the Fifth Amendment protections of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), juveniles are also afforded protection by the statutory provisions set forth in N.C. Gen. Stat. § 7B-2101(a):

> (a) Any juvenile in custody must be advised prior to questioning:
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> (1) That the juvenile has a right to remain silent;
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> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
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> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a) (2009).

However, it is well-established that *Miranda* warnings and the protections of N.C. Gen. Stat. § 7B-2101 apply only if the juvenile is in custody. *In re W.R.*, 363 N.C. 244, 247, 675 S.E.2d 342, 344 (2009) (citation omitted). "The test for determining if a person is in custody is whether, considering all the circumstances, a reasonable person would not have thought that he was free to leave because he had been formally

arrested or had had his freedom of movement restrained to the degree associated with a formal arrest." *Id.* at 248, 675 S.E.2d at 344 (citation omitted).

Our appellate courts have recognized the unique circumstances present in a school environment for purposes of conducting a custodial interrogation analysis. *See In re J.D.B.*, 363 N.C. 664, 669-70, 686 S.E.2d 135, 138 (2009) ("The uniquely structured nature of the school environment inherently deprives students of some freedom of action. . . . For a student in the school setting to be deemed in custody, law enforcement must subject the student to 'restraint on freedom of movement' that goes well beyond the limitations that are characteristic of the school environment in general." (quotations omitted)), *rev'd and remanded on other grounds by* ___ U.S. ___, 180 L. Ed. 2d 310 (2011); *see also In re K.D.L.*, ___ N.C. App. ___, ___, 700 S.E.2d 766, 771 (2010) ("The schoolhouse presents a unique environment for the purpose of applying the custodial interrogation analysis. Our courts have recognized that schoolchildren inherently shed some of their freedom of action when they enter the schoolhouse door." (citation omitted)).

In *In re J.D.B.*, our Supreme Court declined to consider the juvenile's age and experience as part of its inquiry in determining whether the juvenile was in custody for purposes of *Miranda* and N.C. Gen. Stat. § 7B-2101, and reiterated that the appropriate test to be applied was an objective "reasonable person" standard. 363 N.C. at 671, 686 S.E.2d at 139. On 1 November 2010, the United States Supreme Court granted *certiorari* "to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age." *J.D.B. v. North Carolina*, ___ U.S. at ___, 180 L. Ed. 2d at 321. The United States Supreme Court held:

> Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.

Id. at ___, 180 L. Ed. 2d at 326-27 (internal citations and footnote omitted). The United States Supreme Court reversed and remanded the case with the following instructions: "The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address

that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time." *Id.* at ___, 180 L. Ed. 2d at 329. Thus, the trial court is required to consider the juvenile's age at the time of questioning in determining whether they were in "custody."

In the instant case, the trial court did not enunciate specific findings of fact in open court or enter a written order. At the conclusion of the suppression hearing, the trial court stated:

> Well, based on what I've heard in the officer's testimony I'm not convinced that the gentleman was in custody at the time. It sounds as if they were walking down the hallway. I don't find that he has been interrogated, just asked a couple of questions. So, the motion to suppress for those reasons is denied.

Our Supreme Court has stated the following regarding the trial court's duty to make findings of fact after a suppression hearing:

> When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the bases of his ruling. If there is a material conflict in the evidence on voir dire, he *must* do so in order to resolve the conflict. If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific

> findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence.

State v. Phillips, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (internal citations omitted).

In the instant case, there was no material conflict in the evidence on *voir dire*. However, we are unable to discern whether the trial court considered the juvenile's age in accordance with the United States Supreme Court's mandate in *In re J.D.B.* Thus, this issue must be remanded to the trial court for entry of a written order containing findings of fact and conclusions of law, specifically addressing the concerns set forth in *In re J.D.B.*

III. Felonious Possession of a Controlled Substance

In his second argument, defendant contends that the trial court erroneously adjudicated him to be delinquent of felonious possession of a controlled substance when the evidence only supported misdemeanor possession. The State concedes error, and we agree.

Diazepam is a Schedule IV controlled substance. N.C. Gen. Stat. 90-92(a)(1) (2009). It is unlawful for any person to possess a controlled substance. N.C. Gen. Stat. § 90-95(a)(3).

N.C. Gen. Stat. § 90-95(d) provides, in pertinent part:

> (d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:
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> . . . .
>
> (2) *A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor*. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. . . .

(Emphasis added.)

In the instant case, the trial court adjudicated defendant delinquent because of his possession of eight Diazepam pills, a schedule IV controlled substance, but erroneously classified the offense as a Class I felony. N.C. Gen. Stat. § 90-95(d)(2) clearly dictates that possession of a schedule IV controlled substance is a Class 1 misdemeanor. *See also State v. Sanders*, 171 N.C. App. 46, 50, 613 S.E.2d 708, 711, *aff'd per curiam*, 360 N.C. 170, 622 S.E.2d 492 (2005). The quantity of the controlled substance defendant possessed did not exceed one hundred tablets, capsules, or other dosage units, which is required to elevate the offense to a Class I felony.

REMANDED.

Judges ERVIN and MCCULLOUGH concur.

Report per Rule 30(e).